

## DEPARTMENT OF ENERGY & ENVIRONMENT

### PUBLIC COMMENTS

#### **Application of the Building Energy Performance Standards for Privately-Owned Buildings**

The following is the full text of all public comments received between December 4, 2020 and March 4, 2021 in response to a Notice of Proposed Rulemaking published in the DC Register on December 4, 2020. Comments are listed in the order they were received. Summaries of all comments, along with responses from DOEE, will be provided in the preamble of the next rulemaking.

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**From:** [Chris Line](#)  
**To:** [info.BEPS\\_\(DOEE\)](#)  
**Subject:** Public Comments : BEPS  
**Date:** Friday, January 22, 2021 4:00:17 PM  
**Attachments:** [image001.png](#)  
[image002.png](#)

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Hi ,

I manage a historic property . Both the exterior & large parts of the interior have been designated historic & cannot be altered following the Secretary of the Interior Standards . This building was constructed 120 years ago , I can improve efficiency but will never match a building constructed in the last 50 years .

Is DC considering an exemption from BEPS for Historic buildings ?

Will historic buildings be averaged with other historic buildings across the country ?

Thanks

Chris Line

**Chris Line**  
**Building Manager**

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# CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

March 2, 2021

Katie Bergfeld  
Branch Chief  
D.C. Department of Energy and Environment  
1200 First Street, NE, 5<sup>th</sup> Floor  
Washington, D.C. 20002

Dear Katie:

On behalf of The Consortium of Universities of the Washington Metropolitan Area, I am pleased to submit the following comments on the proposed regulations regarding Building Energy Performance Standards for Privately Owned Buildings. We appreciate the great collaborative relationship with you and your office, and the opportunity to present these comments to you. We hope that we can work together to make modest changes that would address some significant and unexpected challenges that will be faced by the Universities with some of the proposed regulations. I look forward to your response.

Sincerely,



Andrew L. Flagel  
President



**OFFICIAL COMMENTS OF THE CONSORTIUM OF UNIVERSITIES OF THE  
WASHINGTON METROPOLITAN AREA ON THE BUILDING ENERGY  
PERFORMANCE STANDARDS FOR PRIVATELY OWNED BUILDINGS**

The Consortium of Universities of the Washington Metropolitan Area (Consortium) is collectively the largest non-government employer in the District of Columbia and serves over 300,000 students throughout the region each year.

The Consortium's members support the goals represented by the Building Energy Performance Standards for Privately Owned Buildings (BEPS), and have every intention of aggressively working towards the pathways of compliance that have been developed by the Department of Energy and the Environment (DOEE). Andrew Flagel, President of the Consortium, served on the DOEE Task Force. We are grateful for the collaborative process that led to those standards, but we have concerns that the proposed penalties and enforcement are inconsistent with those discussions.

The Consortium acknowledges that a penalty regime is a reasonable component to the BEPS regulations. Penalties serve as incentives and, if properly structured and fairly assessed, a penalty will guide building owners toward compliance. The Consortium supports a balanced, fair, and equitable approach to the assessment of penalties for BEPS' violations. However, the current penalty structure presented in the proposed BEPS regulations fails to meet this standard and is unrepresentative of the conversations discussed in various DOEE Task Force meetings.

In addition to the penalty assessment, the Consortium understood that language was to be included allowing for a "good faith" enforcement adjustment for building owners who can demonstrate aggressive compliance efforts.

The proposed penalties, therefore, should be replaced with a system that promotes investment and recognizes the complexity of meeting energy metrics across our extensive campus systems.

### **Comments on Proposed Section 3521.2/3521.3 Penalties**

Sections 3521.2 and 3521.3 presents the penalty structure that can be assessed. The Consortium finds the penalties do not reflect or equitably account for the building improvements made by universities and are inconsistent with some of the discussions and understandings reached in the BEPS Task Force meetings. More importantly, there is a major challenge for the Consortium regarding the way penalties are proposed to be assessed.

The penalty structure, as currently written, is based on a building's achieved performance relative to the energy performance requirements of their compliance pathway. So, for example, if a large (>3M SF) university is 20% (or 40 kBtu) away from its target and gets to 10% (or 20 kBtu) away at the end of BEPS 1, the penalty is \$7,500,000. If another large university is 5% (or 8 kBtu) away from its target and gets to 2.5% (or 4 kBtu) away at the end of BEPS 1, the penalty is also \$7,500,000. In this scenario, in the proposed rulemaking, the penalty for 20 kBtu costs the same as 4 kBtu.

The Consortium - respectfully - finds the proposed financial punishments unnecessarily punitive and the possibility of new exorbitant penalties unreasonable. Considering the expected large investments needed to achieve compliance, on top of the COVID related costs that the District-based universities have had to spend to ensure the safety of the university staff and students, we ask that the regulations include provisions to waive all penalties when due diligence and investments are made seeking to reach compliance, particularly in the first compliance cycle. Further, any penalties that are levied should be mitigated to reflect the

investment made in seeking compliance, and should be capped at levels that do not risk irrevocable harm to our institutions.

The proposed regulations should be modified to reflect both the financial impact of the COVID-19 pandemic and to ensure that compliance penalties are fairly reviewed and assessed. Our recommendations seek to implement a more equitable application of the penalty based on estimated cost of compliance and good faith. Despite the unprecedented financial challenges facing universities, they have and will continue to make important investments in accordance with BEPS.

Dear DC Department of Energy and the Environment,

MaGrann Associates is pleased to provide these comments as an MEP engineering and green building consulting firm focused for over 35 years on improving the performance of places people live throughout the mid-Atlantic region. We would like to congratulate DC's Department of Energy and the Environment for its innovation and forward-thinking in the creation of a Building Energy Performance Standard.

Being the first of its kind, we appreciate the challenge and magnitude of establishing a workable BEPS embraced by the marketplace, and recognize the need for additional collaboration between the government and industry to make it a success. Our comments here are motivated by our commitment to ensuring that DC's BEPS is successfully implemented and achieves its ultimate intent of creating a carbon free DC by 2050. In our experience, the transition from policy writing to market implementation is a critical moment in determining a program's success and we take this opportunity to provide public comments seriously towards achieving that shared goal.

Our comments expand on the following key recommendations:

1. Create a proactively inclusive strategy for stakeholder engagement and bilateral communication to ensure the diversity of market actors are set up for success with BEPS;
2. Avoid a narrow view of building energy performance that does not take into account decades worth of building science knowledge about the health, safety and comfort implications of energy upgrades;
3. Structure the standard to reward market leaders and encourage early adopters to achieve deeper energy retrofits in lieu of last minute, single measure based strategies;
4. Focus the program and its policies on the long-term goal of carbon reduction to avoid the risk of negative environmental consequences from short-sighted energy reductions;

An inherent challenge of DC's BEPS is that it is the first of its kind and we do not have experience with how the policy will be adopted by the market. This implies the need for a more active dialogue between the program's administrator (DOEE) and the program's implementers ("market actors"). An intentionally inclusive dialogue will help capture lessons learned more quickly, proactively avoid barriers to participation, and build an ethos of collaboration and cooperation between government and industry. To achieve this form of dialogue, we would recommend concluding the role of the current mayoral appointed task force and creating a new vehicle for market implementers and other stakeholders to voice their questions and concerns directly with the decision makers at the DOEE. This suggestion is in recognition of the great work and value that the task force provided in guiding the creation of the policy to this point, but also the need for a new and more effective format to elicit the broader engagement needed at this phase of the roll out. A crucial element of this new format would be a public platform

where questions answered for one party can be accessible to all parties. This type of broad and ongoing communication will ensure the program is implemented consistently and with mutual understanding.

While the BEPS policy tool is new, reducing energy consumption in buildings has over 30 years of experience to pull from in writing this policy. We know from that experience that one of the greatest risks of reducing energy in buildings is adversely affecting the tenant's quality of life through measures that do not holistically address the overall health, safety, and durability of the building. The current legislation's loose definition around health and safety leaves a risky degree of interpretation on what measures can be implemented to meet BEPS. Simply stated, a retrofit project can reduce energy consumption while at the same time negatively impacting the standard of living or worse, if there are no provisions in the standard that safeguard against these measures. We would encourage the DOEE to refer to third-party standards such as ASHRAE and building codes within the BEPS in order to ensure that proper health and safety guidance is in place.

The counter balance to placing safeguards in the BEPS legislation is to also provide for conditions that stimulate market innovation and productive competition among market leaders. This approach has enormous potential to stimulate the market for deep energy retrofits. A policy perceived as purely "compliance" based will inevitably lead to a weakening of the more holistic value proposition that BEPS has the potential to catalyze. Administrative burden and bureaucratic complexity encourage overly commoditized service models. We would recommend language in the actual legislation (and not in an alternative compliance pathway) to promote and reward early adopters of deep and comprehensive energy retrofit solutions. Building performance is more than just energy reduction, and we need to ensure that this opportunity to make a positive impact on the long-term quality of our building stock is not lost at a time when housing availability, affordability, societal and environmental impact hang so precariously in the balance. Explicit language that recognizes and rewards these market leaders will align with and accelerate natural market innovation.

In order to achieve DC's carbon reduction goals the DOEE needs market actors to set the same carbon reduction goals for their businesses and work cooperatively on achieving them, only through this alignment of outcomes will we be successful in this ambitious and unprecedented effort. The building energy performance standard as it is written still has the potential to perversely incent decisions that negatively impact the environment and the attainment of these goals. One such example is where a poor-performing building is unprofitable to improve in performance to meet the standard and the owner therefore decides to tear down the structure and build a new building. The embodied carbon impact in this scenario will likely have a far worse environmental impact than if the building was able to effectively be renovated. While these scenarios may be difficult to predict or prevent entirely, a collaborative approach between



government and industry with reasonable accommodation of unique cases will help to ensure that the program's overall energy and carbon reduction outcomes are ultimately achieved. We need an explicit mechanism for arbitration in these scenarios and policy language that shows DOE's earnest effort to accommodate the inherently diverse and complicated scenarios market actors will be faced with while making a good faith effort to implement BEPS.

Similarly unaddressed by the current legislation is the need for encouragement of beneficial electrification, grid harmonization, renewable energy, net zero energy and embodied carbon strategies. While we understand there is a larger suite of policies that may address these in the future, the currently proposed BEPS may misalign or even perversely incent moving the market away from positively impacting these issues in the near term. For example, an electrification measure that may lead to a worse ENERGY STAR score in the short-term could set up the property to meet carbon neutrality goals in the future. We would recommend using site EUI in lieu of source EUI as a program metric to reduce the real risks in the way that gas is incentivized within the current metrics.

Thank you for the opportunity to provide these comments and your consideration in adopting modifications to the current legislation that effectively address the points raised. These comments were written based on discussions with a diverse group of market actors in order to develop a broader understanding of the market's questions and concerns on BEPS. While MaGrann has over 35 years of experience with the services and skills needed to comply with this new policy, the broader market does not. Fears of "we are destined to fail" at BEPS and the risks of increasing living costs and the cost of doing business in the district are real and now is the time to address them. We look forward to continued communication and dialogue that will further assess these topics and the best approach forward. We see BEPS as an important opportunity to grow the market for building performance services while meeting the District's policy goals. Please consider us an ally and partner in working towards a carbon neutral community for all of DC's residents.



# ARCHDIOCESE OF WASHINGTON

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March 3, 2021

## **VIA ELECTRONIC MAIL SUBMISSION**

Department of Energy and Environment  
Tommy Wells, Director  
Attention: Building Performance and Enforcement Branch  
1200 First Street NE,  
Washington, DC 20002  
[info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)

Re: **Public Comments: BEPS;**  
Comments on the Proposed Rulemaking for the Application of the Building  
Energy Performance Standards for Privately-Owned Buildings, Vol. 65, No. 50  
(December 4, 2020)

Dear Mr. Wells:

On behalf of the Archdiocese of Washington (“ADW”) we submit the following comments to the District of Columbia Department of Energy and Environment’s Proposed Rulemaking for the Application of the Building Energy Performance Standards (“BEPS”) for Privately-Owned Buildings, amending Chapter 35 of Title 20 of the D.C. Municipal Regulations, which were published on December 4, 2020.

ADW is directly impacted by the proposed BEPS rulemaking as a religious non-profit organization located in the District; the largest religious-property owner in the District; and one of the largest property owners overall in the District. ADW includes 139 total parishes, serving approximately 655,000 Catholics, including 38 parishes and 20 schools in the District of Columbia. ADW’s District of Columbia schools serve over 6,000 students in the District of Columbia, many of whom come from underserved District of Columbia communities.

As a Catholic institution, ADW supports the goal of the Clean Energy Omnibus Amendment Act of 2018 (the “Act”) and the Sustainable DC Plan of reducing energy consumption in the District. 2020 marked the fifth anniversary of Pope Francis’ encyclical, *Laudato Si’* (“on care for our common home”), which calls on every living person to take “swift and unified global action” to combat and end climate change, pollution, environmental degradation, overconsumption, and waste. In particular, the Catholic faithful are called to reduce the consumption of non-renewable energy and to replace fossil fuels with renewable energy sources.

Despite limited resources, ADW parishes and schools have done their part to respond to Pope Francis' call to action. The majority of ADW's parishes and schools have elected to power their facilities with 100% renewable energy. In 2019, the Catholic Charities of the ADW constructed and dedicated what is now the largest solar array in Washington, D.C. Further, some ADW parishes and schools who are blessed with additional resources have undertaken energy savings projects at their facilities, such as LED lighting and HVAC refits, with such investments providing the additional financial benefit of reduced energy costs.

In addition to these efforts, our buildings are unique because they do not use as much energy as office buildings, retail, or residential buildings that consume energy seven days a week, throughout the day and night. The New York City government ("NYC") researched and published data showing the breakdown of energy use by property type when it was crafting its similar BEPS program (NYC's "Local Law 97," codified at NYC Administrative Code § 28-320.1, *et seq*). See <https://council.nyc.gov/data/green/>. NYC found that only storage facilities emit less greenhouse gases than churches, explaining that "these spaces are not occupied most of the time, so don't have the same energy needs as other buildings." NYC's data demonstrates that houses of worship contribute less than 1% of the share of greenhouse gas emissions, as compared to the 84% share produced by residential, business, hospital, institutional and hotel buildings.

NYC's BEPS program exempts houses of worship, and all "real estate owned by any religious corporation" from the standards requirements. Instead, along with rent-controlled housing, houses of worship and other buildings owned by a religious corporation are provided the option of a series of prescriptive measures, and are not subject to financial penalties. *See* NYC Administrative Code §§ 28-320.1 - 28-320.3.<sup>1</sup> NYC's exemption of religious-owned property is important: it respects the unique and reduced energy use of houses of worship, and accommodates the autonomy guaranteed to houses of worship by the Establishment Clause under the First Amendment of the Constitution

Unfortunately, DOE's proposed regulations group houses of worship, religious corporation property-owners, and non-public K-12 schools together with commercial property, including subjecting them to the same onerous penalties. Religious property owners were not represented in DOE's BEPS task force, and unlike NYC, DOE does not appear to have published any research regarding the unique energy consumption of houses of worship.<sup>2</sup> It is apparent that no consideration for the unique characteristics of religious property owners was given during the drafting of these proposed regulations.

Regardless of the low share of energy consumption by religious properties, the currently-established local median standard for houses of worship and schools means that the houses of

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<sup>1</sup> The St. Louis BEPS program also provides a separate compliance cycle path for houses of worship together with affordable housing.

<sup>2</sup> The Act specifically calls for DOE to engage a third party to conduct a comprehensive study, including "case studies for different property types of buildings." ADW was not contacted by DOE at any time regarding this study as to any of its 38 houses of worship and 20 schools in the District.

worship and schools in the District will be graded against each other for their BEPS standard, and at least half will at all times face the onerous cost of upgrades, compliance, and penalties. Worse still, the least wealthy non-profits will suffer the most as a result of the median standard: the median BEPS standard will be set by the most wealthy half of properties with extra resources to invest in energy upgrades, while the least wealthy locations will become trapped in an unending cycle of compliance paths and penalties as they are unable to meet the BEPS set by their wealthy counterparts.

Most ADW parishes and schools – particularly those that serve minority communities – already face substantial financial challenges, and cannot afford costly upgrades, compliance paths, or penalties.<sup>3</sup> Like many religious organizations, while ADW’s parishes’ and schools’ land holdings have value, each has very limited financial resources. These churches and schools use their sparse resources for ministry and for critical service in their communities. Unlike for-profit and government property owners, religious and non-profit property owners cannot rely on tenants or tax revenue to diffuse the cost of upgrades and penalties. Instead, churches and non-profits rely on voluntary contributions from their community.

Without a fundamental change in approach, the proposed BEPS rulemaking will have a substantial negative financial impact on religious and non-profit property owners, such that the standards and penalty process will inevitably result in litigation challenging the constitutionality of the BEPS program as applied to religious institutions. Therefore, and for the reasons further stated below, ADW submits the following specific comments:

## **COMMENTS:**

- 1. Exemption of Religious-Owned Property:** Religious-owned property, including houses of worship and private secondary schools, should be exempted from the performance standards and penalties in the proposed regulations for the reasons addressed above. The grouping of houses of worship together with other for-profit, commercial and government buildings is inappropriate and arbitrary: in addition to the particular constitutional limitations of government regulation of churches, houses of worship have limited financial resources to comply with the BEPS standards, and moreover, have a substantially reduced share of energy consumption and greenhouse gas emission than other property types.
  - a. New Definition for Houses of Worship: 3599, Definitions, should add a separate definition for “Houses of Worship: The real estate owned by any religious corporation and used for a religious purpose.”

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<sup>3</sup> A penalty, in event a fraction of the amount of the proposed \$1,000,000 for buildings between 50,000 and 100,000 square feet, would be fatal to the majority of any one of ADW’s parishes or schools, and in particular those most needy locations.

- b. Separate Regulations: DOEE shall use the flexibility provided to it by the Act<sup>4</sup> to establish separate regulations for Houses of Worship. The separate regulations may be modeled after NYC Administrative Code § 28-320.1, *et seq*, including providing the choice between performance standards or by meeting a list of established prescriptive measures,<sup>5</sup> and the exemption from penalties applied to other for-profit property types.

**2. Relief for Non-Profit Property Owners:** Non-profit property owners have limited resources to invest in upgrades or for the purpose of reducing energy consumption. Moreover, unlike commercial properties and housing units, non-profit property owners do not have multiple tenants at one facility location over which to spread the costs of compliance or penalties. In order to avoid disproportionate harm to non-profits, the proposed regulations should include relief for non-profit property owners. Alternatively, a new program should be established to provide relief for non-profits.

- a. The proposed regulations should establish a new set of provisions, under 3521, or a new program should be established, that provides resources for religious non-profits, including houses of worship and K-12 schools, to allow them to invest in energy-efficiency projects at their facilities. Such resources may include:
  - i. Zero interest loans for energy;
  - ii. Subsidies for the installation of building energy-efficiency projects (including solar, HVAC, lighting);
  - iii. Tax incentives;
  - iv. Free building energy assessments/consultations/technical assistance;
  - v. Waiver of compliance for next cycle.
- b. Penalties under 3521 should be eliminated or substantially reduced as to non-profits property owners, in lieu of the incentive structure, above.
  - i. The penalty structure at 3521.1 is overly punitive. While penalties are appropriate for bad faith or willful non-compliance, good faith property owners, and religious non-profits in particular, should be incentivized, not penalized.

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<sup>4</sup> See DOEE September 29, 2020 Task Force Meeting Presentation, regarding special consideration for affordable housing: “DOEE should take full advantage of the flexibility allowed under the law to accommodate the unique challenges owners face.” ([https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service\\_content/attachments/BEPS%20Task%20Force%20Meeting%209-29-2020.pdf](https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/BEPS%20Task%20Force%20Meeting%209-29-2020.pdf)).

<sup>5</sup> See example prescriptive measures at NYC Administrative Code § 28-321.2.2 (“Prescriptive energy conservation measures.”).

- c. A new provision should be added at 3517.6 that modifies and “raises” the BEPS standard for property owned by non-profits.
  - i. For example, the standard shall be marked at 80% or 90% of the ENERGY STAR score or Source EUI benchmark for other buildings of that type, as opposed to 50%.
- d. Non-profit property owners should have the option of choosing between the least restrictive of the national median or local median BEPS standard.

**3. Additional provisions and transparency for financial distress exemption process for non-profits:** The proposed regulations do not include enough detail regarding the waiver and exemption criteria and process, leading to the possibility of arbitrary enforcement. The proposed regulations should include far greater detail for the bases of waiver and exemption.

- a. For example, financial distress should be more thoroughly defined, and should include consideration of how many tenants are at one location to diffuse the cost of compliance and any penalties.

Submitted by:  
DC Catholic Conference  
[rivasa@adw.org](mailto:rivasa@adw.org)



March 4, 2021

Attention: Building Performance and Enforcement Branch  
Department of Energy & Environment  
Government of the District of Columbia  
1200 First Street, N.E., 5th Floor  
Washington, DC 20002  
Via Electronic Mail: [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)

**Re: National Housing Trust Comments on the Notice of Proposed Rulemaking, Application of the Building Energy Performance Standards (BEPS) for Privately-Owned Buildings**

The following comments are provided on behalf of National Housing Trust (NHT) and relate to the potential impact of BEPS on affordable housing owners and residents. NHT is a non-profit that creates and preserves affordable homes to provide opportunity, advance racial equity, reduce economic disparities, and strengthen community resilience through practice and policy. NHT is among the largest affordable housing owners in the city with a portfolio of 1,134 affordable apartments.

NHT appreciates the steps DOE has taken in the design of BEPS to accommodate the unique challenges affordable housing owners encounter in making energy-efficient upgrades to their buildings. NHT recommends additional flexibility than what is currently proposed in the rules to reflect the realities uniquely experienced by affordable housing building owners. Challenges encountered by affordable housing owners include tight property cash flow and margins, a lack of upfront capital, limited access to financing to pay for energy efficiency upgrades, and multiple lenders and investors.


NHT recommends that DOE make the following changes to the proposed rules to accommodate compliance challenges in affordable housing:

- Expand the criteria for granting compliance delays to affordable housing owners; and
- Exempt affordable housing owners from paying the alternative compliance penalty if they can demonstrate a good faith effort to achieve 20 percent energy savings but fall short.

NHT also respectfully urges DOE to publish as soon as possible the supplemental BEPS Compliance Guidebook to give building owners certainty about how BEPS will be implemented and provide an opportunity for the public to comment on the Guidebook.

**Background**

The District is in an affordable housing crisis that has been exacerbated by the economic impacts of the COVID-19 pandemic. Climate policy must be implemented equitably to alleviate, not contribute to, the economic burdens of under-resourced communities while providing a clean and safe environment.



The District's Climate and Energy Action Plan ("Clean Energy DC") underscores the importance of planning for equity when enacting and implementing climate policies. The plan cites several potential risks to equity from climate action if strategies are not carefully executed. Risks include increasing financial burdens carried by low-to-moderate income residents and reinforcing structural inequality by increasing social equity gaps in the District. To combat risks to equity, Clean Energy DC recommends that the District "create actions to directly support at-risk communities including low-to-middle income populations and populations of color" when developing and implementing climate and energy policies, including mitigating potential added pressure on rents from the costs of complying with energy retrofit requirements.<sup>1</sup>

The cost to comply with BEPS in affordable housing will be significant. NHT conducted a preliminary analysis of affordable multifamily buildings with 2019 ENERGY STAR scores below the multifamily BEPS.<sup>2</sup> Approximately 20,000 affordable rental units in 108 properties will require energy efficiency upgrades in the first BEPS compliance cycle. The cost of upgrading all of these buildings could exceed \$172 million<sup>3</sup>, an amount that far surpasses current funding available to assist affordable building owners with making energy efficiency upgrades to their buildings.

Absent significant additional resources to defray the costs of upgrades, DOEE should provide affordable housing owners flexible approaches to comply with BEPS to minimize costs to owners and residents and the potential loss of affordable housing. To illustrate the potential impact of compliance costs on building owners and renters, presented below is a case study of the financials of an affordable housing property in the District that is typical of all affordable housing.<sup>4</sup>

### **Property Case Study**

The multifamily rental building is in a high-demand neighborhood convenient to downtown and nearby amenities, including public transit, shopping, and restaurants. It has 63-rental units affordable to families making no more than 60% of Area Median Income. The property was financed using Low Income Housing Tax Credits (LIHTC), and the owner is restricted from raising rents until at least 2044. The building is approximately 55,000 square feet and has an ENERGY STAR score well below the multifamily median.

The limited revenue generated by the lower rents and the property's ownership structure results in no net proceeds available to the non-profit developer to re-invest in the property. The non-profit affordable housing developer is the general partner (GP) with a .01% ownership interest in the property and is responsible for the building's day-to-day operations. The limited partner (LP) has a 99.9% ownership interest.

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<sup>1</sup> Clean Energy DC: The District of Columbia Climate and Energy Action Plan, August 2018.

<sup>2</sup> For this analysis, buildings were considered "affordable" if they receive public subsidies, are subject to D.C.'s rent control law, or are assumed to be naturally occurring affordable housing as defined by CoStar. Due to the lack of publicly available renter income information, this is an approximate number of affordable buildings.

<sup>3</sup> To estimate total compliance costs, the buildings' square footage was multiplied by \$10 per square foot. \$10 is the low end of the range of alternative compliance penalties that building owners will be assessed for non-compliance. DOEE set the amount of the alternative compliance penalty to be commensurate with the cost of complying (See BEPS Task Force Meeting transcript – December 15, 2020).

<sup>4</sup> While the information provided in this case study is based on an actual property in D.C., we have chosen not to disclose the property name and address.



The table below summarizes the property's 2019 financials and illustrates the lack of proceeds available to the non-profit housing developer. After accounting for operating expenses, mortgage debt payments, and expenses due to the limited partner, the property generated approximately \$143,000 in surplus cash flow in 2019. However, all surplus cash flow was used to pay cash flow contingent expenses, including a soft loan payable to DHCD<sup>5</sup>, partnership administration fees, and the investor services fee. No distributions were paid to the GP (the affordable housing developer) or LP (the LIHTC investor).


<b>2019 Annual Property Revenue</b>	\$807,005
<b>2019 Annual Operating Property Expenses:</b>	\$(444,033)
<b>2019 Net Operating Income:</b>	\$364,972
<b>Other non-GAAP Expenses (e.g interest expense, related party fees, annual fee to L.P., miscellaneous)</b>	\$(221,426)
<b>Total Surplus Cash Before Depreciation and Amortization</b>	\$143,546
<b>Cash Flow Contingent Expenses</b>	\$(143,546)
<b>Cash Distributions to the G.P. and L.P.</b>	\$0

The property does not generate any net cash distributions to put towards the cost of building upgrades that will be necessary to meet BEPS compliance. The non-profit housing developer's options to raise funding from other means are also limited for several reasons.

A potential source of funding is the property's operating reserves. Operating reserves cannot be withdrawn without the limited partner's consent and are dedicated to property expenses, such as maintenance, property management, utilities, insurance, etc., if the property generates insufficient revenue to pay for such expenses. Developers of regulated affordable housing must fund replacement reserves annually to pay for capital repairs and renovations, such as roofs, heating, HVAC, etc. Any withdrawals require the consent of the limited partner and lender(s). The amount of reserves is often insufficient to fund needed improvements fully. Also, reserves in regulated affordable housing are typically only allowed to replace equipment at the end of its useful life, not for the early retirement of equipment.

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<sup>5</sup> Soft loans are an important source of gap financing in affordable housing provided by federal, state, and local governments that is paid back only when there is net cash flow.



Affordable housing owners are limited in taking on additional debt to pay for building upgrades for several reasons. Net operating income is often insufficient to sustain additional debt due to the property's limited revenue and the typical operating costs. Taking on additional debt would also require approval from existing lenders and limited partners. Securing consent is typically a lengthy process.

Affordable housing owners can more easily finance energy efficiency upgrades when they are refinancing their debt and can fold in the cost of energy efficiency improvements into new first mortgages. However, there are limited funding sources available to affordable multifamily building owners to recapitalize and rehabilitate a property. Two prominent sources accessible to affordable housing owners are the Low Income Housing Tax Credit program and the District's Housing Production Trust Fund (HPTF). Both programs are highly competitive.

If affordable housing owners cannot overcome these barriers and therefore fail to comply with BEPS, the resulting alternative compliance penalty would likely be impossible for the owner to pay. The non-profit affordable housing owner of the building described above would be subject to an alternative compliance penalty of one million dollars for non-compliance, **equal to 1.24 times the property's annual revenue.**

### **Recommendations on the Proposed BEPS Rules**


**Expand the criteria for granting compliance delays to affordable housing owners to reflect the capital constraints described above.**

Section 3520.6 of the proposed rules specify why DOEE will grant a building owner a delay in compliance, including financial distress. DOEE should take an expansive view of financial distress and grant affordable housing owners an extended delay in compliance beyond three years if they can demonstrate the impracticality of complying due to the challenges stated above. Building owners should be required to demonstrate that they made a good faith effort to identify potential funding sources to qualify for the extended compliance delay.

DOEE should also consider granting an extended compliance delay if the building owner has a plan to recapitalize the property to finance the cost of energy efficiency improvements but is unable to do so for one to three compliance cycles, depending on the requirements of the building's existing financing partners and the availability of the financial resources needed to recapitalize and rehabilitate the property adequately. DOEE should also consider providing additional flexibility to building owners that pursue a recapitalization but are not successful in securing new financing due to the limited availability and competitiveness of funding sources.

**Exempt affordable housing owners from paying the alternative compliance penalty if they can demonstrate a good faith effort to achieve 20 percent energy savings.**

Section 3521 of the proposed rules specify that building owners could be subject to an alternative compliance penalty even if they implement energy efficiency building upgrades but fall short of reducing energy usage by 20 percent. Affordable housing owners should not be subject to penalties if they can demonstrate that they have made a good faith effort to achieve the required energy savings.



There are several reasons why an energy retrofit may not result in the expected energy savings, including the challenge of accurately predicting savings from an energy efficiency measure, improper installation of efficiency measures, and unexpected changes in tenant behavior. DOEE should allow for flexibility when assessing penalties to reflect these uncertainties so that building owners are not penalized for not meeting the 20 percent energy savings requirement for reasons outside of their control.

Under DOEE's proposal, if the owner of a building between 50,000-100,000 square feet chose to follow the performance pathway and achieved a 15 percent reduction in energy usage, instead of a 20 percent reduction, the owner would be subject to a \$250,000 penalty. As demonstrated by the case study above, a penalty of that amount would be extremely detrimental to an affordable housing property's financial sustainability. DOEE should consider exempting affordable housing from penalties if the owner makes a good faith effort to implement an energy efficiency plan modeled to achieve a 20 or more percent reduction in energy use but does not achieve the required threshold.

### **Conclusion**

Thank you for considering our comments and for DOEE's continued efforts to work with affordable housing stakeholders to ensure that BEPS is implemented equitably in affordable housing.

Sincerely,

Priya Jayachandran, CEO  
National Housing Trust



# AIA Washington DC

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March 4, 2021

Mr. Tommy Wells  
Director  
DC Department of Energy + Environment  
1200 First Street, N.E., 5th Floor,  
Washington, DC 20002

RE: Comments on Building Energy Performance Standards

Dear Director Wells,

Thank you for the opportunity to comment on the Building Energy Performance Standards (BEPS). In preparation for our comments, we held a session with our membership on January 26<sup>th</sup> that drew the interest of over 100 stakeholders.

AIA|DC has identified three areas of concern that our members hope will be addressed during the rollout of the legislation: Education, Cost, and Risk.

1. The **Education component is two-fold**, as we see the need for targeted guidance and preparation for both architects and clients. First, architects need more robust training on the subject and scope of the legislation, how it applies to the design profession, tools for understanding financial penalties, and the role of the architect in terms of upfront/contract work. Second, our members seek a toolkit on how to best educate their clients on the legislation so the project owner can make the right decisions for compliance early in the design process. Clients need to make informed decisions, so designers need training on how to provide the data needed if they are expected to educate clients. This will be especially important for clients who are not DC-based or have a smaller portfolio.
2. For **Cost**, our members see areas of concern in the affordable housing, market-rate, and commercial markets—both for implementation of the legislation and for tenants. There is also a perceived risk that BEPS adds to the cost of living/doing business in the District. Since the current draft of the regulations are of a



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cyclical and recurring nature, we ask for consideration of regulations that would guarantee permanent compliance, such as attaining net-zero.

3. **Risk:** Architects and other stakeholders in the design community need more information and training on balancing upfront costs while mitigating future risk. This includes guidance on contracts, the type of legal documents that need to be in place, and how architects and designers can insulate themselves from liability if a client chooses not to follow the regulations or if the building is not BEPS-compliant.

On behalf of our Board of Directors, I thank you for the work you are doing to reduce greenhouse gas emissions and energy consumption in our City by 50% by 2032. We hope these comments will help in furthering that goal. Please do not hesitate to contact me if you have any questions or if the Chapter can be of further service.

Sincerely,

A handwritten signature in black ink, reading "Mary Fitch". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Mary Fitch, AICP, Hon. AIA  
Executive Director



March 4, 2021

Department of Energy and Environment  
ATTN: Building Performance and Enforcement Branch  
1200 First Street, N.E., 5th Floor  
Washington, DC 20002

Submitted via email to [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)

**RE: Sierra Club DC Chapter Public Comments: BEPS**

We appreciate the opportunity to provide comments on the Department of Energy and Environment (DOEE) proposed rulemaking establishing Building Energy Performance Standards (BEPS) program rules published in the DC Register on December 4, 2020.<sup>1</sup>

The Sierra Club DC Chapter supports the BEPS program. BEPS is a ground-breaking program that has the promise to fulfill one of the Sierra Club DC Chapter's main goals: to achieve ambitious and just climate solutions through strategies such as maximizing energy efficiency in the buildings sector of Washington, DC. In its 2018 greenhouse gas (GHG) inventory, DOEE found that 73 percent of GHG emissions in DC came from the buildings sector.<sup>2</sup> Improving the efficiency of existing buildings through BEPS is an important step to meet Clean Energy DC's goal of reducing 797,000 tCO<sub>2</sub>e/yr by 2032 through Existing Building Policies.<sup>3</sup>

We also express our appreciation to DOEE for releasing the 2021 BEPS standards emergency rule<sup>4</sup> by its January 1, 2021, statutory deadline, as well as the work from the members of the BEPS Task Force.

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<sup>1</sup> D.C. Register Vol. 67, No.50, pp. 14269-14280.

<sup>2</sup> <https://doee.dc.gov/service/greenhouse-gas-inventories>

<sup>3</sup> [https://doee.dc.gov/sites/default/files/dc/sites/ddoe/page\\_content/attachments/Clean%20Energy%20DC%20-%20Summary%20Report\\_0.pdf](https://doee.dc.gov/sites/default/files/dc/sites/ddoe/page_content/attachments/Clean%20Energy%20DC%20-%20Summary%20Report_0.pdf)

<sup>4</sup> D.C. Register Vol. 68, No. 1, pp. 161-170.

We are also taking this opportunity to share our visions for the future of BEPS. These comments are organized first by general comments, then comments relevant to specific sections.

## An Appropriate Standard to Achieve Greenhouse Gas Savings

The Sierra Club is primarily interested in this rulemaking due to the potential for reductions to the District's greenhouse gas (GHG) emissions. To that extent, we support efforts to make this rule workable in reality. This includes sufficient incentives to comply and sufficient penalties to deter non-compliance. The BEPS standards should also be sufficiently stringent to achieve the energy efficiency goals set as part of the District's Clean Energy goals, including for the District's goal to reduce GHG emissions to 50 percent of its 2006 baseline by 2032, which would roughly coincide with the end of the second BEPS compliance cycle.

Furthermore, we believe that the "measuring stick" for this rule should have as close a relation to GHG emissions as possible. Sierra Club supports using GHG emissions as the direct measurement for the BEPS program, but we understand the challenges with this proposal given the constraints within the Clean Energy DC Omnibus (CEDC) Act. However, we are encouraged that the CEDC Act also requires DOEE to publish a report on potentially using GHG emissions as the measure for the BEPS program. We fully support that goal. DOEE should initiate work on this report as soon as practicable to begin this important study with a clear commitment to move towards GHG-based BEPS.

There are also opportunities to bring the BEPS program into closer alignment with the District's decarbonization strategy. Building decarbonization is only realistically achievable through electrification, and any BEPS requirements should be consistent with that goal. Accordingly, we fully support moving towards BEPS standards and energy reduction targets that are enumerated in site-energy terms. As DOEE staff is aware, source-energy measurements are calculated by a type-specific, site-to-source multiplier against the site (utility) energy use. The multiplier for electricity is currently 2.8, while those for fossil fuels are much closer to one. These multipliers mean that standards and savings targets based on source-energy will disincentivize electricity use, much to the detriment of the building electrification. While the CEDC Act initializes BEPS Standards around source-energy metrics like the ENERGY STAR Score, it requires >20 percent savings enumerated in terms of Site Energy Use Intensity (EUI). DOEE should not deviate from the principle of using site-energy savings targets in either its Prescriptive Pathway measures or in any alternative compliance pathways it creates. Unfortunately, the proposed Standard Target Pathway, in setting savings targets in terms of the BEPS standards (always source-energy terms), fails this test. We devote more attention to the problematic Standard Target Pathway in comments further below.

One alternative compliance pathway we are excited to learn more about is a "deep retrofit" option that would encourage large energy savings through expensive building envelope improvements by providing some relaxation of the compliance timeline. We await further details about this pathway, but we are encouraged by its development. It is important to

publish the details about this pathway to encourage its use by building owners.

Ultimately, there needs to be a fundamental tie-in between the BEPS program and the District's climate goals. We know that DOEE recognizes this and is somewhat limited by the current construct of the CEDC Act to define this for the Performance Pathway. However, DOEE owes building owners an honest picture of the progression of the BEPS program, as well as any other relevant industry trends. For example, a building owner falling into a BEPS compliance cycle might reasonably consider replacing an old, inefficient gas boiler with a condensing boiler. But DOEE knows that any boiler installed in the next 6 years could be operating until 2050 and beyond, by which point the District is supposed to become carbon neutral. It also knows that it will be considering using a GHG-based BEPS metric, perhaps in time for the next BEPS compliance cycle. The building owners deserve to know that sticking with gas or other fossil fuels will risk them falling into noncompliance quickly when compared to converting to an electric heat pump, especially as electricity becomes less carbon intensive. DOEE should use its authority to define the compliance terms of the Prescriptive Pathway, the Standard Target Pathway, and any alternative compliance pathways to prohibit investments in new fuel-burning equipment.

Likewise, DOEE should also make building owners aware of the recent Federal regulatory requirements related to the scheduled phasedown and likely prohibition in relevant applications of hydrofluorocarbon (HFC) refrigerants. By 2036, conventional HFC refrigerants that many buildings' HVAC equipment use will be in extremely limited supply, if not prohibited altogether.<sup>5</sup> The U.S. Environmental Protection Agency is currently undergoing a rulemaking to schedule a phasedown of these HFC refrigerants according to the requirements of the American Innovation & Manufacturing Act.<sup>6</sup> The Sierra Club DC Chapter is concerned that building owners may make deep retrofits to their HVAC systems to comply with the BEPS program without realizing the forthcoming phasedown of HFC refrigerants. The Sierra Club DC Chapter sees an opportunity for DOEE to work with building owners, Business Improvement Districts (BIDs) and the Apartment and Building Owners Association to educate them about which HVAC equipment they can purchase that will comply with Federal HFC prohibitions, provide greater energy efficiency savings, and limiting the climate damage from potential leaks by choosing equipment that use low-global warming potential refrigerants.<sup>7</sup>

## Concerns With Process Regarding Prescriptive and Alternative Compliance Pathways

We appreciate the extended period, 90 days total, DOEE provided stakeholders to comment on this proposed rule.

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<sup>5</sup> <https://www.congress.gov/bill/116th-congress/house-bill/133/text>

<sup>6</sup>

<https://www.federalregister.gov/documents/2021/02/11/2021-02774/notice-of-data-availability-relevant-to-the-united-states-hydrofluorocarbon-baselines-and-mandatory>

<sup>7</sup> [https://ec.europa.eu/clima/policies/f-gas/alternatives\\_en](https://ec.europa.eu/clima/policies/f-gas/alternatives_en)



However, we are concerned that we do not have adequate details on the Prescriptive Pathway and some of the alternative compliance pathways already identified by DOEE, such as the “deep retrofit” pathway mentioned during several BEPS Task Force meetings. This makes commenting on several portions of this rule difficult or impossible. For example, DOEE has proposed an alternative compliance penalty adjustment schedule in §3521.3 pertaining to the Prescriptive Pathway, referring to “points” that are to be assigned in a manner yet to be finalized. It is impossible to evaluate whether using points to adjust the compliance penalty is appropriate without knowing how points will be measured, determined, or assigned.

During several BEPS monthly update calls dating as far back as October 2020, DOEE staff has said that it would be publishing a Compliance Guidebook on its BEPS webpage that would contain the details of these compliance pathways, but as of February 28, 2021, it is still noted as “coming soon.” Furthermore, the BEPS Task Force continues to discuss the Prescriptive Pathway.<sup>8</sup> We request an opportunity to provide comment on these pathways and relevant portions of this rule once we are given notice that the compliance details are fully drafted and published. A 30-day comment period would likely be sufficient, depending upon the level of detail. DOEE should also be willing to revise rules within this proposal if they are impacted by the details of the proposed pathways.

Lastly, there is no requirement within this proposed rule that DOEE publish any ad hoc alternative compliance plans it approves for a specific building owner(s), nor does it appear to do the same for exemptions or delays it may grant under § 3520. A subsection or two outlining DOEE’s commitments to transparency would be appreciated under principles of good governance and fair and equal treatment to all parties.

## The Standard Target Pathway is Deeply Flawed

The Sierra Club DC Chapter sees no compelling reason to offer the Standard Target Pathway in the BEPS Program at this time. As described below, the proposed pathway is terribly problematic and may be fatally flawed.

The Standard Target Pathway is not specifically required by the CEDC Act like the Performance Pathway and the Prescriptive Pathway are. Instead, it is an apparent invention of the BEPS Task Force. Because the Standard Target Pathway requires improvements to the building’s Source EUI or ENERGY STAR Score, which is based on Source EUI, it significantly deviates from the pathways defined in the CEDC Act, which require reductions in Site EUI instead. Requiring a reduction in Source EUI to comply with BEPS would be problematic because it would incentivize building owners to replace electric appliances with gas appliances. This is due to the lower site-to-source multiplier for fossil fuels compared to electricity. This type of retrofit would make DC’s goal of being carbon-neutral and climate resilient by 2050 much harder to

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<sup>8</sup> BEPS Task Force Meeting Agenda, March 2, 2021. Item 2.  
[https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service\\_content/attachments/BEPSTaskForce\\_MeetingAgenda\\_2021-3-2.pdf](https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/BEPSTaskForce_MeetingAgenda_2021-3-2.pdf)

achieve.<sup>9</sup> The Sierra Club DC Chapter urges DOEE to base the BEPS compliance requirements in Site EUI or, better yet, direct GHG emissions. As noted previously, DOEE should also ban purchases of fuel-burning equipment for building owners using this measure or any other alternative compliance pathway.

We are also concerned that the Standard Target Pathway could set building owners up for failure. We have seen no suggestion from DOEE that the BEPS standards would stay stagnant in future cycles, nor should they. And nor could they, because ENERGY STAR Scores will shift over time as the building stock changes. Yet, this pathway inherently suggests that the building owner is on a path to future compliance. Furthermore, calculating savings needed to achieve a particular ENERGY STAR Score is far more complicated than prescribing a straight, Site-EUI savings. The ENERGY STAR Score is not linear to Source EUI, and it requires an analysis of building uses and expected energy use. Attempting to convert this to a Site-EUI equivalent to comply with the intent of the CEDC Act would further complicate a conversion. This sort of analysis would probably need to be invented and would come at significant cost. It begs the question -- just which type of building owner this option is intended to serve? The likely answer: not the ones who actually need flexibility and cost-effective options.

Another problem with the Standard Target Pathway is that it would reduce the energy savings that could be achieved through the BEPS program. Building owners would likely use this proposed pathway when its requirements are less stringent than any alternative, leading to lower compliance costs but also lower energy savings. Although using the Performance Pathway may result in higher costs, those costs may still result in a positive return on investment and could be worthwhile, especially considering the broader context of the District's climate goals. Furthermore, the reduction in energy savings is not limited to the first Compliance Cycle if DOEE continues using the statistical analyses (e.g. median) of existing building stock to set BEPS in future cycles. Reductions in energy savings in the first BEPS cycle will result in lower median scores of buildings in future compliance cycles, continuing to stymie energy savings through future iterations. This would be defensible if DOEE had completed an analysis charting out the path to a carbon-free, net-zero buildings sector and determined the final EUI/ENERGY STAR Score targets for its building stock, but this does not describe the BEPS of today.

If DOEE is intent on keeping some form of the Standard Target Pathway, then it should make this pathway only available to building owners that demonstrate, through an energy audit, that it would be cost-prohibitive to achieve a greater than 20 percent Site EUI reduction, i.e. to use the Prescriptive Pathway. This would limit the environmental damage from this provision while giving building owners flexibility when they can demonstrate a persuasive justification.

Subsection 3519.3 specifies that either a Performance Pathway or a Standard Target Pathway shall be assigned to building owners who do not select a compliance pathway. For the

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<sup>9</sup> <https://mayor.dc.gov/release/mayor-bowser-commits-make-washington-dc-carbon-neutral-and-climate-resilient-2050>

aforementioned reasons, the Standard Target Pathway should not be offered as a default pathway even if DOEE decides to maintain some version of the pathway.

## Comments on Prescriptive Pathway Proposals

We support DOEE's proposal for the Prescriptive Pathway that the targeted energy savings exceed the nominal 20 percent target because of the typical gap between theorized and realized savings in real projects.<sup>10</sup>

However, we caution DOEE that the CEDC Act, Section 301(d)(2), requires that the Prescriptive Pathway achieve "savings comparable to the performance pathway," or 20 percent site-energy savings. We believe that this language supports DOEE's proposal to require a larger savings goal as necessary to realize energy savings of 20 percent, but DOEE should not pick this larger value arbitrarily. The value should have a defensible basis that is memorialized in a manner that would withstand a legal review.

We support DOEE's proposals requiring building owners to obtain an energy audit showing anticipated energy reduction from energy-efficiency measures, and also requiring these measures to exceed the savings requirement for the current compliance cycle.<sup>11</sup> As one suggestion, DOEE might require building owners that are likely to undergo multiple compliance cycles to propose measures that would save enough energy to achieve the BEPS standard or some value near it, e.g. five percent better than the BEPS standard. Any final requirements in this vein should be added to the text of § 3519.6(b).

## Incentives for Early Implementation

The proposed rulemaking does not incentivize building owners to retrofit their building earlier than 5 years. However, earlier implementation of energy-efficiency measures would result in GHG reductions.

DOEE should consider awarding building owners a credit towards a future BEPS cycle or a financial reward that recognizes the additional energy saved from a building that was retrofitted earlier than required, as verified with building energy-use data (annual benchmarking) and the report of completed actions.

The building-owner representatives on the BEPS Task Force, and other industry representatives, might be best suited to determining which incentives, if any, would be most likely to result in early implementation of energy-saving measures.

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<sup>10</sup> BEPS Task Force Meeting Slides, pp. 15-16.

[https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service\\_content/attachments/BEPS\\_TaskForceMeeting\\_2-2-2021.pdf](https://doee.dc.gov/sites/default/files/dc/sites/ddoe/service_content/attachments/BEPS_TaskForceMeeting_2-2-2021.pdf)

<sup>11</sup> Ibid. at pp. 13-14.

## Comments on Specific Subsections of the Proposed BEPS Rule

The comments preceding this section were separated by topic to discuss major concerns or general topics that do not neatly fit into the proposed text. This section contains comments listed in order by section. When proposed changes are shown, the additions are underlined and the deletions are ~~struck through~~.

### §3518.1(e)

This section contains references to §3518.2(a) through (d). This appears to be a typo, and this should instead reference § 3518.1(a) through (d).

The subsection specifies the applicable EUI average for the period from 2018 to 2019 as the baseline. It is not clear if this is meant to establish the baseline as only the 2018 calendar year, or if it includes the 2019 calendar year. If the latter, it should specify "through 2019" as suggested below.

This subsection should specify "greater than" before the "twenty percent (20%) reduction" to be consistent with the performance pathway requirements.

Proposed changes:

Only for the BEPS Period beginning on January 1, 2021, buildings may follow a 2021 pathway option for each of the pathways described in § 3518.21(a) through (d) by using the applicable EUI average for the period from 2018 ~~to~~ through 2019 as the baseline to compare to the applicable EUI for 2026 in order to determine whether the greater than twenty percent (20%) reduction or comparable energy savings requirement has been met.

### §3519.3

For reasons explained earlier, DOEE should only assign the Performance Pathway when the building owner fails to choose a pathway.

Proposed changes:

If a building owner does not select a compliance pathway as specified in § 3519.2 or does not receive DOEE approval for a pathway, DOEE shall assign a performance pathway for the building. ~~The assigned pathway shall be either a performance pathway or a standard target pathway.~~

## § 3520.6

There is a typo and use of an undefined term, when the defined term of “building owner” should be used instead.

Proposed changes:

For a ~~property to building~~ owner to demonstrate good cause for granting a delay of compliance under § 3520.5, the ~~property building~~ owner must provide substantial evidence that meeting the requirements of § 3518.1 is practically infeasible, including for any of the following reasons:

*(remaining subsections unchanged)*

## § 3521.1

This subsection should probably exclude building owners covered by § 3521.2. It may also be useful to clarify that the penalties assessed are “per non-compliance” so that a building owner can face penalties for multiple buildings they own.

Proposed changes:

A building owner that fails to demonstrate complete implementation of a compliance pathway as required by § 3518.1 at the end of a Compliance Cycle shall be assessed an alternative compliance penalty no greater than the following amounts per non-compliance, unless the non-compliance is covered under § 3518.2. The maximum penalty shall be reduced proportionally to the building’s performance relative to its pathway target as described in § 3521.3.

## § 3521.1(a) through (f)

The penalties should be assessed in a manner consistent with how the District values the damage caused to its citizens by non-compliance. The penalties should:

- Include the direct and indirect costs a complying building owner would have incurred from lost rent revenue, engineering costs, planning, etc.
- Include the cost of allowing greenhouse gas emissions into our atmosphere (Social Cost of Carbon).
- Be adjusted for inflation (Consumer Price Index) at the end of the BEPS cycle.

From our understanding, the current alternative compliance fee proposal only includes the first item, and perhaps only the direct costs.

To serve as an example on the second bullet point, our analysis of DOEE’s benchmarking data shows that the mean GHG emissions for a non-BEPS-compliant building between 100,000 and

200,000 ft<sup>2</sup> reported floor area is 972 tCO<sub>2</sub>e/yr. Assuming that compliance with BEPS would result in a 20 percent GHG emissions reduction<sup>12</sup> for each year over the subsequent compliance period of six years, the GHG reduction would total 1,166 tCO<sub>2</sub>e.

A recent meta-analysis of the social cost of carbon estimates this value at \$113/tCO<sub>2</sub>e, with some estimates ranging over \$8,000/tCO<sub>2</sub>e.<sup>13</sup> Using the lower average value, the cost of non-compliance from the perspective of the social cost of carbon for the average non-compliant building in the 100,000-200,000 ft<sup>2</sup> floor area category is \$132,000. These social costs of carbon should be added to the compliance fees.

## § 3521.3

We recommend setting adjustment factors for the Prescriptive Pathway and, if kept, the Standard Target Pathway proportional to reductions towards a Site EUI target.

There is little reason to adjust the penalties on the Prescriptive Pathway to a proportion of the “points” achieved. The purpose of this pathway is to create a clear guideline to compliance. If the building owner is unable to follow this pathway into compliance, it is entirely fair to assess penalties based on actual performance, especially when facing the inherent uncertainty of the savings when implementing a series of prescribed measures.

While we are in favor of deleting the Standard Target Pathway, the adjustment factor proposal for this pathway would be problematic because the ENERGY STAR Score is not linear with EUI.<sup>14</sup> This is another reason to base it on Site EUI savings instead. Furthermore, the text in the table would peg the energy-use baseline to the building's 2019 ENERGY STAR Score, which would be inappropriate for future BEPS cycles (BEPS 2, BEPS 3,...). Lastly, the BEPS standard is defined for a specific building in terms of either Source EUI or ENERGY STAR Score,<sup>15</sup> yet the Adjustment Factor for the Standard Target Pathway seems to only acknowledge the latter as a possibility. Unless the adjustment factor is converted to Site EUI as proposed, an equivalent adjustment for Source EUI would be needed for buildings unable to achieve an ENERGY STAR Score.

## Harnessing BEPS Data to Transform Markets

We ask DOEE to consider potential ways it could use BEPS data to transform markets when it comes to energy efficiency. While the public benchmarking data is a great first step, this data is

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<sup>12</sup> We acknowledge that GHG emissions likely will not be linear with EUI reductions, but this serves as a first-order estimate.

<sup>13</sup> Pei Wang, Xiangzheng Deng, Huimin Zhou, Shangkun Yu. “Estimates of the social cost of carbon: A review based on meta-analysis,” *Journal of Cleaner Production*, Volume 209, 2019, Pages 1494-1507. <https://doi.org/10.1016/j.jclepro.2018.11.058>.

<sup>14</sup> EPA. ENERGY STAR Portfolio Manager Technical Reference, “ENERGY STAR Score for Offices in the United States,” Figure 6, p. 11. This reference is used as an example to illustrate general methodology. [https://www.energystar.gov/sites/default/files/tools/Office\\_August\\_2019\\_508.pdf](https://www.energystar.gov/sites/default/files/tools/Office_August_2019_508.pdf)

<sup>15</sup> D.C. Register Vol. 68, No. 1, pp. 162-164, §3530.1.

only known by data and policy wonks, and it is difficult for lay-people to translate it into meaningful information. As one possibility, DOEE could assign grades to buildings and require the grades to be publicly displayed (much like food safety ratings in restaurants). Perhaps DOEE could initiate a voluntary program to highlight top-performing buildings in each category by issuing plaques or certificates for public display and for use in marketing materials.

This type of transformation would be especially useful in the residential rental and condo market, where ENERGY STAR Scores and/or DOEE grades, where applicable, could be a required disclosure with any rental application or condominium listing. This could be further refined to include information like average utility costs or GHG intensity. This information could be valuable to both prospective tenants and to the building sector by fostering demand for energy efficiency.

We would be interested in having further discussions on this point with DOEE and any other interested parties.

## Conclusion

We sincerely appreciate the opportunity to submit these comments on the BEPS program rules. Please feel free to contact me with any questions.

Respectfully submitted,

Aykut Yilmaz  
Energy Efficiency Subcommittee Chair  
Sierra Club, DC Chapter

**From:** [JBG SMITH Sustainability](#)  
**To:** [info.BEPS\\_\(DOEE\)](#)  
**Subject:** Public Comments: Establishment of the 2021 BEPS  
**Date:** Thursday, March 4, 2021 3:45:08 PM

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Dear DOEE Building Performance and Enforcement Branch,

The JBG SMITH Sustainability team would like to provide the below comments in response to *Establishment of the 2021 Building Energy Performance Standards*.

**§ 3530.1**

Can you please clarify how New Construction will be treated during the BEPS 1 compliance cycle? Specifically, for buildings that would have fallen into the BEPS 1 group, Private buildings >50,000 sq. ft. and DC-owned >10,000 sq. ft, that were not required to benchmark in CY 2019 due to the New Construction exemption (20 DCMR 3513.11(a)) New Construction will they be held to the 2026 compliance cycle?

As a Developer with a pipeline of projects that have delivered since 2018, it is our suggestion that an asset that delivers during the first BEPS compliance cycle should not be required to comply until the second cycle in 2027. This suggestion will take into consideration the period of stabilization for the asset, the amount of time it takes to reach the EPA Multifamily minimum occupancy of 80% to be eligible for certification, and the build-out of ground floor retailers if applicable.

**§ 3518.1(b):** Rather than refer to “above/below” national median, should refer to “more efficient than” to avoid confusion, as better ENERGY STAR scores are higher and better Source EUI is lower.

**§ 3519.5:** Additional reporting deadlines should be aligned with the benchmarking deadline (April 1), rather than February 1.

**§ 3521.3:** For the avoidance of confusion all references to “fines” should be replaced with “penalties.”

Thank you for your consideration.

Best,  
JBG SMITH Sustainability Team

**JBG SMITH Sustainability**

JBG Smith





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**March 4, 2021**

**BY ELECTRONIC TRANSMISSION**

**Katie Bergfeld  
Branch Chief  
District Of Columbia  
Department Of Energy  
And Environment  
1200 First Street, NE  
5<sup>th</sup> Floor  
Washington, D.C. 20002**

**RE: Public Comments – BEPS**

**JOINT COMMENTS OF  
THE APARTMENT AND OFFICE BUILDING  
ASSOCIATION OF METROPOLITAN WASHINGTON AND  
THE DISTRICT OF COLUMBIA BUILDING INDUSTRY ASSOICATION**

The Apartment and Office Building Association of Metropolitan Washington (“AOBA”) and the District of Columbia Building Industry Association (“DCBIA”),<sup>1</sup> pursuant to the “Notice of Proposed Rulemaking,” issued by the District of Columbia Department of Energy and Environment (“DOEE”) on December 4, 2020 (the “December 4 Notice”),<sup>2</sup> hereby respectfully submit these “Comments” on the proposed regulations seeking to implement provisions of the CleanEnergy DC Omnibus Amendment Act of 2018 (the “CEDC”).

**I. PRELIMINARY STATEMENT**

**A. A FRAMEWORK FOR TIMELY IMPLEMENTATION**

By these Comments, the Joint Parties present a framework for the timely adoption of the

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<sup>1</sup> AOBA and DCBIA are sometimes collectively referred to hereinafter as the “Joint Parties.”

<sup>2</sup> By “Notice of Extension of Public Comment Period,” issued by DOEE on January 29, 2021, the comment period was extended to March 4, 2021.

proposed regulations and, equally important, the timely implementation and completion of the initial compliance cycle set out in the regulations. As presented and subject to one condition precedent and two conditions subsequent, the Joint Parties support the proposed regulations seeking to implement BEPS. Specifically, the Joint Parties conditionally, but readily, support the proposed: (i) BEPS start date, (ii) separate compliance pathways, (iii) energy reduction targets, (iv) reporting and verification requirements and (v) performance exemptions and compliance delays. Significantly, the Joint Parties also support the proposed five (5) year deadline and one (1) year extension for completion of the compliance pathways and, if adjusted, the penalty structure set out in the proposed regulations.

In exchange for the above endorsement and support, the Joint Parties respectfully ask DOEE to:

- (i) refrain, absent bad faith, from assessing any penalty for non-compliance during the initial compliance cycle and only during the initial compliance cycle;
- (ii) commit to the establishment of an independent review and determination of any notice of infraction/enforcement and any request for a performance exemption or compliance delay; and
- (iii) commit to at least a fifty percent (50%) reduction in the maximum alternative compliance penalties set out in the proposed BEPS regulations.

The Joint Parties' conditional support of the proposed regulations reflects a compromise of the diverse and divergent interests of their Members. Specifically, while the Joint Parties support the targeted reductions in greenhouse gases and energy consumption set out in the CEDC, the diverse interests of their Members precluded the submission of Joint Comments on the proposed regulations that each Member could unconditionally support. The instant Comments, therefore, reflect a compromise by and commitment from the Members of both AOBA and DCBIA to support

and implement the proposed regulations subject, in the Joint Parties' view, to several reasonable conditions. It is the hope of the Joint Parties, if not our expectation, that other stakeholders will agree to a similar compromise and commitment.

The Joint Parties acknowledge that, because the proposed regulations are under review in a rulemaking proceeding, DOEE has almost unfettered discretion to accept, reject or modify the implementation framework proposed herein. The Joint Parties are confident, nonetheless, that the proffered framework presents the best opportunity for the timely implementation of the regulations and the equally timely completion, by building owners, of the proposed compliance pathways. The framework presented herein, in sum, provides for immediate adoption of the proposed regulations by DOEE and the commencement of immediate compliance by building owners.

The framework or "trade-off" is simply stated. Specifically, as proffered by the Joint Parties, the BEPS start date and initial six (6) year compliance cycle would proceed without additional interruption or extension, if: (i) a temporary penalty moratorium is adopted, (ii) subsequent penalties and subsequent requests for an exemption or delay are subject to review by an independent arbiter and (iii) the penalties set out in the proposed regulations are reduced by a material amount. The moratorium on penalties would apply only to the first compliance cycle. The establishment of an independent adjudicator and material reduction in penalties would become effective in the second compliance cycle. Importantly, if adopted, neither AOBA nor DCBIA will seek an extension or delay of either the BEPS start date or the initial compliance cycle.<sup>3</sup>

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<sup>3</sup> This commitment to refrain from seeking any delay of the initial compliance cycle in exchange for a moratorium on the assessment of penalties during the same cycle is not – and cannot be – binding on AOBA or DCBIA Members. Indeed, given the precise standards and exacting requirements of BEPS compliance, it is not unreasonable to expect a building owner, faced with insolvency or a lesser (but still severe) BEPS penalty, will seek a "hardship" compliance exemption or delay – even if DOEE were to approve the proposed penalty moratorium. The Joint Parties are confident, nonetheless, that the proposed "Grand Bargain" will exponentially reduce

## **B. REVISION OF THE PROPOSED REGULATIONS**

Alternatively, should DOEE conclude that a temporary penalty moratorium is unwise, the Joint Parties respectfully recommend revision of the proposed regulations as follows:

- (i) in addition to the one year compliance delay set out in Proposed Regulation 3520.7, DOEE should grant building owners an additional two (2) year extension in the initial compliance cycle to reflect the reordering of priorities created by the COVID-19 pandemic. Increased expenses related to providing a safe and healthy environment for both commercial building tenants and multifamily building residents together with declining rental income are driving down Net Operating Revenues which, in turn, negatively impact Debt Coverage Ratios; a critical metric for obtaining financing for building improvements. Further, the concomitant changes in building occupancy and the measurement of building performance and energy consumption will take time to “normalize”;
- (ii) the Proposed Regulation 3520.3 should be revised to provide for an independent evaluation of requests by building owners for a performance exemption or compliance delay;
- (iii) the regulations governing the issuance of fines and penalties should be revised to provide for an independent determination of the need for enforcement action;
- (iv) during the first compliance cycle, building owners who can demonstrate a good faith attempt to comply with the selected pathway should be exempt from any penalty for non-compliance;
- (v) the penalty regime set out in the proposed regulations should be revised to align specific penalty amounts with the investments necessary to secure compliance with the BEPS targets;
- (vi) DOEE and the DOEE Task Force should support expedited legislation to permit building owners to use an assessed penalty to install additional energy efficiency measures; and

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the number of exemption and delay requests, as building owners will be able to devote time and resources exclusively to the completion of a selected compliance pathway unencumbered by concerns that a building performance score just short of complete compliance will trigger a debilitating financial penalty. Recognition of a hardship exemption request, therefore, is no reason to reject the proposed penalty moratorium.

- (vii) DOEE and the DOEE Task Force should support expedited legislation to penalize commercial building occupants and multifamily building residents whose conduct contributes to the inefficient or wasteful consumption of energy.

With respect to penalties, the Joint Parties note that, as proposed, the penalties are arbitrary, inequitable and exorbitant. Indeed, notwithstanding the time and effort expended in BEPS Task Force discussions and presentations, AOBA, DCBIA and their Members were shocked and disappointed by the proposed amount of each penalty and by the fact that the proposed penalties in no way reflected or otherwise accounted for the building improvements installed by owners in anticipation of the formal adoption of the BEPS targets. The penalties also fail to acknowledge that, oft-times, it is the efficiency measures necessary to secure the last two or three or four points required to achieve the required ENERGY STAR score – that prove the most difficult to ascertain and install. Thus, while the Joint Parties support the adoption of penalties to guide compliance with BEPS, fundamental fairness and program efficacy dictate a substantial reduction in the amount of each proposed penalty not only to reflect the impact of the COVID-19 pandemic on BEPS compliance, but to provide proper incentives to enable building owners to complete each compliance cycle as well.

## **C. THE NEED FOR REMEDIAL LEGISLATION**

### **1. The Alternative Compliance Payment.**

In addition, the Joint Parties note that an amendment to existing legislation will be necessary if the twin statutory goals of reduced greenhouse gas emissions and reduced energy consumption are to be fully realized. Specifically, commercial building *occupants* and multifamily building *residents* must be incentivized to adopt effective conservation practices or be penalized for the inefficient or otherwise wasteful consumption of energy. Indeed, it makes little sense to implement and enforce stringent building performance standards if the resulting conservation

savings can be undermined by a cavalier or deliberately detrimental approach to energy conservation by a commercial building occupant or multifamily building resident.

Building occupant and resident participation, therefore, is vital to the District of Columbia's energy conservation commitment: with such participation, energy conservation cannot fail; without the active commitment from both commercial building occupants and multifamily building residents, energy conservation cannot succeed. The success of BEPS and of energy conservation in the District of Columbia, in short, will be dependent upon the active – and enforceable – commitment from both building owners *and* building occupants and residents.

The Joint Parties, accordingly, respectfully recommend that DOEE support a legislative amendment authorizing DOEE to assess an *alternative compliance payment* against building owners who fail to complete a selected compliance pathway in a timely manner.<sup>4</sup> As explained below, an alternative compliance payment would augment the completion of a compliance pathway by allowing owners to engage building occupants and residents who participate in the wasteful or otherwise inefficient consumption of energy. As contemplated by the Joint Parties, the alternative compliance payment would replace the “alternative compliance penalty” and the “penalties, fines and fees” currently specified in D.C. Code Section 8-1772.21(g) and D.C. Code Section 8-1772.21(i), respectively.

## **2. The Need To Reinvest BEPS Penalties.**

The Joint Parties also respectfully ask DOEE to support a legislative amendment to allow building owners to reinvest penalty proceeds in the same low performance score buildings that

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<sup>4</sup> AOBA also notes that this same reasoning – joint efforts by building owners, commercial building occupants and multifamily building residents to meet targeted reductions in greenhouse gases and energy consumption – supports the final adoption of submetering for District of Columbia multifamily buildings.

precipitated the penalty in the first instance. Current legislation requires the remission of any “collected” penalties to the Sustainable Energy Trust Fund.<sup>5</sup> Again, if the statutorily prescribed energy targets and savings are to be fully realized, the costs of compliance (including the collection of penalties) must be reinvested or “recycled” in buildings found to be inefficient under the cyclical BEPS regulations. The Joint Parties respectfully submit, therefore, that the more performance-effective and more cost-efficient practice would be to permit building owners to use collected penalties to install additional efficiency measures in the very buildings that precipitated the penalty in the first instance. As proposed by the Joint Parties, collected penalties would be reinvested in buildings under the auspices of DOEE.

The legislative amendments suggested by the Joint Parties seek to augment BEPS compliance first, by ensuring that those who waste or inefficiently consume energy pay for such waste and inefficiency and second, by reinvesting penalized amounts in the same low performance building that precipitated the penalty. The immediate need for this legislation is compounded by the fact that, in the District of Columbia, the proposed regulations will have no application to buildings owned by either the federal government or foreign countries. DOEE and the District of Columbia Council, therefore, must rethink and expand the application of the conservation standards and the penalties collected thereunder in order to ensure the goals are achieved and the standards of both the CEDC and the proposed BEPS regulations are realized.

## **II. BACKGROUND AND SUMMARY**

The proposed regulations are the product of the CEDC. The CEDC, among other things, mandated that DOEE establish property types and BEPS for such building types and further

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<sup>5</sup> See D.C. Code Section 8-1772.21(g) (“Penalties collected pursuant to this provision shall be deposited into the Sustainable Energy Trust Fund.”).



mandated that building owners implement energy efficiency measures over a five (5) year compliance cycle. According to the December 4 Notice, the proposed regulations “provide specific instructions to owners and operators of privately-owned buildings on how to comply with BEPS.”<sup>6</sup>

The Joint Parties, on behalf of their Members, embrace the energy conservation and environmental protection goals established by the Council of the District of Columbia and again commend DOEE and the DOEE Task Force for their open and collaborative approach to the discussion and promulgation of the proposed BEPS regulations. The proposed BEPS regulations are another – but not the last – step towards the statutorily mandated reduction in greenhouse gas emissions and energy consumption. BEPS, the Joint Parties have concluded, is here to stay and when the regulations are finally adopted, all building owners will be – and should be – required to implement any and all cost-effective and energy efficient measures that will bring District of Columbia buildings into compliance with the cyclical standards.

The proposed regulations, however, are not perfect and, absent stakeholder consensus, the Joint Parties are concerned that implementation of BEPS will be unreasonably and, therefore, unnecessarily delayed by interminable requests for exemptions and delays and incessant disputes over DOEE’s *initial* interpretations of building owner obligations. The adoption and implementation of BEPS is unprecedented not only in the District of Columbia, but across the nation, and the Joint Parties respectfully submit that approval of a consensus driven framework that allows building owners to adopt both traditional and innovative approaches to the installation and financing of conservation measures without fear of what can only be described as draconian penalties will redound to the benefit of DOEE, building owners and the public. The advantages

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<sup>6</sup> See December 4 Notice at 2.

of adopting a consensus driven framework providing for the timely adoption and implementation of the BEPS regulations, thus, are obvious.

Equally obvious is the fact that, if no consensus on the regulations is reached, the sweeping and permanent impact of the COVID-19 pandemic on the management, maintenance, measurement and occupancy of privately-owned buildings in the District of Columbia will render timely and effective compliance with BEPS and timely completion of compliance pathways unlikely. Indeed, as proposed, the regulations already extend compliance by an additional year<sup>7</sup> *and* also allow DOEE to “delay . . . compliance . . . for up to three (3) years.”<sup>8</sup> The impact of the pandemic will only multiply and accelerate these extension and delay requests, as building owners are forced to choose between expending limited resources and scarce funds to protect the health and safety of each individual who enters a building *or* expending the same resources and funding to comply with rigorous and untested regulations that, if violated, could result in insolvency. Given the declining revenues building owners are facing now and in the foreseeable future, lenders (including PACE lenders) will not internalize the increased material risk of a loan default if Debt Coverage Ratios slip below underwriting standards.

### **III. DISCUSSION**

#### **A. DOEE SHOULD ADOPT A TEMPORARY MORATORIUM ON THE ASSESSMENT OF PENALTIES**

##### **1. Absent Bad Faith, A Penalty Should Not Be Assessed Against A Building Owner During The First Compliance Cycle.**

The successful implementation of the BEPS regulations and attainment of energy conservation and building targets will require the adoption of new approaches to building

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<sup>7</sup> See Proposed Regulation 3519.1.

<sup>8</sup> Proposed Regulation 3520.5. For “qualifying affordable housing building,” DOEE is permitted to grant “a delay in compliance of more than three (3) years.”

performance, innovative thinking on when and how buildings will be occupied, risk-taking in the financing of new equipment and, of course, a new emphasis on the health and safety of building occupants and residents. As noted, BEPS compliance is a new and novel task(s) for many building owners and in particular many building engineers and, despite their best and good faith efforts, some owners will not meet the prescribed performance and energy targets within the applicable compliance cycle.

The Joint Parties, accordingly, respectfully recommend that DOEE adopt a penalty moratorium or “standstill,” under which a good faith attempt to implement the approved compliance cycle measures would be a complete defense to an assessment of a penalty. As proposed, building owners would be able to raise the defense only during the first compliance cycle and the defense would not excuse bad faith performance by an owner. The Joint Parties have concluded that a penalty deferment or standstill is necessary in order to encourage the new, innovative and risk-taking approaches to the improvement of building performance, financing challenges notwithstanding. BEPS is a new and untested approach to the improvement of building performance in the District of Columbia and, despite DOEE’s best efforts to establish reasonable terms and conditions for compliance, unanticipated and novel issues will likely arise and impede compliance.

In particular, the Joint Parties are concerned that efforts and measures implemented in anticipation of the adoption of the final BEPS regulations will not be recognized if a building falls just short of meeting the applicable savings target. Compounding this concern is the fact that it is the last two or three or four points necessary to secure compliance that are typically the most difficult to obtain. A temporary delay in the enforcement of penalties, therefore, will provide both DOEE and building owners with an opportunity to make real-time adjustments to unanticipated

issues and, most importantly, encourage building owners to take reasonable risks and obtain related financing to secure compliance.

Equally important, a delay in the enforcement of penalties will allow DOEE, in consultation with the Task Force, to revisit and revise a penalty structure that is charitably described as punitive. As explained below, the proposed penalties are arbitrary, fundamentally unfair and exorbitant. The penalties, again as proposed, will also create an unenviable and perhaps unavoidable conflict: given the excessive amount of each penalty, many building owners will be forced to choose between complying with BEPS to forestall assessment of a (large) penalty or purchasing new equipment and systems and adopting new protocols to protect the health and safety of each individual who enters a building.

To be clear: the Joint Parties do not oppose the adoption of a penalty structure to enforce building owner compliance with BEPS. The Joint Parties do oppose, however, the specific penalties and penalty structure set out in the proposed regulations. A moratorium on the assessment of penalties during the initial compliance cycle, then, would allow DOEE to revisit and replace an unfair and excessive penalty structure and simultaneously allow building owners both to implement post-pandemic health and safety measures and to commence and complete selected compliance pathways without fear of retribution from a punitive penalty regime.

As an adjunct to the penalty moratorium, the Joint Parties respectfully request that DOEE allow a neutral third party to determine whether a penalty is warranted and whether performance exemption or delay request should be granted. As explained below, DOEE's authorship of the proposed regulations coupled with the fact that DOEE will conduct any investigation into compliance with or completion of a performance pathway necessarily compromises DOEE's

ability to render a fair and impartial determination. The funds spent by a building owner to complete a performance pathway also militates in favor of the selection of independent party.

**B. ALTERNATIVELY, ADOPTION OF THE PROPOSED BEPS REGULATIONS SHOULD BE DELAYED**

**1. The Impact Of The COVID-19 Pandemic On Building Owners.**

Much has been written about the impact of the COVID-19 pandemic and the Joint Parties will not detail here the unparalleled and unrelenting hardships the pandemic has visited upon the residents of the District of Columbia. Much has not been written, however, about the specific and unique impact the pandemic has had upon the owners and operators of buildings located in the District of Columbia. Specifically, and as noted in the separate AOBA Comments on the proposed benchmarking regulations, the pandemic has forced building owners and operators to shift their focus from the adoption of energy efficient measures designed to comply with BEPS to the immediate installation of new equipment and the application of new protocols designed to protect the health and safety of each individual who enters a building.

In particular, the pandemic has forced building owners and operators to:

- (i) purchase and install new ventilation and filtration systems to slow the spread of the virus that causes COVID-19 and to run these new systems on an almost continuous basis;
- (ii) recalibrate building occupancy, as the Mayor's Emergency Orders have forced commercial and residential tenants to vacate buildings and work from home;
- (iii) recalculate and remodel anticipated revenues, as the economic downturn caused by the pandemic has left many firms and families unable to meet lease obligations;
- (iv) post signage and install new hygienic devices to limit the spread of the COVID-19 virus;
- (v) retrain building operational and maintenance personnel;
- (vi) revise building cleaning and disinfection protocols;

(vii) design and implement new health and safety policies and procedures for building staff; and

(vii) install, in some buildings, ultra-violet or “UV” lighting.

The expenditures on building and the training of building personnel to combat the impact of the pandemic have been significant. These expenditures, moreover, are not readily recoverable by building owners, as the combination of ever-increasing rates of unoccupancy and the ever-increasing cost of combating the pandemic has forced building owners to make difficult resource allocation decisions.

And it is this current uncertainty and difficulty in recovering investments and expenditures necessitated by the COVID-19 pandemic that frames and informs our alternative request for a delay in the adoption of the proposed regulations. Specifically, *there could not be a worse time* to obligate owners to make additional expenditures on building efficiency and energy conservation – especially when assumptions which formed the basis for energy consumption modeling have been dramatically altered. Simply stated, when forced to choose between the installation of measures designed to protect the health and safety of building occupants and the installation of measures designed to boost building performance, building owners will select health and safety every time. Indeed, the marketplace will demand it. This owner selection and market demand, in turn, necessitates a re-evaluation of the ability of some building owners to meet initial compliance cycle deadlines.

## **2. The Impact Of The COVID-19 Pandemic On Energy Consumption Warrants Baseline Adjustments Or More Time To Achieve The Resulting Increased Energy Reduction Requirements.**

The COVID-19 pandemic has increased energy consumption for many buildings. Regulations implementing the CEDC must reflect this new reality.

Specifically, the increased filtration and ventilation requirements necessary to meet indoor air quality health and safety standards to combat the pandemic have, and will continue to, increase energy use for building owners. Office building owners have continued to operate their buildings despite a reduction in occupancy, but now must implement these new air quality standards. The increased energy usage resulting from these new requirements will mean the baseline reductions required by BEPS will also increase.<sup>9</sup> Likewise, with more District of Columbia residents working from home pursuant to the Mayor's emergency orders, energy (and water) consumption has increased, making it that much more difficult to achieve the baseline reductions required by BEPS. Thus, the changes wrought by the pandemic – new air filtration/ventilation standards and changes in building occupancies – will require a new flexibility: either additional extensions to an already extended compliance period *or* an adjustment to BEPS baseline reductions *or* some combination of both will be necessary to satisfy the requisite BEPS obligations.

**C. THE STANDARD GOVERNING AN EXEMPTION OR DELAY REQUEST IS UNFAIR**

Proposed Regulation 3520.3 provides:

An exemption or delay may be granted only if the building owners demonstrate *to the satisfaction of DOEE*, based on the documentation presented, that the building meets one or more of the criteria in §§ 3520.4 or 3520.6. (Emphasis added).

Proposed Sections 3520.4 and 3520.6, in turn, set out the following criteria for an exemption or delay: (i) complete demolition of the building, (ii) financial distress, (iii) change in ownership, (iv) major building renovation, (v) unoccupancy, (vi) pending demolition, (vi) change in property

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<sup>9</sup> To cite just one example, assume that the new filtration and ventilation requirements increase a building's energy profile by an additional ten percent. In order to satisfy the current twenty percent baseline reduction as required by BEPS, the owner must now reduce consumption by thirty percent (20% baseline reduction + 10% filtration/ventilation increase = 30%).

type and (vii) the building was operating and consuming energy, beginning 2021, during the COVID-19 public health emergency.

The Joint Parties respectfully submit that the sole and exclusive *satisfaction* of DOEE is not a proper standard for the determination of an exemption or delay request. Specifically, because DOEE reviews and approves the compliance pathway selected by the building owner and because, further, DOEE makes the final decision on whether an owner in fact satisfied the selected pathway target, DOEE is not (and cannot be) an impartial or neutral arbiter of the merits of an exemption or delay request. The need for an unbiased exemption/delay arbiter is particularly acute where, as here, the cost to complete a selected compliance pathway will likely be considerable and the proposed penalties for non-compliance will certainly be significant. DOEE, the Joint Parties respectfully submit, should not be permitted to: (i) draft the BEPS regulations, pass judgment on the comments submitted on the BEPS regulations and then approve the final BEPS regulations *and then* (ii) determine whether a specific BEPS regulation has been violated *and then* (iii) assess a penalty for a violation of a regulation promulgated by DOEE. There is, in sum, simply too much at stake, in terms of financial investment and resource commitment, to permit an exemption or delay request to be determined by the subjective satisfaction of a DOEE representative. The standard, accordingly, must be broadened to permit an exemption or delay request to be determined by an independent evaluator. Stated differently, DOEE should not be permitted to be the jury, judge and executioner in determining whether a request for delay in or exemption from compliance with BEPS is appropriate.

The Joint Parties also note that, unlike the formal hearing and appellate remedies available to a building owner challenging a fine or penalty,<sup>10</sup> no such remedies attach to a rejection of a

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<sup>10</sup> See Proposed Regulation Sections 3521.9, 3521.10.



request for a performance delay or compliance exemption. A building owner, thus, has no formal procedural or appellate remedy to challenge the rejection of a delay or exemption request; the owner, instead, must either accept the rejection or, because there are no additional procedural or appellate remedies specified in Proposed Section 3520, seek redress in the local court. An independent review standard, in sum, ensures that each exemption and delay request is properly reviewed and fairly evaluated in the most cost-effective manner. Proposed Regulation 3520.3, accordingly, should be revised to permit an independent review of any exemption or delay request.

**1. Compliance Exemptions For Affordable Housing Buildings Merit Special Consideration.**

In accordance with the statute authorizing BEPS,<sup>11</sup> the proposed regulations contain several references to “affordable housing.” The regulations, for example, propose to amend Section 3599 of the Green Building Requirements to include a definition of affordable housing.<sup>12</sup> If adopted, Proposed Regulation 3520.5 would also allow DOEE to grant the owners of “qualifying affordable housing buildings . . . a delay in compliance of more than three (3) years.” Like other building owners, however, an owner of a qualifying affordable housing building would have to show “good cause” and demonstrate by “substantial evidence” that one or more specific “circumstances” had rendered compliance with BEPS “practically infeasible.”

Among the circumstances identified in the proposed regulations as substantial evidence that would render compliance practically infeasible is “financial hardship.”<sup>13</sup> Financial hardship for affordable housing buildings, however, is not tantamount to financial hardship for privately-owned, for-profit buildings. Specifically, because rents are typically subsidized and because,

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<sup>11</sup> See D.C. Code Section 8-1772.21(e)(2).

<sup>12</sup> See Proposed Regulation 3599.

<sup>13</sup> See Proposed Regulation 3520.6(a).

further, government regulations typically limit rent increases, the ability of the owners of affordable housing buildings to fund and install energy efficient measures is necessarily limited and especially limited when measured by BEPS compliance. And, while most owners of affordable housing buildings maintain capital reserves, these reserves are typically governed by regulations that limit the amount of capital that may be withdrawn in any one year.

Owner contributions to replace the reserves, moreover, are often earmarked for existing capital needs, such as replacing or repairing stoves, refrigerators, pipe leaks, paving and elevators. Accordingly, because the owner of an affordable housing building cannot draw upon the same resources and reserves as other building owners, affordable housing owners should not – and cannot – be held to the same compliance standard as other building owners. Any review of a claim of financial distress asserted by an owner of an affordable housing building, therefore, should be subject to a lower evidentiary threshold.

## **2. Rent-Controlled Housing Buildings Merit Special Consideration As Well.**

Similar to affordable housing, rent-controlled buildings must also adhere to government regulations that not only limit rent increases, but restrict the scope and scale of major building upgrades that would be supported by any rent increases. Specifically, owners operating buildings under the Rent Stabilization Program who need to raise rents to fund BEPS updates, would need to submit a petition to the Rental Housing Commission (RHC) for its approval. The petition process is not just a government review and approval process of the owner's proposed petition, but it also requires the support of effected tenants as a third-party. The document composition and tenant negotiations that go into preparing a petition can take an average of a year before it is even filed with RHC. In circumstances where tenants oppose the petition, the process can span multiple years before an agreement is reached and approval is granted; in the worst-case scenario the

petition can be denied entirely. Even when the petition is approved, the amount of the rent increase is determined by RHC, not the owner. This impacts an owner's access to the funding sources needed to meet BEPS standards, as many lending institutions see rent-controlled properties as high risk due to the inability to align rent revenues with the market.

Owners of rent controlled buildings should not be held to the same BEPS compliance standard as building owners without these additional stringent government regulations, bureaucratic obstacles, and tenant approval. Rent-controlled buildings should be given greater flexibility that includes a reduced BEPS compliance standard.

In addition to the rent constraints rent-controlled buildings operate under, many rental apartment buildings in the District of Columbia are experiencing soaring rent delinquencies as a result of the pandemic. Drastic reductions in already constrained rent revenue coupled with significantly increased expenses such as cleaning, PPE for employees, and increased water and utility bills driven by increased consumption, will make it near impossible for these buildings to be able to invest further in energy-efficient measures at this time. If the District of Columbia insists on pushing forward with the stated timeline and goals of the CEDC, the District must subsidize the cost to comply or risk the very viability of the rental housing stock.

**D. THE STANDARD GOVERNING THE ISSUANCE OF A FINE OR PENALTY IS ALSO UNFAIR**

Similar reasoning applies to the issuance of fines and penalties under Proposed Regulation 3521. Specifically, pursuant to subparts (6), (7) and (8) of Proposed Regulation 3521, building owners suspected of violating the BEPS regulations receive a "notice" of violation from DOEE, a "notice" of infraction from DOEE and a "notice" of enforcement from DOEE. Any appeal of the

enforcement notice is submitted to DOEE as well.<sup>14</sup> DOEE, accordingly, is jury, judge and executioner; DOEE identifies a purported BEPS violation, determines whether BEPS has in fact been violated and assesses a penalty for the violation.

Again, the Joint Parties respectfully suggest that DOEE is simply too interested and too involved in BEPS compliance to render a fair and impartial decision on whether an infraction of the Standards has been committed. Given the length of the compliance cycles and the investments necessary to satisfy each successive (and increasingly expensive) compliance cycle, fundamental fairness demands that a neutral arbiter determine whether a BEPS violation or infraction has occurred and the amount, if any, of the penalty for the violation.

The procedural and appellate remedies specified in Proposed Regulation 3521.9 and Proposed Regulation 35121.10, moreover, offer little assistance to building owners charged with a BEPS violation. Specifically, most building owners will have neither the time nor funding nor inclination to pursue a separate hearing and adjudication on an enforcement notice issued by DOEE or a subsequent appeal to the District of Columbia Court of Appeals. Instead, given the cost and resource commitment of both initial compliance and any subsequent challenge to an alleged BEPS violation, most building owners will likely forgo any hearing and appeal and engage in a singular attempt to persuade DOEE that the enforcement notice and accompanying fine or penalty is unwarranted. As noted, however, this attempted persuasion is inherently unfair, as DOEE is responsible for identifying the compliance infraction and the assessment of any alternative compliance penalty. The better and far fairer practice, therefore, would be to allow an independent adjudicator to review and rule upon the alleged BEPS violation.

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<sup>14</sup> See Proposed Regulation 3521.8.

**E. THE PENALTIES SET OUT IN THE PROPOSED REGULATIONS ARE ARBITRARY, UNFAIR AND EXORBITANT**

At the outset, the Joint Parties acknowledge that a penalty regime is a necessary component to the BEPS regulations. Penalties serve as incentives and, if properly structured and fairly assessed, a penalty will guide building owners toward compliance with the BEPS regulations. The Joint Parties, therefore, fully support a balanced, fair and equitable approach to the assessment of penalties for BEPS' violations.

Unfortunately – and respectfully – the penalties presented in the proposed BEPS regulations are neither balanced nor fair nor equitable. Specifically:

- (i) because there is no nexus between the proposed penalties and the investment necessary to secure compliance – the proposed penalties are arbitrary;
- (ii) because the proposed penalty adjustments would impose different penalties on similarly situated building owners *and* substantively similar penalties on dissimilar building owners – the proposed adjustment are fundamentally unfair; and
- (iii) because application of the proposed penalties on a square foot basis would cost a building owner more than the cost of electricity on a square foot basis – the proposed penalties are exorbitant.

The proposed penalties, therefore, should be rejected and replaced with a proposal that promotes building investment over building owner intimidation. As noted, the penalties should be dramatically reduced, not only to promote investment in building performance, but to reflect the good faith efforts of building owners and to reduce the disparate impact of the proposed penalties on similar buildings *and* dissimilar buildings. The Joint Parties also respectfully recommend that the current BEPS legislation be amended to permit building owners to reinvest penalized funds in the very low performance buildings that precipitated the penalty in the first instance.

# **1. The Proposed Penalties Are Arbitrary.**

The maximum amount of the penalties proposed for non-compliance ranges from \$7.5 million for buildings with at least 500,000 square feet of gross floor space and \$250,000 for buildings with less than 25,000 square feet of gross floor space. These maximum amounts, frankly, shocked AOBA. DCBIA and their Members, but even more disturbing is the fact that there is no foundation or basis for each proposed penalty. There is nothing in this rulemaking – no evidence or task force discussion or DOEE presentation – that suggests that the proposed maximum or minimum penalties are appropriate or necessary to secure compliance. The specific penalty amounts, rather, appear to be simply punitive, designed to intimidate or coerce building owners into compliance.

More important, the specific penalties are unrelated to the investments necessary to secure compliance. This relationship is key to compliance; specifically, a penalty should be *just* large enough to incentivize a building owner to make the necessary investment, but not so large as to be punitive. Here, no such nexus or relationship exists between the proposed penalties and the necessary compliance investment and, for this reason, the penalties should be re-evaluated as arbitrary.

The Joint Parties also note that, in numerous task force meetings, the discussion of penalties inevitably focused on the fact that any penalty or fine levied against a building owner should be slightly larger than the actual cost of the energy efficiency measure. This penalty/cost relationship would act as an incentive to building owners to complete the work instead of simply paying the penalty or fine for non-compliance. Failure to recognize this penalty/cost relationship renders the penalty structure set out in the proposed regulations arbitrary and ineffective.

## **2. The Proposed Penalties Are Fundamentally Unfair.**

The Joint Parties also respectfully submit that the proposed penalty provisions are fundamentally unfair. Specifically, in applying the proposed “adjustment factor,” the penalty provisions make no attempt to distinguish between: (i) similarly situated buildings that, under the regulations, would receive a substantially different penalty for non-compliance and (ii) dissimilar buildings that, under the regulations, would receive a substantially similar penalty. Two simple examples illustrate these incongruous results.

In example 1, assume a BEPS median score of 71 and then consider the following two buildings:

### **Building A**

- 250,000 square feet in gross floor area
- ENERGY STAR score at the beginning of compliance cycle - 68
- ENERGY STAR score at close of compliance cycle – 70
- Proposed penalty amount - \$5 million
- Penalized amount after application of adjustment factor - \$1.7 million

### **Building B**

- 250,000 square feet in gross floor area
- ENERGY STAR score at the beginning of compliance cycle – 30
- ENERGY STAR score at close of compliance cycle – 60
- Proposed penalty amount - \$5 million
- Penalized amount after application of adjustment factor - \$1.7 million

Pursuant to the adjustment factor set out in the proposed rules, the owners of Building A and Building B would be treated the same: both owners would be penalized \$1.7 million for failure to meet the BEPS I target even though the owner of Building A made substantial building investments in anticipation of the adoption of BEPS. The statute authorizing BEPS, the Joint Parties respectfully submit, could not have intended that a building owner with a lethargic or cavalier approach towards compliance receive the same penalty as a building owner with energetic,

earnest approach towards BEPS compliance. Fairness and compliance with CEDC, therefore, require that any penalty structure finally approved by the DOEE recognize and reflect a building owner's investment made in anticipation of the adoption of the BEPS regulations.

In example 2, assume again a BEPS median score of 71 and consider the following two buildings:

**Building C**

- 200,000 square feet in gross floor area
- ENERGY STAR score at the beginning of compliance cycle - 66
- ENERGY STAR score at close of compliance cycle – 70
- Proposed penalty amount - \$5 million
- Penalized amount after application of adjustment factor - \$1 million

**Building D**

- 200,000 square feet in gross floor area
- ENERGY STAR score at the beginning of compliance cycle – 46
- ENERGY STAR score at close of compliance cycle – 70
- Proposed penalty amount - \$5 million
- Penalized amount after application of adjustment factor - \$200,000

In this second example, the owner's prior and significant investments in Building C (*i.e.*, the initial ENERGY STAR score of 66) is ignored and penalized, while Building D receives a substantially lesser penalty for later and perhaps nominal or marginal investments (*i.e.*, the initial ENERGY STAR score of 46) in building performance.

The Joint Parties acknowledge that the two examples are not perfect because the owners of Building B and Building D would likely follow a prescriptive pathway towards compliance. The examples, however, raise a critical point ignored by the proposed regulations: investments made by building owners in anticipation of the adoption of BEPS should be recognized – not penalized – if and when the results of investments fall just short of full compliance. Indeed, in this second scenario, the penalized owner of Building C would have been better off foregoing the pre-BEPS building investments.



As a possible corrective, the Joint Parties recommend adoption of a graduated penalty structure, under which any buildings with an ENERGY STAR score of greater than 20 percent from the BEPS standard would be assessed 100 percent of the proposed penalty, with an additional scaling down to a predetermined penalty “floor.” For example, and assuming a BEPS median score of 71, buildings with a performance score of 57 or below would be subject to the maximum penalty, with a graduated penalty scale down for each building score to a floor of 20 percent. This approach would provide building owners with sufficient incentive to make improvements, while also providing DOEE a large enough penalty or “stick” to encourage compliance. The Joint Parties’ proposal would also recognize and credit building owners for the significant investments in building performance made prior to the adoption of BEPS.

### **3. The Proposed Penalties Are Exorbitant.**

Compounding the fact that the penalties, as proposed, bear no relationship to the investment necessary to meet the BEPS target is the fact that the penalties, again as proposed, are exorbitant. Specifically, a \$5 million penalty for failure to satisfy the BEPS I energy savings target translates into a \$1 million penalty per year which, when applied to a 500,000 square foot building, translates into a penalty of \$5.00 per square foot. A \$5.00 per square foot penalty, in turn, would exceed the price per square foot to provide electric service to a 500,000 square foot building.

The same penalty/square footage ratio applies to other, lesser penalties; in each instance, the amount of the penalty per square foot would exceed the cost to provide electric service to a building on a square foot basis. Surely, by any rule of reason, it makes little sense to pay more in penalties per square foot than to pay for electric service per square foot. The proposed penalties, therefore, are simply too high and should be reduced.

**4. The Proposed Penalties Have A Disproportionate And Disparate Impact On Owners Of Affordable Housing Buildings And, Therefore, Should Be Reduced.**

Both the statute establishing BEPS and the regulations promulgated thereunder make provision for “qualifying affordable housing buildings,” specifically allowing DOEE to delay compliance for such buildings for “more than 3 years.”<sup>15</sup> This specific and extended more-than-three-year exemption does not apply or carry-over to penalties. Under the proposed regulations, then, an owner of an affordable housing building would be subject to the same penalty structure as any other building owner.

The failure to apply a separate and lesser penalty structure to owners of affordable housing buildings is improper. Specifically, and as noted, owners of affordable housing buildings face government restrictions and financial limitations that other building owners do not: unlike their private, for-profit counterparts, owners of affordable housing buildings are limited in the rents that can be charged to tenants as well as any annual increase in such rents. The application of capital reserves that might be used to install energy efficient measures to comply with BEPS are also restricted and, in many cases, predetermined. Fundamental fairness and the continued availability of affordable housing, therefore, dictate that the owners of such housing be subjected to a separate and lesser penalty structure. Specifically, if BEPS compliance by an owner is found wanting, a penalty should be levied only if the owner has:

- (i) presented a budget-based rent increase request to the appropriate regulatory agency;
- (ii) the appropriate regulatory agency has approved the request; and
- (iii) the combined and collected rent increases are sufficient to complete compliance.

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<sup>15</sup> See Proposed Regulation 3520.5.

## **F. THE LEGISLATIVE CORRECTIVES**

Lastly, and as noted, the Joint Parties proffer two legislative correctives that, if enacted, will increase energy conservation in the District of Columbia in general and improve BEPS compliance in particular. First, we ask that DOEE and the DOEE Task Force support a legislative amendment authorizing DOEE to levy an alternative compliance *payment* against building owners failing to complete implementation of a compliance pathway. Second, we ask that DOEE and the DOEE Task Force support a legislative amendment authorizing building owners to reinvest penalty proceeds in the same low performance score building that precipitated the penalty.

### **1. The Alternative Compliance Payment.**

Based on discussions with the BEPS Task Force, it is the understanding of the Joint Parties that, because D.C. Code Section 8-1771.21(i) references an “alternative compliance *penalty*,” the same reference – penalty – must be carried forward in the BEPS regulations.<sup>16</sup> As DOEE is well aware, however, most multifamily lease agreements prohibit building owners from assigning or “passing-through” penalties to multifamily building residents. Building owners, thus, have no remedy against recalcitrant residents who, through inattention or deliberate action, waste energy. Indeed, absent the ability to pass-through a payment charge (or penalty) to the building resident, the effort of a building owner to meet the BEPS target will always be subject to the whims of a recalcitrant building resident. Surely, in promulgating landmark conservation legislation, the Council of the District of Columbia did not intend for the aggressive and targeted reductions in greenhouse gas emissions and energy consumption to be subject to the vagaries of undisciplined and unpunishable building occupants and residents.

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<sup>16</sup> And Proposed Regulation 3521.1 does just that, imposing an “alternative compliance penalty” on any owner that “fails to demonstrate complete implementation of a compliance pathway.”

The solution, thus, is to amend D.C. Code Section 8-1772.21(i) to replace the alternative compliance penalty with alternative compliance “payment.” If enacted, the amendment would not only preserve DOEE’s authorization to extract a payment from building owners for failure to complete a selected compliance pathway, but if warranted, allow building owners to collect a portion of the payment from occupants and residents who contributed to the failure. The amendment, thus, would promote BEPS compliance by enlisting building occupants and residents in the effort to conserve energy.

The requested amendment, moreover, would not cloak a building owner with an unchecked ability to recover an alternative compliance payment from building occupants and residents. Instead, market forces (*i.e.*, the supply and demand for commercial building space and multifamily apartments) would act as an effective check on any attempt to foist upon occupants and residents any payments that were the result of the building owner’s failure to complete a compliance pathway. Market principles as well as fundamental principles of cost causation/cost responsibility, thus, dictate that commercial building occupants and multifamily building residents have a stake in the conservation of energy in the District of Columbia.

## **2. The Penalty Reinvestment.**

Parallel principles, likewise, support the reinvestment of collected penalties in efficiency measures that will raise a building’s BEPS performance score. As noted, the proposed regulations force and, by penalty, enforce compliance with specific building performance standards and does so on an ever-changing and ever-increasing-score basis. During the second compliance cycle and each successive cycle thereafter, building performance standards will increase as will the owner expenditures necessary to meet the successive and increased performance score. Building owners, thus, face continuous and ever-expensive compliance obligations; as soon as one compliance cycle

is completed, a second cycle emerges, demanding an even higher building score. Under this ever-changing, and increasingly-expensive compliance scheme, building owners should be able to utilize any and all available funds to secure compliance. A statutory amendment authorizing building owners to reinvest penalty funds to install additional energy efficiency measures provides an additional source for this necessary funding.

The Joint Parties also note that, while the legislation establishing the Sustainable Energy Trust Fund does in fact provide for the allocation of the penalized funds to implement both BEPS and the “EnergyStar benchmarking program,”<sup>17</sup> allocations are also authorized to fund administrative costs, independent reviews, the activities of the Sustainable Energy Utility advisory board as well as support for the Green Energy Finance Authority. While these non-BEPS and non-benchmarking allocations are laudable, the Joint Parties respectfully submit that, because building owners are compelled by statute to implement energy efficient measures to increase the BEPS score of low performing buildings and to do so on an ever-increasing score basis and because, further, building owners will be penalized for their failure to do so, building owners must be permitted to reinvest or “recycle” penalized funds in improving building performance. Indeed, if the goal of the CEDC is to reduce greenhouse gas emissions and to reduce energy consumption the District of Columbia (and it is), the Joint Parties suggest that direct application of the penalties to the installation of DOEE-approved measures is a better practice than remitting collected penalties elsewhere.

#### **IV. CONCLUSION**

In closing, AOBA and DCBIA acknowledge the hard work by DOEE and the DOEE Task Force in drafting the proposed regulations. Drafting the regulations could not have been easy and

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<sup>17</sup> See D.C. Code Section 8-1774.10(c)(9).

AOBA and DCBIA again thank DOEE and the Task Force for completing the difficult task of preparing the proposed regulations.

AOBA and DCBIA also acknowledge that implementing the BEPS regulations will be difficult as well. Although new to the District of Columbia and to the nation as well, the regulations will be implemented eventually, the initial compliance cycle will be eventually completed and then the process will begin anew. Given these novel and cyclical predicates, the successful implementation of BEPS will require some regulatory flexibility and, as noted, several legislative amendments. AOBA and DCBIA respectfully submit that the proposed framework, under which DOEE stays the assessment of penalties during the first compliance cycle in order to permit building owners to capably complete the performance pathways, is another important step towards the successful implementation of BEPS.

Respectfully submitted,

**APARTMENT AND OFFICE  
BUILDING ASSOCIATION OF  
METROPOLITAN WASHINGTON**



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Dated: March 4, 2021

## **DEPARTMENT OF ENERGY AND ENVIRONMENT**

### **NOTICE OF PROPOSED RULEMAKING**

#### **Application of the Building Energy Performance Standards for Privately-Owned Buildings**

The Director of the Department of Energy and Environment (DOEE or Department), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.01 *et seq.*) (2013 Repl. & 2019 Supp.)); Section 301 and 304 of the CleanEnergy DC Omnibus Amendment Act of 2018 (CEDC Act), effective March 22, 2019 (D.C. Law 22-257; 66 DCR 3973 (April 5, 2019)), as amended by Section 2 of the CleanEnergy DC Omnibus Temporary Amendment Act of 2020, effective May 6, 2020 (D.C. Law 23-94; 67 DCR 5015 (May 15, 2020)); and Mayor's Order 2020-087, dated August 21 2020, hereby gives notice of the intent to add new sections to Chapter 35 (Green Building Requirements) of Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

The proposed rulemaking will implement provisions of the CEDC Act, which mandates that every six (6) years, DOEE establish property types and Building Energy Performance Standards (BEPS) by property type for the properties covered by the benchmarking requirements of the Clean and Affordable Energy Act of 2008 and that, for any building identified as below the performance threshold set by DOEE, the building owner be required to implement lasting energy efficiency measures in their buildings over a five (5)-year compliance cycle. The proposed rules also set forth DOEE's implementation and enforcement of the BEPS requirements.

#### **Input from the Task Force**

The Clean Energy Omnibus Act of 2018 established the BEPS Program as well as a Mayoral appointed BEPS Task Force. The charge of the BEPS Task Force was to: advise DOEE on creation of an implementation plan for the Building Energy Performance Program; recommend amendments to proposed regulations issued by DOEE; and, recommend complementary programs or policies. Throughout calendar year 2020, DOEE held biweekly meetings with the 17-member Task Force to discuss the roll-out of the BEPS Program. A detailed description of the input DOEE received from the BEPS Taskforce as well as the issues discussed will be available on DOEE's website in the BEPS Task Force Report.

In regard to these rules, DOEE incorporated significant input from the BEPS Task Force on the following sections:

Standard Target Pathway  
Reporting and Verification Requirements  
Exemption Criteria  
Delay of Compliance Criteria  
Alternative Compliance Penalties

#### **Overview of the Building Energy Performance Standard Rules**

These rules provide specific instructions to owners and operators of privately-owned buildings on how to comply with the BEPS. These rules identify the buildings to which the BEPS are applicable, and the performance and procedural requirements for buildings that are not in compliance with the BEPS. These rules and accompanying guidance documents developed by DOE will be available on DOE's website (<https://doe.dc.gov/service/building-energy-performance-standards>).

### Section-by-Section Descriptions

Section 3517 states that DOE will publish notice of the establishment of BEPS in the *D.C. Register* and also establishes the *BEPS Period* and the *Compliance Cycle*. It lays out the size-based time frames during which buildings will be required to meet the BEPS, and the method by which building owners must determine the size of their building. It provides direction to building owners on how to determine whether their building meets the BEPS and how to identify the correct property type for their building.

Section 3518 outlines the compliance pathways allowed for buildings that do not meet the BEPS for a BEPS Period. The compliance pathways in Subsection 3518.2 include the (a) performance pathway, (b) prescriptive pathway, (c) standard target pathway, and (d) alternative compliance pathway. Detailed specifics about the prescriptive pathway and alternative compliance pathways will all be described in accompanying documents. Subsection 3518.4 provides an alternative pathway for the BEPS Period beginning on January 1, 2021, given the anticipated abnormalities associated with calendar year 2020 energy data due to the coronavirus (COVID-19) public health emergency.

Section 3519 outlines the requirements for selecting a compliance pathway and compliance pathway milestones to be met during the BEPS Period. This section also establishes the consequences for building owners that fail to select a compliance pathway. It establishes how a building owner may change pathways during a Compliance Cycle, and the deadlines for various milestones under the prescriptive pathway. This section establishes how DOE may deny or revoke approval of a pathway.

Section 3520 details the process for building owners to obtain exemptions from, or delays in meeting, required compliance criteria. It also provides a broadly available compliance delay for building owners of one year for the Compliance Cycle beginning in 2021 due to the public health emergency declared on March 11, 2020.

Section 3521 implements the alternative compliance penalty process should a building fail to meet the performance requirements of their selected pathway and establishes maximum alternative compliance penalties based on building size. Alternative compliance penalties are separate from the potential civil fines associated with failure to meet the requirements in Sections 3518 through 3519. Alternative compliance penalties will be adjusted proportionally to the building's performance relative to its pathway target. Building owners have the opportunity to request DOE reconsideration of the penalty through the enforcement process described in Section 3521 and may request a hearing or adjudication by the Office of Administrative Hearings.

Section 3522 covers the enforcement of the civil infractions associated with the procedural requirements in Section 3519.

**Commented [1]:** Change "alternative compliance penalties" to "alternative compliance payments" which will allow the potential for landlords to allocate compliance costs and attempt to assign accountability for BEPS compliance between landlord and tenant.



**Chapter 35, GREEN BUILDING REQUIREMENTS, of Title 20 DCMR, ENVIRONMENT, is amended as follows:**

**New Sections 3517 through 3522 are added to read as follows:**

**3517 Building Energy Performance Standards (BEPS)**

**3518 Building Energy Performance Compliance Pathways**

**3519 Building Energy Performance Reporting and Verification**

**3520 Building Energy Performance Exemptions and Compliance Delays**

**3521 Building Energy Performance Standards Alternative Compliance Penalty, Violations, and Enforcement**

**3517 BUILDING ENERGY PERFORMANCE STANDARDS (BEPS)**

3517.1 Every six (6) years, DOEE shall, pursuant to Section 301(b) of the Act (D.C. Official Code § 8-1772.21(b)), establish the BEPS. DOEE shall publish notice of the BEPS in the *D.C. Register* before the relevant Compliance Cycle begins.

3517.2 A building that does not meet the BEPS as of the effective date of the BEPS shall have a Compliance Cycle of five (5) years from that date to meet the performance requirements set forth in § 3518 and the procedural requirements set forth in § 3519.

3517.3 Sections 3517 through 3521 shall apply to buildings in accordance with the following schedule:

- (a) Beginning January 1, 2021, all privately-owned buildings with at least fifty thousand square feet (50,000 sq. ft.) of gross floor area and all District-owned or District instrumentality-owned buildings with at least ten thousand square feet (10,000 sq. ft.) of gross floor area;
- (b) Beginning January 1, 2027, all privately-owned buildings with at least twenty-five thousand square feet (25,000 sq. ft.) of gross floor area; and
- (c) Beginning January 1, 2033, all privately-owned buildings with at least ten thousand square feet (10,000 sq. ft.) of gross floor area.

3517.4 To assess applicability of § 3517.3, a building owner shall determine the building size in accordance with 20 DCMR § 3513 (Energy Performance Benchmarking of Privately-Owned Buildings).

3517.5 A building owner shall determine the applicable BEPS based on the primary property type in Portfolio Manager.

**3518 BUILDING ENERGY PERFORMANCE COMPLIANCE PATHWAYS**

3518.1 An owner of a building that does not meet the BEPS shall implement one (1) of the following compliance pathways to meet the building energy performance requirements:

- (a) A performance pathway, which includes meeting the reporting milestone described in § 3519.5 and achieving energy savings according to the following metrics, as determined through Portfolio Manager:
  - (1) For a building that can earn an ENERGY STAR® score, a greater than twenty percent (20%) decrease in Site Energy Use Intensity Adjusted to Current Year (Adjusted Site EUI) averaged over the last two (2) years of the Compliance Cycle, as compared to the Adjusted Site EUI averaged over the two (2) years preceding the first year of the Compliance Cycle; or
  - (2) For a building that cannot earn an ENERGY STAR® score, a greater than twenty percent (20%) decrease in the Weather Normalized Site Energy Use Intensity (Normalized Site EUI) averaged over the last two (2) years of the Compliance Cycle, as compared to the Normalized Site EUI averaged over the two (2) years preceding the first year of the Compliance Cycle;
- (b) For property types for which the BEPS is above the national median, a standard target pathway, which includes meeting the reporting milestone described in § 3519.5 and achieving energy savings according to the following metrics, as determined through Portfolio Manager:
  - (1) If a building can earn an ENERGY STAR® score, an increase in its ENERGY STAR® score to the level established as the BEPS for the applicable BEPS Period in the last year of the Compliance Cycle; or
  - (2) If a building cannot earn an ENERGY STAR® score, a decrease in its Weather Normalized Source Energy Use Intensity (Normalized Source EUI) to the level established as the BEPS for the applicable BEPS Period in the last year of the Compliance Cycle;
- (c) A prescriptive pathway, which includes meeting reporting milestones described in § 3519.6 and implementing one or more DOEE pre-determined energy efficiency measures designed to achieve energy savings comparable to the requirements in § 3518.1(a);
- (d) An alternative compliance pathway as agreed upon by DOEE and the building owner that is designed to achieve energy savings comparable to the requirements in § 3518.1(a); or
- (e) Only for the BEPS Period beginning on January 1, 2021, buildings may follow a 2021 pathway option for each of the pathways described in § 3518.2(a) through (d) by using the applicable EUI average for the period from 2018 to 2019 as the baseline to compare to the applicable EUI for 2026 in order to determine whether the twenty percent (20%) reduction or comparable energy savings requirement has been met.

3518.2 When measuring energy performance, a building owner shall exclude the gross floor area and energy consumption of spaces that meet the criteria in Portfolio Manager for excluding a space.

3518.3 A building owner shall not implement a compliance measure that poses a threat to the health and safety of a building occupant or user.

**3519 BUILDING ENERGY PERFORMANCE REPORTING AND VERIFICATION**

3519.1 This section establishes reporting and verification requirements for building owners to meet the building energy performance requirements. For the BEPS Period beginning in 2021, all deadlines set forth in this section shall be extended by one (1) year, consistent with § 3520.7 and § 301(e)(1) of the Act (D.C. Official Code § 8-1772.21(e)(1)).

3519.2 The owner of a building that does not meet the BEPS as of the first day of the Compliance Cycle shall select a compliance pathway described under § 3518.1 for DOEE review and approval through the Online BEPS Portal no later than February 1, one (1) year from the start of the Compliance Cycle.

3519.3 If a building owner does not select a compliance pathway as specified in § 3519.2 or does not receive DOEE approval for a pathway, DOEE shall assign a pathway for the building. The assigned pathway shall be either a performance pathway or a standard target pathway.

3519.4 A building owner may change a pathway, including a DOEE-assigned compliance pathway, during a Compliance Cycle for good cause shown by submitting a pathway change application through the Online BEPS Portal and receiving approval from DOEE. A building owner may not change pathways until approval is received from DOEE.

3519.5 For a building pursuing either a performance or standard target pathway, a building owner shall submit a report of completed actions to DOEE through the Online BEPS Portal no later than February 1, five (5) years from the start of the Compliance Cycle.

3519.6 For a building pursuing a prescriptive pathway, a building owner shall submit the following documents to DOEE through the Online BEPS Portal:

- (a) No later than February 1, one (1) year from the start of the Compliance Cycle, a preliminary assessment plan that includes a current energy use assessment or audit and identifies any entities that will implement improvements;
- (b) No later than February 1, two (2) years from the start of the Compliance Cycle, an action plan that includes a final list of energy efficiency measures selected for implementation;

- (c) No later than February 1, four (4) years from the start of the Compliance Cycle, an implementation and testing report that includes permit drawings, permits, inspection reports, or other documentation identified in the approved pathway pertaining to the implementation of selected energy efficiency measures;
  - (d) No later than February 1, five (5) years from the start of the Compliance Cycle, an evaluation, monitoring, and verification report that includes a narrative describing the savings achieved and any corrective actions taken; and
  - (e) Additional documentation as identified by DOEE in its approval of the building pathway.
- 3519.7 For an alternative compliance pathway, a building owner shall sign an alternative compliance pathway agreement prepared by DOEE, and shall complete and submit all documentation in a manner and timeframe required by the agreement.
- 3519.8 A building owner may use a complete and accurate District Benchmark Results and Compliance Report as required under §§ 3513 through 3516 of this chapter to demonstrate that the building has met its pathway target for a Compliance Cycle.
- 3519.9 A building owner shall provide any additional documentation as requested by DOEE to determine compliance with this section.
- 3519.10 A report, a plan, or documentation submitted in accordance with §§ 3519.5 through 3519.9 must be complete and accurate.
- 3519.11 DOEE may deny or revoke approval of a pathway and designate a different pathway specified in § 3518.1 if a building owner:
- (a) Fails to submit a complete and accurate report, plan, or documentation as required by §§ 3519.5 through 3519.9; or
  - (b) Fails to implement a requirement of a DOEE-approved compliance pathway;
  - (c) Failed to demonstrate energy savings described by the approved pathway for the previous Compliance Cycle.
- 3519.12 If ownership of a building covered by § 3517.3 is transferred during a Compliance Cycle, the seller shall provide the buyer with the following information prior to the transfer or sale:
- (a) Any information, plans, or reports submitted to DOEE as required by §§ 3519.2, 3519.5, 3519.6, 3519.7, and 3519.8;

- (b) The most recent complete and accurate District Benchmark Results and Compliance Report as required under § 3513 of this chapter for the building; and
- (c) Information describing any progress toward meeting the energy performance requirements as applicable under § 3518.

**3520 BUILDING ENERGY PERFORMANCE EXEMPTIONS AND COMPLIANCE DELAYS**

3520.1 A building owner may apply through the Online BEPS Portal for an exemption from or delay in compliance with the performance and procedural requirements specified in § 3518 and § 3519.

3520.2 A building owner seeking an exemption or delay shall submit a request describing the exemption or delay sought and the reason the exemption or delay is being requested. The request shall include documentation that substantiates the basis for the request, such as financial information, deeds, building and construction permits, technical reports, invoices, or other proper documentation.

3520.3 An exemption or delay may be granted only if the building owner demonstrates to the satisfaction of DOEE, based upon the documentation presented, that the building meets one or more of the criteria in §§ 3520.4 or 3520.6.

3520.4 DOEE shall grant an exemption from the performance and procedural requirements specified in § 3518 and § 3519 for a building that is completely demolished immediately prior to the beginning of the applicable Compliance Cycle or during the Compliance Cycle.

3520.5 DOEE shall grant a delay in compliance from the performance and procedural requirements specified in § 3518 and § 3519 for up to three (3) years upon a showing of good cause by the applicant that one or more of the circumstances in § 3520.6 exist. For qualifying affordable housing buildings, DOEE may grant a delay in compliance of more than three (3) years.

3520.6 For a property to owner to demonstrate good cause for granting a delay of compliance under § 3520.5, the property owner must provide substantial evidence that meeting the requirements of § 3518.1 is practically infeasible, including for any of the following reasons:

- (a) Financial distress;
- (b) A change of ownership of the property during a Compliance Cycle;
- (c) The building undergoes a major renovation;
- (d) The building becomes unoccupied;

- (e) The building is pending demolition, as evidenced by a demolition or raze permit;
- (f) There is a change in primary property type, as determined through Portfolio Manager; or
- (g) For the BEPS period beginning in 2021, the building was operating and consuming energy during the COVID-19 public health emergency declared on March 11, 2020 by Mayor's Order 2020-045.

3520.7 For the BEPS Period beginning in 2021, an owner of a building subject to compliance under § 3517.3(a) may, in keeping with § 3520.6(g), seek a one (1)-year delay of compliance, as set forth in § 3519.1. A one (1)-year delay of compliance granted pursuant to this subsection shall not preclude DOEE from granting additional delays in compliance under § 3520.5; provided, that, for a building other than a qualifying affordable housing building, any additional delays may not, in total, exceed two (2) additional years.

3520.8 DOEE may attach additional conditions to a delay of compliance, including adjustments to the building's compliance pathway, or additional reporting and verification requirements to move a building toward compliance with the BEPS.

3520.9 An exemption or delay approved during one Compliance Cycle does not extend the requirement for a building to meet the BEPS established for the next Compliance Cycle.

## 3521 **BUILDING ENERGY PERFORMANCE STANDARDS ALTERNATIVE COMPLIANCE PENALTY, VIOLATIONS, AND ENFORCEMENT**

3521.1 A building owner that fails to demonstrate complete implementation of a compliance pathway as required by § 3518.1 at the end of a Compliance Cycle shall be assessed an alternative compliance penalty no greater than the following amounts. The maximum penalty shall be reduced proportionally to the building's performance relative to its pathway target as described in § 3521.3.

- (a) A building with at least five hundred thousand square feet (500,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of seven million five hundred thousand dollars (\$7,500,000);
- (b) A building of at least two hundred thousand square feet (200,000 sq. ft.) of gross floor area but less than five hundred thousand square feet (500,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of five million dollars (\$5,000,000);
- (c) A building of at least one hundred thousand square feet (100,000 sq. ft.) of gross floor area but less than two hundred thousand square feet (200,000 sq.

**Commented [2]:** We would ask that all fines are benchmarked for reasonability

ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of two million dollars (\$2,000,000);

- (d) A building of at least fifty thousand square feet (50,000 sq. ft.) of gross floor area but less than one hundred thousand square feet (100,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of one million dollars (\$1,000,000);
- (e) A building of at least twenty-five thousand square feet (25,000 sq. ft.) of gross floor area but less than fifty thousand square feet (50,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of five hundred thousand dollars (\$500,000); and
- (f) A building of at least ten thousand square feet (10,000 sq. ft.) of gross floor area but less than twenty-five thousand square feet (25,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of two hundred and fifty thousand dollars (\$250,000).

3521.2 A post-secondary educational institution or hospital with multiple buildings in a single location owned by a single entity (campus) that fails to demonstrate implementation of the alternative compliance pathway as required by § 3518.1(d) at the end of a Compliance Cycle shall be assessed an alternative compliance penalty in the following amount. The penalty shall be adjusted proportionally to the building's performance relative to its pathway target.

- (a) A campus with at least three million square feet (3,000,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance payment of fifteen million dollars (\$15,000,000); and
- (b) A campus of less than three million square feet (3,000,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of seven million five hundred thousand dollars (\$7,500,000).

3521.3 The maximum fines assessable under §§ 3521.1 - 3521.2 shall be adjusted according to the selected compliance pathway and according to the following chart:

Pathway	Adjustment Factor	Example
Performance pathway under § 3518.1(a)	Percent reduction actually achieved divided by twenty percent (20%).	Building A achieves a 10% reduction in site EUI. Their fine is reduced by fifty percent (50%) ( $10/20 = 50\%$ ).
Standard target pathway under § 3518.1(b)	ENERGY STAR Score Points actually earned from 2019 divided by total points needed to meet standard.	Building B gains four (4) points but needs six (6) total to meet the standard. Their fine is reduced by sixty-seven percent (67%) ( $4/6 = 67\%$ ).

Prescriptive pathway under § 3518.1(c)	Number of prescriptive pathway points actually earned divided by total needed.	Building C completes measures worth 15 points but needs twenty (20) total. Their fine is reduced by seventy-five percent (75%) ( $15/20 = 75\%$ ).
Alternative compliance pathway under § 3518.1(d)	Parameters shall be described in the alternative compliance pathway agreement prepared by DOEE, as described under § 3519.7.	

**Commented [3]:** We would ask that these fines prorated or somehow otherwise adjusted for how close the starting score is to the BEPS at the start of the compliance cycle and recommend evaluating the DC ESG CRE group recommendations on how

- 3521.4 Notwithstanding § 3521.3, a building owner that knowingly submits inaccurate information will be subject to assessment of the maximum alternative compliance penalty in accordance with § 3521.1 regardless of the building's performance relative to its pathway target, in addition to any other applicable fines and penalties.
- 3521.5 A building owner violating a provision in §§ 3517 through 3520 shall be fined according to the schedule set forth in Title 16 (Consumer, Commercial Properties, and Civil Infractions) of the District of Columbia Municipal Regulations.
- 3521.6 DOEE may enforce the requirements of this section, including assessment of an alternative compliance penalty, by issuing one or more of the following:
- (a) Notice of violation;
  - (b) Enforcement notice; or
  - (c) Notice of infraction.
- 3521.7 DOEE may issue a notice of violation to notify a building owner of a violation under §§ 3516 through 3520 and any potential fine if the violation is not corrected. A notice of violation does not impose a fine.
- 3521.8 DOEE may issue an enforcement notice to assess a fine or penalty for a violation under §§ 3516 through 3521. An enforcement notice may be appealed to DOEE pursuant to the instructions provided in the notice.
- 3521.9 If a fine or penalty is not resolved under §§ 3521.7 or 3521.8, DOEE may issue a notice of infraction. A building owner that receives a notice of infraction may request a hearing or adjudication pursuant to the Office of Administrative Hearings Establishment Act of 2001 (D.C. Official Code § 2-1831.01 *et seq.*) and the Office of Administrative Hearings Rules (1 DCMR § 2800 *et seq.*).



- 3521.10 A building owner may appeal to the District of Columbia Court of Appeals only after exhausting all administrative remedies.
- 3521.11 In addition to or instead of a civil infraction, the Attorney General for the District of Columbia may commence a civil action for damages, cost recovery, reasonable attorney and expert witness fees, and injunctive or other appropriate relief to enforce compliance with §§ 3516 through 3521.

**Section 3599, DEFINITIONS, is amended as follows:**

**The following definitions are added to read as follows:**

**Affordable housing** – buildings that are primarily residential and contain five (5) or more dwelling units, and either:

- (1) in which use restrictions or other covenants require that at least 50% of all the building's dwelling units are occupied by households that have household incomes of less than or equal to 80% of the area median income; or
- (2) the building owner can demonstrate that at least 50% of the dwelling units rent at levels that are affordable to households with incomes less than or equal to 80% of the area median income.

**Building Energy Performance Standards or BEPS** – the level of energy efficiency set forth by DOEE as an ENERGY STAR score or Normalized Source EUI value for each property type, as provided in section 301(b) of the Act (D.C. Official Code § 8-1772.21(b)).

**Building Energy Performance Standards Period or BEPS Period** - the period of time in which specific BEPS are in effect, which shall run from the date DOEE establishes BEPS until the next DOEE establishment of BEPS.

**Building Energy Performance Standards Program or BEPS Program** – the DOEE program overseeing and implementing BEPS.

**Compliance Cycle** – a period of five (5) years from the date of the establishment of BEPS during which, in the absence of a delay of compliance granted by DOEE, a building must meet the performance requirements set forth in § 3518 and procedural requirements set forth in § 3519.

**Major renovation** – any repair, alteration, or addition of a building or structure that:

- (1) Significantly affects multiple core building systems; and

- (2) Costs at least twenty-five (25) percent of the value of the building or structure, as determined based on Office of Tax and Revenue records, before the repair, alteration, or addition is started.

**National Median** – the ENERGY STAR score or Source EUI benchmark, available on the U.S. Environmental Protection Agency ENERGY STAR Portfolio Manager website, that fifty percent (50%) of properties perform above and fifty percent (50%) perform below.

**Online BEPS Portal** – a web-based application created by DOE for a building owner to submit required reporting and verification documents pertaining to BEPS, accessible through the DOE BEPS Program webpage.

**Property type** – the primary function of a building as determined through Portfolio Manager.

**Site Energy Use Intensity or Site EUI** – the annual amount of energy a building consumes onsite, as reported on a building's utility bills, divided by the building's gross floor area, as determined through Portfolio Manager.

**Site Energy Use Intensity Adjusted to Current Year or Adjusted Site EUI** – the Site EUI a building would be expected to have if its operations were the same as in the current time period, as determined through Portfolio Manager.

**Source Energy Use Intensity or Source EUI** – the total amount of raw fuel that is required to operate a building, divided by the building's gross floor area, as determined through Portfolio Manager.

**Weather Normalized Site Energy Use Intensity or Normalized Site EUI** – the Site EUI a building would have consumed during thirty (30) year average weather conditions, as determined through Portfolio Manager.

**Weather Normalized Source Energy Use Intensity or Normalized Source EUI** – the Source EUI a building would have consumed during thirty (30) year average weather conditions, as determined through Portfolio Manager.

All persons desiring to comment on the proposed rulemaking should file comments in writing not later than sixty (60) days after publication of this notice in the *D.C. Register*. Comments should be clearly marked "Public Comments: BEPS" and filed with DOE, Benchmarking, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, Attention: Building Performance and Enforcement Branch, or e-mailed to [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov). All comments will be treated as public documents and will be made available for public viewing on the Department's website at [www.doe.dc.gov](http://www.doe.dc.gov). If a

comment is sent by e-mail, the e-mail address will automatically be captured and included as part of the comment that is placed in the public record and made available on the Department's website.

March 4, 2021

**Public Comments: BEPS**

DOEE  
Benchmarking  
1200 First St NE  
5<sup>th</sup> Floor  
Washington, DC 20002

**Attention: Building Performance and Enforcement Branch**

In response to the request for public comment on the BEPS legislation and rules several owners of commercial real estate assets in Washington, DC have compiled the following comments and recommended legislative changes. Overall, this group is comprised of organizations that support the efforts of the District of Columbia to create standards that drive energy performance in existing buildings to help meet the energy and climate goals of the Sustainable DC plan — to reduce greenhouse gas emissions and energy consumption by 50% by 2032. The following feedback and recommendations we believe will result in improvements to the BEPS process and will contribute to the effectiveness and fairness of program. A summary of key areas where we have collaborated to provide feedback:

- The maximum penalties are exorbitant and not connected with the projected costs of compliance.
- The penalty adjustment mechanism creates unfair and improper discrepancies.
- Restrictions on the use of the Standard Target Pathway unfairly penalizes certain property type groups, which may become more pronounced in future cycles at lower floor area thresholds.
- Several legislative changes to improve clarity.

**The maximum penalties are exorbitant and not connected with the projected cost of compliance.**

The maximum alternative compliance penalties are exorbitant, especially when compared to the cost of property operations and the estimated cost of BEPS compliance through energy reduction, placing an undue burden and financial risk on building owners. We understand and are in agreement with DOEE that it is preferable for owners and operators to invest in efficiency improvements in their buildings rather than paying compliance penalties, however, so as not to be arbitrary or overly punitive, the penalty amounts ought to more closely relate to the costs required to bring buildings into compliance.

The following analysis looks at the penalties in the context of capital investment and operating costs and is why we believe the current penalty amounts are not reasonable as compared to the compliance costs.

- When represented as the capital investment required to achieve a 20% energy reduction the penalty amounts would imply a 17-40+ year payback period.<sup>1</sup> A payback period

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<sup>1</sup> Calculation based on conservative assumptions for annual energy expenses (\$3/sf), achieving 20% annual energy cost savings. For example: 200,000 square foot property \* \$3/sf = \$600,000/year energy expense \* 20% savings = \$120,000/year saved, for which \$5,000,000 penalty ("investment") = 42-year simple payback.

which would be unreasonable from an investment perspective as it would likely exceed the expected life of the installed equipment and implemented measures. Our experience indicates the implied payback periods are certainly double, if not triple, those likely required to achieve the intended savings.

- The penalty amounts represented as a cost per square foot range from \$10-25 /sf, or \$2-5/sf per year of a five-year compliance cycle. This would be roughly equivalent to a commercial property's annual energy expense. We believe penalizing buildings at a rate equivalent to 100% of energy costs excessively punitive when the intention is to achieve 20% saving.

We recommend that DOE collect industry feedback on the types and size of investments necessary to achieve 20% savings and adjust the size of the penalties accordingly.

### **The penalty adjustment mechanism creates unfair and improper discrepancies.**

The mechanism for adjusting alternative compliance penalties as described in §3521.1 – 3521.3 will result in penalties that are unfair and do not align with building performance outcomes. The reduction in penalty amounts only account for performance achieved at the end of the compliance cycle, it does not treat fairly those buildings that have previously invested in and achieved efficiency improvements. The proposed adjustment mechanism penalizes buildings with superior efficiency performance at the start of the cycle more harshly than buildings with inferior efficiency performance, even when achieving similar results. This issue is most notable with the standard target pathway, where the amount of savings required is itself variable.

We present the following scenario to illustrate this discrepancy:

	Office A		Office B	
Building Size (sf)	200,000		200,000	
2019 ENERGY STAR Score	66		59	
2021 Office BEPS	71			
Maximum Penalty	\$5,000,000		\$5,000,000	
Potential Results				
2026 ENERGY STAR Scores & Penalties			59	\$ 5,000,000
			60	\$ 4,583,333
			61	\$ 4,166,667
			62	\$ 3,750,000
			63	\$ 3,333,333
			64	\$ 2,916,667
			65	\$ 2,500,000
	66	\$ 5,000,000	66	\$ 2,083,333
	67	\$ 4,000,000	67	\$ 1,666,667
	68	\$ 3,000,000	68	\$ 1,250,000
	69	\$ 2,000,000	69	\$ 833,333
	70	\$ 1,000,000	70	\$ 416,667
	71	\$ -	71	\$ -

*Table 1. Example energy performance and penalty scenarios*

Consider the circumstance where both of the sample office buildings reach an ENERGY STAR score of 69 at the end of the compliance cycle. The two buildings, with equivalent efficiency performance, would be subject to substantially different penalties - \$2 million for Building A

versus \$833.333 for Building B. In addition, the penalty decrements for Building A are substantially higher than for Building B. Each one-point improvement in ENERGY STAR score reduces the penalty amount by \$1,000,000 for Building A versus \$416,667 for Building B. Therefore, Building A, which had already demonstrated a higher level of efficiency performance faces excessive risk for partial performance results. If improved energy efficiency of the building sector is the overall goal, the BEPS program should be agnostic about whether those efficiency improvements occurred prior to or during the compliance cycle.

To resolve this issue and promote greater fairness, we propose that DOE adopt an additional adjustment factor to the penalty-setting process such that the maximum penalty shall be reduced proportionally to the building's distance from the BEPS at the start of the compliance cycle. First, we amend the table shown in §3521.3 to describe this proposal.

Pathway	Pre-Adjustment Factor	Post-Adjustment Factor	Example
Standard target pathway under § 3518.1(b)	<p>(1) Define the Max Penalty Score (i.e., the ENERGY STAR Score equivalent to 20% less efficient than the BEPS)</p> <p>(2) Starting year ENERGY STAR Score Points above the Max Penalty Score divided by the number of ENERGY STAR Score Points between the Max Penalty Floor and the BEPS</p>	Ending year ENERGY STAR Score Points above the Max Penalty Score divided by the number of ENERGY STAR Score Points between the Max Penalty Floor and the BEPS	<p>The office sector BEPS is an ENERGY STAR Score of 71 and for this example we estimate the Max Penalty Score as 56. For this example, we consider an office building that starts with a score of 59 and achieves a score of 68 at the end of the compliance cycle.</p> <p>The Pre-Adjustment Factor is <math>(59-56)/(71-56) = 20\%</math>. The maximum penalty at the start of the compliance cycle would be reduced by 20% for this building.</p> <p>The Post-Adjustment Factor takes into account the max penalty score and the end of compliance cycle score of 68 and would result in an actual penalty reduction of 80% <math>(68-56)/(71-56) = 80\%</math> for this building.</p> <p><i>See Table 3 for detailed example</i></p>

Table 2. Amended from §3521.3, description of penalty adjustment mechanisms.

We have amended Table 1, but now with the proposed change incorporated to illustrate the impact of this proposal on penalty amounts and demonstrate the alignment of penalty outcomes to different building scenarios.

	Office A		Office B	
Building Size (sf)	200,000		200,000	
2019 ENERGY STAR Score	66		59	
2021 Office BEPS			71	
Maximum Penalty	\$5,000,000		\$5,000,000	
Calculated Max Penalty Score			56	
Adjusted Maximum Penalty	\$1,666,667		\$4,788,732	
Potential Results				
2026 ENERGY STAR Scores & Penalties			56	\$ 5,000,000
			57	\$ 4,666,667
			58	\$ 4,333,333
			59	\$ 4,000,000
			60	\$ 3,666,667
			61	\$ 3,333,333
			62	\$ 3,000,000
			63	\$ 2,666,667
			64	\$ 2,333,333
			65	\$ 2,000,000
	66	\$ 1,666,667	66	\$ 1,666,667
	67	\$ 1,333,333	67	\$ 1,333,333
	68	\$ 1,000,000	68	\$ 1,000,000
	69	\$ 666,667	69	\$ 666,667
	70	\$ 333,333	70	\$ 333,333
	71	\$ -	71	\$ -

Table 3. Example energy performance and penalty scores, with the proposed adjustment mechanism

**Restrictions on the use of the Standard Target Pathway unfairly penalize certain property type groups, which may become more pronounced in future cycles at lower floor area thresholds.**

Removing one of the compliance paths as an option from certain property types creates an unfair burden for these buildings. The proposed criterion for the restriction is those property types whose District median BEPS is less efficient than the national median. In this way, the program penalizes individual property owners for a group metric which is outside the control of any single building. Not only does this place a restriction on a handful of property types for the first compliance cycle, but it may become an even more pronounced disparity in future cycles as more properties and more property types enter the program with lower floor area thresholds. For these groups, we recommend setting a Standard Target compliance option equal to the national median. This will allow these properties to have a standard target option and ensure that the District median is improved to align with the national median.

**DOEE's right to deny or revoke approval of a pathway should be relaxed.**

Section 3519.11(c) states that DOEE may deny or revoke approval of a pathway and designate a different pathway if a building owner fails to demonstrate energy savings for the previous

compliance cycle. Instead, such denial or revocation should only be applied in cases when the building owner fails to demonstrate *reasonable effort* to achieve the necessary energy savings.

**The following additional miscellaneous improvements and/or clarifications are recommended:**

- § 3518.1(b): Rather than refer to “above/below” national median, should refer to “more efficient than” to avoid confusion, as better ENERGY STAR scores are higher and better Source EUI is lower.
- § 3519.5: Additional reporting deadlines should be aligned with the benchmarking deadline (April 1), rather than February 1.
- § 3521.3: For the avoidance of confusion all references to “fines” should be replaced with “alternative compliance penalties.”

**In addition to these rules changes we believe the following legislative changes should be recommended for approval by the Council to improve clarity and effectiveness of the legislation:**

- As currently written, the Clean Energy DC Act requires the second BEPS standard to be set in 2026 based on 2025 data. As all buildings are now allowed an extra, sixth, year for compliance due to the Covid-19 pandemic, the first cycle’s compliance data runs through 2026 and would be reported in April 2027 after the start of the next compliance cycle. A legislative correction is recommended to allow DOEE flexibility to set the start of each subsequent compliance period based on the successful conclusion of the previous period. This will reduce the prescriptive requirements of the legislation and allow DOEE the flexibility to start compliance periods at the time they feel appropriate in the event of a future external impact event.
- Change “alternative compliance penalties” to “alternative compliance payments” which will allow the potential for landlords to allocate compliance costs and attempt to assign accountability for BEPS compliance between landlord and tenant.

We, the undersigned organizations, appreciate your consideration of this feedback and proposed changes. As commercial building owners we are especially sensitive to the impact BEPS legislation may have on the value of our real estate assets. We believe the real estate industry has been a valuable partner to DOEE, supporting the District in its efforts to enact a replicable model for building efficiency legislation that aligns building standards with the District’s carbon reduction goals and provides fair and equitable incentives for improvement. We look forward to continuing to work together to achieve our shared goals around energy efficiency and carbon reduction in the built environment.

Sincerely,

*Bozzuto Management Company*

*Equity Residential*

*Host Hotels & Resorts*

*Nuveen Real Estate*

*The Lenkin Company Management Inc.*

*The Tower Companies*

*St. John Properties*

*WashREIT*





March 4, 2021

Department of Energy and Environment, Benchmarking  
1200 First Street, N.E., 5th Floor  
Washington, DC 20002  
Attention: Building Performance and Enforcement Branch

**Re: Public Comments: BEPS**

Dear Department of Energy and Environment Building Performance and Enforcement Branch Staff:

Thank you for the opportunity to provide comments on the rulemaking regarding the 2021 Building Energy Performance Standards. The Chesapeake Solar and Storage Association (“CHESSA”) is the official trade association of the solar industry in the District of Columbia, representing over 1,000 solar energy workers and dozens of D.C.-based solar energy firms. Solar energy jobs are one of the District’s most successful growth markets. In light of present challenging circumstances, it is imperative the Department of Energy and Environment (“DOEE”) support the original intent of the District’s strong solar and renewable energy policies and utilize them as part of our city’s economic recovery and an imperative tool in meeting the District’s ambitious sustainability goals.

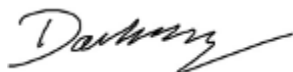
The solar carveout within the Renewable Portfolio Standard (RPS) not only governs the viability of the District solar market but also DOEE’s nationally-recognized community solar program, Solar for All (“SFA”). As you know, Solar for All aims at delivering the benefits of the clean energy revolution to all D.C. residents. It is an inclusive program, that ensures that not only D.C. homeowners in single-family homes can realize the benefits of solar. A large portion of the SFA program relies on the development of community renewable energy facilities (“CREFs”). The energy generated from these arrays ultimately ends up as a credit on the Pepco bills of D.C.’s low-to-moderate income residents.

As DOEE has maintained, BEPS does not disincentivize buildings from installing solar; buildings can use on-site, net-metered solar photovoltaic (PV) systems to meet the Standards, and thus avoid being placed in a Compliance Cycle during a BEPS Period. CREFs, however, are front-of-the-meter systems, where the energy produced is credited to subscribers either in the same location or elsewhere. In other words, though it is a crucial contributor to our city's sustainability goals, it is essentially not given that "recognition" in this program and this could result in an extreme disincentive for building owners to host CREF systems. Thus, putting in jeopardy the success of one of the District's most successful social equity, and clean energy, programs to date - the Solar for All program. Ideally building efficiency and solar - irrespective of interconnection type - should be complementary to each other. Ultimately, we believe the spirit of the law - and our mission as climate advocates- is to drive our city to carbon neutrality in a socially equitable manner. If this is in fact true, CREF systems will be crucial in enabling the District to achieve its goals.

Moreover, to achieve the BEPS goals, DOEE should consider a credit trading system - similar to the stormwater program - whereby those buildings that are not achieving the appropriate standards can purchase credits from a building that have gone above and beyond the requirements. In this light, BEPS will become a floor and not a ceiling. This market could help ensure building owners can are meeting carbon neutrality goals. Creating such a market will make it easier for third parties to provide energy efficiency services and may enable greater adoption of BEPS requirements faster. The District has a proven track record of success facilitating an environmental credit trading model.

Thank you for the opportunity to provide these comments. The District has progressive climate goals and we must utilize every optimal location across the city to achieve these goals. Just as BEPS is an ambitious program, so too are our solar energy goals - particularly Solar for All. With roof space in the city being limited, we need to ensure every rooftop possible is incentivized to have the largest possible solar system on it, irrespective of whether the electricity is used onsite or across town. If our city leadership is not optimizing energy policies to encourage solar energy system deployment, we fear our solar goals may fall short.

Sincerely,



David Murray  
Executive Director  
CHESSA

March 4, 2020

Attention: Building Performance and Enforcement Branch  
Department of Energy & Environment  
Government of the District of Columbia  
1200 First Street NE, 5th Floor  
Washington, DC 20002  
*Via Electronic Mail: [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)*

As members of the Building Energy Performance Standards Task Force, so appointed by Mayor Muriel Bowser, we are pleased to jointly submit these comments on the “Notice of Proposed Rulemaking: Application of the Building Energy Performance Standards for Privately-Owned Buildings.” We do not purport to speak for any members not undersigned. Some members of the Task Force also have additional comments that will be submitted separately.

## **Overall**

Overall, we were very pleased with the proposed rulemaking. We commend DOEE for its excellent work engaging the community for over two years on the development of this groundbreaking and complex program. The proposed rulemaking is a detailed and thoughtful document that is responsive to most of the feedback from the Task Force. We have focused our comments on places where the rules seem to diverge from what the Task Force discussed, are unclear, or create undesirable outcomes. While the comments we provide below do represent requests for substantive changes to the rulemaking, they are highly targeted, and do not require a major rewrite of the rules.

The rulemaking contains appropriate responses to the challenges presented by the Covid-19 pandemic, providing that the first reporting requirements do not come until February 1, 2023, and also offering a standard one-year extension to the BEPS period that we expect the vast majority of building owners will take advantage of. We do not believe any additional delay in BEPS implementation is needed, nor do we believe such a delay would serve the public interest. We feel the regulated community needs regulatory and financial certainty that can be provided by the following targeted revisions and prompt finalization of the rules.

As was made clear in the BEPS Task Force Report published alongside the proposed rulemaking, the scope of Task Force discussions have gone far beyond the narrow focus of the rules. It is our understanding that many of the details of BEPS implementation will be laid out in a BEPS Guidebook, and that this Guidebook will reflect some of our additional recommendations. It is unfortunate that this Guidebook was not made available for review during the comment period on the initial rules, as this might have helped avoid stakeholder confusion. It is our hope and expectation that the Guidebook will be published soon, and that a period for public comment on the Guidebook will be provided.

## **Alternative Compliance Penalties**

As the Task Force had no advance insight into proposed penalty levels, much of our group feedback focuses on this topic. As we stated in multiple Task Force meetings, it is important that the cost of non-compliance be higher than the cost of compliance. The proposed maximum penalties will certainly achieve this goal in most cases. As a group, we do not have consensus on whether the proposed maximum penalties are appropriate or excessive. Rather, we want to focus on several ways the penalty structure needs revision to avoid undesirable outcomes.

### *1. Ability to Pay*

While penalties need to be high enough to prompt action, they will not be effective if payment is impossible. For many affordable housing properties, houses of worship, and other income-constrained entities, the penalties proposed may well exceed total revenue. Of course, DOEE has the authority and ability to offer settlements for reduced amounts in such cases. However, total potential liabilities that exceed revenue may complicate access to capital. Just as the law and regulations provide for extended time frames for compliance by affordable housing properties, DOEE should evaluate whether property income should be a formal factor in setting penalties.

### *2. Excessively Abrupt Jumps in Maximum Penalties*

The large floor area bins laid out in § 3521.1, and the substantial differences in maximum penalties between bins, result in undesirable jumps in financial liability at the boundary between bins. For example, a property that is 210,000 ft<sup>2</sup> is subject to penalties more than 2.25 times greater than a property that is 190,000 ft<sup>2</sup>, holding all else equal. A property that is 102,000 ft<sup>2</sup> is subject to penalties twice as high as a property that is 98,000 ft<sup>2</sup>. We recognize that DOEE used bins to reduce litigation regarding the precise floor area of a building. To address these issues, the section should use a simpler maximum penalty calculation, such as \$X per 10,000 ft<sup>2</sup>.

### *3. Penalty Adjustments for the Standard Target Pathway*

§ 3521.3 lays out a system where the maximum penalty is adjusted based on the amount of progress achieved towards the pathway goal. However, because the adjustment factor reduces penalty amounts only for performance achieved at the end of the compliance cycle, it does not fairly treat those building owners who have invested in and achieved efficiency improvements prior to the start of the compliance cycle. Buildings with superior efficiency performance at the start of the cycle may be penalized more harshly than buildings with inferior efficiency performance, even when achieving similar results. The issue is most notable for the standard target pathway, where the actual amount of energy savings required of a building to meet the BEPS target differs greatly.

Per § 3521.3, the maximum penalty is reduced based on the number of ENERGY STAR points added between the start and the end of the cycle, relative to the number of points needed to meet the standard target. Let's say you have two 200,000 ft<sup>2</sup> office buildings, one with an ENERGY STAR score of 56 and one with an ENERGY STAR score of 66. If both buildings reach a score of 68 by the end of the cycle, the first building will get its fine reduced by 80%, while the second will only get its fine reduced by 40%--yet the resulting energy performance of the buildings, relative to the standard target, is the same.

To address this, we would propose that the penalty reduction for the standard target pathway accounts not only for the change in ENERGY STAR score, but for the proximity of the score at the start of the cycle to the standard target. This additional reduction could be reserved for higher-performing properties only, such as those with initial ENERGY STAR scores above the national median or that require relatively minor additional EUI savings to meet the standard target pathway.

#### *4. Penalty Adjustments for Alternative Compliance Pathways*

Parameters for penalty reductions for alternative compliance pathways cannot be fully delineated in a rulemaking. However, it is important that building owners not be penalized for shooting for the moon and landing among the stars. For example, if an owner takes a Deep Energy Retrofit pathway wherein it strives to reduce its energy use by 36%, but only reduces energy use by 24%, it may have only gotten 67% of the way to its goal, but still exceeded the performance pathway goal of 20%. In this scenario, it should not be subject to an alternative compliance penalty; failure to earn compliance for future cycles is sufficient penalty. Similarly, if a property selects the prescriptive pathway and does not implement all chosen EEMs, but still achieves 20% site EUI savings, then it should not be subject to financial penalties.

To assure building owners that ambition and creativity will not be punished, we propose that the rules explicitly state that properties on other pathways that end up not completing the chosen pathway cannot be liable for financial penalties greater than they would have been liable for on the performance pathway. This also aligns with the logic in § 3519.3 that properties that 'fall off' another pathway are assigned to the performance pathway.

#### *5. Consistent Language*

Throughout the proposed rulemaking, the words "fines" and "penalties" are both used. We recognize that there may be fines for failure to complete interim steps of some pathways. But when talking about the penalties for final non-compliance, for which the CEDC Act prescribes "alternative compliance penalties," that is the language that should be used. To this end, "fines" should be changed to "penalties" anywhere where only the alternative compliance penalties are being referenced--most notably in § 3521.3. We call for renaming "alternative compliance penalties" as "alternative compliance payments" in the discussion of legislative changes below.

## Sufficient Notice for Property Transactions

Under § 3519.12, the rules require that if ownership of a building covered by § 3517.3 is transferred during a Compliance Cycle, the seller shall provide the buyer with various information about the BEPS compliance. It is also important that there be transparency to counter parties that a building has BEPS obligations, early enough to be considered in negotiations. This issue of the *time* of disclosure has been the achilles heel of “transactional” disclosure requirements nationwide. To promote transparency, a building that is subject to BEPS could be required to disclose this to any potential buyers prior to executing a contract for possible sale. Furthermore, all documents listed in § 3519.12 should be shared at least two weeks before final sale.

## Specific Language Tweaks

1. § 3517.2: At the beginning of and throughout the proposed rules, reference is made to a building that does or does not meet BEPS, without defining that term. The definition is found in the emergency rules published on January 1, 2021. To increase readability, 3517.2 could begin: “A building shall be found to meet or not meet the BEPS as defined in § 3530.5.”
2. § 3517.5: This section says that the primary property type determines BEPS applicability. In some cases, no one property type makes up more than 50% of the floor area. Language could be added to either explicitly state that if no single property use type makes up more than fifty percent (50%) of the overall building gross floor area, then an appropriate BEPS will be calculated on a pro rata basis; alternately, DOEE could insert a specific reference to the variance language in § 3530.7(a) of the emergency rulemaking setting the 2021 BEPS.
3. § 3518.1(b): Rather than refer to “above/below” national median, should refer to “more efficient than” to avoid confusion, as better ENERGY STAR scores are higher and better Source EUI is lower.
4. § 3519.5, 3519.6: Additional reporting deadlines should be aligned with the benchmarking deadline of April 1, rather than February 1. This is particularly important for the final reporting, as any evaluation of final performance on a pathway must take into account the final year of benchmarking data, and sufficient data for benchmarking is rarely available by February 1.
5. § 3520.4 is too vague regarding how BEPS exemptions work in the context of property demolition: “immediately prior” should be defined, and planned demolitions should be more fully addressed, since they may make efficiency investments uneconomic. A planned demolition should be a stated reason for a delay of compliance, so as to extend the compliance period until after the property is demolished, at which point it can be exempted

entirely. Planned demolitions could also be sufficiently addressed by accepting the below suggestion regarding § 3520.6(e).

6. § 3520.6(b): Change in ownership should be clarified to reserve delays of compliance for actual changes in the ultimate ownership of the property.
7. § 3520.6(e): Add “or other documentation acceptable to the Department” so that it reads “The building is pending demolition, as evidenced by a demolition or raze permit or other documentation acceptable to the Department;”
8. § 3520.6(f): Language about delays for changes in property use should be clarified to reserve this delay for actual real-world changes in the function of the property, and to exclude clerical updates in Portfolio Manager.

### **Future Legislative Changes**

Finally, in addition to these rules changes, we believe the following legislative changes should be recommended for approval by the Council, to improve clarity and effectiveness of the legislation:

#### *1. Timing of the Next BEPS Cycle*

As currently written, the Clean Energy DC Act requires the second BEPS standard to be set in 2026 based on 2025 data. As all buildings are now allowed an extra, sixth, year for compliance due to the Covid-19 pandemic, the first cycle’s compliance data runs through 2026 and would be reported in April 2027 after the start of the next compliance cycle. We recommend a legislative correction that provides DOEE with the flexibility to set the start of each subsequent compliance period based on the successful conclusion of the previous period. This correction will reduce the prescriptive requirements of the legislation and allow DOEE the flexibility to start compliance periods at the time DOEE feels appropriate in the event of a future external impact event.

#### *2. Alternative Compliance Payments and Pass-Through*

We recommend that “alternative compliance penalties” be changed to “alternative compliance payments” in order to better align the interests of landlords and commercial tenants, giving the commercial tenants an incentive to work with the landlord to improve building performance. Tenants have a significant impact on building energy performance. Under most existing commercial leases, landlords may pass through to commercial tenants a portion of the costs of “payments” to comply with laws. Such a change should require that building owners include and call out what they know regarding such compliance costs in any presentation of projected or actual pass through costs to current or potential tenants and should also include language requiring landlords to demonstrate sufficient efforts to address energy inefficiency of any base building systems, as well as efforts to

engage tenants in relevant tenant space energy retrofit projects (e.g. addressing end uses such as lighting or plug loads) prior to passing payment costs on to tenants.

## **Conclusion**

Thank you for considering our comments. It has been a pleasure to work with DOEE and with stakeholders across the District on developing an effective BEPS program. We believe the changes recommended here will increase the effectiveness and the fairness of the law.

As DOEE reviews the many comments you will doubtless receive, we hope that the Task Force can be used as a venue for evaluation of public comments. In our experience, solutions to one issue may sometimes create other problems that the regulator does not foresee, but that stakeholders do. By working proactively with the Task Force to workshop possible changes to the rules, DOEE can avoid the need for additional rounds of public comment, and move more quickly to a set of rules that can be finalized this year.

Sincerely,

Marshall Duer-Balkind, Co-Chair / Energy Efficiency & Renewable Energy Service Provider  
representative

Anica Landreneau, Co-Chair / Green Building Advisory Council representative

Matt Praske, Co-Chair / Market-rate apartment building representative

Patti Boyd, DC Sustainable Energy Utility representative

Jessica Jones, Affordable housing developer representative

Cliff Majersik, Nonprofit advocating for energy efficient buildings or a low-carbon built environment  
representative

Todd Nedwick, Affordable housing operator representative





**DAYBREAK**  
CLIMATE  
CONSULTING

March 4, 2021

Attention: Building Performance and Enforcement Branch  
Department of Energy & Environment  
Government of the District of Columbia  
1200 First Street, N.E., 5th Floor  
Washington, DC 20002  
*Via Electronic Mail: [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)*

Dear Katie Bergfeld:

I am pleased to submit the following comments on the “Notice of Proposed Rulemaking: Application of the Building Energy Performance Standards for Privately-Owned Buildings,” on behalf of myself and my organization.

In my capacity as a co-chair of the Building Energy Performance Standards (BEPS) Task Force, I helped draft comments that were signed by a majority of private-sector members of the Task Force, which I submitted separately. Those comments focused on topics that the Task Force has discussed, and where there was substantial agreement. I endorse all the comments in that document. In contrast, the below comments represent my own professional opinion. I know that these concerns are shared by some other members of the Task Force, but they have not yet been discussed by the group as a whole.

### **Indoor Environmental Quality**

Reducing energy use and carbon emissions is a critical goal, and one of the utmost urgency. However, experience shows if Energy Efficiency Measures (EEMs) do not proactively consider the impact on indoor human health, safety, and environmental quality, they may have an unintended adverse impact on the health and quality of life for building occupants. Faced with the steep penalties imposed by BEPS, some building owners may be tempted to make choices to sacrifice ventilation, lighting, thermal comfort, or other critical elements in order to meet the standard. Moreover, when DOEE says a building has complied with BEPS, it is unavoidably making *some* endorsement of the building’s resulting energy efficiency; the District should avoid giving this endorsement to buildings that do not support human health. The COVID-19 pandemic has rightly heightened attention on this issue.

The Proposed Rulemaking includes a comment in § 3518.3 that “A building owner shall not implement a compliance measure that poses a threat to the health and safety of a building occupant or user.” This is a good start, but it is too vague and does not build on recognized standards. DOEE should lean on nationally recognized, consensus-driven standards in this area, including: ASHRAE Standard 55 (Thermal Environmental Conditions for Human Occupancy), ASHRAE Standard 62.1 (Ventilation for Acceptable Indoor Air Quality), ASHRAE Standard 62.2 (Ventilation and Acceptable Indoor Air Quality in Residential Buildings), and the Illuminating Engineering Society (IES) Lighting Handbook.

Most energy efficiency and green building certification programs now require safeguards for IEQ, and many further incentivize efforts to improve the quality of life for building occupants. The ENERGY STAR program requires that any existing building receiving ENERGY STAR certification but be signed off on by an architect or engineer as providing acceptable thermal comfort sufficient to meet ASHRAE Standard 55, provide acceptable indoor air quality to meet ASHRAE Standard 62, and provide adequate illumination per the IESNA Lighting Handbook. Similar requirements are common in most Green Building Certifications for new or existing buildings: in a review that Integral Group conducted for Fannie Mae of 44 Green Building Certifications in the United States, we found that most of them require the property meet ASHRAE Standards 62.1 and/or 62.2.<sup>1</sup>

In my January 4, 2021 comments on the “Notice of Proposed Rulemaking for Energy Performance Benchmarking of Privately-Owned Buildings,” I recommended that the third-party data verification for benchmarking should include completion of the Indoor Environmental Standards section of the Data Verification Checklist. This section of the checklist requires verification of acceptable ventilation, thermal comfort, and lighting via ASHRAE Standard 62, ASHRAE Standard 55, and the IESNA Lighting Handbook for lighting quality. I noted that while this might not be sufficiently important for benchmarking data verification alone, it was crucial for implementation of the Building Energy Performance Standards. I continue to believe that it will be simpler, more legally sound, more broadly effective for DOE to require this verification under § 3515.

However, if DOE does not wish to require such verification for all properties, then it is important that these standards be included in the proposed BEPS rulemaking. In this scenario, all properties that do not meet the BEPS would submit verification of adequate ventilation as defined in ASHRAE 62.1/62.2, and adequate thermal comfort as defined in ASHRAE 55, as part of their final submission at the end of the BEPS compliance cycle. For buildings on the pursuing either a performance or standard target pathway, this would be included with the completed actions report detailed in § 3519.5. For buildings on the prescriptive pathway, this would be included with the monitoring and verification report detailed in § 3519.6(e). For buildings on Alternative Compliance Pathways, this requirement would be included in the Alternative Compliance Pathway agreement.

I recognize that adding these requirements increases the paperwork burden and soft costs for building owners, particularly those taking the performance path. However, it is not in the public interest to allow building owners to pursue BEPS compliance without any protections for human health and comfort. To ease compliance, if a compliance with ASHRAE 55 and 62 has already been verified through an ENERGY STAR certification, or another certification with similar requirements (such as LEED O+M or Enterprise Green Communities) within the last 12 months, that should be considered sufficient documentation.

## **New Construction and Net Zero Energy**

As developers and architects look to build in the District of Columbia, they are rightly concerned about the future impact of the BEPS. The uncertainty of what standards will be set in future BEPS

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<sup>1</sup> This finding is alluded to in the following peer-reviewed article; the source data can be provided to DOE upon request: Cluett, R., M. Duer-Balkind, J. Perakis, J. Tosh, and M. Simpson. 2020. “Ranking and Rewarding Certifications for Energy-Efficient and Healthy Multifamily Buildings to Drive Market Transformation.” Proceedings of the ACEEE 2020 Summer Study on Energy Efficiency in Buildings. Washington, DC: American Council for an Energy-Efficient Economy <https://multifamily.fanniemae.com/media/14001/display>

cycles creates unavoidable anxiety. No one wants to deliver or take ownership of a new building, only to find out within five years that it is not compliant with the BEPS and needs costly renovations to avoid penalty liability. The increasingly aggressive Building and Energy codes mean that most new buildings are likely to be compliant with BEPS, at least in this first cycle. The risk cannot ever be avoided, however, as no building performs precisely as designed, and tenant occupancy and behavior often cannot be predicted. Thus, the BEPS serves as an important check to make sure the District's new buildings actually meet the lofty goals of District's codes and plans.

However, there is a place where DOEE could offer greater assurance to architects, engineers, and developers, without compromising the integrity of the program-- Net-Zero Energy (NZE) buildings. A building *that is performing as designed* can reasonably be said to have taken advantage of most-to-all energy savings opportunities. Achieving further significant energy savings in such a building could prove cost-prohibitive or impossible. And even if the city moves to a Greenhouse Gas (GHG) standard for BEPS, the requirement to generate all energy from renewable sources, either onsite or via a long-term PPA for tier 1 renewable resources, might be sufficient.

Fortunately, DC already has code language that defines NZE via Appendix Z. Moreover, the Clean Energy DC plan sets a goal of having a NZE energy code for all buildings in the District by 2026. While many details are to-be-determined, buildings built under the 2026 DC energy code will need to meet a certain Building Performance Factor (BPF) or Zero Energy Performance Index (ZEPI) and would make up their energy use in a combination of onsite and offsite renewable energy.

I therefore recommend that a new section be added to the proposed rulemaking, which specifies that a building can receive an exemption from BEPS for each and every cycle if it was built to Appendix Z or a similar NZE standard and has maintained all of the following: the BPF or ZEPI score it was designed to, onsite renewable energy generation, and offsite renewable energy procurement.

While this issue may seem to be far in the future, these buildings are being planned today. I grant that that any NZE building would most likely end up meeting any future BEPS—but “likelihood” is not sufficient when financing is on the line. Providing a clear path for ongoing BEPS compliance for a new NZE building would provide needed certainty to the market. It also might prove to be the most impactful thing that DC could do to promote NZE new construction and retrofits in the near-term.

An explicit NZE exemption would also be useful for a building owner (such as DC DGS) who owns all the properties in a single property type, and thus has an Alternative Compliance Path that is based on its own average performance. This path is by definition an endless loop; a NZE exemption would provide a natural and appropriate brake.

### **Promoting Beneficial Electrification**

It is increasingly clear that moving to a 100% clean electric grid coupled with fully electric buildings is the best solution for halting carbon emissions from the building sector. The District has already taken a crucial step towards the former half with the 100% Renewable Portfolio Standard (though this is not the same as 100% clean electricity, due to geographical and time-of-use issues). The District is developing a strategy for the latter through several DOEE grant projects. BEPS is almost certain to be a major part of any electrification strategy.

However, at present, the proposed rulemaking contains no discussion of electrification as such. The performance pathway will likely encourage electrification thanks to its focus on Site EUI. A well-designed electrification strategy can also improve an ENERGY STAR score. However, this is not guaranteed, and there is a real risk that buildings on the standard target pathway will pursue EEMs that lock in natural gas use for another 30 years. DOE should work to prevent this outcome through education, alternative compliance paths that promote electrification, and a rapid shift to a GHG-based standard. (A GHG standard would be beneficial today, since the combination of heat pump efficiency and the increasing role of renewables in the RFC-E grid subregion mean that delivering heating services with heat pumps already results in GHG savings for DC buildings relative to natural gas furnaces/boilers.<sup>2</sup>)

In the prescriptive pathway and alternative compliance pathways, DOE has the most ability to promote electrification, and should use it. EEMs that directly burn natural gas should absolutely not count towards any prescriptive path compliance plan. For university and hospital campuses, DOE should not approve any alternative compliance plan that involves increasing the use of natural gas through CHP systems, unless those new systems are already procured and under construction.

### **Compliance Certainty for Affordable Housing**

Multifamily Affordable Housing (MFAH) properties face strict limitations on access to capital, fixed refinancing cycles, and limited ability to increase revenue. The District already has a shortage of affordable housing, and we need to ensure BEPS does not exacerbate this trend. Indeed, BEPS should be a vehicle to reduce energy burden and increase indoor air quality for the District's most vulnerable. It is a good start that "for qualifying affordable housing buildings, DOE may grant a delay in compliance of more than three (3) years," per § 3520.5. However, given the long capital cycles of affordable housing, this is likely insufficient assurance. DOE could evaluate providing a path for up to 15 years of compliance certainty for MFAH, to align with the mortgage cycle. This will allow MFAH to bundle approved improvements into a mortgage refinance while taking full advantage of aligned federal initiatives such as Fannie Mae's "Green Rewards" program.

### **Legislative Updates**

As written, the Clean Energy DC Act requires that achievement of the performance pathway be measured by comparing the average Site EUI for the two years preceding the first year of the Compliance Cycle to the average Site EUI for the last two years of the compliance cycle. Since this is legislative language, the proposed regulations echo it. I have no doubt this requirement was conceived as a genuine attempt to protect buildings against the impact weather fluctuations. However, it is both unnecessary and counterproductive.

The two-year comparison is unnecessary because the ENERGY STAR Portfolio Manager system already accounts for weather through the use of Weather-Normalized EUI. Indeed, for buildings with ENERGY STAR scores, the software produces an "Adjusted EUI," which normalizes not only for weather but for use and occupancy factors. DOE's reference to "Adjusted EUI" in § 3518.1(a) is good. But it also further demonstrates the limited need for a two-year comparison.

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<sup>2</sup> Internal analysis by Greenlink Analytics and Daybreak Climate Consulting, which can be provided to DOE upon request.

The two-year comparison is counterproductive because it has the net effect of forcing compliance to occur a year earlier. If a building wants to be sure it will achieve the 20% Site EUI reduction required by the performance path, it must actually reduce its EUI by over 20% by the end of the third year of a five-year compliance cycle, so that the average EUI for years four and five actually shows a 20% reduction. If they instead simply target getting the performance reduction by year 5, the average savings on the performance path will be closer to 17.5% than 20%.<sup>3</sup> Some less sophisticated owners may be caught unaware by this, incurring fines and increasing public discontent with the program. More sophisticated owners will opt to rush their EEM projects in the first few years, and then have much less work to do for the following three years. This will increase the strain on the District's Energy Efficiency Service Provider community, which already suffers from workforce challenges—and could create a very harmful “boom-bust” cycle for the nascent BEPS consulting industry. These outcomes were surely not intended and are not in anyone's interest.

I encourage DOEE and the DC Council to consider emergency legislation to correct this issue, and the two other legislative issues addressed in the Task Force comments, so that the proposed or final BEPS rulemaking can in be updated accordingly.

### **Looking Forward**

Over the past 15 months, the Task Force has been very involved in the structure of the BEPS program. I believe there will be a continued role for the Task Force in this respect, as DOEE seeks to respond to comments. When I worked on the benchmarking rulemaking in 2012, DOEE proactively discussed/workshopped possible solutions with stakeholders between the first and second comment periods. As a result, further changes were designed, and the second proposed rulemaking required no further substantive changes. Should DOEE determine that the proposed BEPS rulemaking needs substantive changes, I hope the Task Force can provide DOEE with a structured venue to do something similar. Regardless, a number of the topics discussed in this letter would certainly benefit from Task Force discussion.

Moreover, now that the BEPS implementation has begun, it is equally important that DOEE engage more proactively with market implementers, including the EERE Service Provider community, as we all figure out how to make this policy *work on the ground*. I think there is a role for the Task Force in this aspect as well and look forward to exploring it.

Sincerely,



Marshall Duer-Balkind  
Principal  
Daybreak Climate Consulting, LLC

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<sup>3</sup> I recognize that for the first BEPS cycle, all buildings are eligible for a one-year extension due to the Covid-19 pandemic, and thus cycle 1 is actually six years. I am intentionally using a five-year cycle in this example avoid complicating the point.



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**IMT.org**

Attention: Building Performance and Enforcement Branch  
Department of Energy & Environment (DOEE)  
Government of the District of Columbia  
1200 First Street NE, 5th Floor  
Washington, DC 20002  
*Via Electronic Mail: [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov)*

As a member of the Building Energy Performance Standards (BEPS) Task Force who was involved in the drafting of the CleanEnergy DC Act of 2018, I am pleased to submit these comments on the “Notice of Proposed Rulemaking: Application of the Building Energy Performance Standards for Privately-Owned Buildings.”

I commend DOEE on its excellent work in implementing BEPS, including in drafting these proposed rules. DOEE has engaged with building owners, activists, service providers, experts, the BEPS Task Force, and other BEPS stakeholders in a respectful, open, knowledgeable and sincere way. The proposed rulemaking is detailed, thoughtful and generally responsive to feedback from the Task Force.

With the first BEPS in the country, DC has had to blaze a new trail that other cities and states are already following.

BEPS are the most powerful tool for driving change in the built environment; with such power comes risk of unintended consequences. At the same time, the climate crisis and the District’s climate commitments require immediate action. DOEE has risen to the challenge and proceeded with the care, thoughtfulness and urgency that the situation demands.

I particularly commend DOEE for a few additional specific decisions:

1. **The decision to use the ENERGY STAR Portfolio Manager benchmarking tool and ENERGY STAR’s associated rules, resources, and guidance to the greatest extent practical:** ENERGY STAR is widely used and respected by the DC building community; using it builds on a strong foundation of industry acceptance and familiarity, reducing the cost of compliance to building owners.
2. **The decision to require regular verification of benchmarking data:** This data is foundational to the BEPS program and it is essential to BEPS’s success that the data be as accurate as practical and that it be so viewed by the market. In scheduling required data verifications on a three-year cycle, DOEE has aligned verification with BEPS reporting requirements. Following the one year BEPS extension DOEE granted

to assist building owners in responding to the pandemic, in order to maintain the alignment of verification and reporting and to prevent overlapping compliance cycles, the DC Council should give DOEE the discretion to push back the start of future BEPS compliance cycles.

3. **The decision to propose that “alternative compliance penalties” be changed to “alternative compliance payments” in order to better align the interests of landlords and commercial tenants, giving the commercial tenants an incentive to work with the landlord to improve building performance.** Unfortunately, this change will require action by the DC Council. Tenants have a significant impact on building energy performance. Under most existing commercial leases, landlords may pass through to commercial tenants a portion of the costs of “payments” to comply with laws. Such a change should require that building owners include and call out what they know regarding such compliance costs in any presentation of projected or actual pass through costs to current or potential tenants.

There are several ways DOEE could improve the draft BEPS rules. I have attached a redline of the draft rules with suggested changes ranging from minor clarifications to substantive changes. They are highly targeted, and do not require a major rewrite of the rules.

To call out a few suggestions:

1. § 3521 - Basing penalties on each property’s assessed value rather than its floor area, would be more equitable, more protective of housing affordability, and would better align penalties with landlords’ access to capital and ability to pay for improvements. Doing so would also better align penalties with the deterrent needed to drive improvements by building owners.
2. The District faces an affordable housing crisis. BEPS will change the financial calculations of landlords weighing whether to convert affordable housing to other purposes less essential to District residents. The District should take additional steps to preserve housing affordability, including by making preservation and creation of affordable housing more financially attractive to building owners. The District should devote significant new resources to invest in affordable housing and other buildings to benefit disinvested communities through lower utility costs, improved health, improved resilience, preservation of affordable housing, and assistance in complying with BEPS. DOEE should also provide a BEPS compliance path that will give affordable housing 15+ years of compliance certainty to align with their mortgage cycle. The BEPS performance path is good, but given affordable housing’s limited capacity and access to capital mid mortgage cycle, the performance path leaves too much compliance uncertainty. Affordable

- housing needs to be able to bundle improvements approved by DOE into mortgage refinancing, make the improvements approved by DOE and have a 15+ year window of BEPS compliance certainty.
3. DOE should create a BEPS pathway for long-term near-guaranteed compliance for net zero energy buildings, to help promote their construction, and give developers some assurance that a new net zero energy building will be BEPS compliant (with backstop checks in case the building does not perform as designed).
  4. Promoting building electrification is critically important. Not crediting installation of new fossil fuel systems toward the prescriptive path is a start, but more needs to be done.

In the interest of brevity, I will not repeat recommendations from joint Task Force comments submitted by Marshall Duer-Balkind on our behalf.

Thanks for the opportunity to submit these comments and congratulations again on the success of BEPS to this point.

Sincerely,



Cliff Majersik  
Senior Advisor



## **DEPARTMENT OF ENERGY AND ENVIRONMENT**

### **NOTICE OF PROPOSED RULEMAKING**

#### **Application of the Building Energy Performance Standards for Privately-Owned Buildings**

The Director of the Department of Energy and Environment (DOEE or Department), pursuant to the authority set forth in the District Department of the Environment Establishment Act of 2005, effective February 15, 2006 (D.C. Law 16-51; D.C. Official Code § 8-151.01 *et seq.*) (2013 Repl. & 2019 Supp.)); Section 301 and 304 of the CleanEnergy DC Omnibus Amendment Act of 2018 (CEDC Act), effective March 22, 2019 (D.C. Law 22-257; 66 DCR 3973 (April 5, 2019)), as amended by Section 2 of the CleanEnergy DC Omnibus Temporary Amendment Act of 2020, effective May 6, 2020 (D.C. Law 23-94; 67 DCR 5015 (May 15, 2020)); and Mayor's Order 2020-087, dated August 21 2020, hereby gives notice of the intent to add new sections to Chapter 35 (Green Building Requirements) of Title 20 (Environment) of the District of Columbia Municipal Regulations (DCMR).

The proposed rulemaking will implement provisions of the CEDC Act, which mandates that every six (6) years, DOEE establish property types and Building Energy Performance Standards (BEPS) by property type for the properties covered by the benchmarking requirements of the Clean and Affordable Energy Act of 2008 and that, for any building identified as below the performance threshold set by DOEE, the building owner be required to implement lasting energy efficiency measures in their buildings over a five (5)-year compliance cycle. The proposed rules also set forth DOEE's implementation and enforcement of the BEPS requirements.

#### **Input from the Task Force**

The Clean Energy Omnibus Act of 2018 established the BEPS Program as well as a Mayoral appointed BEPS Task Force. The charge of the BEPS Task Force was to: advise DOEE on creation of an implementation plan for the Building Energy Performance Program; recommend amendments to proposed regulations issued by DOEE; and, recommend complementary programs or policies. Throughout calendar year 2020, DOEE held biweekly meetings with the 17-member Task Force to discuss the roll-out of the BEPS Program. A detailed description of the input DOEE received from the BEPS Taskforce as well as the issues discussed will be available on DOEE's website in the BEPS Task Force Report.

In regard to these rules, DOEE incorporated significant input from the BEPS Task Force on the following sections:

- Standard Target Pathway
- Reporting and Verification Requirements
- Exemption Criteria
- Delay of Compliance Criteria
- Alternative Compliance Penalties

#### **Overview of the Building Energy Performance Standard Rules**

These rules provide specific instructions to owners and operators of privately-owned buildings on how to comply with the BEPS. These rules identify the buildings to which the BEPS are applicable, and the performance and procedural requirements for buildings that are not in compliance with the BEPS. These rules and accompanying guidance documents developed by DOE will be available on DOE's website (<https://doee.dc.gov/service/building-energy-performance-standards>).

### **Section-by-Section Descriptions**

Section 3517 states that DOE will publish notice of the establishment of BEPS in the *D.C. Register* and also establishes the *BEPS Period* and the *Compliance Cycle*. It lays out the size-based time frames during which buildings will be required to meet the BEPS, and the method by which building owners must determine the size of their building. It provides direction to building owners on how to determine whether their building meets the BEPS and how to identify the correct property type for their building.

Section 3518 outlines the compliance pathways allowed for buildings that do not meet the BEPS for a BEPS Period. The compliance pathways in Subsection 3518.2 include the (a) performance pathway, (b) prescriptive pathway, (c) standard target pathway, and (d) alternative compliance pathway. Detailed specifics about the prescriptive pathway and alternative compliance pathways will all be described in accompanying documents. Subsection 3518.4 provides an alternative pathway for the BEPS Period beginning on January 1, 2021, given the anticipated abnormalities associated with calendar year 2020 energy data due to the coronavirus (COVID-19) public health emergency.

Section 3519 outlines the requirements for selecting a compliance pathway and compliance pathway milestones to be met during the BEPS Period. This section also establishes the consequences for building owners that fail to select a compliance pathway. It establishes how a building owner may change pathways during a Compliance Cycle, and the deadlines for various milestones under the prescriptive pathway. This section establishes how DOE may deny or revoke approval of a pathway.

Section 3520 details the process for building owners to obtain exemptions from, or delays in meeting, required compliance criteria. It also provides a broadly available compliance delay for building owners of one year for the Compliance Cycle beginning in 2021 due to the public health emergency declared on March 11, 2020.

Section 3521 implements the alternative compliance penalty process should a building fail to meet the performance requirements of their selected pathway and establishes maximum alternative compliance penalties based on building size. Alternative compliance penalties are separate from the potential civil fines associated with failure to meet the requirements in Sections 3518 through 3519. Alternative compliance penalties will be adjusted proportionally to the building's performance relative to its pathway target. Building owners have the opportunity to request DOE reconsideration of the penalty through the enforcement process described in Section 3521 and may request a hearing or adjudication by the Office of Administrative Hearings.

Section 3522 covers the enforcement of the civil infractions associated with the procedural requirements in Section 3519.

**Chapter 35, GREEN BUILDING REQUIREMENTS, of Title 20 DCMR, ENVIRONMENT, is amended as follows:**

**New Sections 3517 through 3522 are added to read as follows:**

- 3517 Building Energy Performance Standards (BEPS)**
- 3518 Building Energy Performance Compliance Pathways**
- 3519 Building Energy Performance Reporting and Verification**
- 3520 Building Energy Performance Exemptions and Compliance Delays**
- 3521 Building Energy Performance Standards Alternative Compliance Penalty, Violations, and Enforcement**

**3517 BUILDING ENERGY PERFORMANCE STANDARDS (BEPS)**

3517.1 Every six (6) years, DOEE shall, pursuant to Section 301(b) of the Act (D.C. Official Code § 8-1772.21(b)), establish the BEPS. DOEE shall publish notice of the BEPS in the *D.C. Register* before the relevant Compliance Cycle begins.

3517.2 A building eligible for an ENERGY STAR Score shall be found to meet the BEPS if the ENERGY STAR score based on the building's performance in the calendar year which ended one year prior to the Compliance Cycle (2019 for the first cycle) is at or above the ENERGY STAR standard. A building not eligible for an ENERGY STAR score shall be found to meet the BEPS if the Source EUI based on the building's performance in the calendar year which ended one year prior to the Compliance Cycle (2019 for the first cycle) is at or below the Source EUI standard. A building that does not meet the BEPS as of the effective date of the BEPS shall have a Compliance Cycle of five (5) years from that date to meet the performance requirements set forth in § 3518 and the procedural requirements set forth in § 3519.

3517.3 Sections 3517 through 3521 shall apply to buildings in accordance with the following schedule:

- (a) Beginning January 1, 2021, all privately-owned buildings with at least fifty thousand square feet (50,000 sq. ft.) of gross floor area and all District-owned or District instrumentality-owned buildings with at least ten thousand square feet (10,000 sq. ft.) of gross floor area;
- (b) Beginning January 1, 2027, all privately-owned buildings with at least twenty-five thousand square feet (25,000 sq. ft.) of gross floor area; and
- (c) Beginning January 1, 2033, all privately-owned buildings with at least ten thousand square feet (10,000 sq. ft.) of gross floor area.

3517.4 To assess applicability of § 3517.3, a building owner shall determine the building size in accordance with 20 DCMR § 3513 (Energy Performance Benchmarking of Privately-Owned Buildings).

**Commented [CM1]:** The DC Council should pass a law to delay for one year to conform to the one-year Covid extension.

3517.5 A building owner shall determine the applicable BEPS based on the primary property type in Portfolio Manager.

**Commented [CM2]:** If there is no primary property type, alternative BEPS standard to be created?

## **3518 BUILDING ENERGY PERFORMANCE COMPLIANCE PATHWAYS**

3518.1 An owner of a building that does not meet the BEPS shall implement one (1) of the following compliance pathways to meet the building energy performance requirements:

- (a) A performance pathway, which includes meeting the reporting milestone described in § 3519.5 and achieving energy savings according to the following metrics, as determined through Portfolio Manager:
  - (1) For a building that can earn an ENERGY STAR® score, a greater than twenty percent (20%) decrease in Site Energy Use Intensity Adjusted to Current Year (Adjusted Site EUI) averaged over the last two (2) years of the Compliance Cycle, as compared to the Adjusted Site EUI averaged over the two (2) years preceding the first year of the Compliance Cycle; or
  - (2) For a building that cannot earn an ENERGY STAR® score, a greater than twenty percent (20%) decrease in the Weather Normalized Site Energy Use Intensity (Normalized Site EUI) averaged over the last two (2) years of the Compliance Cycle, as compared to the Normalized Site EUI averaged over the two (2) years preceding the first year of the Compliance Cycle;
- (b) For property types for which the BEPS is above the national median, a standard target pathway, which includes meeting the reporting milestone described in § 3519.5 and achieving energy savings according to the following metrics, as determined through Portfolio Manager:
  - (1) If a building can earn an ENERGY STAR® score, an increase in its ENERGY STAR® score to the level established as the BEPS for the applicable BEPS Period in the last year of the Compliance Cycle; or
  - (2) If a building cannot earn an ENERGY STAR® score, a decrease in its Weather Normalized Source Energy Use Intensity (Normalized Source EUI) to the level established as the BEPS for the applicable BEPS Period in the last year of the Compliance Cycle;
- (c) A prescriptive pathway, which includes meeting reporting milestones described in § 3519.6 and implementing one or more DOE pre-determined energy efficiency measures designed to achieve energy savings comparable to the requirements in § 3518.1(a);

**Commented [CM3]:** Based on plans that DOE has shared with the BEPS Task Force, I assume that this text will need to be changed.

- (d) An alternative compliance pathway as agreed upon by DOEE and the building owner that is designed to achieve energy savings comparable to the requirements in § 3518.1(a); or
- (e) Only for the BEPS Period beginning on January 1, 2021, buildings may follow a 2021 pathway option for each of the pathways described in § 3518.2(a) through (d) by using the applicable EUI average for the period from 2018 to 2019 as the baseline to compare to the applicable EUI for 2026 in order to determine whether the twenty percent (20%) reduction or comparable energy savings requirement has been met.

**Commented [CM4]:** Would the CEDC Act need to be amended to use a single year instead of the average of two years? The CEDC Act says, "performance pathway, which shall require a building to demonstrate a greater than 20% decrease in normalized site energy use intensity averaged over the last 2 years of the 5-year compliance cycle, as compared to the normalized site energy use intensity averaged over the 2 years preceding the first year of the 5-year compliance cycle"

3518.2 When measuring energy performance, a building owner shall exclude the gross floor area and energy consumption of spaces that meet the criteria in Portfolio Manager for excluding a space.

3518.3 A building owner shall not implement a compliance measure that poses a threat to the health and safety of a building occupant or user.

## 3519 BUILDING ENERGY PERFORMANCE REPORTING AND VERIFICATION

3519.1 This section establishes reporting and verification requirements for building owners to meet the building energy performance requirements. For the BEPS Period beginning in 2021, all deadlines set forth in this section shall be extended by one (1) year, consistent with § 3520.7 and § 301(e)(1) of the Act (D.C. Official Code § 8-1772.21(e)(1)).

3519.2 The owner of a building that does not meet the BEPS as of the first day of the Compliance Cycle shall select a compliance pathway described under § 3518.1 for DOEE review and approval through the Online BEPS Portal no later than February 1, one (1) year from the start of the Compliance Cycle.

3519.3 If a building owner does not select a compliance pathway as specified in § 3519.2 or does not receive DOEE approval for a pathway, DOEE shall assign a pathway for the building. The assigned pathway shall be either a performance pathway or a standard target pathway.

3519.4 A building owner may change a pathway, including a DOEE-assigned compliance pathway, during a Compliance Cycle for good cause shown by submitting a pathway change application through the Online BEPS Portal and receiving approval from DOEE. A building owner may not change pathways until approval is received from DOEE.

3519.5 For a building pursuing either a performance or standard target pathway, a building owner shall submit a report of completed actions to DOEE through the Online BEPS Portal no later than ~~February~~ April 1, five (5) years from the start of the Compliance Cycle.

**Commented [CM5]:** Will this just state the Energy Star score or EUI and attest to the accuracy of inputs? It's important to minimize reporting requirements on building owners.

**Commented [CM6]:** To align with benchmarking reporting deadline

3519.6 For a building pursuing a prescriptive pathway, a building owner shall submit the following documents to DOEE through the Online BEPS Portal:

- (a) No later than February 1, one (1) year from the start of the Compliance Cycle, a preliminary assessment plan that includes a current energy use assessment or audit and identifies any entities ~~that will implement improvements involved in preparing the plan;~~
- (b) No later than February 1, two (2) years from the start of the Compliance Cycle, an action plan that includes a final list of energy efficiency measures selected for implementation;
- (c) No later than February 1, four (4) years from the start of the Compliance Cycle, an implementation and testing report that includes permit drawings, permits, inspection reports, the entities that implemented the improvements, or other documentation identified in the approved pathway pertaining to the implementation of selected energy efficiency measures;
- (d) No later than ~~February-April~~ 1, five (5) years from the start of the Compliance Cycle, an evaluation, monitoring, and verification report that includes a narrative describing the savings achieved and any corrective actions taken; and
- (e) Additional documentation as identified by DOEE in its approval of the building pathway.

**Commented [CM7]:** Requiring an owner to identify who will do the work before selecting which measures will be implemented would create an unnecessary paperwork burden.

3519.7 For an alternative compliance pathway, a building owner shall sign an alternative compliance pathway agreement prepared by DOEE, and shall complete and submit all documentation in a manner and timeframe required by the agreement.

3519.8 A building owner may use a complete and accurate District Benchmark Results and Compliance Report as required under §§ 3513 through 3516 of this chapter to demonstrate that the building has met its pathway target for a Compliance Cycle.

3519.9 A building owner shall provide any additional documentation as requested by DOEE to determine compliance with this section.

3519.10 A report, a plan, or documentation submitted in accordance with §§ 3519.5 through 3519.9 must be complete and accurate.

3519.11 DOEE may deny or revoke approval of a pathway and designate a different pathway specified in § 3518.1 if a building owner:

- (a) Fails to submit a complete and accurate report, plan, or documentation as required by §§ 3519.5 through 3519.9; or
- (b) Fails to implement a requirement of a DOEE-approved compliance pathway;

- (c) Failed to demonstrate energy savings described by the approved pathway for the previous Compliance Cycle.

3519.12 If ownership of a building covered by § 3517.3 is transferred during a Compliance Cycle, the seller shall provide the buyer with the following information at least 10 days prior to the transfer or sale:

- (a) Any information, plans, or reports submitted to DOEE as required by §§ 3519.2, 3519.5, 3519.6, 3519.7, and 3519.8;
- (b) The most recent complete and accurate District Benchmark Results and Compliance Report as required under § 3513 of this chapter for the building; and
- (c) Information describing any progress toward meeting the energy performance requirements as applicable under § 3518.

## **3520 BUILDING ENERGY PERFORMANCE EXEMPTIONS AND COMPLIANCE DELAYS**

3520.1 A building owner may apply through the Online BEPS Portal for an exemption from or delay in compliance with the performance and procedural requirements specified in § 3518 and § 3519.

3520.2 A building owner seeking an exemption or delay shall submit a request describing the exemption or delay sought and the reason the exemption or delay is being requested. The request shall include documentation that substantiates the basis for the request, such as financial information, deeds, building and construction permits, technical reports, invoices, or other proper documentation.

3520.3 An exemption or delay may be granted only if the building owner demonstrates to the satisfaction of DOEE, based upon the documentation presented, that the building meets one or more of the criteria in §§ 3520.4 or 3520.6.

3520.4 DOEE shall grant an exemption from the performance and procedural requirements specified in § 3518 and § 3519 for a building that is completely demolished immediately prior to the beginning of the applicable Compliance Cycle or during the Compliance Cycle.

Commented [CM8]: Strike?

3520.5 DOEE ~~shall~~ may grant a delay in compliance from the performance and procedural requirements specified in § 3518 and § 3519 for up to three (3) years upon a showing of good cause by the applicant that one or more of the circumstances in § 3520.6 exist. For qualifying affordable housing buildings, DOEE may grant a delay in compliance of more than three (3) years.

3520.6 For a property ~~to~~ owner to demonstrate good cause for granting a delay of compliance under § 3520.5, the property owner must provide substantial evidence

that meeting the requirements of § 3518.1 is practically infeasible, including for any of the following reasons:

- (a) Financial distress;
- (b) A change of ownership of the property during the Compliance Cycle;
- (c) The building undergoes a major renovation;
- (d) The building becomes unoccupied;
- (e) The building is pending demolition, as evidenced by a demolition or raze permit;
- (f) There is a physical change to the building or the actual usage of the building that results in a change to the building's primary property type, as determined through Portfolio Manager; or
- (g) For the BEPS period beginning in 2021, the building was operating and consuming energy during the COVID-19 public health emergency declared on March 11, 2020 by Mayor's Order 2020-045.

**Commented [CM9]:** DOEE needs discretion to not grant delays for changes to ownership e.g. where ownership of a building is transferred to a subsidiary and there is de minimis change in management or operations.

**Commented [CM10]:** This edit makes clear that there must be an actual change in use/physical space and not just a correction or clerical change to Portfolio Manager space type.

3520.7 For the BEPS Period beginning in 2021, an owner of a building subject to compliance under § 3517.3(a) may, in keeping with § 3520.6(g), seek a one (1)-year delay of compliance, as set forth in § 3519.1. A one (1)-year delay of compliance granted pursuant to this subsection shall not preclude DOEE from granting additional delays in compliance under § 3520.5; provided, that, for a building other than a qualifying affordable housing building, any additional delays may not, in total, exceed two (2) additional years.

3520.8 DOEE may attach additional conditions to a delay of compliance, including adjustments to the building's compliance pathway, or additional reporting and verification requirements to move a building toward compliance with the BEPS.

3520.9 An exemption or delay approved during one Compliance Cycle does not extend the requirement for a building to meet the BEPS established for the next Compliance Cycle.

## 3521 BUILDING ENERGY PERFORMANCE STANDARDS ALTERNATIVE COMPLIANCE PENALTY, VIOLATIONS, AND ENFORCEMENT

3521.1 A building owner that fails to demonstrate complete implementation of a compliance pathway as required by § 3518.1 at the end of a Compliance Cycle shall be assessed an alternative compliance penalty no greater than the following amounts. The maximum penalty shall be reduced proportionally to the building's performance relative to its pathway target as described in § 3521.3.

**Commented [CM11]:** Penalties are poorly aligned with building owners' ability to pay them and could negatively impact housing affordability. Greater assistance should be provided to affordable housing owners to improve building performance, preserve affordable housing, and comply with BEPS. And, penalties should be based on assessed value instead of square footage.

**Commented [CM12]:** IMT commends DOEE for trying to switch to the term "alternative compliance payment" in place of "alternative compliance penalty" as the latter better aligns the interests of landlords and commercial tenants. Sadly, the text of the CEDC Act prevented this change. The DC Council could make this change.



- (a) A building with at least five hundred thousand square feet (500,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of seven million five hundred thousand dollars (\$7,500,000);
- (b) A building of at least two hundred thousand square feet (200,000 sq. ft.) of gross floor area but less than five hundred thousand square feet (500,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of five million dollars (\$5,000,000);
- (c) A building of at least one hundred thousand square feet (100,000 sq. ft.) of gross floor area but less than two hundred thousand square feet (200,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of two million dollars (\$2,000,000);
- (d) A building of at least fifty thousand square feet (50,000 sq. ft.) of gross floor area but less than one hundred thousand square feet (100,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of one million dollars (\$1,000,000);
- (e) A building of at least twenty-five thousand square feet (25,000 sq. ft.) of gross floor area but less than fifty thousand square feet (50,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of five hundred thousand dollars (\$500,000); and
- (f) A building of at least ten thousand square feet (10,000 sq. ft.) of gross floor area but less than twenty-five thousand square feet (25,000 sq. ft.) of gross floor area, shall be assessed a maximum alternative compliance penalty of two hundred and fifty thousand dollars (\$250,000).

**Commented [CM13]:** Recognizing that there are benefits to the simplicity of buckets, it seems excessively arbitrary that a 100,000 sf building would face twice the penalty of a 99,999 sf building.

3521.2 A post-secondary educational institution or hospital with multiple buildings in a single location owned by a single entity (campus) that fails to demonstrate implementation of the alternative compliance pathway as required by § 3518.1(d) at the end of a Compliance Cycle shall be assessed an alternative compliance penalty in the following amount. The penalty shall be adjusted proportionally to the building's performance relative to its pathway target.

- (a) A campus with at least three million square feet (3,000,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance payment of fifteen million dollars (\$15,000,000); and
- (b) A campus of less than three million square feet (3,000,000 sq. ft.) of gross floor area shall be assessed a maximum alternative compliance penalty of seven million five hundred thousand dollars (\$7,500,000).

3521.3 The maximum fines assessable under §§ 3521.1 - 3521.2 shall be adjusted according to the selected compliance pathway and according to the following chart:

Pathway	Adjustment Factor	Example
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Performance pathway under § 3518.1(a)	Percent reduction actually achieved divided by twenty percent (20%).	Building A achieves a 10% reduction in site EUI. Their fine is reduced by fifty percent (50%) ( $10/20 = 50\%$ ).
Standard target pathway under § 3518.1(b)	ENERGY STAR Score Points actually earned from 2019 divided by total points needed to meet standard.	Building B gains four (4) points but needs six (6) total to meet the standard. Their fine is reduced by sixty-seven percent (67%) ( $4/6 = 67\%$ ).
Prescriptive pathway under § 3518.1(c)	Number of prescriptive pathway points actually earned divided by total needed.	Building C completes measures worth 15 points but needs twenty (20) total. Their fine is reduced by seventy-five percent (75%) ( $15/20 = 75\%$ ).
Alternative compliance pathway under § 3518.1(d)	Parameters shall be described in the alternative compliance pathway agreement prepared by DOEE, as described under § 3519.7.	

- 3521.4 Notwithstanding § 3521.3, a building owner that knowingly submits inaccurate information will be subject to assessment of the maximum alternative compliance penalty in accordance with § 3521.1 regardless of the building's performance relative to its pathway target, in addition to any other applicable fines and penalties.
- 3521.5 A building owner violating a provision in §§ 3517 through 3520 shall be fined according to the schedule set forth in Title 16 (Consumer, Commercial Properties, and Civil Infractions) of the District of Columbia Municipal Regulations.
- 3521.6 DOEE may enforce the requirements of this section, including assessment of an alternative compliance penalty, by issuing one or more of the following:
- (a) Notice of violation;
  - (b) Enforcement notice; or
  - (c) Notice of infraction.
- 3521.7 DOEE may issue a notice of violation to notify a building owner of a violation under §§ 3516 through 3520 and any potential fine if the violation is not corrected. A notice of violation does not impose a fine.
- 3521.8 DOEE may issue an enforcement notice to assess a fine or penalty for a violation under §§ 3516 through 3521. An enforcement notice may be appealed to DOEE pursuant to the instructions provided in the notice.

- 3521.9 If a fine or penalty is not resolved under §§ 3521.7 or 3521.8, DOEE may issue a notice of infraction. A building owner that receives a notice of infraction may request a hearing or adjudication pursuant to the Office of Administrative Hearings Establishment Act of 2001 (D.C. Official Code § 2-1831.01 *et seq.*) and the Office of Administrative Hearings Rules (1 DCMR § 2800 *et seq.*).
- 3521.10 A building owner may appeal to the District of Columbia Court of Appeals only after exhausting all administrative remedies.
- 3521.11 In addition to or instead of a civil infraction, the Attorney General for the District of Columbia may commence a civil action for damages, cost recovery, reasonable attorney and expert witness fees, and injunctive or other appropriate relief to enforce compliance with §§ 3516 through 3521.

**Section 3599, DEFINITIONS, is amended as follows:**

**The following definitions are added to read as follows:**

**Affordable housing** – buildings that are primarily residential and contain five (5) or more dwelling units, and either:

- (1) in which use restrictions or other covenants require that at least 50% of all the building's dwelling units are occupied by households that have household incomes of less than or equal to 80% of the area median income; or
- (2) the building owner can demonstrate that at least 50% of the dwelling units rent at levels that are affordable to households with incomes less than or equal to 80% of the area median income.

**Building Energy Performance Standards or BEPS** – the level of energy efficiency set forth by DOEE as an ENERGY STAR score or Normalized Source EUI value for each property type, as provided in section 301(b) of the Act (D.C. Official Code § 8-1772.21(b)).

**Building Energy Performance Standards Period or BEPS Period** - the period of time in which specific BEPS are in effect, which shall run from the date DOEE establishes BEPS until the next DOEE establishment of BEPS.

**Building Energy Performance Standards Program or BEPS Program** – the DOEE program overseeing and implementing BEPS.

**Compliance Cycle** – a period of five (5) years from the date of the establishment of BEPS during which, in the absence of a delay of compliance granted by DOEE, a building must meet the performance requirements set forth in § 3518 and procedural requirements set forth in § 3519.

**Major renovation** – any repair, alteration, or addition of a building or structure that:

- (1) Significantly affects multiple core building systems; and
- (2) Costs at least twenty-five (25) percent of the value of the building or structure, as determined based on Office of Tax and Revenue records, before the repair, alteration, or addition is started.

**National Median** – the ENERGY STAR score or Source EUI benchmark, available on the U.S. Environmental Protection Agency ENERGY STAR Portfolio Manager website, that fifty percent (50%) of properties perform above and fifty percent (50%) perform below.

**Online BEPS Portal** – a web-based application created by DOE for a building owner to submit required reporting and verification documents pertaining to BEPS, accessible through the DOE BEPS Program webpage.

**Property type** – the primary function of a building as determined through Portfolio Manager.

**Site Energy Use Intensity or Site EUI** – the annual amount of energy a building consumes onsite, as reported on a building's utility bills, divided by the building's gross floor area, as determined through Portfolio Manager.

**Site Energy Use Intensity Adjusted to Current Year or Adjusted Site EUI** – the Site EUI a building would be expected to have if its operations were the same as in the current time period, as determined through Portfolio Manager.

**Source Energy Use Intensity or Source EUI** – the total amount of raw fuel that is required to operate a building, divided by the building's gross floor area, as determined through Portfolio Manager.

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**Weather Normalized Site Energy Use Intensity or Normalized Site EUI** – the Site EUI a building would have consumed during thirty (30) year average weather conditions, as determined through Portfolio Manager.

**Weather Normalized Source Energy Use Intensity or Normalized Source EUI** – the Source EUI a building would have consumed during thirty (30) year average weather conditions, as determined through Portfolio Manager.

All persons desiring to comment on the proposed rulemaking should file comments in writing not later than sixty (60) days after publication of this notice in the *D.C. Register*. Comments should be

clearly marked “Public Comments: BEPS” and filed with DOEE, Benchmarking, 1200 First Street, N.E., 5th Floor, Washington, DC 20002, Attention: Building Performance and Enforcement Branch, or e-mailed to [info.BEPS@dc.gov](mailto:info.BEPS@dc.gov). All comments will be treated as public documents and will be made available for public viewing on the Department’s website at [www.doe.dc.gov](http://www.doe.dc.gov). If a comment is sent by e-mail, the e-mail address will automatically be captured and included as part of the comment that is placed in the public record and made available on the Department’s website.