NATIONAL
CONSUMER LAW
CENTER INC

7 Winthrop Sq., 4th flr.
Boston, MA 02110-1245
Phone: 617-542-8010
Fax: 617-542-8028
consumerlaw@nclc.org
www.ConsumerLaw.org

STATEMENT OF THE NATIONAL CONSUMER LAW CENTER AND TEXAS LEGAL SERVICES CENTER FOR THE JUNE 18, 2009 DEPARTMENT OF ENERGY PUBLIC HEARING

RE: NOTICE OF PROPOSED RULEMAKING, RIN 1904-AB-97 WEATHERIZATION ASSISTANCE PROGRAM FOR LOW-INCOME PERSONS

The National Consumer Law Center (NCLC) and Texas Legal Services Center (TLSC) welcome this opportunity to engage in a dialogue around the proposed changes to the Department of Energy's Weatherization Assistance Program (WAP) eligibility rules.[1] 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, including access to basic utility services. Their attorneys regularly represent clients before the Legislature, the Public Utility Commission, and related state agencies.

Before commenting specifically on the issues raised in the NOPR, 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 level, compared to the need, NCLC/TLSC believes that there generally was not a great demand from the owners of large, publicly-assisted multi-family properties to have their buildings weatherized. In addition, in many areas there was a focus on weatherizing private housing in 1-to-4 unit buildings, although not to the exclusion of multi-family buildings or publicly-assisted housing.[2]

[1] See Notice of Proposed Rulemaking (hereafter, "NOPR"), 74 Fed. Reg. 23804 (May 21, 2009).
[2] In this context, "publicly-assisted housing" is intended to refer to Qualified Assisted Housing and Low-Income Housing Tax Credit units, as defined in the NOPR.

Four months ago, the American Recovery and Reinvestment Act of 2009 ("ARRA") provided substantial increases in funding for WAP and also for several programs that can support energy-efficiency improvements in publicly-assisted housing, including $1 billion specifically for capital improvements in public housing (including energy efficiency improvements), to be distributed through competitive grants;[3] $250 million specifically for capital improvements (including energy efficiency improvements) in properties receiving project-based section 8, section 202 or section 211 assistance from HUD, also to be distributed through competitive grants;[4] and $6.3 billion for a very broad range of energy efficiency activities under the Energy Efficiency and Conservation Block Grants ($3.2 billion) and State Energy Program ($3.1 billion).[5] 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. The Department of Energy (DOE), which administers WAP, and the Department of Housing and Urban Development (HUD), which oversees much of 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."**[6]

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.

[3] See Pub. L. 111-5, Title XII, Div. A; 213 Stat. 214.
[4] See Pub. L. 111-5, Title XII, Div. A; 213 Stat. 222.
[5] 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"].
[6] MOU, Recital R-10 (emphasis added).

However, NCLC/TLSC urges DOE and HUD to balance important policies that somewhat compete with each other, as they develop new rules and guidance for weatherization of multi-family properties. Those somewhat competing policies are summarized below:

1. A. Some of the poorest families in America live in publicly-assisted housing, particularly traditional federal public housing units operated by local housing authorities (LHAs), and publicly-assisted housing owners often struggle to find sufficient funds to adequately maintain their units. Therefore, directing WAP funding to these units can serve the public purpose of helping to maintain affordable housing units. Owners of publicly-assisted housing are highly motivated to seek WAP funding for this very reason.

B. However, it is equally important to recognize that WAP is not a program meant to provide additional operating subsidy for publicly-assisted housing. It is also critical to note that low-income households in private housing must pay their energy bills and whatever rental costs prevail in the market, without any assistance from HUD. Single-family housing in particular has long been given a priority in WAP. 42 USC 6864(b)(2).

2. A. The MOU and NOPR flag the importance of ensuring that any WAP expenditures in publicly-assisted housing are "consistent with the Weatherization Assistance Program" (MOU) and result in the benefits of that weatherization work accruing primarily to the low-income tenants in those properties. Many owners of publicly-assisted housing take the position that weatherizing their properties will result in the benefits of the work accruing primarily to tenants, simply because the owners operate affordable housing and, in the lingo, are "good guys."

B. However, the primary benefits of weatherization are reduced energy bills, as made clear in the Congressional findings within the WAP statute, 42 USC 6861 (e.g., "weatherization of such dwellings would lower shelter costs in dwellings owned or occupied by low-income persons;"

WAP agencies should "develop and support coordinated weatherization programs designed to alleviate the adverse effects of energy costs on such low-income persons"), by the legislative history, and by common sense. To the extent there are other benefits of weatherization, such as indirectly helping to maintain affordable housing units, those benefits are secondary in importance and harder to document, monitor and enforce.

3. A. Many operators of publicly-assisted housing feel that they should be given greater access to WAP because of their need to make energy efficiency improvements and the scarcity of funds to do so.

B. However, publicly assistance housing comprises only 5- to 6-million units of the more than 35 million housing units in which low-income families live.[7] The ARRA targets $4 billion for capital improvements in public housing, including $1 billion specifically for "priority investments, including investments that leverage private sector funding or financing for renovations and energy conservation retrofit investments,"[8] and another $250 million for "energy retrofit and green investments in such [section 8/202/811] assisted housing."[9] The remaining 30 million households residing in private housing units must rely almost exclusively on the WAP funding within the ARRA to have their units weatherized with federal funds.

NCLC/TLSC has summarized these facts and policies to reinforce the central premises of its own positions:

First, it is much harder to demonstrate in publicly-assisted rental housing that the benefits of weatherization will primarily accrue to the low-income tenants, an unquestionable

[7] 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, and almost all of those households would thus be eligible for WAP. "Issue Brief: The Low Income Home Energy Assistance Program," p. 2 (NEADA, Nov. 26, 2007), available at http://www.neada.org/publications/issuebriefs/2007-11-26.pdf.
[8] Pub. L. 111-5, Title XII, 123 Stat. 214.
[9] Pub. L. 111-5, Title XII, 123 Stat. 222.

requirement of federal law (42 USC 6863(b)(5)(A)) and DOE regulations (10 CFR 440.22(b)(3)). Publicly-assisted owners must be required to demonstrate how the benefits will so accrue.

Second, DOE must ensure that despite any changes that may be made to income-eligibility rules, such as those in the NOPR, adequate funding will remain for the 30 million low-income households in private, unassisted housing who also are in great need of weatherization assistance.

With this as background, NCLC/TLSC draws the following conclusions and makes the following recommendations:

1. Due to how rent and utility allowance rules operate in most of the publicly-assisted housing programs covered by the NOPR (especially how the provisions of the so-called Brooke Amendment, 42 USC 1437a(a) and companion utility allowance regulations work to cap housing costs), publicly-assisted tenants will not receive the bill-reduction savings that result from weatherization, whether heat and utility costs are included in rent or even when tenants pay those bills directly. The Brooke Amendment caps a tenant's "shelter costs," that is, the sum of rent plus out-of-pocket utilities, at 30% of income. Reductions in energy costs in a publicly-assisted building as a result of weatherization should result in reductions in the tenant's utility allowance, meaning that there is no net decrease in the tenant's total out-of-pocket costs.

2. Therefore, for a publicly-assisted property owner to meet the unambiguous legal requirement that the benefits of weatherization will flow primarily to the tenants, that owner will have to demonstrate significant, other benefits that accrue to the tenants. NCLC/TLSC believes the following could be considered substantial enough benefits to justify weatherization of publicly-assisted properties, subject to the discretion of the state WAP grantee or local subgrantee in

weighing the priority that should be given to specific buildings seeking weatherization assistance:

A. For project-based section 8, section 202, section 811 and LIHTC, 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.

B. 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 could be given higher priority.

C. If the owner 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 benefits to the tenants.

D. In properties 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.[10]

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

[10] 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.

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 to decide whether any such program- and income-qualified buildings are high enough priority to actually receive weatherization assistance.[11] 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 more rigorous landlord-tenant agreements.[12]

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

Submitted by:

Charles Harak, Staff Attorney

[11] 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."

[12] These agreements should be used whenever a publicly-assisted rental property in weatherized, in order to ensure that the provisions of 10 CFR 440.22(b) – (d) are met. Based on a survey that NCLC is conducting of landlord-tenant agreements around the country, it appears that New York and a handful of other states have model agreements that are well-suited for weatherizing large multi-family buildings.