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**NRDC Comments on the Draft Program Guidelines for the BUILD Program**

*Additional submitted attachment is included below.*

# **Comments of the Natural Resources Defense Council (NRDC) on the Draft Program Guidelines for the Building Initiative for Low-Emissions Development (BUILD) Program**

## **Docket Number 20-DECARB-01**

Submitted: December 15, 2021

Submitted by: Merrian Borgeson and Kiki Velez

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On behalf of the Natural Resources Defense Council (NRDC) we respectfully submit the following comments on the proposed Building Initiative for Low-Emissions Development (BUILD) Draft Program Guidelines.

### **I. Summary**

While there are some positive improvements to the program design that are notable, we are concerned that several elements of what is being proposed are ill-advised and directly threaten the success of the program. In particular, the Evaluation, Measurement & Verification (EM&V) plan is poorly designed, will not serve the purpose intended, and will inhibit participation. Similarly, the CEC's legal guidance on prevailing wage is misleading and will create uncertainty that will similarly dampen participation. We anticipate that these unnecessary barriers will be more likely to dissuade developers that are new to all-electric design, for whom participation will already be a stretch, which would do a fundamental disservice to the primary intention of the program to enable a transition in the affordable housing market to all-electric new construction.

We recommend the following:

- The Proposed EM&V Requirements should be abandoned and entirely reworked so that the EM&V supports the success of BUILD instead of undermining its impact.
- The statement in the Guidelines on triggering prevailing wage is misleading, and will result in both unwarranted confusion and an unnecessary reduction in program participation. BUILD program participation would only trigger a new prevailing wage requirement for a developer if the incentive for a project is more than \$600,000 or 2 percent of the total project cost.
- Start with an initial cap of \$1.5 million per applicant in the first program year, and increase as needed based on the initial program experience and feedback from the technical assistance providers.

- Increase maximum New Adopter Design Award to \$100,000 and provide up to \$2 million in total funding for these awards

## II. Recommendations

### A. The Proposed EM&V Requirements should be abandoned and entirely reworked so that the EM&V supports the success of BUILD instead of undermining its impact.

As a stakeholder that was actively engaged in both the development and passage of SB 1477, and in the last three years of process that has led to the imminent launch of the BUILD program, we are deeply concerned to see this eleventh hour proposal for EM&V<sup>1</sup> that so fundamentally misconstrues the purpose of this program and the role of EM&V to support this program and provide information about its impacts.

Instead of outlining a workable plan to provide the information required by statute (i.e., number of systems installed, projected utility bill savings, and the cost per metric ton of avoided GHG emissions) along with what we anticipated would be a proposal that included **early program engagement to improve participant attraction and experience in order to boost the market transformation impact of this program**, the evaluator spends the entire proposal describing an impractical and invasive plan that includes requiring affordable housing developers to do the following:

- Choose products from an array of complex and new-to-market choices,<sup>2</sup> procure them, and have them installed. Then apply for reimbursement for the incremental costs of the products, which are not specified in the document.
- Ensure access to and pay for a wireless internet connection for the monitoring devices, apparently for the life of the equipment according to comments by the evaluator at the December 6 workshop, which in many cases will be 10-20 years or more.
- Obtain consent from the low-income households residing in the building for the CPUC and program evaluator to collect data from the installed monitoring devices, which would include real-time energy use data from “program-incentivized heat pump space conditioning equipment, heat pump water heaters, smart thermostats, cooktops, clothes dryers, additional on-site solar and energy storage, and electric vehicle supply

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<sup>1</sup> The document entitled “Proposed Evaluation Measurement and Verification Requirements for the Building Initiative for Low Emissions Development Program” (December 3, 2021) is referred to here as the “Proposed EM&V Requirements” or “EM&V Proposal.”

<sup>2</sup> As described in Section 3 of the EM&V Proposal.

equipment.”<sup>3</sup> The potential liability issues that this could create for affordable housing developers, in addition to the administrative ones, almost certainly guarantees the failure of the evaluators’ approach as affordable housing developers cannot legally compel their residents to grant use of their private information, nor will they be likely feel comfortable requesting this permission from residents due to privacy concerns.

- “Facilitate” occupant surveys, interviews with project professionals, and access to the property, possibly over the life of the equipment (though the timeframe was not clear from the proposal or the presentation).

The BUILD program is intended to achieve market transformation by supporting affordable housing developers, through technical assistance and incentives, to transition to all-electric buildings that reduce GHG emissions while maintaining affordability for residents. The proposal does nothing to assess what support is most beneficial in assisting affordable housing developers in this transition, and how to improve future programs. Instead, it places burdens on participants that are likely to dissuade all but the most sophisticated affordable housing developers. The type of assessment proposed is appropriate to a technology assessment grant, which the CEC has funded for heat pump in other forums, but entirely misses the mark for what is needed to support and learn from a market transformation program.

It appears that the proposed approach is based on a misunderstanding of the purpose of EM&V for a program such as this, as well as a mis-read of the CPUC record. The proposal refers many times the need for “real-time” feedback, and makes the false assumption that this means continuous monitoring of the energy use of each appliance. The record in no way supports this. Here are the referenced sections in D.20-03-027 issued in April 2020:

The program evaluator shall be continuously engaged throughout the initiation of these pilot programs and during the administration of them. This should occur in as close to real time as possible so that timely, substantive feedback can be used to change course when and if appropriate, and to ensure the success of these pilot programs (pages 38-39).

The program evaluator shall be engaged throughout the initiation of the two pilot programs and during the administration of them to ensure that substantive, real time feedback is given, and data and information gathering is meaningful to support the success of these pilots (page 94).

To provide more context from the CPUC record, this decision was directly informed by comments made by NRDC and other parties. In particular, NRDC, the California Environmental Justice Alliance (CEJA), and Sierra Club submitted feedback on the Staff Proposal on August

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<sup>3</sup> EM&V Proposal, pdf page 7.

13, 2019 which included some of the same language that is in the wording of the final decision. In these comments we argued:

It is also important that the evaluator be closely engaged with the program administrators and implementers during program design to ensure the program is set up with the evaluation needs in mind. In addition, evaluators should be continually engaged throughout the launch and running of the programs to provide real-time feedback, and to ensure efficient tracking of data and other information that will be used in the evaluation. We strongly recommend that the RFP for the evaluator require experience evaluating market transformation programs, such as those in the Pacific Northwest that have been launched through the Northwest Energy Efficiency Alliance (NEEA) where evaluation is more integrated into the program design and implementation to enable real-time feedback and more immediate improvements. The Commission should confer with NEEA staff to better understand reasonable evaluation costs and how best to integrate evaluation into program implementation.<sup>4</sup>

The “real-time” feedback early in the program is to **support program uptake and participant experience**, as is done in the more integrated evaluation work seen in the Pacific Northwest for market transformation programs. The “success of these pilots”<sup>5</sup> reasonably refers to market transformation and program uptake—*not* to individual appliance energy use monitoring over the life of the appliance. The decision also states that data and information gathering should be “meaningful” to support the success of these pilots. While data and information gathering are not specifically defined in the decision, the data that Opinion Dynamics proposes to gather would not be “meaningful” to the success of the pilots. It would trickle in (if consent is, in fact, obtained from residents) over many years after the projects are built and only provide information about the energy use of specific appliances. Instead of contributing to program success, the barriers created by this approach would more likely *hinder* program success by placing a burden on potential applicants that reduces participation.

Additionally, D. 20-03-027 states that “The CEC shall also collect program performance data and information to inform evaluation and lend insight to program successes and failures. Data collection plans should be coordinated with the Commission and the program evaluator.”<sup>6</sup> “Program performance data” does not mean real-time appliance energy use – it is meant to encompass data that “lends insight to program successes and failures,” and that is based on the

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<sup>4</sup> Opening Comments of the Natural Resources Defense Council (NRDC, the California Environmental Justice Alliance (CEJA) and Sierra Club on the Administrative Law Judge’s Ruling Seeking Comment on the Staff Proposal for Building Decarbonization Pilots, submitted in R. 19-01-011 on August 13, 2019, page 6: <https://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=311582830>

<sup>5</sup> D. 20-03-027, pages 38-39 and 94.

<sup>6</sup> D. 20-03-027, page 52.

program's success in transforming the market by reaching new affordable housing developers and assisting them in transitioning to all-electric new construction.

The Proposed EM&V Requirements also fail to meet their own stated goals, which are described in the plan:

There are four overarching goals for the BUILD evaluation plan:

- (1) to evaluate effectiveness of the BUILD program's implementation,
- (2) to evaluate program impacts in terms of GHG savings, utility bill savings, energy savings, non-energy impacts, and cost-effectiveness, and
- (3) to evaluate BUILD program's long term market impact.
- (4) Ensure implementers comply with California Air Resources Board rules regarding Cap-and-Trade funds

The program evaluator is proposing an embedded evaluation approach so that real-time, robust data and results can continuously inform program design, implementation enhancements and policy decisions. This approach will enable data-based course correction with short feedback loops as envisioned in D.20-03-027.<sup>7</sup>

The plan includes nothing about (1) evaluating the effectiveness of program implementation or (3) evaluating BUILD's long term market impact. It is also false to assume that appliance energy use consumption collected after a project is built could "continuously inform program design, implementation enhancements and policy decisions" or enable "course correction with short feedback loops." This data will be received well after the initial roll out and year or two of program implementation because the projects have to be built to start transmitting energy use data, and is not relevant to questions about the effectiveness of program implementation or the program's impact on long term market transformation.

Given the fundamental disconnect between this proposal and the success of the BUILD program, we recommend the following:

1. **Immediately abandon this approach and make a commitment that any EM&V will not harm the success of the program, further delay its launch, or place additional burdens on affordable housing developers.** We strongly suggest that this be the first screen for the redesign of EM&V for this program going forward.
2. **Limit any EM&V work only to meeting the basic requirements of statute,** unless it can be demonstrated that the EM&V plan does not inhibit program success or delay the program launch.

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<sup>7</sup> EM&V Proposal, pdf page 6.

3. **Consider ways that EM&V could in fact support program success.** Ideally, the CEC would have already been working with Opinion Dynamics closely to clarify the data needs for evaluating the BUILD Program in a way that would support its success. For example, information about the affordable housing developers in California, what would motivate them to participate, their experience once in the program, and how this initial experience may or may not translate into changing their ongoing design practices. Given the EM&V proposal provided for review, we are not confident that the evaluator is capable of this significant change in direction especially so late in the game, but this change in approach is worth at least considering.
4. **Consider using EM&V funding to provide optional professional commissioning services to affordable housing developers, and use this as a method to collect program data.** Commissioning of buildings is a formal process that happens right after buildings are constructed. It is essentially a testing and review of all the building systems to ensure they are performing as designed. Many buildings are never commissioned because it involves an extra step and expense, but this process has been shown to be extremely useful to ensure building performance. This idea was put forward by Katie Ackerly from David Baker Architects at the December 6 webinar. Commissioning should be offered to BUILD participants as an *option* (not requirement) and would provide the evaluators with data about the building's systems while also providing a benefit to the developer.
5. **If any element of appliance-level energy monitoring is kept, it should be optional and paired with additional funding that covers all costs.** Some of the questions asked by the evaluator are quite interesting and are appropriate to an intensive technical research initiative on product performance. For example, understanding “lifecycle performance, degradation curves and failure thresholds of these new technologies”<sup>8</sup> are worthy research questions. The CPUC and CEC could consider using a *small portion* of the EM&V budget support developers who *opt in* to a more intensive monitoring process and provide them with funding and assistance to participate in this research.

**B. The statement in the Guidelines on triggering prevailing wage is misleading and will result in both unwarranted confusion and an unnecessary reduction in program participation. BUILD program participation would only trigger a new prevailing wage requirement for a developer if the incentive for a project is more than \$600,000 or 2 percent of the total project cost.**

The draft guidance provided by the CEC is as follows:

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<sup>8</sup> EM&V Proposal, pdf page 7.



Applicants acknowledge acceptance of BUILD technical assistance or incentives may trigger public works laws (Labor Code Section 1720 et seq.), a requirement of which is to pay prevailing wages, applying to their entire project. Applicants are responsible for complying with all applicable laws, which can include public works requirements. Only the California Department of Industrial Relations (DIR) and courts of competent jurisdiction may issue legally binding determinations that a project is or is not a public works project. Applicants shall assume their projects are public works unless they obtain a determination to the contrary from DIR or an appropriate court. As such processes can be time-consuming, please plan accordingly. Without such a determination, applicants shall explain how they have included appropriate budgets for prevailing wages.<sup>9</sup>

While it is technically true that “only the DIR and courts of competent jurisdiction may issue **legally binding determinations** that a project is or is not a public works project” (emphasis added), this statement and the sentence that follows are misleading because they imply that acceptance of BUILD funds will automatically trigger the requirement to pay prevailing wage, regardless of the incentive amount received.

This section also creates the program **requirement** that applicants must go through a court process or pay prevailing wages, implying that the only legally sound way to determine if prevailing wages applies is through such a process. While prevailing wages may apply to projects for other reasons, such as the source of general funding for the project, the threshold for BUILD program incentives to trigger prevailing wage are clear in Labor Code Section 1720, which states that recipients of “de minimis” public subsidies are not subject to public works laws as a result of receiving this funding.<sup>10</sup> The statute defines a public subsidy as de minimis “if it is both less than six hundred thousand dollars (\$600,000) and less than 2 percent of the total project cost.”<sup>11</sup>

The phrasing of this section is not only confusing, but it could result in an unnecessary reduction in program participation. For example, the last sentence of the section requires all applicants without a DIR determination to “explain how they have included appropriate budgets for prevailing wages” – regardless of whether the incentive they receive is large enough to trigger public work laws. At the same time, the Guidelines themselves acknowledge that the process of receiving a DIR determination can be “time-consuming.” Clearly, this requirement imposes a burden on applicants that could discourage program participation.

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<sup>9</sup> BUILD Draft Guidelines, page 31.

<sup>10</sup> Labor Code Section 1720 (3)(A), “If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to this chapter.”

<sup>11</sup> Labor Code Section 1720 (B)(i)

It is improper and unnecessary for the CEC to create additional legal hurdles for affordable housing builders. The CEC should not “advise” applicants on how to interpret laws nor add unnecessary requirements. Instead, the guidelines should note the relevant legal code and allow developers – who have lawyers familiar with the requirements associated with accepting various forms of public funding – to assess and decide the appropriate course of action.

**C. Start with an initial cap of \$1.5 million per applicant in the first program year, and increase as needed based on the initial program experience and feedback from the technical assistance (TA) providers.**

At a cap of \$3 million per developer, it would be possible for only 20 developers to utilize *all* of the \$60 million in available BUILD funds in the first year of the program. Yet, according to Tax Credit Allocation Committee (TCAC) data, there are at least 150-200 unique affordable housing developers in California. Therefore, setting the first-year cap at \$3 million per developer might result in a situation where the developers that are ready to apply immediately – namely seasoned, sophisticated affordable housing developers who may have some all-electric experience – drain the BUILD budget before developers with less familiarity with all-electric design are ready to apply. This would undermine the main goal of the BUILD Program, which is to transform the market for all-electric construction and requires bringing new developers into the fold. To prevent this situation, the CEC should set the cap at \$1.5 million per applicant for the first year of the program. This cap is high enough to encourage program participation while protecting the opportunity for developers new to all-electric design to partake in the program beyond the first year, when they are prepared through technical assistance to pursue their first all-electric affordable housing project.

Setting the cap at \$1.5 million per applicant for the first year will also provide the CEC the opportunity to assess program uptake after the first year of BUILD and adjust the cap as necessary to ensure program participation. Ultimately, the target should be to distribute *all* of the BUILD incentive money over the course of the program while also ensuring that the program meets its goal of market transformation by reaching developers that are new to all-electric design. Lowering the first-year cap to \$1.5 million and increasing it as needed in future years is the best way to ensure this goal is met.

**D. Increase maximum New Adopter Design Award to \$100,000 and provide up to \$2 million in total funding for these awards**

To encourage program participation by developers that are new to all-electric design, the CEC should increase the maximum New Adopter Design Award from \$25,000 to \$100,000 per applicant. The goal of the BUILD Program is to transform the market for all-electric

construction, which requires reaching developers who otherwise would not have built all-electric. The current maximum New Adopter Design Award of \$25,000 is too low to do this – especially given the strict timelines and budget constraints of affordable housing projects and the perceived difficulty of first-time all-electric construction. Instead, the CEC should adopt a maximum award of \$100,000 to meaningfully influence project decisions at the beginning of a developer’s project, when the money has the greatest leverage over design choices. This would be a reasonable use of BUILD funds, furthering the “Progress Payment” proposal’s goal of aligning incentive payments with developers’ decision-making timelines.

In addition to raising the maximum award amount to \$100,000 per applicant, the CEC should increase the total funding pool for the New Adopter Design Awards from \$1 million to \$2 million. This would ensure that at least twenty new developers can take advantage of the award money. Together these measures would strengthen the New Adopter Design Award proposal and improve the overall impact and reach of the BUILD Program.

### **III. Conclusion**

Thank you for the opportunity to comment. We look forward to working with the CEC and stakeholders to deploy an effective and equitable BUILD program that helps put California on the path to safe, healthy, and decarbonized buildings.

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