

February 3, 2022

Comments re: Climate Action Council Draft Scoping Plan

The Guarini Center on Environmental, Energy & Land Use Law (“Guarini Center”) appreciates the opportunity to provide comments regarding the New York State Climate Action Council Draft Scoping Plan (the “draft Scoping Plan” or the “plan”).¹ The Guarini Center is a think tank housed in New York University’s School of Law that is devoted to advancing innovative energy and environmental policies for a sustainable economy. To that end, we respectfully submit the following observations on the plan’s chapter 12 on buildings. Our comments draw heavily from a recent study that the Guarini Center led for New York City into whether New York City should develop a carbon trading program for buildings pursuant to Local Law 97 of 2019 (“the Carbon Trading Study”).²

We have five main observations regarding the draft Scoping Plan’s proposals for buildings:

1. New York City’s Local Law 97 (“LL97”) cannot be relied on to achieve widespread electrification of existing buildings in New York City, and thus additional steps will likely be necessary to achieve the State’s goals for electrifying buildings in New York City. The draft Scoping Plan states that “by 2050, 85% of homes and commercial building space statewide should be electrified with energy-efficient heat pumps.” (draft Scoping Plan, at 122). Given this goal, we would like to draw your attention to the fact that the Carbon Trading Study suggests that New York City’s signature building emissions law, Local Law 97 of 2019 (LL97), will not be sufficient to achieve the State’s goals for building electrification in New York City, even among the large buildings that LL97 regulates. To the contrary, the Carbon Trading Study found that the LL97 would spur relatively little electrification because the emissions caps that the law imposes are not stringent enough to incentivize most building owners to invest in electrification.³ (Carbon Trading Study, at 9).

In December 2021, New York City adopted Local Law 154 (“LL154”), which will require the electrification of new buildings in the City over time, by prohibiting the use of natural gas and other fossil fuels in new buildings starting in 2024. LL154 will not require the electrification of existing buildings in New York City, except to the extent that it requires the electrification of buildings that undergo extensive renovations. This means that LL97 is currently the principal legal spur to electrify the many existing buildings in the City that will still be standing in 2050, but as indicated above, LL97 seems unlikely to induce much electrification in these buildings.

¹ These comments do not represent the views of New York University or New York University School of Law, if any.

² 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-tRIDUBkYwrHI4q85vMSty7F4OpOs/view>

³ As you know, LL97 was passed before the Climate Leadership and Community Protection Act (CLCPA) was passed, so the LL97 standards appeared more technology-forcing than they will prove to be if the State meets the CLCPA’s timetable for grid decarbonization.

We urge New York State to assess the gap between the State's targets for building electrification in New York City and the electrification that LL154 and LL97 are expected to induce in buildings.⁴ Once this gap is well understood, City and State officials will then need to consider what additional policies should be adopted to promote building electrification in New York City and whether the City or State is the best jurisdictional entity to adopt the relevant measures.

One question the State will need to consider in thinking about new policies to encourage or mandate electrification is how to reconcile the different metrics that the City and State are using for buildings. New York City's LL97 measures buildings' compliance in terms of GHG emissions and does not explicitly privilege electrification over other means of achieving the targets such as energy efficiency. By contrast, the draft State Scoping Plan suggests a metric that would specifically require electrification. These metrics may need to be harmonized to reduce regulatory friction.

2. We strongly support the proposal to establish a New York State building performance standard based on energy efficiency. We support the draft Scoping Plan's proposal to establish a state building performance standard for existing buildings. We also believe the State is correct to peg such a standard to energy efficiency as opposed to greenhouse gas (GHG) emissions. There are two main reasons that we believe energy efficiency is a superior metric to greenhouse gas emissions: first, as the plan alludes to, cost-effective grid decarbonization requires an increase in energy efficiency alongside an increase in renewable energy.⁵ Second, the GHG intensity of grid-tied electricity is not within the control of building owners; this means that a regulation that measures compliance in terms of GHG emissions will necessarily create substantial investment uncertainty for building owners.⁶ Compared to a GHG performance standard, a standard that is focused on efficiency will both encourage the cost-effective decarbonization of the grid and provide the investment certainty that owners need to make long-term capital investments.

In formulating a building performance standard, the State should analyze the expected impacts of the proposed standard for the State as a whole, and for components of the State. For example, to facilitate informed policymaking, the cost impacts might be estimated for different building sectors (such as commercial, industrial, and residential buildings), and different geographies and groups (including environmental justice communities and non-environmental justice communities, building owners and tenants). The benefits of the building performance standard in terms of generating new investment in existing buildings and reducing local air pollution also should be evaluated state-wide and for different communities within the State. The State could use the analysis of the expected impacts to develop policies to mitigate the cost burdens that a building performance standard might impose on certain groups or sectors.

⁴ The analysis of the impacts of LL97 on electrification must take into account the decarbonization of electricity mandated by the CLCPA.

⁵ A number of recent academic studies have suggested that absent marked improvements in efficiency, building electrification could require substantial expansion of the electricity grid which would increase tariffs. See, e.g., Fournier et al. (2020). Implications of the timing of residential natural gas use for appliance electrification efforts. 15 *Environ. Res. Lett.* 124008; Gaur et al. (2020). *Deep Electrification of Residential Heating and Possible Implications: An Irish Perspective*. E3S Web of Conferences 173, 03003.

⁶ Environmental Protection Agency. (2021). *Building Performance Standards: Overview for State and Local Decision Makers*; Bugnion, V. et al. (2021). *Leading by Example: Building Performance Standards for Decarbonizing Federal Buildings*. Resources for the Future, at 16.; Spiegel-Feld, D., & Wyman, K. (forthcoming 2022). *Building Better Building Performance Standards*.

We suggest that the State also consider making its building performance standard tradable. The Carbon Trading Study indicates that it is possible to design a tradable standard that will achieve multiple goals, including increasing investment in environmental justice communities while also safeguarding such communities against potential increases in local air pollution. Trading could be superior to other means of providing owners flexibility such as allowing use of GHG offsets or Renewable Energy Credits because it ensures that energy reductions are made locally, thus producing local air quality improvements and reducing demand for electricity from the grid. (Carbon Trading Study, at 74–75).⁷

3. New York State should assess the impact of New York City’s benchmarking and building energy grade requirements on Disadvantaged Communities to determine whether these requirements have had any negative impacts on Disadvantaged Communities that the State should seek to avoid in implementing its own benchmarking program. The draft Scoping Plan calls for the State to adopt an energy benchmarking program. (draft Scoping Plan, at 129). We applaud the State’s interest in benchmarking, which we believe is an important prerequisite to developing effective building performance standards. Benchmarking also promotes consumer protection by providing prospective buyers and renters with more information about their future utility expenses; this enhanced transparency about utility costs could be highly valuable to low-income households given the prevalence of energy insecurity in New York State. Despite these apparent advantages, the draft Scoping Plan expresses concern that enhanced transparency about energy efficiency could harm Disadvantaged Communities. (draft Scoping Plan, at 129). In particular, the draft Scoping Plan posits that “[d]isinvestment could occur if disclosure or labeling of energy performance makes properties less attractive to potential renters and buyers, or conversely, demand for efficient buildings could price people out of the market for healthy housing in their community.” (draft Scoping Plan, at 129). Given that New York City has required energy benchmarking of its large buildings for a decade, and has also required broad disclosure via labeling since 2020, there is a growing repository of data available to empirically study whether benchmarking and/or disclosure in fact has adverse consequences on low-income households. We encourage the New York State Energy and Research Authority to investigate this issue. If the analysis reveals that benchmarking and letter grades have had negative impacts on Disadvantaged Communities, the State should endeavor to design its own benchmarking program in a manner that avoids these impacts.
4. New York State should carefully assess the legal pathways for requiring building electrification. The draft Scoping Plan indicates that “NYSERDA, DEC and DOS will collaborate to adopt regulatory requirements that will bring about the end of fossil fuel combustion in buildings by prohibiting replacement of fossil fuel equipment at end of useful life” (draft Scoping Plan, at 124). The plan also states that “NYSERDA should set zero emissions standards for the sale of building equipment, in coordination with DOS for enforcement. DEC should set and enforce zero emissions standards tied to the operation of large fuel burning equipment.” (draft Scoping Plan, at 129). Banning replacement of fossil fuel equipment could make an important contribution to electrifying equipment in buildings. However, depending on how the ban is formulated, it is conceivable that such a ban might be challenged in court as preempted by federal law, including the Energy Policy and Conservation Act, which has been interpreted in some contexts to have a surprisingly expansive preemptive effect. We think it would be useful to carefully examine the

⁷ See also Spiegel-Feld, D., & Wyman, K. (forthcoming 2022). *Towards Tradeable Building Performance Standards*.

potential for preemption in this context so that the proposal to ban replacement of fossil fuel equipment in buildings could be designed to minimize legal risk.

5. New York State should thoroughly analyze how building electrification might impact tenant utility costs in low and moderate income (LMI) housing. Some advocates have pointed out that electrification of heating systems in multifamily housing could potentially shift heating costs from landlords to tenants.⁸ Given the prevalence of energy insecurity in New York City in particular, it is important that the State thoroughly assess whether electrification could in fact increase households' utility burden so that the State can design appropriate safeguards against this potential. The Guarini Center is currently conducting an initial scoping analysis of this issue to determine whether there are gaps in the legal protections that leave households vulnerable to cost-shifting. Should we determine that cost-shifting is legally possible, we urge the State to conduct further research to determine the magnitude of the problem.

Thank you again for providing the opportunity to review the draft Scoping Plan and provide feedback. We would be delighted to discuss any of the points mentioned above in more detail if appropriate. The Guarini Center's Executive Director, Danielle Spiegel-Feld, can be reached at [REDACTED]

⁸ See, e.g., Urban Green Council (UGC). (2020). *Going Electric: Retrofitting NYC's Multifamily Buildings*, at 20.