

T&E COMMITTEE #1
March 18, 2024

MEMORANDUM

March 13, 2024

TO: County Council

FROM: Keith Levchenko, Senior Legislative Analyst

SUBJECT: **Worksession #3:** Executive Regulation 17-23: Building Energy Performance (BEPS) Standards

Expected Participants

- Kelly Schulz, CEO, Maryland Tech Council
- Avi Halpert, Vice President of Government and Community Affairs - United Therapeutics
- Stan Edwards, Chief, Energy, Climate, and Compliance Division, Department of Environmental Protection (DEP)
- Lindsey Robinett Shaw, Section Chief, Building & Transportation Programs, DEP
- Emily Curley, Building Energy Performance Programs Manager, DEP

On-Line Resources

- [January 24, 2024 Staff Report for T&E Meeting #1 on Executive Regulation 17-23](#)
- [DEP Slide Presentation for the January 24, 2024 T&E Committee Meeting](#)
- [April 19, 2022 Action Staff Report: Bill 16-21 Environmental Sustainability – Building Energy Use Benchmarking and Performance Standards – Amendments](#)
- [November 17, 2015 Action Staff Report: Bill 35-15 Environmental Sustainability - Benchmarking - Amendments](#)
- [April 22, 2014 Action Staff Report: Bill 2-14 Environmental Sustainability – Buildings – Benchmarking](#)
- [Department of Environmental Protection \(DEP\) BEPS Webpage](#)
- [Maryland Department of the Environment \(MDE\) BEPS Webpage](#)
- [MDE September 11, 2023 BEPS Presentation to the Air Quality Control Advisory Council](#)

Schedule

On January 12, 2024, the County Executive transmitted “Executive Regulation 17-23 – Building Energy Performance Standards.”

On January 24, 2024, the T&E Committee held its first worksession on Executive Regulation 17-23, Department of Environmental Protection (DEP) staff provided a presentation summarizing the regulation. The Committee also heard from the Maryland Hospital Association and hospital representatives regarding their sector's concerns and suggestions regarding the regulation.

On February 26, the Committee heard from representatives involved in affordable housing development.

At this third meeting, the Committee is planning to hear from representatives from the Life Sciences/Tech sector.

Because of the Council's ongoing review of the FY25-30 Capital Improvements Program and the Council's upcoming review of the FY25 Operating Budget, which will begin in April, T&E worksessions on Executive Regulation 17-23 will restart in June.

As a Method 2 Executive Regulation, the Council is required to act within 60 days of receipt from the County Executive (i.e. by March 12, 2024). Because of the longer expected time frame for the Committee's review of Executive Regulation 17-23, on February 26, 2024 the Council approved an extension of the deadline for action to September 30, 2024.

Background

Council Staff included background on Bill 16-21 and Executive Regulation 17-23 in the [Staff Report for the January 24 T&E Committee meeting](#). This background information is copied below. The DEP slide presentation from the first T&E meeting is available [here](#).

NOTE: ©page numbers below refer to attachments in the [January 24, T&E Committee Staff Report](#).

On January 12, 2024, the County Executive transmitted "Executive Regulation 17-23 – Building Energy Performance Standards." Bill 16-21 "Environmental Sustainability Building Energy Use Benchmarking and Performance Standards – Amendments" required transmittal of this regulation. The regulation was advertised in the November County Register. In the Executive's transmittal memorandum (see ©1-2), he notes changes made to the regulation as a result of public comments (see ©37-210) received.

Bill 16-21 was enacted by the Council on April 19, 2022.¹ This bill expanded the number of buildings covered by the existing benchmarking requirements, created a Building Performance Improvement Board, and required energy performance standards to be established (by regulation) for covered buildings (non-residential and multi-family) with gross floor area of 25,000 gross square feet or greater.

Bill 16-21 places buildings into six groups based on whether they are county-owned, commercial, or non-residential and by size:

County-Owned Buildings 50,000 gross square feet or larger

¹ The Staff Report from Council Action is Available [here](#).

- Group 1: Non-Residential Buildings greater than 250,000 gross square feet
- Group 2: Non-Residential Buildings 50,000 to 250,000 gross square feet
- Group 3: Non-Residential Buildings 25,000 to 50,000 gross square feet
- Group 4: Multi-Family Residential Buildings greater than 250,000 gross square feet
- Group 5: Multi-Family Residential Buildings 25,000 to 250,000 gross square feet

Benchmarking deadlines, interim standard and final standard deadlines are established for each group.

The bill requires County-owned buildings and commercial buildings of 50,000 gross square feet or greater to phase into BEPS first. These buildings were already required under Bill 2-14 “Environmental Sustainability - Buildings Benchmarking,” to benchmark and report energy use data each year. Commercial buildings of 25,000 gross square feet up to 50,000 gross square feet and multi-family buildings of 25,000 gross square feet or greater were added to the benchmarking requirement by Bill 16-21. Bill 17-23 phases these buildings into BEPS after three years of benchmarking.

The BEPS regime set up by Bill 17-23 establishes the use of Site Energy Use Intensity (or Site EUI)² for setting targets by major building use types. The specific targets (for both interim and final performance standards) are to be established by resolution (see below). Bill 17-23 also provides credit towards the BEPS requirements from generation of on-site renewable energy.

Bill 17-23 provides for an alternative compliance approach for cases where meeting the Site EUI by the prescribed deadline is economically infeasible. A building performance improvement plan (BPPI) would be submitted by the building owner and reviewed and approved by the DEP director.

Regulation 17-23:

- sets numerical site EUI performance standards (both interim and final) for each building group (see ©215-218 for the list of building groups and the final performance standard for that group).
- Defines how renewable energy will be incorporated into the performance metric
- Defines the elements required in Building Performance Improvement Plans (BPIPs)

Maryland Climate Solutions Now Act

In April 2022, the Maryland General Assembly passed the Climate Solutions Now Act. This legislation requires commercial and multi-family buildings 35,000 gross square feet or larger to begin benchmarking in 2025. These buildings are required to meet net-zero direct greenhouse gas and site energy use intensity targets (by building type) by January 1, 2040.³

The Maryland Department of the Environment (MDE) [presented](#) its draft regulation to the Air Quality Control Advisory Council in September 2023. The companion regulation was advertised in the Maryland Register on December 15 with a goal of final adoption in 2024.

² Site energy use intensity (site EUI) measures annual energy used on-site at the building per gross square foot.

³ See the [MDE BEPS website](#) for more details on the State law and draft regulation.

DEP staff have noted that the EUI targets in the County regulation generally align with the MDE targets. However, further discussion is needed of how the State regulation could impact the Montgomery County regulation (i.e. whether Montgomery County's regulation is preempted or not).

UPDATE: As of early February the General Assembly's Administrative, Executive and Legislative Review (AELR) Committee had notified MDE that the Committee intends to put MDE's regulation on hold; pending further review by the Committee of the economic impacts of the regulation.

Executive Regulation 17-23

Compliance

Building owners must report annually by June 1 of energy improvement measures implemented in the previous calendar year.

If a building is determined to have met its final performance target or has fulfilled all the requirements of the approved BPIP, then the building owner may apply for the termination of the covenant.

Bill 16-21 includes several provisions under which the DEP Director may provide deadline extensions and adjustments to the compliance plans. The bill also provides that additional provisions can be included in the companion regulation.

Regulation 17-23 includes some additional provisions under which the DEP Director can grant an extension to an interim or final performance standard, including:

- If, on average, less than one full-time-equivalent employee or occupant utilized the building during the calendar year being reported.
- A change in building ownership where the building owner could not obtain necessary benchmarking data for the interim or final performance standard year.
- Affordable housing refinancing timelines that do not align with interim or final performance standard dates.
- A building is subject to historic preservation requirements.

Renewable Energy Allowance

The renewable energy allowance will credit all electricity use generated from onsite renewable energy systems. The renewable energy system must be physically located on the building or the building site for the energy generation to be credited.

The transmittal package notes that ownership of the renewable energy credits (RECs) associated with the onsite renewable energy generation is not required to qualify for the allowance.

DEP staff believe this approach will encourage the development of onsite renewable energy systems by providing more cost-effective options to building owners, who could choose to own their systems (and sell the associated RECs each year to improve the payback period) or who could more

affordably lease these systems or have a power purchase agreement (PPA) through a third party who would own the system and the RECs.

One alternative approach would be to require the building owner to own the associated RECs (i.e. not sell them each year) or in the case of a lease or a PPA, to require the property owner to purchase an equivalent number of RECs on the market to receive the renewable energy allowance.

Building Performance Improvement Plans (BPIPs)

Regulation 17-23 details the requirements of the BPIPs including:

- Supporting documentation is required that demonstrates economic infeasibility⁴ or other circumstances outside the building owner's control that prevent the building from reaching the interim or final site EUI targets.
- The results of an ASHRAE level 2 energy audit performed not more than four years earlier.
- An assessment that evaluates the initial cost and annual energy savings of potential upgrades in existing equipment, electrification feasibility for replacement of fossil fuel combustion equipment, and onsite renewable energy systems.
- A retrofit plan that identifies the energy improvement measures that will be made in the building, and when the measures will be done, along with the predicted energy savings/renewable energy generation.

The BPIP must be completed by an energy auditor credentialed as a building energy auditor, a professional engineer, or other professional with credentials recognized by the DEP director.

The plan is subject to review and approval by the DEP Director. The Director may request additional information and assessments. If the BPIP is not approved by the Director, then the building owner must meet the applicable interim and final standards or be considered non-compliant.

⁴ The definition of "economic infeasibility" was revised in the Executive transmittal from what was included in the regulation in the November County Register. The new definition focuses on the payback period of the improvements rather than the financial condition of the property owner. Economic infeasibility is defined as the simple payback of the energy improvement measure package required to meet the interim or final standard being more than 25 years. For "under resourced" buildings (a qualified affordable housing building, a common-ownership community, a non-profit owned building, or a local small business owned building) economic infeasibility is defined as a simple payback of more than 10 years.