



June 5, 2023

The Honorable Serena McIlwain
Secretary of Environment
Maryland Department of Environment
1800 Washington Blvd.
Baltimore, MD 21230

Via email – BEPS.MDE@maryland.gov

Re: Building Energy Performance Standards – Comments on May 2023 Draft Regulations

Dear, Secretary McIlwain:

The NAIOP Maryland Chapters represent more than 700 companies involved in all aspects of commercial, industrial, and mixed-use real estate, including some of the largest property owners in Maryland. On behalf of our member companies, I write to provide comments on MDE's draft Building Energy Performance Standards. (BEPS)

➤ Summary Points.

As detailed below, NAIOP has serious concerns about the regulation in its current form. The proposal presents an unreasonably short, technically narrow, financially severe compliance pathway.

The regulation includes new requirements such as the regulation of electricity use (EUI) that serves to reduce off-site utility sector emissions rather than direct building emissions, and a new interim emissions limit in 2035 that essentially brings forward the net zero requirement from 2040 to 2035. Both provisions are beyond the scope of authority granted by the Climate Solutions Now Act (CSNA).

The regulation does not include provisions that are required by the CSNA such as allowances for the use of biofuels, provisions for the very common situation when tenants control utility use and building mechanical equipment, nor does the regulation appear to set its emissions limits by comparing buildings of like construction instead doing so only by building use type.

The civil penalties for electricity use are punitive (\$25,000 / day) and the Alternative Compliance Fees (\$230 / ton plus inflation factor) are unnecessarily high, setting the stage for building owners and occupants to pay ten times more than a public utility would pay in the RGGI market per ton of CO² emitted. The proposed \$230 / ton Alternative Compliance Fee, before applying an inflation factor, is higher than the \$190 central value proposed by EPA, the \$127 / ton fee adopted by New York State and three times the \$100 fee used by MDE in modeling the program. There is no indication of how that money will be spent to benefit the fee-paying public.

For buildings in Montgomery County, the regulation does not provide guidance on how overlapping and contradictory requirements between the state and local regulations will be reconciled.

Together the provisions in the proposed regulation will put extreme, unsustainable financial pressure on the owners and occupants of covered buildings, including thousands of apartment renters, condominium owners, and small businesses that are responsible for the utilities and mechanical systems in covered buildings.

This mandate arrives at a time when office occupancy is declining, and retail is still recovering from COVID restrictions. Interest rates are rising and bank loans to commercial real estate for any purpose are limited.

Multifamily apartments and condominiums which have higher emissions rates than other types of covered buildings will require expensive, disruptive renovations to replace in-unit gas stoves, hot water heaters and furnaces or boilers. Over the same period the BEPS requirements will interact with separate state legislation that requires condominium associations to complete reserve studies and fully fund future replacement and repair costs in reserve accounts.

Building owners and occupants need a technically feasible and financially realistic building energy transition. A feasible building energy transition would set 2030 emissions targets that can be met through energy conservation and operational efficiencies or through the purchase of offsets at market rates.

Once past the 2030 emissions reduction, building owners and occupants need the ability to gather resources for major renovations and mechanical replacements necessary to meet the 2040 net zero deadline specified in the CSNA. They need breathing room to do so without diverting capital to exorbitant annual Alternative Compliance Fees, meeting incremental emissions deadlines and additional mandates to limit electricity use.

A reasonable guide to amending the BEPS regulation proposed for privately owned buildings is the pragmatic and flexible [executive order for publicly owned buildings](#) recently signed by Governor Moore.

Below please find detailed comments and rationale for our perspective on these most critical issues. Also please note that NAIOP was a contributor to Michael Powell's written comments submitted separately. In the interest of brevity, we do not repeat those points in this letter but want to make clear that NAIOP endorses Mr. Powell's [comments which are linked here](#).

We appreciate the opportunity to comment at this early stage and hope that we will have the opportunity to recraft a technically feasible and financially realistic building energy transition before the regulation is sent to the Air Quality Control Advisory Council for review.

➤ 60% reduction by 2035 essentially moves the net zero requirement forward by five years - it should be removed.

The regulation proposes that covered buildings achieve a 60% emissions reduction by 2035. This is a new requirement that is not included in the CSNA but is the result of the regulation seeking to impose a straight-line trajectory of emissions reductions.

The straight-line trajectory approach incorrectly assumes emissions reductions can and will be implemented on a gradual, equalized basis and in five-year increments. Because mechanical systems are ideally replaced at the end of their service life, and major renovations are disruptive and capital-intensive, emissions reductions will be inconsistent - achieved in bunches.

Recent case studies of emissions reductions indicate that, in most cases, energy conservation and operational efficiencies can achieve a 13% - 15% reduction in emissions. In most cases, deeper emissions reductions can only be accomplished through major renovations and by electrifying fossil fuel powered heating, hot water, or both. A 60% reduction essentially dictates that covered buildings will have to electrify mechanical systems within 12 years – not the 17 years indicated by the 2040 deadline in the CSNA.

- Regulating Energy Use Intensity (EUI) reduces off-site emissions and is not authorized by the CSNA - it should be removed.

BEPS regulations focus on either carbon emissions (Boston, New York City) or energy use intensity. (Denver, Washington State, Montgomery County). The proposed regulation seeks to regulate both. The proposed addition of energy use (Energy Use Intensity – or EUI) to the BEPS is in direct contradiction to the provisions of the CSNA which authorize MDE to adopt regulations that reduce *net direct greenhouse gas emissions* from covered buildings.

Section 2-1602 of the CSNA does indicate that the regulations include energy use intensity targets. This provision is contained in a section authorizing the regulation of *net direct greenhouse gas emissions* and therefore was intended to mean a building's *fossil fuel* EUI. Building EUI is commonly divided between gas and electric energy use. The source documents referenced in MDE's BEPS briefing slides ([Building Energy Performance Standards Development – Technical Analysis, Steven Winter Associates, 02.2022](#)) illustrate how EUI can be set for fuel type. MDE should use a fossil fuel EUI target to assist in reducing greenhouse gas emissions produced on-site by covered buildings.

Montgomery County benchmarking data shows 68% of office buildings are already fully electric and therefore have no direct emissions. Applying an EUI limit to these buildings breaks with MDE's long-standing method of emissions inventory and assignment of mitigation responsibilities where building owners and occupants are responsible for direct emissions and the utility sector is responsible for emissions from power generation.

Without amendments, the regulation of EUI would require building owners and occupants (including those with no direct greenhouse gas emissions) to mitigate the emissions of in-state and out-of-state power generating facilities. MDE's Berkeley Lab briefing slides show that 64% of the emissions reductions expected from Maryland's BEPS are off-site utility emissions reductions that result from regulating EUI in covered buildings. These are additional reductions achieved beyond those achieved by the building sector reaching net zero direct emissions.

- Allowed emissions levels are unexpectedly low, regulators should ensure the method of setting emissions limits compares buildings of like kind construction not just use type.

Appropriate target setting will be critical to the feasibility of this regulation. The proposed emissions limits set for 2030 seem low when compared to emissions intensities reported as part of the Montgomery County benchmarking data. For example, the regulation proposes a .22 kg CO₂/sq. ft. emissions limit for office buildings in 2030. 84% of office floor area that reported emissions to Montgomery County in 2021 would need to reduce direct emissions 45% or more to reach the proposed 2030 limit – 76% would need to achieve reductions of 60% or more. This level of emissions reduction can only be achieved by electrifying all mechanical systems. For these buildings, the proposed targets essentially bring the net zero deadline forward to 2030 not 2040 as indicated in the CSNA.

A contributing factor seems to be that the method used to set the targets does not compare buildings of similar construction. The CSNA requires that emissions reductions be measured by how a building's emissions compare to buildings of like construction. This requirement differs from energy use focused BEPS regulations that only compare buildings of the same use type i.e., all offices or hotels are compared to each other regardless of construction characteristics. The fuel used by a building's space and water heating systems is one of the most important attributes of a building's construction and essential to target setting as directed by the CSNA.

Comparing like-kind buildings when setting emissions limits will have a major effect on the ability of building owners and occupants to reach the targets. The Montgomery County benchmarking data indicated 68% of office buildings were all electric and therefore reported direct greenhouse gas emissions of 0 kg CO₂/sq. ft. This high percentage of zero emissions office buildings lowers the average emissions for all office buildings – both fossil fuel and electric - to .65 kg CO₂/sq. ft. Office buildings that reported emissions averaged 1.72 kg CO₂/sq. ft. Including all electric construction in the calculation makes the gap to 20% below the office use group average insurmountable for most fossil fuel powered buildings. Not making the performance comparison between fossil fuel office buildings forces electrification to meet the 2030 requirements. We do not believe this is how the General Assembly intended the 2030 target to work.

NAIOP requests that MDE make publicly available copies of the building stock data, a description of the methodology used for setting emissions limits, emissions reduction modeling data and a copy of the guidance manual.

- The regulation needs to better reflect the division of responsibility between building owners and tenants.

Although required by the CSNA, the regulation does not address circumstances where tenants are the utility customer and have control over mechanical equipment. The regulation proposes that compliance, fines, and fees be the responsibility of the building owner, but it is common for commercial, industrial, and retail lease agreements to make the tenant responsible for utilities as well as operation, maintenance, and replacement of mechanical equipment. The set point of thermostats is often outside the control of the building owner. Even in full-service leases, electricity used for appliances and other equipment (plug loads) often makes up much of the energy used in a building but is under the control of tenants. Building owners should not be fined for the failure of tenants to meet energy use or emissions limits.

➤ Fees and Penalties are Punitive and Unreasonably High.

The electricity use limitations are written so that existing civil penalties for violation of air quality regulations apply. This means that commercial and multifamily building owners and occupants are subject to penalties of up to \$25,000 per day for failing to meet electricity use limitations in the regulation.

The proposed Alternative Compliance Fee imposed for failure to meet emissions limits is inflated. The \$230 fee in 2020 dollars is a base fee before applying an inflation factor. This method will result in a fee that is much higher than the \$190 / ton central value of the three options EPA proposed for a nation-wide social cost of carbon and much higher than the \$127 / ton carbon fee New York State recently adopted. The fee is nearly ten times higher than what a public utility will pay on the REGGI market per ton of emissions.

➤ District energy customers should not be required to mitigate off-site emissions at power generating stations.

The regulations allocate the emissions of power generating facilities owned by district energy companies to their customers' buildings. This requires the owners and occupants of buildings served by district energy in Baltimore City and other locations to mitigate the off-site emissions of utility power generating stations. These are not considered direct emissions by EPA Energy Star Portfolio Manager and should be mitigated by the companies that own the emissions.

➤ Miscellaneous Items.

- + The language limiting backup power generation using fossil fuels is concerning. Backup power equipment is a safety issue that should be exempt at least during the initial stages of BEPS.
- + The definition of financial distress is far too limiting. Loans on bank watchlists or other criteria need to be developed.
- + There are product types in the Maryland market that are not recognized by Energy Star Portfolio Manager. Customization of the program may be necessary.
- + Targets may need to be adjusted to account for high occupancy activities, longer operating hours, data centers or other uses.
- + Counting on-site renewables in energy use is a misjudgment. The state should be encouraging installation of on-site renewables by excluding on-site renewable energy from use calculations.
- + Buildings that cannot meet emissions standards on schedule or have equipment that is not near the end of its service life should have the option of entering into an agreement with MDE setting an individual compliance schedule.

Thank you for considering NAIOP's perspective.

Sincerely,

A handwritten signature in blue ink, appearing to read "T.M. Ballentine", is written over a faint, light blue rectangular stamp or watermark.

Tom Ballentine, Vice President for Policy

NAIOP Maryland Chapters -*The Association for Commercial Real Estate*