

## Environmental Law

## Expert Analysis

# Next Mayor Will Inherit Job of Implementing 2019 Law Setting Building Emissions Caps

Whoever becomes New York City's next Mayor will need to pivot quickly to implementing a collection of laws adopted in 2019 and bundled together as the Climate Mobilization Act. These laws are designed to help reduce greenhouse gas emissions in New York City by 40% below 2005 levels by 2030 and 80% by 2050. Because 70% of the greenhouse gases emitted in New York City are generated by how New Yorkers heat, light and power buildings, the Climate Mobilization Act includes Local Laws 92 and 94, which require that new buildings or buildings undergoing major roof renovations include solar panels and/or green roofs; Local Law 95, which requires that buildings conduct annual energy efficiency reviews and publicly post their scores as a letter grade; and Local Law 96, which establishes the New York City Sustainable Energy Loan program.

MICHAEL B. GERRARD is a professor and director of the Sabin Center for Climate Change Law at Columbia Law School, and Senior Counsel to Arnold & Porter. EDWARD MCTIERNAN is a partner with Arnold & Porter, and a former General Counsel of the New York State Department of Environmental Conservation.



By  
**Michael B.  
Gerrard**



And  
**Edward  
McTiernan**

However, the most far-reaching part of the Climate Mobilization Act is Local Law 97, which places caps on how much greenhouse gas can be emitted from large residential and commercial buildings. The incoming Mayor's first term will roughly coincide with several of the key implementation deadlines in Local Law 97. It is a safe bet that over the next four and a half years climate change will continue to garner attention, and many New York City voters will expect our next Mayor to make significant progress on implementing the Climate Mobilization Act. In this article we review the key elements of the law and offer five suggestions for how the next Mayor might deal with the challenges presented by Local Law 97.

### Applicability

Local Law 97 applies to three classes of "covered buildings": (1)

buildings that exceed 25,000 gross square feet, (2) any two or more buildings on the same tax lot that together exceed 50,000 square feet, and (3) two or more condominium buildings under common management that exceed 50,000 square feet. It is estimated that more than 50,000 buildings, amounting to 60 percent of the city's total building footprint, qualify as "covered buildings." Eight categories of buildings are exempt from Local Law 97, ranging from electric or steam generating stations to public places of worship. The law requires City buildings to adopt programs to reduce emissions, but they are not subject to the enforcement provisions.

As enacted in 2019, the law exempted buildings with even one rent regulated unit. In 2020 the City Council expanded the law's coverage by exempting only buildings in which more than 35 per cent of the residential units are rent regulated.

### Overview of Local Law 97

The core of Local Law 97 is §28-320.3, which sets caps on greenhouse gas emissions from buildings. The caps are based upon emission intensity (expressed in CO<sub>2</sub> per square foot) and vary depending upon the occupancy group assigned

to a building pursuant the City's Building Code. Although occupancy groups are usually a zoning or fire safety consideration, they are used in Local Law 97 as a proxy for expected energy use.

Initial emission caps will be phased in during two initial compliance periods: 2024 to 2029, and 2030 to 2034. The first begins half-way into the next Mayor's first term. Allowable emissions will decrease incrementally until 2050, when the average from all covered buildings must reach the law's required greenhouse gas emissions limit (1.4 kilograms of CO<sub>2</sub> emissions per square foot per year). One key interim compliance date coincides with what could be the end of the next Mayor's second possible term, 2030, when buildings that exceed their prescribed occupancy group emissions limit by more than forty percent will be required to demonstrate reductions. It is generally thought that compliance with the 2024 emission caps will not be difficult for most buildings, but the 2030 limits will be very challenging.

To demonstrate compliance with its emissions cap, each covered building must calculate and report the greenhouse gas coefficient of the energy consumed on the premises and total energy consumption. These reports will be due on May 1st starting in 2025 and must be certified by registered professionals. Buildings that exceed their established emission cap must reduce energy consumption by implementing efficiency programs or adopting alternative clean energy measures. Future rules will need to provide details about how

to account for these compliance measures.

Covered buildings can seek adjustments to their emissions cap. The Department of Buildings began accepting initial applications for adjustments last April. The adjustment process can consider costs of capital improvements, physical constraints of the building or site, and good faith efforts to construct or finance capital improvements. Adjustments are only intended to provide temporary relief, not permanent changes to mandated emissions limits. Covered buildings are also entitled to limited deductions from their annual greenhouse gas totals for purchasing either offsets or renewable energy credits, or for consuming distributed clean energy from a renewable source.

Local Law 97 provides for penalties for the failure to submit timely and complete annual emission limits reports, and for reporting exceedances of allowable limits. The maximum penalty for emissions exceedances is \$268 per ton of carbon emitted over the allowable limit. Although Local Law 97 affords some discretion to the City to allow downward penalty revisions based upon financial hardship and/or good faith compliance efforts, numerous commentators have predicted that six or even seven figure penalties could be common.

#### **Next Steps**

Various City and some state agencies have started to prepare for Local Law 97. The Department of Buildings has developed a Sustainable Buildings NYC website and has initiated outreach and education programs for buildings owners. However, there is much more

that the incoming Mayor could do. Here are five concrete suggestions:

**(1) Staff the Office of Building Energy and Emissions Performance (OBEEP).** The Climate Mobilization Act requires the creation of OBEEP within the City's Department of Buildings. OBEEP is to be dedicated to achieving reductions in greenhouse gas emissions by overseeing building energy use for existing buildings, new construction, and major renovations. OBEEP is responsible for overseeing all building energy performance requirements, including those required by Local Law 97. Staffing of OBEEP has been slow to occur. Given the complexity of implementing Local Law 97 and the need for one-stop shopping to support building owners' efforts to reduce emissions, the next Mayor should address this situation.

**(2) Fully Evaluate and If Feasible Implement a City Cap and Trade Program.** Local Law 97 calls for a study of the feasibility of a cap-and-trade program that might allow buildings that are able to lower their emissions below their allowable cap to sell credits to buildings that have not yet achieved compliance. This report was due Jan. 1, 2021, and although the Mayor's Office of Sustainability engaged NYU to lead the study, the required report has not yet been released publicly. Building owners will need a full range of options to comply with Local Law 97 and cap and trade warrants careful consideration. However, to be successful, the program will need to be designed to avoid market incentives that allow certain classes of buildings to avoid reducing their energy intensity. It

also needs to prevent the clustering of buildings with excess emissions in disadvantaged communities. The next administration will have the opportunity to provide leadership on this important issue.

**(3) Encourage Property Assessed Financing.** Certain property assessed financing programs are authorized by New York State General Municipal Law Article 5-L, which allows municipalities to offer financing for property owners to fund energy efficiency and renewable energy projects using federal loan support. Under these programs, building owners agree to repay the loan through a special assessment. Local Law 96 in the Climate Mobilization Act builds on these concepts and authorizes a new property assessed financing program intended to make it easier for building owners to access long-term loans to make necessary building energy upgrades. These loans are intended to be billed and collected in conjunction with city property taxes. In June, the Mayor's Office of Sustainability announced that New York City had completed its first C-PACE deal (property assessed financing for commercial buildings), involving a 1.2 million square-foot, 25-story office building in the financial district. The incoming administration will need to build capacity to handle these sorts of transactions and quickly educate building owners and the real estate community about the availability of this new tool. During the just-ended mayoral campaign, several candidates stressed the need to develop methods to finance the work required by Local Law 97.

**(4) Decide Upon the Types of Eligible Renewable Credits.** Many covered buildings are expected to need to purchase deductions from their annual greenhouse gas totals in order to comply with the Local Law 97 limits, especially during the early compliance periods as capital projects are planned and implemented. However, Local Law 97 has a narrow definition of renewable energy projects that can qualify to create and sell such credits. At present, only projects within New York City or which directly link into the City's transmission grid are eligible. Whether or not to permit building owners to use renewable energy credits generated outside the City proved to be a controversial topic during the last state legislative session; real estate interests supported this, environmental groups opposed it, and the legislature did not act. Given the relative scarcity of renewable projects such as solar and wind farms within the City, and the potential benefits to renewable energy projects elsewhere in New York through the transfer of credits, this issue is likely to continue to generate controversy for the next Mayor.

**(5) Provide Timely Rules and Guidance.** Local Law 97 is necessarily general in many areas, and the Department of Buildings is expected to provide details relatively soon. For example, rules for determining greenhouse gas coefficients, a key factor in measuring energy intensity, during the compliance period 2030 through 2034, as well as rules establishing building emission limits for 2035 through 2050, must be adopted by Jan. 1, 2023. Although Local Law 97 allows these rules to

contain some flexibility, especially during the later compliance period from 2035 to 2050, §28-320.3.4 provides that the limit for average building emissions intensity in 2050 cannot be relaxed.

Rulemaking can be cumbersome for City agencies, and the incoming administration can help ensure the success of this program by providing staff and other resources that are able to issue timely rules for public review and comment, and by publishing appropriate guidance so that market participants are not left guessing about important issues.

Another uncertainty is the interaction of Local Law 97 with New York State's Climate Leadership and Community Protection Act. The Climate Action Council established by that state law is scheduled to issue its draft implementation plan by Jan. 1, 2022.

### Conclusion

New York City is committed to reducing its greenhouse gas emissions by 80% by 2050. This will require dramatic changes in how energy in residential and commercial buildings is generated and consumed. To achieve this goal, Local Law 97 introduces a new regulatory program including enforceable building emissions caps. The incoming Mayor will have an important opportunity to shape policy as these limits are phased in during his or her first term.