Guarini Center
on Environmental, Energy
& Land Use Law
NEW YORK UNIVERSITY SCHOOL OF LAW

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Comments re: Proposed Rule Implementing Penalties for Article 320 of Local Law 97

The Guarini Center on Environmental, Energy & Land Use Law ("Guarini Center") is a university-based research center housed in New York University's School of Law that is devoted to advancing innovative energy and environmental policies for a sustainable and equitable economy. In 2020-2021, the Guarini Center worked with the then Mayor's Office of Sustainability to study the potential for New York City to develop a carbon trading program to help achieve Local Law 97's objectives. With that aim in mind, we offer the following comments on the rules establishing penalties for noncompliance with Article 320 of Chapter 3 of Title 28 of the New York City Administrative Code proposed by the Department of Buildings in September 2023.[1]

1. The Extensive Good Faith Compliance Mechanisms Are Unfortunate and Should Not Be Replicated.

We appreciate the efforts of the Department's staff to ensure that Local Law 97 is implemented. New York City has long been a global leader in city-level climate action. Local Law 97 was one of the first building greenhouse gas (GHG) emissions performance standards implemented in the nation, and it has been a model for action across the country, including at the federal level. In light of this leadership, it is unfortunate that the administration has concluded that it is necessary to define "good faith" compliance so broadly. Indeed, the decarbonization plan as structured will effectively delay the enforcement of the law for two years for those buildings that elect this new option.

If the administration continues to believe that an expansive definition of "good faith" compliance is necessary for the 2024-2029 period, then the ability to mitigate penalties by submitting a decarbonization plan should be a one-time only exception. The administration should not open the door to delaying enforcement of the building emissions limits for 2030 or any other compliance period. As a vanguard of municipal climate action, the City must show that it is not enough to merely pass ambitious climate change laws, but they must also be robustly and fully implemented.

2. The Department Should Include More Guardrails in the "Good Faith" Compliance Definition and the Mediated Agreements to Promote Compliance Now and For Future Compliance Periods.

A. Decarbonization Plan [proposed 1 RCNY § 103-14(i)(2)(iv)(a)]

- The Department should publish a list of buildings utilizing a decarbonization plan and the contents of those plans. It is essential for the public to have access to information about a building's compliance when buying or renting property covered by Local Law 97, considering the serious financial risks associated with out-of-compliance buildings. Buildings should also be required to share their plans with all tenants or co-ops and condo owners.

- The Department should prohibit the use of carbon offsets with a decarbonization plan. This recommendation is consistent with the proposed rule's bar on utilizing renewable energy credits (REC). The GHG emissions impact of carbon offsets is dubious, as many offsets do not result in additional GHG emissions reductions as they claim.[2] As a result, at best, carbon offsets complicate

[1] These comments do not represent the views of New York University or New York University School of Law, if any.
[2] For resources on the well-established verifiability and additionality concerns with carbon offsets, *see generally* Thales West, et al., *Action Needed to Make Carbon Offsets from Forest Conservation Work for Climate Mitigation,*

compliance by requiring ongoing monitoring and accounting; at worst, they waste building and Department resources that otherwise can ensure actual reductions in on-site emissions and reduce local co-benefits from reduced carbon emissions. Because of the well-documented challenges in accounting for carbon offsets' actual impact on GHG emissions, despite similar environmental integrity principles as required by Local Law 97, allowing buildings relying on a decarbonization plan to also purchase offsets would harm progress towards on-site emissions reductions goals.

- The Department should clarify what would be considered a landlord planning the removal of a tenant under proposed section 103-14(i)(2)(iv)(a)(4). The current definition is unclear. For example, if a building plans to raise rents, would the Department infer a plan to remove tenants?

- The Department should define a "capital plan" as required by proposed section 103-14(i)(2)(iv)(a)(4)(ii) in greater detail. The contents should include potential sources of funding, expected costs based on reliable sources of information, and an overall project budget.

B. Electrification Readiness Plan [proposed 1 RCNY § 103-14(i)(2)(iv)(c)]

- The Department should require that buildings submitting an electrification readiness plan meet 2024 limits by a set date. As proposed, buildings submitting electrification readiness plans are not required to meet emissions reduction targets in the short term, show progress towards 2030 emissions reductions, or undergo long-term planning. Those requirements are strong elements in the decarbonization plan, and the electrification readiness plan would more robustly ensure future compliance if it included similar requirements. We recommend that these buildings must meet their 2024 limits by 2026. Even if the Department thinks 2026 is too soon, we emphasize it is important for there to be a required date by which these buildings must meet 2024 emissions limits.

- These buildings should also be required to show progress towards 2030 or other future targets. Similar, if not identical, requirements in the decarbonization plan should be applied to buildings pursuing electrification readiness. Buildings could be required to complete applications for work to meet 2030 emissions limits by 2028, required to implement specific energy efficiency measures, similar to Article 321 buildings, or develop a long-term plan to reach 2050 limits.

- For the reasons stated above, the Department should prohibit buildings submitting electrification readiness plans from relying on RECs and carbon offsets, to meet 2024-29 limits.

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381 SCIENCE 873 (2023), https://doi.org/10.1126/science.ade3535; Barbara Haya, et al., *Comprehensive Review of Carbon Quantification by Improved Forest Management Offset Protocols*, 6 FRONTIERS FORESTS & GLOB. CHANGE (2023), https://www.frontiersin.org/articles/10.3389/ffgc.2023.958879/full; Raphael Calel, et al., *Do Carbon Offset Carbon?*, CESifo Working Paper No. 9368 (2021), https://dx.doi.org/10.2139/ssrn.3950103; Grayson Badgley, et al., *Systematic Over-Crediting in California's Forest Carbon Offsets Program*, 28 GLOB. CHANGE BIO. 1433 (2021), https://doi.org/10.1111/gcb.15943; Heidi Blake, *The Great Cash-For-Carbon Hustle*, THE NEW YORKER (Oct. 16, 2023), https://www.newyorker.com/magazine/2023/10/23/the-great-cash-for-carbon-hustle; Patrick Greenfield, *Revealed: More than 90% of Rainforest Carbon Offsets by Biggest Certifier Are Worthless, Analysis Shows*, THE GUARDIAN (Jan. 18, 2023), https://www.theguardian.com/environment/2023/jan/18/revealed-forest-carbon-offsets-biggest-provider-worthless-verra-aoe

- As it should for the decarbonization plans, the Department should publicly list the buildings relying on electrification readiness plans, and make those plans publicly available.

C. Mediated Resolutions [proposed 1 RCNY § 103-14(j)]

- A mediated dispute resolution agreement should attach to the building. Proposed rule § 103-14(j)(2) states that the Department may offer a mediated resolution to an *owner* if they have shown good faith efforts to comply, foregoing enforcement so long as the *owner* follows the agreement. Because these agreements are contracts with the owner, it is not clear whether they would bind subsequent owners in the event of a sale. Therefore, we recommend the Department amend these provisions to ensure the agreement attaches to the building, not just the owner.

  There are likely several ways the Department could achieve this. One possibility is structuring an agreement as a *post-enforcement* action. A building would receive a violation for exceeding emissions limits, then the Department would *suspend* a penalty pursuant to the agreement. This would attach any violations to the title, notifying prospective buyers of the issue, and incentivizing compliance with the mediated agreements.

- The Department should specifically preserve its discretion to impose a penalty. The proposed rule states that the terms of the mediated resolution agreement "may contain such provisions as may be agreed upon by the Department and the owner." The Department should specifically state in the rules that those terms can include any penalties the Department sees are necessary in light of the circumstances.

D. General Recommendations

- The Department should publicize the compliance status of all buildings. In addition to making public buildings' decarbonization and electrification readiness plans, the Department should publish the status of all buildings, both in- and out-of-compliance with the law. Notably, Tokyo has successfully utilized public lists to spur compliance with its own building emissions policy. The list includes the out-of-compliance buildings, current emissions levels, and decarbonization plans; but buildings exceeding emissions reductions targets are celebrated.[3] A similar disclosure tool could be developed for the New York context.

  Additionally, more public information would ensure transparency in the real estate market, increase public confidence, and improve policy development. First, knowledge of the building's compliance status and potential plans is essential information for current tenants and unit owners, along with prospective renters or buyers, given Local Law 97's financial implications.

  Second, increased transparency would increase public confidence in the implementation of the law. In the context of the proposed rulemaking, the limited public information about the subset of Article 320 buildings that might use the good faith compliance options makes it difficult to assess the efficacy of these exceptions. Providing additional information about the extent of the

[3] INT'L CARBON ACTION P'SHIP, *Japan - Tokyo Cap-and-Trade Program Factsheet*, https://icapcarbonaction.com/system/files/ets_pdfs/icap-etsmap-factsheet-51.pdf (last visited Oct. 16, 2023); TOKYO METRO. GOV'T, "Tokyo Cap-and-Trade Program" for Large Facilities, May 2015, http://www.kankyo.metro.tokyo.jp/en/climate/cap_and_trade/index.files/TokyoCaT_detailed_documents.pdf.

need for the exceptions and which buildings might use them would bolster public understanding of the rationale for the rule, and increase confidence in enforcement going forward.

Finally, greater details on buildings' progress towards meeting reduction targets could help researchers propose policies specifically tailored towards assisting buildings decarbonize. These efforts would not only assist New York as it moves forward, but also other municipalities across the country and the world who will follow New York's example.

- The Department should clarify the last three proposed types of "good faith compliance." In the proposed rule, three of the statutory mitigating factors in City Administrative Code § 28-320.6.1 are listed as definitions of good faith under proposed 1 RCNY § 103-14(i)(2)(iv): Part (d), demonstrating past compliance; Part (e), critical facilities; and Part (f), compliance with an adjustment. It is confusing to include them as a part of good faith, because these factors have distinct statutory requirements, especially adjustments. Instead, these categories should be listed as three distinct penalty mitigation factors under proposed § 103-14(i) to mirror statutory structure.

3. Amend Local Law 97 to Allow Trading Within NYC Post-2030 and Index the Penalty to Inflation

In closing, we take this opportunity to suggest that, once the Department has promulgated the rules necessary for the 2024-2029 compliance period, the Department should work with the City Council to make several legislative amendments to Local Law 97.

A. RECs and offsets should be eliminated as alternative compliance mechanisms.

- To start, the lack of local control over RECs and resulting uncertainty undermine their efficacy as a compliance mechanism. REC prices, the quantity of available RECs, and the timing of their availability are beyond the control of the City because RECs are governed by state agencies. The Department's "REC Policy for LL97" suggests that RECs will not be an economically attractive compliance option for many buildings in 2024-2029, but this cannot be accurately predicted. This policy also forecasts that few buildings will rely on RECs, thus undermining any arguments for retaining RECs as a compliance mechanism.

- And, as discussed above, carbon offsets are a largely unreliable method of reducing GHG emissions. Verifying offsets is a challenge for the City, and the City does not control the price or availability of offsets.

- Therefore, the City should limit the vulnerability of Local Law 97 to decisions made by state agencies or private actors beyond the control of the City. Instead, the City should utilize compliance mechanisms that reliably reduce local emissions. Reducing local GHG emissions will bring additional air quality improvements through the reduction of co-pollutants, a priority for environmental justice communities.

B. Instead, we recommend that the City should implement an emissions trading program.

- A carefully designed emissions trading program implemented in 2030 would provide buildings with a flexible compliance mechanism that would better serve the goals of decarbonizing the building stock while centering environmental justice. This program would enable the City to better control the pace and timing of GHG emissions reductions by buildings by removing the

uncertainties created by state decisions about REC supply and pricing and the uncertainty of offsets. A properly designed cap and trade program would provide buildings with flexibility in the timing of their emissions reductions, while ensuring that the City's goals for reducing GHG emissions are met and advancing environmental justice.

- There are existing proposals for an emissions trading program for New York City that could be used to develop a program to start in 2030. In 2020-2021, the Guarini Center worked with the City to develop two representative samples of a possible cap and trade program that satisfied a range of metrics defined by the City, including ensuring protections for environmental justice communities.[4] The second proposal is the simpler of the two proposed programs and it could be implemented by the City without state legislation. There were some concerns in 2021 that the proposal would increase air pollution in environmental justice communities compared to Local Law 97 without trading.[5] With the City Council's vote to accelerate the phase out of fuel oil #4, the basis for these concerns has largely been addressed.[6]

C. Finally, the penalty should change with inflation.

- We recommend the Department work with Council to ensure that the penalty is adjusted automatically to reflect inflation. Left untouched, over time, the maximum statutory penalty of $268 per ton of CO_2E over emissions limits likely will be less than the cost of compliance due to inflation. If the cost of compliance is more than paying the penalty, the incentive for a building to comply instead of just paying the penalty will substantially decrease. The deterrent value of the $268 penalty has already declined in the four years since Local Law 97 was passed due to inflation; $268 in April 2019 is the equivalent of $322.79 in September 2023 nationally.[7]

Overall, we believe that implementing the above recommendations can further ensure that the goals of Local Law 97 are met long-term and urge the Department to amend the proposed rules to reflect these comments. We reiterate our concern that providing too much flexibility in compliance will delay the implementation of Local Law 97 and undercut progress towards meeting decarbonization goals. We are happy to answer any questions that Department staff may have and thank them for their hard work in preparing these rules.

[4] Spiegel-Feld, D. et al. (2021). *Carbon Trading for New York City's Building Sector: Report of the Local Law 97 Carbon Trading Study Group to the New York City Mayor's Office of Climate & Sustainability*. The report is available here: https://drive.google.com/file/d/1Kmx-tRlDUBkYwrHl4q85vMSty7F4OpOs/view.

[5] DEP'T OF BUILDINGS, NEW YORK CITY, *Local Law 97 Advisory Board Report* 26 (2022), https://www.nyc.gov/assets/sustainablebuildings/downloads/pdfs/ll97_ab_report.pdf.

[6] NEW YORK CITY COUNCIL, "Council Votes to Expedite Phasing Out Fuel Oil Grade No. 4 in Boilers Across the City, Resulting in Cleaner Air, Especially in Environmental Justice Communities" (Feb. 16, 2023), https://council.nyc.gov/press/2023/02/16/2354/.

[7] U.S. BUREAU OF LAB. STAT., *Consumer Price Index Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl (last accessed Oct. 20, 2023).