October 24, 2023

New York City Department of Buildings
Office of General Counsel
280 Broadway, 7th Floor
New York, NY 10007

Via email: dobrules@buildings.nyc.gov

Re: Comments on Proposed Article 320 Rules

Dear Commissioner Oddo and General Counsel:

The undersigned organizations respectfully submit these comments on the proposed rules issued on September 12, 2023, implementing Article 320 of Chapter 3 of Title 28 of the New York City Administrative Code ("Proposed Article 320 Rules") and other portions of Local Law 97 of 2019 ("Local Law 97"). The proposed rules must be revised to ensure building owners are held accountable for reducing pollution in the manner and timeline set forth in the law.

New York City's Local Law 97, enacted in 2019 as part of the Climate Mobilization Act, is groundbreaking local legislation that requires large buildings across the city to reduce their greenhouse gas ("GHG") emissions starting in 2024. Buildings are by far the City's largest source of GHG emissions, accounting for roughly two-thirds of the total. During the four and a half years since the law's passage, owners have had ample time to implement efficiency measures and structural changes, and most covered buildings are already in compliance with the 2024—2029 emissions limits.[1] The remaining 11% of buildings must – under the terms of Local Law 97 – either seek an adjustment of the limits if they qualify, quickly come into compliance over the next few months, or face penalties.

Despite this clear legislative mandate, the Department of Buildings (DOB), in the proposed Article 320 rules, has crafted a free pass for the small number of building owners who have sat on their hands, allowing those buildings the option to continue polluting without facing

[1] Stephen Lee, *NYC Buildings Complying with Emissions Law Faster Than Expected*, Bloomberg L. News (Aug. 16, 2023).

any penalties. Provisions of the proposed Article 320 rules are contrary to Local Law 97 in four main ways:

(1) The proposed rules undermine the process set forth in the law for DOB to adjust individual buildings' emissions limits, by allowing buildings to exceed emissions limits without penalty even if they don't meet the statutory criteria to qualify for an adjustment;
(2) The proposed rules allow DOB to forego even a minimum recommended penalty, which the law requires, and gives to DOB power to set final penalties that the statute grants only to courts and administrative tribunals;
(3) The proposed rules include definitions of "good faith efforts" for the purpose of penalty mitigation that require no evidence that a building owner has made any efforts to comply with the law or acted in good faith; and
(4) The proposed rules fail to set limits on the amount of renewable energy credits ("RECs") building owners can use to comply with emissions limits, as required by Local Law 77 of 2023, which amended Local Law 97.

These provisions of the proposed Article 320 rules must be removed or revised. The existing law already provides multiple pathways for building owners that have tried but are unable to achieve emissions limits to avoid penalties by seeking an adjustment or receiving mitigated penalties. There is no need for DOB to provide a penalty-free pathway for recalcitrant building owners that have not acted in good faith to comply with the law. These proposed rules send a terrible signal that the City is not serious about the climate crisis, about air quality and environmental justice, or about holding companies that flout the law accountable.

I. The Proposed Article 320 Rules Allow Unlawful Adjustments to Building Emissions Limits.

1. Local Law 97 already includes an "adjustment" process for building owners who are unable to meet their emissions limits in time.

When passing Local Law 97, City Council contemplated that some owners of covered buildings might not be able to meet building emissions limits even if they did everything right. Accordingly, the Council built some flexibility into the law, allowing DOB to grant "adjustments" to building owners. Under the law, an "adjustment" is a temporary grant of a less stringent annual emissions limit. In effect, the adjustment provisions of Local Law 97 provide DOB with the ability to waive enforcement of the strict requirements of the law for up to three years.

The text of Local Law 97 indicates that City Council wanted to make sure that DOB only granted the adjustments as a last resort, and under qualifying circumstances. The law allows DOB to make adjustments **only** on a building-by-building basis and **only** after making a specific determination that the individual building owner has complied with Local Law 97 "to the maximum extent practicable." [2] City Council made clear that "to the maximum extent

[2] N.Y.C. Admin. Code § 28-320.7.

practicable" has a specific meaning under Local Law 97, which requires building owners seeking an adjustment to demonstrate that:

1. They have explored all available opportunities to seek federal, state, private and utility incentive programs and city funding.

2. They have tried, but been unable to meet the emissions limit by purchasing greenhouse gas offsets.

3. It is not reasonably possible to make the capital improvements necessary to comply with Local Law 97 for financial, legal, or technical reasons.[3]

In addition, an adjustment granted for financial reasons may only be one year long.[4]

2. DOB is unlawfully substituting the adjustment process with a less stringent "mediated resolution" process.

By creating this tightly circumscribed adjustment process, City Council struck a delicate balance between Local Law 97's overarching aim to achieve the rapid decarbonization of New York City's building sector amidst an escalating climate crisis, and the practical constraints building owners might face when acting in good faith to achieve that goal.[5] DOB's Proposed Article 320 Rules upend this balance by adding a new mediated resolution process that, in effect, allows the Department to grant adjustments to building owners without making the specific determination required by the text of Local Law 97.

Under the proposed Article 320 Rules, a building owner "not in compliance with the annual building emissions limits" can execute an agreement with DOB "not to bring an enforcement proceeding" against the owner.[6] These Proposed Article 320 Rules indicate that these non-enforcement agreements allow buildings to emit greenhouse gases above the statutory limit for several years, simply on the condition that building owners meet the statutory limit in later years. DOB suggests that it will use these non-enforcement agreements to achieve the annual emissions limit for non-compliant building owners at some date after 2024,[7] and allow

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[3] *Id*.
[4] *See* N.Y.C. Admin. Code § 28-320.7.1.
[5] Local Law 97 City Council Hearing Transcript for April 18, 2019, statement of Council Member Lander ("Every night when I get home my daughter … says to me, Dad, what did you do today about climate change? This planet that you're handing off to us needs urgent action …. [T]oday there's a lot to say … to be able to say we're passing the most aggressive action to reduce emissions and energy consumption in our largest buildings is extraordinary."); statement of Council Member Constantinides ("[I]f a building owner is suffering a *true* financial hardship, or have made good faith efforts to buy grid energy credits only to find out they can't them [sic], for instance, [DOB] is going to be empowered to help them out and get an adjustment *if really needed* …. There are talks about the Rockaways, Coney Island, and neighborhoods in Staten Island literally being wipe[d] off the map by the end of the century if we do not act. We see the seriousness of this and have to take real action,") (emphasis added).
[6] *See* Proposed Article 320 Rules §§ 14(j)(3)i, ii.
[7] *See* Proposed Article 320 Rules §§ 14(j)(3)i(iii) ("[T]he Department shall offer such resolution only where ... such resolution would facilitate the building meeting such building's annual emissions limit."); *see also* Proposed Rules at 4.

DOB to collect back penalties for every year that the emissions deadline was extended if the building owner violates the non-enforcement agreement.[8] However, the Proposed Article 320 Rules still allow buildings to exceed emissions limits without penalty. For this reason, a non-enforcement agreement is indistinguishable from an adjustment as provided for under the law.

The mediated resolution process is unlawful because it does not incorporate any of the statutory criteria or time limits for adjustments. Instead of abiding by City Council's requirements, the proposed rules require only that the owner has made ambiguously defined "good faith efforts" to meet the annual emissions limit, that the mediated resolution "would facilitate the building meeting such building's annual emissions limit," and that the owner submits an annual building emissions report.[9] In addition, in contrast to the statutory adjustments, which can be granted for a maximum of either one or three years depending on the reason, the proposed mediated resolution process specifies no time limits.[10]

3. DOB's proposed mediated resolution process must be removed or rewritten to comply with Local Law 97.

Because Local Law 97 does not allow DOB to adjust an annual emissions limit unless DOB finds that the building owner satisfied the specific elements laid out in the statute by City Council, DOB must either remove the mediated resolution provision from the final rules or revise it to add distinct requirements from the adjustment process. For example, DOB could revise the rules to ensure that owners opting into the mediated resolutions process achieve additional emissions reductions in future years to make up for their excess emissions during the years covered by the non-enforcement agreement. To do this, DOB could make specific revisions to the regulatory text as proposed in red below:

(3) Mediated resolution. i. The Department may offer a mediated resolution to an owner not in compliance with the annual building emissions limits, provided that the Department shall offer such resolution only where (i) such owner has filed a report pursuant to section 28-320.3.7; (ii) such owner has demonstrated good faith efforts to meet such emissions limits, including but not limited to the criteria set forth in paragraph 2 of subdivision I of this section or other demonstrated effort to meet such limits; ~~and~~ (iii) such resolution would facilitate the building meeting such building's annual emissions limit *within a reasonable time~~.~~; and (iv) such resolution also requires that, after meeting said annual emissions limit, the building owner must make additional capital improvements, purchase additional offsets, or take other actions that result in additional reductions in emissions equivalent to the emissions in excess of the annual emissions limits for the years covered by the agreement.*

[8] *See* Proposed Article 320 Rules § 14(j)(3)iii ("Where such agreement covers more than one year, the owner may be subject to an enforcement proceeding and civil penalty ... for each calendar year that such owner is not in compliance with the annual building emissions limit during that time period.").
[9] Proposed Article 320 Rules § 14(j)(3)i.
[10] *See* Proposed Article 320 Rules § 14(j)(3)iii.

Using simplified numbers, the chart below illustrates this rule revision would bring the building owner into full compliance with Local Law 97, whereas the proposed rules would leave emissions unaccounted for in the same manner as an adjustment:

	2024	2025	2026	2027	2028	2029
Annual Emissions Limit Mandated by Local Law 97	100 tCO2e	100 tCO2e	100 tCO2e	100 tCO2e	100 tCO2e	100 tCO2e
Annual building emissions	150 tCO2e	140 tCO2e	110 tCO2e	100 tCO2e	100 tCO2e +30 tCO2e in additional reductions, e.g. through offsets, credits, DERs, or additional capital improvements	100 tCO2e +70 tCO2e in additional reductions, e.g. through offsets, credits, DERs, or additional capital improvements
Annual excess emissions	50 tCO2e	40 tCO2e	10 tCO2e	0 tCO2e	0 tCO2e	0 tCO2e
Cumulative "emissions debt"	50 tCO2e	90 tCO2e	100 tCO2e	100 tCO2e	70 tCO2e	0 tCO2e

Figure 1. Illustration of Hypothetical Building Owner's Excess Emissions Debt Under Revised Mediated Resolution Process Ending in 2029.

II. The DOB Does Not Have Power to Mitigate Penalties for Building Owners Who Violate Article 320.

Local Law 97 only allows DOB to recommend penalties, and grants authority to courts or administrative tribunals to determine the final penalty based on mitigating or aggravating factors. The Proposed Article 320 Rules allow building owners who are not compliant with Local Law 97 to become "eligible for a mitigated penalty based on mitigating factors" set forth by DOB.[11] However, DOB cannot unilaterally make Article 320 building owners "eligible for a mitigated penalty."[12] City Council simply did not grant this authority to DOB. To avoid confusion, the final rules must clarify that DOB can only *recommend* mitigated penalty amounts, while the ultimate decision on mitigation lies with a court or tribunal. Moreover, factors relevant for OATH or a

[11] *See* Proposed Article 320 Rules § 14(i).
[12] *Id.*

court to decide about penalty mitigation cannot be the basis for DOB to unilaterally, through the mediated resolution process, decide to issue no penalty at all.

1. DOB only has limited authority to issue summons and recommend penalties for building owners violating Article 320.

Under the statute, the Department has a very limited role in the collection of penalties: it may only issue administrative summonses to violators of Article 320 returnable to the Office of Administrative Hearings and Tribunals (OATH).[13] Local Law 97 also gives the Department of Buildings' Office of Building Energy and Emissions Performance the responsibility to *recommend* "penalties, including minimum penalties, for buildings that are noncompliant with applicable emissions limits."[14] The statute grants no additional authority to DOB to set penalties for Article 320 buildings.

2. Under the law, only courts and OATH have authority to make final penalty determinations.

The text of Article 320 unambiguously states that the courts or OATH are the units of government responsible for setting final penalty amounts for individual building owners:

> "Determination of penalty. In considering the amount of the civil penalty to be imposed pursuant to this article, *a court or administrative tribunal* shall give due regard to aggravating or mitigating factors . . . ."[15]

City Council instructed decisionmakers in the court or administrative tribunal to consider six statutory aggravating and mitigating factors in arriving at their penalty determinations for individual noncompliant building owners.[16] In doing so, lawmakers indicated that the judge must engage in an independent analysis of penalty amount. The Office of Building Energy and Emissions Performance's recommendations can guide courts or administrative tribunals, but a court or administrative tribunal is not bound by them.

Under Article 320, the discretion of a court or administrative tribunal to set a penalty amount is itself constrained by two statutory mandates. First, City Council made unambiguous its intent to ensure that penalties higher than zero dollars would be imposed on noncompliant building owners, notwithstanding mitigating factors.[17] Second, City Council pegged the maximum penalty the court or tribunal could levy on a building to the severity of the violation—allowing for higher penalties where a building exceeds emissions limits by a large amount.[18]

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[13] *See* N.Y.C. Admin. Code § 28-321.4.
[14] *See* N.Y.C. Charter § 651(7).
[15] N.Y.C. Admin. Code § 28-320.6.1; *see also id.* § 28-320.6.4.
[16] *See id.* § 28-320.6.1.
[17] *See* N.Y.C. Charter § 651(7) (reflecting City Council's intent to set a "minimum penalty"). The phrase "minimum penalty" or "minimum civil penalty" as used throughout Title 28 of the New York City administrative code is always associated with a penalty above zero. *See* N.Y.C. Admin. Code § 28-202.1.
[18] *See* N.Y.C. Admin. Code § 28-320.6.

3. If City Council wanted to give DOB the authority to make building owners eligible for mitigated penalties, then lawmakers would not have included language in Article 320 expressly cabining this authority in courts in tribunals.

If City Council wanted to give DOB a role in determining final penalties for violations of Article 320, it would not have included language specifically delegating this authority to the Office of Administrative Hearings and Tribunals or courts. Indeed, Article 321 of the Administrative Code, the portion of Local Law 97 that covers the obligations of a subset of buildings, including certain rent-regulated and religious buildings, provides an illustrative contrast. That section of Local Law 97 contains no language cabining authority to determine penalties in administrative tribunals or courts. When lawmakers include "particular language in one section of a statute but omit[] it in another section of the same Act, it is generally presumed that [the lawmakers] act[] intentionally and purposely in the disparate inclusion or exclusion."[19] City Council apparently sought to constrain DOB's discretion to determine final penalties for Article 320 buildings, while allowing the Department a freer hand to determine penalties for Article 321 buildings.[20] This dichotomous arrangement is understandable in light of the special financial burdens and obligations borne by many Article 321 building owners and tenants. City Council likely sought to give DOB the latitude to create a more flexible enforcement regime for Article 321 buildings, while ensuring that Article 320 building owners were held to a high standard throughout Local Law 97's implementation.

III. The Proposed Regulations Set Forth an Unreasonable Definition of "Good Faith Efforts."

As mentioned above, Article 320 of the Administrative Code provides discretion to courts and administrative tribunals to impose penalties below the statutory maximum based on a list of six mitigating and aggravating factors.[21] One of the factors is "[t]he respondent's good faith efforts to comply with the requirements of this article, including investments in energy efficiency and greenhouse gas emissions reductions before the effective date of this article."[22]

The term "good faith efforts" in this statutory provision must be construed according to its ordinary meaning because "lawmakers employ words as they are commonly or ordinarily employed."[23] Moreover, "dictionary definitions serve as useful guideposts in determining the word's ordinary and commonly understood meaning."[24] According to Black's Law Dictionary, "good faith" means "(1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or

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[19] *See Rivers v. Birnbaum*, 102 A.D.3d 26, 36 (2d Dept 2012) (citations omitted).
[20] Indeed the original version of Local Law 97 indicated that the Department had unlimited discretion setting penalty amounts for Article 321 violations: "Penalties that may be assessed for violations of [Article 321] shall be *determined by department rule*." N.Y.C. Admin. Code § 28-321.4 (emphasis added), repealed by Local Law 147 of 2019.
[21] *See* N.Y.C. Admin. Code § 28-320.6.1.
[22] N.Y.C. Admin. Code § 28-320.6.1(1).
[23] *See People v. Holz*, 35 N.Y.3d 55, 59 (2020) (citation omitted).
[24] *Id.*

(4) absence of intent to defraud or to seek unconscionable advantage."[25] In the context of statutory requirements, good faith *efforts* generally means actual, demonstrated attempts to comply with the applicable law. For example, regulations under the Montana Agricultural Chemical Ground Water Protection Act define "good faith effort" as "a substantiated or measurable attempt to comply" with the standards set forth in the law.[26] Thus, under Local Law 97 demonstrating a "good faith effort" should include: a) evidence of efforts to reduce building emissions *prior to and during* the year the building exceeded emissions limits; and b) a showing that the effort has been made in "good faith," i.e., without an intent to defraud or evade the law's requirements.

Yet, certain provisions of the Proposed Article 320 Rules broaden the meaning of "good faith efforts" beyond reasonable bounds.[27] Specifically, the rules characterize efforts that take place *after* the emission limits' effective date as "good faith efforts," and do not require a demonstration of any actual efforts made to date to comply with the statutory requirement.[28]

This unreasonably broad reading of the term "good faith efforts" is also superfluous. The law already includes a comprehensive list of mitigating factors that an adjudicator can consider before mitigating penalties, including actual good faith efforts such as early measures to reduce GHG emissions, unforeseen circumstances or delays out of the owner's control, history of compliance, and access to financial resources.[29] These provisions provide ample discretion to reduce penalties where appropriate and impose them where owners have ignored or flouted the law's requirements without good reason.

1. Future decarbonization plans cannot qualify as "good faith efforts."

The proposed regulations seek to characterize the filing of a decarbonization plan as "a good faith effort" to comply with Local Law 97.[30] While the proposed regulations require that the plan "is being implemented" when the owner submits the plan by May 2025, the regulations fail to require a demonstration that owners made any effort to comply with the 2024–2029 emissions limits prior to the effective date of those limits in 2024. Commenters agree that entry into such a plan may be valid evidence of good faith efforts to meet annual emissions limits in

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[25] *Good Faith*, Black's Law Dictionary (11th ed. 2019).
[26] Mont. Admin. R. 4.11.101.
[27] The Proposed Article 320 Rules include a list of examples of "good faith efforts" that building owners may undertake to become eligible for a mitigated penalty. Explaining these provisions of the proposed rules during a presentation published on September 21, 2023, DOB stated that the Department is "required" under Local Law 97 to consider "good faith efforts" before seeking penalties from building owners.[27] *See* Urban Green Council, *LL97: Unpacking the Proposed Rules* (2023), https://www.urbangreencouncil.org/ll97-unpacking-the-proposed-rules-2023/. This is not true. There is no statutory directive anywhere in Local Law 97 stating that DOB "shall consider" or "must consider" the good faith efforts of building owners. DOB's issuance of rules enumerating specific examples of "good faith efforts" is a policy choice, not a legal necessity.
[28] Other provisions of the rules include examples of good faith efforts that do fall within the meaning of the term, such as demonstrating the owner is starting electrification readiness work. *See* 1 R.C.N.Y. § 103-14(i)(2)(iv)(c).
[29] *See* N.Y.C. Admin. Code § 28-320.6.1.
[30] Proposed Article 320 Rules § 14(i)(2)(iv)(a).

the years *subsequent*. However, a decarbonization plan manifestly cannot demonstrate that the building owner acted in good faith *before* accepting the plan.

Local Law 97 was enacted in 2019, giving building owners nearly five years to prepare for the first emissions limits that go into effect in 2024. This proposed regulatory provision would allow a building owner to escape penalties – potentially entirely, under the mediated resolution provision of the regulations – despite having taken no action prior to 2025 to comply with limits that purportedly took effect in 2024. Indeed, building owners who have actively sought to roll back Local Law 97 by funding lawsuits, going to the press, or lobbying the administration could easily take advantage of this provision and escape penalties. Attempting to recast such a lack of action -- and even potentially bad faith actions -- as a "good faith effort" by regulation goes beyond the clear meaning of the statute and is outside DOB's statutory authority.

An owner truly acting in good faith but unable to comply with the 2024 annual limit would not need this decarbonization plan pathway because other statutory or proposed regulatory provisions would allow penalties to be mitigated. An owner that made early investments in energy efficiency and GHG reduction prior to 2019, *or* has an approved application for work necessary to comply with the limit that is not yet fully completed, *or* experienced unexpected or unforeseen events that made completing work impossible, could easily receive a mitigated penalty under the law. To the extent the DOB is concerned that imposing full penalties could undermine building owners' ability to invest in work necessary to bring their buildings into compliance for the remainder of the 2024–2029 period, Local Law 97 also specifies lack of access to financial resources as a mitigating factor for setting penalties.[31] OATH could absolutely consider whether, given the building owner's access to financial resources, penalties could reduce the owner's ability to pay for work needed to bring the building into compliance with emissions limits, and could reduce penalties accordingly.

Therefore, this particular provision of the proposed Article 320 Regulations is both unreasonable and unnecessary. The only possible purpose this proposed definition of "good faith" could serve is giving building owners who chose to take no action for five years an additional three years to pollute without penalty. In doing so, DOB is acting contrary to the language of the statute and the intent of City Council in passing Local Law 97. DOB must clarify that entry into a decarbonization plan can only establish good faith in the years subsequent to a building owner's acceptance of the plan.

2. Compliance during one year of the 2024–2029 period alone cannot qualify as "good faith efforts."

The proposed regulations also give building owners a free pass to potentially exceed emissions limits in five of the six years between 2024 and 2029 as long as their emissions were under the limit in one of the covered years.[32] While getting a building that previously exceeded the limits to reduce its emissions likely would require some effort by the building owner, there is

[31] N.Y.C. Admin. Code § 28-320.6.1(5).
[32] Proposed Article 320 Rules § 14(i)(2)(iv)(d).

no guarantee that such efforts are made in good faith. In fact, this provision gives some building owners a loophole they could exploit in bad faith by artificially lowering building emissions in 2024 – for example, delaying a tenant's occupancy or delaying turning on the heat during that year – and then going back to normal operations for the rest of the 2024–2029 period without having made any long-term structural changes or investments to reduce the building's emissions. This provision, again, unlawfully ignores the statutory language requiring of a showing of good faith efforts and could allow unscrupulous building owners to exploit a potentially huge loophole without penalty.

At a minimum, DOB should amend this provision of the regulations to a) require a demonstration that the building owner took steps to meet the 2024–2029 emission limits; b) only apply to de minimis exceedances of those limits; and c) require the owner, as a condition of reduced penalties for the first year it exceeds the limits, to implement a plan to ensure it does not continue to exceed them for the rest of the 2024–2029 compliance period. Any reduced penalty under this provision should only be available for one year and not multiple years of noncompliance.

3. Applications for adjustment of emissions limits alone cannot qualify as "good faith efforts."

DOB attempts to squeeze yet another potential loophole that landlords could exploit in bad faith into the proposed regulations as an example of actions that qualify as "good faith efforts." As mentioned earlier, Local Law 97 establishes a process for individual buildings to apply for adjustments of applicable emission limits, which the DOB may grant subject to certain criteria.[33] The proposed regulations attempt to cast as "good faith efforts" not just the grant of an adjustment by DOB, which of course would excuse emissions above the generally applicable limit, but also an application for an adjustment that has not been granted.[34]

This regulatory provision, again, requires no actual showing of good faith. An unscrupulous building owner could wait until April 2025, put in an application for an adjustment despite not meeting the criteria, and escape meaningful penalties for at least the first compliance year while the agency considers the application.

Again, building owners have had ample time to take steps to reduce emissions or submit adjustment applications. There is no reason to grant reduced penalties to owners who wait until the very last minute to put in an application for an adjustment, without any demonstration that they have done so in good faith.

The final regulations should remove this provision, as it is unnecessary, or at the very least require owners who have put in an application that has not yet been granted to attest that they believe they qualify under the statutory criteria and provide a reason for delay in filing the adjustment application or show that DOB has unreasonably delayed its determination. The

[33] N.Y.C. Admin. Code §§ 28-320.7 – 320.8.
[34] Proposed Article 320 Rules § 14(i)(2)(iv)(f).

submission of an application that hasn't been granted should not be considered a mitigating factor after the first year of any compliance period.

IV. Local Law 97 Sets Forth a Strict Penalties Regime for Article 320 Buildings that DOB May Not Upend by Rule and Regulation.

As outlined above, Article 320 of the NYC Administrative Code sets forth a strict regulatory scheme whereby a building owner who violates the annual emissions limit set forth in Local Law 97 faces the prospect of unavoidable and possibly steep penalties. This penalty scheme is consistent with that found in other environmental legislation. For example, in the context of the Clean Water Act courts have found that a "civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business" and even mandated penalties where a polluter proffers some evidence of good faith.[35] When courts issue a penalty, they must ensure that the minimum penalty amount is sufficient to deter future noncompliance by both the building owner subject to enforcement proceedings and other regulated parties.

As explained above, DOB is engaged in an unlawful effort to undermine this penalty scheme through various rules that supplant the statutory adjustment process, usurp judicial authority to set final penalties for building owners, and redefine "good faith." DOB suggests that its policy rationale for adopting this illicit bundle of rules is to facilitate compliance with emissions limits. Materials published by the Department alongside the September 12, 2023 rule package suggest that there is a tension between levying of penalties on noncompliant building owners and encouraging the use of "limited resources for projects to reach compliance" with Local Law 97. However, this is a false dichotomy. Civil penalties, if they are sufficiently high, may deter noncompliance with the law and encourage building owners to use their resources to achieve compliance with Local Law 97's targets.[36]

If stakeholders would like dollars collected through the penalty provisions of Local Law 97 to instead be spent on compliance, then City Council can pass legislation to address these concerns. Commenters would support DOB working with the Mayor and City Council during the city's next budget process to ensure that fines collected from noncompliant building owners are directed towards decarbonization efforts for buildings experiencing financial hardship (as defined in the statute), especially in environmental justice communities throughout the city. However, DOB may not lawfully ignore or overturn the City Council's statutory directive to deter violations of Local Law 97 with penalties.

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[35] *See, e.g., United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 869 (S.D. Miss. 1998) (citation omitted); *Hawaii's Thousand Friends v. City & Cnty. of Honolulu*, 821 F. Supp. 1368, 1392 (D. Haw. 1993) ("The fact that a violator is 'without fault' in committing violations of the Clean Water Act does not absolve the violator from penalties, although it may mitigate the amount of the penalties assessed.").

[36] *See New York v. United Parcel Serv., Inc.*, 942 F.3d 554, 599 (2d Cir. 2019) ("In general, civil penalties are designed to punish culpable individuals, deter future violations, and prevent the conduct's recurrence.").

V. The Proposed Article 320 Rules Fail to Comply with Local Law 77's Mandate to Limit the Use of Renewable Energy Credits.

The Proposed Article 320 Rules ignore the clear directive of Local Law 77, passed in May of this year, which mandated that DOB "shall by rule limit the amount" of renewable energy certificates ("RECs") that can be used to meet a building's annual emissions limit.[37] Nowhere in the Proposed Article 320 Rules is there a provision that limits the amount of RECs that building owners can deduct from their annual emissions. Nevertheless, six days after the promulgation of the Proposed Article 320 Rules, DOB released a guidance document, titled "REC Policy for LL97," which bafflingly suggests that the Department did, in fact, comply with Local Law 77. Specifically, DOB states that the Proposed Article 320 Rules "limit the use of RECs" because the regulations allow building owners to opt in to a "decarbonization plan" that limits RECs.[38] Building owners who voluntarily submit to such plans "may not claim emissions deductions associated with the purchase of renewable energy credits (RECs) for the 2024–2029 compliance period."[39] The Department acknowledges that "[t]here is no other specific restriction in this rule regarding the use of RECS during this compliance period."[40]

The "Decarbonization Plan" regulations are plainly not sufficient to comply with Local Law 77's mandate to promulgate rules limiting the use of RECs. First, the proposed decarbonization plan compliance pathway is entirely voluntary. The regulations pertaining to the Decarbonization Plan merely give building owners the option to enter into a plan and voluntarily abstain from the purchase of RECs for the duration of that plan. Thus, the proposed rule does not in fact "limit the amount of" RECs authorized by the Department.

In addition, the proposed rules do not contain generally applicable limits setting a maximum percentage of emissions that can be offset by the purchase of RECs, and DOB failed to consider environmental justice impacts. The rules must be revised to set a percentage limit on the amount of RECs each building can deduct from its annual emissions, as the law unambiguously requires.

1. The Proposed Article 320 Rules fail to set a generally applicable limit on the amount of RECs building owners may use to meet emissions limits.

Legislative history indicates that the City Council intended Local Law 77 to require a percentage cap on the use of RECs that would apply equally to all covered buildings. City Council passed Local Law 77 after both the New York City Comptroller's Office and the Local Law 97 Advisory Board made recommendations that the City set a generally applicable percentage limit on the use of RECs for all buildings covered by Article 320. Specifically, on December 29, 2022 the Local Law 97 Advisory Board recommended "that the City establish a limit on RECs of not more than 30% of a property's overage, meaning the excess annual emissions beyond the building emissions limit for the property," echoing the recommendation of

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[37] *See* N.Y.C. Admin Code § 28-320.6.1.1.
[38] REC Policy for LL97 at 1; *see also* Proposed Article 320 Rules § 14 (i)(2)iv(a)(6).
[39] Proposed Article 320 Rules § 14 (i)(2)iv(a)(6).
[40] REC Policy for LL97 at 1.

a report by the New York City Comptroller from November 2022.[41] It is apparent from these reports that the Advisory Board and the Comptroller's Office sought a RECs cap that would be applicable to all covered buildings, not just a subset of noncompliant buildings.

City Council also clearly contemplated that the Department would set a specific limit on the percentage of a building's emissions that could be satisfied with RECs, in line with the recommendations of the Comptroller and the Advisory Board. At a hearing on Local Law 77, Council Member Pierina Sanchez, Chair of the Committee on Housing and Buildings, specifically referenced the Comptroller's Report, and asked DOB to clarify the precise percentage limit on REC usage that would apply to building owners after the Department's rulemaking process.[42] Both Council Member Sanchez and Council Member Lincoln Restler pressed the Department on committing to a specific limit, with Council Member Sanchez noting that the "[t]he Comptroller's Office produced a report in December on Local Law 97 modelling different RECs limit scenarios so 10 percent, 30 percent, and 50 percent."[43] Although DOB Deputy Commissioner Guillermo Patino responded that "[w]e don't have a limit that we would propose at this time" he assured the lawmakers that "[w]e're really committed to looking at this issue carefully."[44] It is therefore apparent that City Council expected DOB to decide upon a specific percentage limit after the law's passage and set it via rulemaking. Nevertheless, instead of setting such a limit in the Proposed Article 320 Rules, the DOB has only proposed a voluntary system applicable to a subset of noncompliant buildings.

2. DOB failed to consider environmental justice impacts.

Local Law 77 states that DOB must "consider … [e]nvironmental justice impacts" when setting a REC limit for Article 320 covered buildings.[45] The Department has failed to substantively comply with this obligation. The entirety of DOB's environmental justice analysis is contained in just three sentences of REC Policy for LL97:

> "The building emissions reductions that will be achieved with the decarbonization plan pathway (as described below) are expected to result in significant emissions reductions in the first compliance period from otherwise noncompliant buildings. Building level emissions reductions will also reduce local criteria air pollutants. These improvements will be citywide and are particularly important for EJ communities that see disproportionate health impacts associated with poor air quality."[46]

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[41] Local Law 97 Advisory Board Report, at 19–20 (Dec. 2022), https://www.nyc.gov/assets/sustainablebuildings/downloads/pdfs/ll97_ab_report.pdf; Office of NYC Comptroller, Cap the Credits: Strong Implementation of Local Law 97, NYC's Green New Deal for Buildings, at 16–19 (Nov. 2022). https://comptroller.nyc.gov/wp-content/uploads/documents/Cap-the-Credits.pdf.
[42] Transcript of the New York City Council Committee on Housing and Buildings Hearing, January 24, 2023, at 63–64.
[43] *Id.* at 63–64, 66.
[44] *Id.* at 67.
[45] *See* N.Y.C. Admin Code § 28-320.6.1.1.
[46] REC Policy for LL97 at 3.

This cursory analysis is plainly insufficient to support the Department's decision-making.[47] First of all, actual REC limits are not mentioned at all in the analysis. DOB makes conclusory assertions about the environmental justice impacts of Decarbonization Plans generally, without discussing RECs. Second, there is no consideration of alternatives. The Department does not consider, for instance, whether a REC limit that applied equally to all Article 320 buildings would have a larger environmental justice impact than a voluntary procedure available to a subset of noncompliant buildings. Finally, DOB failed to examine the geographic distribution of the anticipated air quality improvements or analyze any data related to the location of noncompliant buildings to be able to make any conclusion regarding whether its policy will benefit environmental justice communities directly. Instead, it simply assumed that overall air quality improvements will benefit those communities.

3. Local Law 77 requires DOB to set a limit on RECs.

City Council passed Local Law 77 to ensure DOB promulgates rules limiting the use of RECs. To avoid running afoul of City Council's legislative intent, DOB must set a generally applicable limit on the amount of RECs that can be used to achieve emissions limits in its final Article 320 Rules. Legislative history indicates the Council passed Local Law 77 because it didn't trust DOB to take this action without a legislative mandate.

An early draft of the legislation stated that "[t]he department *may* by rule limit the amount of" of RECs used by building owners to meet the annual emissions limits.[48] After a committee hearing on the bill, the final legislative text replaced the permissive "may" with a mandatory "shall."[49] At the Council committee hearing on Local Law 77, Council Members Sanchez and Restler probed the DOB Deputy Commissioner Guillermo Patino on the roll out of Local Law 97.[50] The lawmakers sought assurances that rules would be promulgated by the Department to ensure that the use of RECs would not undermine the implementation of Local Law 97.[51] After DOB representatives failed to confirm rules limiting the use of RECs would be promulgated in 2023, Council Member Restler stated that "[t]he loopholes that we have right now are wholly unacceptable, and if DOB does not act appropriately then I certainly believe the Council must and so if you all are unable to resolve this in rulemaking then we should push through aggressive legislation to impose those requirements ourselves."[52]

By failing to set generally applicable percentage limits on the amount of RECs that can be used to achieve emissions limits in the proposed Article 320 Rules – and by asserting in its

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[47] *Cf. Matter of Boone v. New York City Dept. of Educ.*, 53 Misc. 3d 380, 391 (Sup. Ct., NY County 2016) ("agencies must consider each statutory factor carefully"); *Matter of People v. Schofield*, 73 Misc. 3d 1209 (Sup. Ct., Rensselaer County 2021), *aff'd*, 199 A.D.3d 5 (3d Dept 2021) (noting that "an agency may not simply rely on conclusory claims such as its own knowledge" to support a decision).
[48] Minutes of the Proceedings for the New York City Council Charter Meeting of Wednesday, January 4, 2023, at 40 (emphasis added).
[49] *See* N.Y.C. Admin Code § 28-320.6.1.1.
[50] Transcript of Minutes of the New York City Council Committee on Housing and Buildings Hearing, January 24, 2023, at 61–72.
[51] *Id.*
[52] *Id.* at 70.

guidance document that it has set a limit – DOB is flouting the requirements of Local Law 77. It must revise the proposed rules to incorporate such a limit before finalizing the rules.

CONCLUSION

The initial compliance period of Local Law 97 is a critical moment for New York City in addressing the climate crisis. DOB must revise the Proposed Article 320 Rules to hold building owners accountable for complying with Local Law 97 emissions limits in the following ways: remove or revise provisions that allow noncompliant building owners to escape penalties altogether, require evidence of good faith efforts for mitigation under that statutory provision, and include a generally applicable percentage limitation on the use of RECs. We look forward to working with DOB to uphold and enforce Local Law 97 while ensuring building owners and the agency retain flexibility within the boundaries of the law.

Sincerely,

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Earthjustice

Shravanthi Kanekal
New York City Environmental Justice Alliance

Pete Sikora
New York Communities for Change

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