New Mexico Environmental Law Center

January 18, 2022
Transmitted via email: 2022act@state.nm.us

Secretary Sarah Cottrell Propst
New Mexico Energy, Minerals, and Natural Resources Department

Secretary James Kenney
New Mexico Environment Department

Re: Comments on the Clean Future Act (H.B. 6) Draft Bill

Dear Secretary Cottrell Propst and Secretary Kenney,

By this letter, the New Mexico Environmental Law Center ("Law Center") submits its comments on the H.B. 6, the Clean Future Act.

The Law Center is a non-profit public interest law center. The Law Center provides free and low-cost legal services to individuals and communities working to protect the air, water and land in New Mexico. For the past 34 years, a significant majority of the Law Center's work has involved working with and on behalf of community groups to fight for environmental justice. During that time, almost all of the Law Center's legal services have been provided to communities whose residents are predominantly low-income and predominantly people of color. We appreciate the opportunity to provide feedback related to the Act.

The Law Center applauds the Lujan Grisham Administration's efforts to combat the climate crisis under Executive Order 2019-003, "Executive Order on Addressing Climate Change and Energy Waste Prevention." The Clean Future Act represents an important step in achieving climate justice for the State of New Mexico. We respectfully submit the following comments in order to strengthen the Act.

First, the Act's mandate in Section 6(D)(2) for the environmental improvement board to adopt rules implementing a carbon offset scheme falls short of the action needed to combat the climate crisis and to protect the health of New Mexican communities. Traditional carbon offset schemes, such as cap and trade markets or the offsetting scheme offered by the Act, often exacerbate environmental justice concerns by creating "hot spots" for carbon emissions, which are often coupled with other harmful air pollutants.[1] The offsetting scheme provided by the Act presents a false solution to the climate crisis, where emissions reductions can simply be purchased and sold without any meaningful changes that reduce the overall emissions in the atmosphere or protect community health.

A common offset identified by greenhouse gas emitters, for example, is planting trees in order to offset emissions. While trees serve as an essential source of carbon sequestration, a newly

[1] *See* Raul P. Lejano et al., *The Hidden Disequities of Carbon Trading: Carbon Emissions, Air Toxics, and Environmental Justice*, *Frontiers in Env't Sci.* at 5 (Nov. 10, 2020).

planted tree can take at least 20 years to capture the amount of CO2 that a carbon offset scheme promises.[2] Even then, the carbon accounting may be imprecise.[3] As such, this offset scheme does not effectively reduce overall emissions in the atmosphere until many years too late. This offset, along with other offsets commonly identified by polluters (for example, financing a wind turbine generator), ultimately results in allowing the emitting person or entity to continue on with business as usual, emitting as usual, while placing the burden of the climate crisis primarily on low income communities and communities of color.

Such trading schemes fail to cut carbon emissions directly from polluting industries and fail to address the fact that emissions must be prevented from entering the atmosphere in the first place. These schemes also often rely on climate mitigation and adaptation technology that has not yet been invented, allowing for polluters to continue operating under the status quo because climate change mitigation and adaptation practices simply do not exist.

Second, we are concerned that the Act provides inadequate safeguards for communities experiencing disproportionate environmental health harms. While Section 4(B)(1) requires coordination with "disproportionately impacted communities" for the preparation of the report by the Environment Department and the Energy, Minerals and Natural Resources Department, the Act provides no information regarding how this coordination will take place or how these communities will be identified or meaningfully included in the process. The rulemaking requirements imposed by the Act could provide these details, however, rulemaking requirements to address the disproportionate impacts of climate change are notably absent.[4] Without additional language addressing climate injustice, the frameworks utilized by the Act to combat the climate crisis may continue to perpetuate existing environmental health disparities and further impact the wellbeing of communities already experiencing environmental injustice.

In addition to the comments above, we also offer the following specific comments:

Section	Comment
Section 2(B) &	The definition of "disproportionately impacted communities" provided

[2] Ross W. Gorte, *U.S. Tree Planting for Carbon Sequestration, Congressional Research Service* (May 4, 2009) https://climatechange.lta.org/wp-content/uploads/cct/2018/03/R40562_2009.pdf.

[3] *See* Carolyn Gramling, *Why planting a bunch of trees isn't enough to solve climate change, Science News* (Jul. 9, 2021), https://www.sciencenews.org/article/planting-trees-climate-change-carbon-capture-deforestation.

[4] We incorporate by reference item no. 1 included in the comments on this Draft Bill submitted by a coalition of other environmental organizations dated January 18, 2022, which recommends adding a new subsection (g) to 6.D.(2) (p. 10, line 6) to read: "protocols to identify, describe, and reduce adverse impacts to, and advance benefits to, overburdened communities as New Mexico reduces its greenhouse gas emissions, as well as a process to coordinate with overburdened communities in developing these protocols;"

Section 6(A)(2)	by the Act fails to recognize the structural inequality and systemic racism that perpetuates the named burdens impacting communities. We recommend changing the language of this section to read, "'disproportionately impacted communities' means communities or populations of people facing disproportionate impacts of multiple burdens due to systemic racism and structural inequality, including but not limited to environmental and socioeconomic stressors, inequity, poverty, high unemployment, pollution or discrimination, that may act to persistently and negatively affect the health, well-being and environment of communities or populations." We further recommend specifically defining a disproportionately impacted community to include any census block group, as determined by the most recent United States Census, in which: 1) At least 35 percent of the households qualify as low-income households (at or below twice the poverty threshold as determined by the United States Census Bureau); 2) At least 40 percent of the residents identify as minority or as members of a State recognized tribal community; or 3) At least 40 percent of the households have limited English proficiency (without an adult that speaks English "very well" according to the United States Census Bureau) We also recommend adding language that recognizes that communities have the right to identify and define themselves.
Section 2(E) & Section 6(D)(2)(c)	The Act should define the terms, "quantifiable, enforceable, additional, permanent, and verifiable."
Section 4(A)(1)	We recommend removing the term, "to the extent known," from this provision.
Section 4(B)(1)	We recommend clarifying what impacts are being referred to in this section.
Section 4(A)(2)	Rather than requiring state entities to report on "the ways in which [it] is able to integrate climate change adaptation and mitigation practices into its programs or operations," we recommend mandating that state entities actually integrate such practices.
Section 5(A)(4)	We incorporate by reference item no. 11 included in the comments on this Draft Bill submitted by a coalition of other environmental organizations dated January 18, 2022, which recommends the removal of reference to additional needed authority in annual reports. We join in the following statement: "We believe that, with passage of the CFA, state agencies will have all the authority needed to limit GHG emissions. The

	law should not suggest otherwise. As a result, we recommend the following change to Section 5.A.4: (4) any additional resources, statutory or regulatory authority or programs ~~needed~~ that could facilitate efforts by the state entity to reduce direct emissions…
Section 6(B)	We recommend that the start date for the rulemaking be changed to begin no later than January 1, 2023 in order to avoid the delay of overall emissions reductions.
Section 6(D)(2)(c)	The Act should define, "environmental justice communities" in addition to defining "disproportionately impacted communities." We recommend the definition provided in the following document: https://www.nmhealth.org/publication/view/help/309/ Additionally, the Act should include specific language that clearly requires free, prior and informed consent by Indigenous communities impacted by any identified offset. While this consent should be defined by the identified community, at minimum, free should mean free of barriers to information, including technological or financial barriers. This consent requires meaningful access to meetings and, often, flexible timeframes to allow for meaningful communication among rights holders and state agencies prior to any decision related to offset approval by the state agencies.
Recommended new section	We incorporate by reference item no. 4 included in the comments on this Draft Bill submitted by a coalition of other environmental organizations dated January 18, 2022, recommending inclusion of the following new section: SECTION __. [NEW MATERIAL] ALTERNATIVE ENFORCEMENT MECHANISM. — If on December 31, 2030 the greenhouse gas emissions limit of 50 percent of 2005 levels is not being enforced due to agency inaction, court action, or for any other reason, there is hereby created a right for any person to enforce, by an action in any New Mexico district court, the 2030 limit against any source. Upon a finding by the court that a source has in 2030 or thereafter emitted greater than 50 percent of its 2005 emissions, the source shall pay $100 for each metric ton of emissions above that limit into the State Climate Fund for the purpose of purchasing offsets. Upon such a finding the source shall also pay to the person

	bringing the action the reasonable attorney fees and costs that the person incurred in bringing the action. For actions against sources that did not exist in 2005, the source shall pay $50 per metric ton of its emissions. (page 10, line 6) "investment of the fund, proceeds from lawsuits and fees collected by the department…" (page 10, line 12) "the Air Quality Control Act, and for the purchase of offsets. Disbursements from the fund shall…" (page 10, line 18)

Conclusion

We emphasize that carbon offsets are a false solution to the climate crisis. Offsets do not deliver a reduction in the overall carbon emissions in the atmosphere—rather, they provide a mechanism for polluting industries to continue with the status quo. Offsets might buy time, but New Mexican communities need immediate action. Case after case demonstrates that carbon offsets do not, in fact, offset the amount of pollution they purport to and ultimately provide polluters with a guilt-free pass to continue emitting.[5] At a minimum, the Act should be revised to provide additional detail regarding how it will address climate injustice in coordination with "disproportionately impacted communities" in New Mexico.

Sincerely,

NEW MEXICO
ENVIRONMENTAL LAW CENTER

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[5] Lisa Song & James Temple, *The Climate Solution Actually Adding Millions of Tons of CO2 into the Atmosphere, ProPublica* (April 29, 2021), https://www.propublica.org/article/the-climate-solution-actually-adding-millions-of-tons-of-co2-into-the-atmosphere.