

**FINAL COMMENTS OF THE NATIONAL CONSUMER LAW CENTER  
AND TEXAS LEGAL SERVICES CENTER**

**Re: THE DEPARTMENT OF ENERGY  
NOTICE OF PROPOSED RULEMAKING, RIN 1904-AB-97  
WEATHERIZATION ASSISTANCE PROGRAM  
FOR LOW-INCOME PERSONS  
74 Fed. Reg. 23804 (May 21, 2009)**

On May 21, 2009, the Department of Energy (“DOE”) published a Notice of Proposed Rulemaking (“NOPR”) in which the agency proposes to amend the income-eligibility provisions under the Weatherization Assistance program (“WAP”), 10 CFR 440.22. In essence, DOE is proposing to make it easier for WAP grantees and sub-grantees to conduct weatherization activities in certain publicly-assisted housing facilities, by publishing a list of such buildings that would be deemed automatically income-eligible, obviating the need for local WAP sub-grantees to conduct individual income verification for each tenant in those buildings.<sup>1</sup>

The National Consumer Law Center (NCLC) and Texas Legal Services Center (TLSC) (collectively referred to as “NCLC/TLSC”) welcome this opportunity to comment on the proposed changes to the Department of Energy’s WAP eligibility rules.<sup>2</sup> For 40 years, NCLC has been advocating on behalf of the interests of low-income consumer regarding a broad range of energy and utility issues, including policies involving WAP. TLSC is a statewide Legal Aid program that represents low-income clients in matters affecting access to life essentials,

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<sup>1</sup> See 74 Fed. Reg. 23809 – 23810, amending 10 CFR 440.22(b).

<sup>2</sup> See Notice of Proposed Rulemaking, 74 Fed. Reg. 23804 (May 21, 2009).

including access to basic utility services. Their attorneys regularly represent clients before the Texas Legislature, the Texas Public Utility Commission, and related state agencies.

### **I. NCLC/TLSC Supports The Proposal To Streamline Determination Of Income-Eligibility For “Qualified Assisted Housing” And LIHTC Properties**

The proposal for DOE to publish lists of Qualified Assisted Housing (“QAH”)<sup>3</sup> and Low-Income Housing Tax Credit (“LIHTC”) buildings that would be deemed income-eligible for WAP is good public policy. Front-line WAP agencies that carry out the work of weatherizing low-income homes can find it challenging to determine whether a sufficient percentage of tenants in a publicly-assisted<sup>4</sup> multi-family building meet the income-eligibility requirements of 10 CFR 440.22(b)(2). To the extent that DOE, working with the Department of Housing and Urban Development (“HUD”), can make those determinations from existing data bases, this can only help to facilitate the process of weatherizing those buildings, **to the extent that those buildings are program eligible under other WAP rules highlighted in the NOPR and to the extent that weatherizing those buildings is consistent with the priorities of the local WAP agency.**

The NOPR itself squarely flags the program requirement that “a grantee must ensure that the benefits of weatherizing a building that consists of rental units, including rental units where the tenant pays for energy through rent, accrue primarily to the low-income tenants,” 74 Fed. Reg. 23807, col. 2 - 3, as required by 42 U.S.C. 6863(b)(5)(A) and 10 CFR 440.22(b)(3)(i). As

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<sup>3</sup> DOE defines “Qualified Assisted Housing” as including traditional public housing projects; buildings that receive project-based Section 8 assistance [but excluding “projects also benefitting from assistance under Section 221(d)(3) and (d)(5), and section 236 of the National Housing Act”]; Section 202 Supportive Housing for the Elderly; and Section 811 Supportive Housing for Persons with Disabilities.” 74 Fed. Reg. 23805, fn. 1. NCLC/TLSC generally finds this definition reasonable, although these commenters do not immediately perceive why project-based section 8 building that also receive section 221(d)(3), 221(d)(5) or 236 assistance are excluded (unless this exclusion simply reflects the fact that adequate income data is not available for these buildings).

<sup>4</sup> In these comments, “publicly-assisted housing” refers to all of the units covered by the NOPR: QAH and LIHTC buildings.

more fully discussed below, NCLC/TLSC believes that many QAH and LIHTC building owners will not be able to demonstrate that the benefits of weatherization “accrue primarily to the low-income tenants” in buildings where the sum of the tenants’ rents and utility payments are capped by law. However, as these commenters also explain below, there are circumstances in which QAH and LIHTC owners could demonstrate that the benefits of weatherization will accrue primarily to the tenants. We urge DOE to provide guidance on this issue, and to amend its regulations if necessary to implement these recommendations.

## **II. DOE Must Provide Guidance To Ensure That When QAH and LIHTC Properties Are Weatherized, The Benefits Will Accrue Primarily To The Tenants**

### **A. Context of the NOPR and the “benefits” of weatherization**

Before commenting on the specific issue raised in the NOPR, “on how to ensure compliance with the requirement that benefits of weatherization accrue primarily to low income tenants,”<sup>5</sup> NCLC/TLSC would like to summarize the context in which the NOPR arises.

For two decades, WAP was funded in the range of \$130 million to \$240 million. At this relatively low funding level, there was not a great demand from the owners of publicly-assisted multi-family properties to have their buildings weatherized. But four months ago, the American Recovery and Reinvestment Act of 2009 (“ARRA”) appropriated \$5 billion for WAP and also for several programs that can support energy-efficiency improvements in publicly-assisted housing, including \$1 billion for capital improvements (including energy-efficiency improvements) in public housing;<sup>6</sup> \$250 million for capital improvements (including energy efficiency improvements) in properties receiving project-based section 8, section 202 or section 211 assistance from HUD;<sup>7</sup> and \$6.3 billion for a very broad range of energy efficiency activities

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<sup>5</sup> 74 Fed. Reg. 23807, col. 3.

<sup>6</sup> See Pub. L. 111-5, Title XII, Div. A; 123 Stat. 214.

<sup>7</sup> See Pub. L. 111-5, Title XII, Div. A; 123 Stat. 222.

under the Energy Efficiency and Conservation Block Grants (\$3.2 billion) and State Energy Program (\$3.1 billion).<sup>8</sup> This created a much greater focus on WAP from a broad range of potential beneficiaries of the increased funding, including owners of publicly-assisted housing. DOE, which administers WAP, and HUD, which oversees the publicly-assisted housing stock, entered a Memorandum of Understanding (MOU) on May 6, 2009 with the specific intent to “facilitate use” of the WAP funds “in HUD Qualified Housing and in the LIHTC projects, **where such assistance is consistent with the Weatherization Assistance Program and can benefit tenants.**”<sup>9</sup>

The MOU and subsequent NOPR make it very clear that HUD and DOE wish not only to facilitate the determination of which publicly-assisted buildings are income eligible for WAP, but also to significantly increase the amount of WAP funding that goes to these properties.

In the NOPR, DOE:

recognizes that if made final, today’s proposal would not address **the requirement that, for multi-unit buildings, a grantee must ensure that the benefits of weatherizing a building that consists of rental units, including rental units where the tenant pays for energy through rent, accrue primarily to the low-income tenants.**

74 Fed. Reg. 23807, col. 2 – 3 (emphasis added). DOE has asked for comments on “how to ensure compliance with the requirement.” *Id.* NCLC/TLSC offers comments on this question, by reviewing the legislative history of the WAP statute as well as the actual language of the statute and DOE’s implementing regulations; by analyzing what are “the benefits of weatherizing a building that consists of rental units;” and by suggesting ways that WAP grantees can ensure that those benefits accrue primarily to the tenants.

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<sup>8</sup> See the summary of these programs in “Memorandum of Understanding Between Department of Energy and Department of Housing and Urban Development --- Coordinating Recovery Act Funds for Home Energy Retrofits”, Recital R-1 (May 6, 2009). [Hereafter, “MOU”].

<sup>9</sup> MOU, Recital R-10 (emphasis added).

The WAP statute is quite clear, explicitly limiting use of weatherization funds to premises where the State administering the program can ensure that, among other things, “the benefits of weatherization assistance in connection with such rental units, including units where the tenants pay for their energy through their rent, will accrue primarily to the low-income tenants residing in such units.” 42 U.S.C. 6863(b)(5). DOE’s regulations, 10 CRR 440.22(b)(3), contain near-identical language. Moreover, in introductory comments at the June 18, 2009 public hearing in this docket, DOE’s Dan Sze noted that one of the purposes of the weatherization program is to “reduce their total energy expenditures,” referring to the bills that low-income households must pay. June 18 Trans., p. 13. No one can credibly suggest that reduction of the energy bills of low-income households is anything but a central, if not primary, goal and benefit of the weatherization program.

WAP was enacted in 1976 in the wake of the second oil embargo and subsequent price shock. Pub. L. 94-385, title IV, 90 Stat. 1150 - 1158. As DOE notes:

Congress directed that state agencies . . . should be encouraged . . . to develop and support coordinated weatherization programs designed **to alleviate the adverse effects of energy costs on low-income households.**

74 Fed. Reg. 23804, col. 3, citing 42 U.S.C. 6861(a)(4) (emphasis added); *see also* Pub. L. 94-385, § 411(a)(3), 90 Stat. 1151 (“Congress finds that . . . weatherization of such dwellings would **lower utility expenses for such low-income owners or occupants.** . . .”) (emphasis added). While NCLC/TLSC does not suggest that “alleviat[ing] the adverse effects of energy costs on low-income households” or “lower[ing] utility expenses for such low-income owners or occupants” are the only goals or benefits of weatherization, these are clearly the primary goals of the program and the most important benefits low-income households derive from it. Moreover, the benefit of reduced energy

bills can be easily quantified, as well as easily determined to be accruing primarily to either the tenant (if the tenant pays the energy bills affected by the weatherization work) or the owner (if the owner pays those bills). Any alleged health and safety benefits of weatherization usually cannot be quantified; may not exist at all in particular buildings; and may be not be traceable to a particular tenant or group of tenants.

For example, if a local WAP grantee is asked to weatherize a high-rise, multi-family building with a brick façade, inefficient boiler, and pitched roof, the grantee may add insulation to the roof and replace the old boiler with a new, high-efficiency heating system, but not insulate the exterior walls because they are brick-clad. If the owner pays the heating bills, the financial benefit of the weatherization work accrues not only primarily, but exclusively, to the owner, not the low-income tenants. Moreover, there may be little, if any, health and safety benefits. So long as the old boiler was operative and able to provide the required level of heat, tenants on the lower floors of the building might notice no difference in terms of safety or comfort.<sup>10</sup> Even in buildings where the replaced heating system could not always provide adequate heat, it is not intuitively obvious that any comfort benefits that the tenants derive are equal to or greater than the benefit the owner derives, if the owner pays for the heating bills. Thus, even where there are some health and safety benefits that tenants derive, one could conclude that the overall benefits (that is, the sum of the economic benefits and health and safety benefits) accrue primarily to the owner. Neither DOE nor its grantees can simply assume that the

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<sup>10</sup> It is possible that tenants on or near the top floor may notice less heat loss/fewer drafts if the roof is insulated, but any such benefits are somewhat speculative and impossible to quantify.

benefits of weatherization work done in a multi-family building accrue primarily to the tenants, especially if the owner pays for the energy bills.<sup>11</sup>

**B. The rent and utility structure in publicly-assisted housing limits the extent to which the benefits of weatherization accrue primarily to tenants**

Many tenants in QAH and LIHTC units are subject to rent caps under the Brooke Amendment<sup>12</sup> or comparable rent restrictions, and, if they pay for their utilities, are provided with “utility allowances.”<sup>13</sup> To the extent the utility allowance is adequate,<sup>14</sup> these tenants pay no more than a fixed percentage of their income for total “shelter cost” (the sum of rent plus any out-of-pocket utilities), **whether or not they pay for utilities directly or as an undifferentiated portion of rent.**

For example, a tenant whose income is \$1,000 per month, pays no utility expenses directly, and is subject to the Brooke Amendment rent cap of 30% of income would pay \$300 per month as rent (30% of \$1,000 = \$300), and total shelter costs would also be \$300 because the tenant pays no utilities. Similarly, a tenant whose income is \$1,000 per month but who pays heating utility bills of \$100 per month, and whose utility allowance is set at \$100 per month, would pay \$200 per month as net rent (Gross rent = \$300 [30% of \$1,000], less the utility allowance of \$100). But this tenant’s total shelter cost would also be \$300: the sum of \$200

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<sup>11</sup> As explained below, it is also challenging to show that the benefits of weatherization accrue primarily to the tenants in public-assisted housing, even if the tenants pay for the energy bills but also receive utility allowances.

<sup>12</sup> The Brooke Amendment, named for Sen. Edward Brooke of Massachusetts, was included in Pub. L. No. 91-152, § 213(a) (Dec. 24, 1969), 1969 U.S. Code Cong. & Adm. News 413, and originally limited rents to 25% of the tenant’s income. This rent cap was raised to 30% in 1981. Pub. L. No. 97-35, § 322(a), 95 Stat. 400 (Aug. 13, 1981). The current Brooke Amendment is codified at 42 USC § 1437a(a).

<sup>13</sup> Utility allowances are credits against the rent that would otherwise be due under the Brooke Amendment (or comparable rent caps in QAH and LIHTC housing), provided to tenants who are directly responsible for any electric, gas, water or other utility bills. For the public housing utility allowance regulations, see 24 CFR 965.502.

<sup>14</sup> NCLC/TLSC readily acknowledges that utility allowances are often inadequate, either because the public housing authority or other entity calculating the allowance has not adequately estimated typical consumption amounts (e.g., kilowatt-hours of electricity or therms of gas), or has not recently updated the assumed price per unit consumed. To the extent utility allowances are inadequate, tenants in fact may pay more in shelter cost than the statutorily-fixed percentage of their income. This point is discussed more fully in section C., below, regarding how the benefits of weatherization can accrue primarily to certain public housing tenants.

directly paid as rent, plus \$100 paid for utilities. Moreover, if weatherization reduced this tenant's heating bills to \$70 per month, and the utility allowance was adjusted down to \$70 to reflect the lower monthly consumption, the tenant's total shelter cost would remain the same, even though the portions of shelter cost attributable to rent and utilities would change:

<b>Gross rent</b>	= <b>\$300</b> (30% of \$1,000 per month income)
<b>Utility allowance</b>	= <b>\$70</b> (adjusted down from \$100, to reflect weatherization)
<b>Net rent paid</b>	= <b>\$230</b> (gross rent, less utility allowance)
<b>Total shelter cost</b>	= <b>\$300</b> (net rent of \$230 plus utilities paid of \$70).

Thus, for tenants whose rent is capped at a fixed percentage of income, and whose utility allowances are set at the level of actual utility bills, the bill-reduction benefits of weatherization do not "accrue primarily" to those tenants.

Quite simply, the current Brooke Amendment, 42 USC 1437a(a), as implemented by HUD, limits the tenant's rent (including the sum of rent and utilities, if the tenant pays for utilities) to no more than 30% of income, when utility allowances are adequate. If the property owner pays all utilities, the rent is directly set at the income-based rent cap for that household. If the property owner's costs decrease as a result of work done by the local weatherization agency, the tenant still pays 30% of income for rent. **The tenant receives no financial benefit of the weatherization, as the savings all flow to the property owner.** Even if some argue that the tenants receive benefits in terms of increased "health and safety" (see 74 Fed. Reg. 23804, col. 3), there are two reasons why any alleged "health and safety" benefits would not meet the statutory requirement that the benefits of weatherization "accrue primarily" to the tenants. First, the primary benefit of weatherization work is "lower[ing] utility expenses" for "low-income owners and occupants," Pub. L. No. 94-385, § 411(a)(3), 90 Stat. 1151, as common sense dictates. To the extent tenants in QAH or LIHTC properties may receive health or safety benefits, those benefits are secondary and speculative. Second, in some circumstances, it is not

that easy to articulate any meaningful “health and safety benefits” that would accrue to the tenants (see the discussion, p. 6, above, regarding weatherization of certain high-rise buildings.) While it is possible that multi-family tenants might be healthier and more comfortable in a weatherized unit, the building owner would only be able to show that some of these secondary benefits accrue to the tenants, not that the primary benefit of bill reduction accrues to the tenants.

Some might argue that bill reduction is not the primary benefit of weatherization, and that such hard-to-quantify benefits such as health and safety are paramount. However, DOE’s own web page describing the weatherization program makes it clear that reducing the bills of low-income households is in fact the paramount benefit. The very first sentence of that web page [<http://apps1.eere.energy.gov/weatherization>] reads:

The Weatherization Assistance Program enables low-income families **to permanently reduce their energy bills** by making their homes more energy efficient.

The third sentence of that same web page explains why reducing the energy bills of low-income households is such an important goal of the program:

By reducing the energy bills of low-income families instead of offering aid, weatherization reduces dependency and **liberates these funds for spending on more pressing family issues.**

Nowhere on its web page does DOE mention the secondary benefits of health or safety. Nor does DOE mention the possibility that by reducing the building owner’s energy costs, weatherization might result in indirect benefits to tenants in the form of increased owner spending on other amenities. While NCLC/TLSC agrees that health and safety benefits may accrue to tenants in particular buildings that are weatherized, these benefits are hard to quantify and almost always quite secondary to the benefits of bill reduction highlighted in the WAP statute, in the legislative history of that statute, in DOE’s regulations, and on DOE’s weatherization web page.

DOE itself acknowledges that the “Weatherization Assistance Program reduces energy costs for low-income persons, by increasing the energy efficiency of their homes” 74 Fed. Reg. 23804, col. 2 – 3. As explained above, however, “energy costs for low-income persons” are not reduced through weatherization in most QAH and LIHTC properties, and weatherizing those units could therefore violate the requirements of the WAP statute and DOE’s own regulations requiring that the benefits of weatherization accrue primarily to the low-income tenants, unless the owner can demonstrate other, very substantial benefits that in fact accrue to the tenants.

DOE implicitly acknowledges that it is a particular challenge to demonstrate how tenants benefit if weatherization work is done in QAH and LIHTC properties in which the tenants do not pay for the utilities:

In instances in which tenants of a building do not directly pay utility costs and have capped rents, the property owner needs to demonstrate that benefits accrue primarily to the tenant of the weatherized units other than the benefit of reduced utility bills.

74 Fed. Reg. 23807, col. 3. NCLC/TLSC has a hard time imagining a circumstance in which a public housing authority could demonstrate that the benefits of weatherization accrue primarily to the tenants, if the tenants do not pay for any utilities. However, and as described more fully below, NCLC/TLSC does believe that there may be circumstances where a public housing authority could meet the “accrue primarily” standard if the tenants pay for their own utilities, and also that there are a wider range of circumstances in which private owners of HUD-subsidized or LIHTC units could show that the benefits accrue primarily to the tenants.

In the just-quoted section of the NOPR (74 Fed. Reg. 23807, col. 3), DOE has reworded the actual statutory requirement, so it is important to re-state the actual statutory requirement here:

In any case in which a dwelling consists of a rental unit or rental units, the State, in implementation of this part, shall ensure that – (A) the benefits of weatherization assistance in connection with such rental units, including where the tenants pay for their energy through the rent, will accrue primarily to the low-income tenants residing in such units . . . .

42 U.S.C. 6863(b)(5). There can be no doubt that Congress intended that the state must assure that among all of the benefits arising from the weatherization work, those benefits must primarily accrue to tenants, and not just that some subset of the benefits accrue primarily to tenants.

Moreover, this “accrue primarily” requirement must be met not only when tenants pay for their own utilities directly, but also when “the tenants pay for their energy through rent.”

DOE’s rewording of this requirement undermines Congressional intent because the agency suggests that the requirement can be met by showing that “benefits accrue primarily to the tenant . . . **other than the benefit of reduced energy bills.**” 74 Fed. Reg. 23807, col. 3.

This is a completely unjustified and peculiar rewording of the clear statutory language because the primary benefits of weatherization are reductions in energy bills and “lower[ing] utility expenses” for low-income families. Pub. L. No. 94-385, § 411(a)(3), 90 Stat. 1151 [currently codified, in slightly reworded form, at 42 USC § 6861(a)(3)]; *see also* 42 USC § 6861(a)(4)

[weatherization grantees, should develop “weatherization programs designed to **alleviate the adverse effects of energy costs on such low-income persons**”]; 10 CFR 440.1 [one major

purpose of WAP is reduce the “total residential expenditures” of low-income households];

DOE’s WAP web page [<http://apps1.eere.energy.gov/weatherization>]. To the extent that DOE is suggesting that the State need not show that the benefits of reductions in energy bills accrue primarily to tenants (or, alternatively, need not show other, very significant benefits such that the sum of bill reduction benefits and other benefits accrue primarily to tenants), this would be in violation of the underlying statute and DOE’s own rules, 10 CFR 440.22(b)(3). As noted in the

Congressional history of the statute, WAP was intended not only to conserve energy, but expressly “to assist persons least able to afford increased energy costs.” Joint Explanatory Statement of the Committee on Conference, Energy Conservation and Production Act, 1976 U.S. Code Cong. & Adm. News (Vol. 3) 2064.

Due to the nature of how the Brooke Amendment operates in public housing units in which tenants do not pay for any utilities, public housing owners cannot show how the benefits of weatherization would accrue primarily to the tenants of those units.

However, NCLC/TLSC believes that owners of other publicly-assisted housing units may be able to make the requisite showing, as described more fully below.

**C. Some tenants in public housing who pay their own utility bills could reap the primary benefits of weatherization, if DOE and HUD adopt appropriate policy and regulatory changes, thus allowing these units to be weatherized**

NCLC/TLSC fully recognizes that some of the poorest families in America live in traditional public housing. Therefore, directing WAP funding to these units can serve the public purpose of helping to maintain affordable housing units, “where such assistance is consistent with the Weatherization Assistance Program.”<sup>15</sup> However, it is equally important to recognize that WAP is not a program intended to provide additional operating subsidy for public housing, as important a societal goal as that may be. It is not sufficient for those who urge weatherization of public housing units to speak in general terms of unspecified and unquantified health and safety benefits that might arise from weatherizing these units, nor to assume that the benefits of weatherization must accrue primarily to the tenants simply because the purpose of a housing authority is to provide housing to low-income tenants.

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<sup>15</sup> DOE-HUD MOU (May 6, 2009), Recital R-10

However, NCLC/TLSC believes that the benefits of weatherization could accrue primarily to public housing tenants who pay their utility bills if the following conditions were met by the owner:<sup>16</sup>

- ▶ The owner agrees to freeze for a period of at least one year the consumption assumptions (e.g., kWh of electricity; therms of natural gas, etc.) upon which the current utility allowances are based; and

- ▶ The owner agrees that no later than 24 months after the weatherization work is completed, it will revise its utility allowances to reflect actual amounts of utilities consumed in the property post-weatherization and then-current utility prices, and that it will update those utility allowances annually.

To the extent this proposal may require HUD to revise any of its utility allowance regulations (or IRS to revise any relevant LIHTC regulations) or DOE to revise its rules regarding weatherization of rental properties, public housing owners should not be granted access to WAP funds until those rule changes are made, or the owners can otherwise commit, in a legally binding manner, to these two conditions.

These two conditions result in the benefits of the weatherization work accruing primarily to the public housing tenants. In the first year, tenants will gain the direct, economic benefit of enjoying lower actual energy bills without having their utility allowances commensurately reduced. The bill-reduction savings will flow directly to the tenants. In subsequent years, the tenants will enjoy the economic benefit of having accurate and adequate utility allowances, because those allowances will be based on building-specific consumption data and will be

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<sup>16</sup> Note that most states already impose various conditions, in writing, on an owner whose rental building is weatherized, in order to carry out the requirements of 42 U.S.C. § 6863(b)(5). The current landlord-tenant agreements are generally not adequate to address the conditions being proposed here as they do not contemplate the unique rules governing rents and utility allowances in publicly-assisted housing, not the types of unique tenant benefits that can arise in this type of housing (e.g., extensions of affordability and use restrictions).

updated annually. In many locales, this will result in more accurate utility allowances and, therefore, more affordable shelter costs for tenants.

**D. Many tenants in other publicly-assisted housing could reap the primary benefits of weatherization and thus have their units weatherized**

In project-based section 8, section 202, section 811 and LIHTC properties (herein referred to as “subsidized housing”), substantial benefits could accrue primarily to the tenants if the owner contractually agrees to a meaningful extension of the use restrictions that ensure that units are affordable and rented to low-income households. The benefit should only be deemed meaningful if the affordability restrictions are set to expire in five years or less, and the owner agrees to extend those restrictions for five years or more. Moreover, to the extent an owner who meets this requirement to extend the low-income use restrictions also agrees to make a financial contribution to the weatherization work, that building should be given higher priority as the local WAP agency will have to invest less of its funding in order to weatherize these units. The economic benefits of weatherization will accrue primarily to tenants in these circumstances because the WAP funding will ensure that the housing remains affordable to low-income families.

Similarly, if the owner of a subsidized property can demonstrate, through legal filings, contractual documents, or other certain proof, that in the absence of receiving weatherization assistance, the property would be lost due to foreclosure or conversion to market-rate housing within the next year or two, there would again be substantial economic benefits to the tenants of avoiding the loss of their housing units.

In subsidized housing with a mix of deeply subsidized units subject to Brooke Amendment-type shelter cost caps, and shallow-subsidy or unsubsidized units, there would be substantial benefit to the tenants in the building if at least 50% of those tenants are not deeply

subsidized and thus will see reductions in their energy bills and/or will benefit from avoided rent increases.<sup>17</sup>

Finally, the benefits of weatherization would accrue primarily to tenants in subsidized housing who pay utility allowances, if the two conditions described under heading C., above, were met.

### **III. FINAL OBSERVATIONS AND CONCLUSION**

It is very helpful for DOE, working with HUD, to have proposed methods that will facilitate local WAP agencies determining that specific QAH and LIHTC properties are income-eligible to receive weatherization services. The DOE-HUD MOU clearly reflects the desire of these agencies that more publicly-assisted housing be weatherized. However, public assisted housing comprises some 5- to 6-million units, of the 35 million housing units in which low-income families live.<sup>18</sup> NCLC/TLSC urges DOE and HUD to ensure that low-income families who live in completely unsubsidized units have access to sufficient funds to weatherize their homes, since these households pay whatever rents prevail in their local markets and do not receive any “utility allowances” to help pay their energy bills. These households must be given a high priority in the weatherization program.

NCLC/TLSC believes that state WAP grantees and local WAP subgrantees are in the best position to determine which publicly-assisted buildings seeking weatherization assistance meet the statutory requirements that the benefits of the weatherization work accrue primarily to the tenants, using the above framework to evaluate tenant benefit. They are also in the best position

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<sup>17</sup> In this context, NCLC notes that it is not clear why DOE has excluded section 221(d)(3) and 236 housing from the definition of “Qualified Assisted Housing”, 74 Fed. Reg. 23805, n.1, since many tenants in these units are exposed to rent increases as the owner’s operating costs increase and to increases in any energy bills they pay directly.

<sup>18</sup> According to the National Energy and Directors Association (NEADA), there are more than 35 million households eligible for the Low Income Home Energy Assistance Program (LIHEAP). Almost all LIHEAP-eligible households are also eligible for WAP. “Issue Brief: The Low Income Home Energy Assistance Program,” p. 2 (NEADA, Nov. 26, 2007), available at [www.neada.org/publications/issuebriefs/2007-11-26.pdf](http://www.neada.org/publications/issuebriefs/2007-11-26.pdf).

to decide whether any such program- and income-qualified buildings are high enough priority to actually receive weatherization assistance.<sup>19</sup> In order to ensure that the benefits of the weatherization work flow primarily to the tenants, DOE should provide technical assistance to states to develop owner agreements specific to publicly-assisted property owners.

NCLC and TLSC again thank DOE for this opportunity to comment.

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<sup>19</sup> See 74 Fed. Reg. 23807, col. 3, in which DOE notes that “the proposed rule would not impact the prioritization that States and subgrantees rely on in evaluating requests for weatherization work.”