

Memorandum

To: Vermont Climate Solutions Caucus

From: James A. Dumont, Esq.

Date: 12/2/19

Re: Proposed Language for Global Warming Solutions Act

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Some of the language in the existing draft Global Warming Solutions Act, and some of the suggestions currently being proposed for a revised draft, suffer from major defects that may not be readily apparent.

The first major shortcoming lies in the Enforcement section. Unless modified, the Act may be unenforceable. The Attorney General by law cannot enforce the Act by bringing claims against State agencies that fail to comply (because the Attorney General's duty is to defend the State). And court decisions appear to prevent citizens from having the "standing" needed to bring any claims to enforce the Act. The widely reported decision by the US District Court for the District of Oregon, which held that plaintiffs in that case did possess standing to challenge government action and inaction on climate change, *Juliana v. US*, 217 F. Supp. 3d 1224, 1250, 1260-61 (D. Or. 2016), based its ruling on facts that would not apply to any person challenging the Vermont state government's failure to comply with this Act. The rationale of the carefully written decision suggests that any Vermont citizen's attempt to enforce the Global Warming Solutions Act would fail. (Vermont citizens may not be able to satisfy the "injury in fact," "causation" and "redressability" requirements needed in order to enforce the Act.) As a result, unless the draft Act is changed, no one may have the ability to enforce its mandates against the State. This can be remedied by adding language proposed below.

The second major shortcoming is that the draft Act would have limited effect on utility regulation unless it is amended to address the Vermont Comprehensive Energy Plan and its Electric Plan. Several Vermont statutes mandate that the PUC grant or deny certificates of public good under section 248 based on whether projects comply with these plans and on the Integrated Resource Plans that implement these plans. The climate change provisions in the current plans depart drastically from the proposed Act -- but the draft Act does nothing to require these plans to conform to the Act or to give the Act priority over these plans. These plans, therefore, will, in practical effect supersede the Act with regard to all proceedings before the PUC -- unless the Act states otherwise. Language below does that.

The third, and perhaps most severe, shortcoming is that the bill is silent about what is now nearly universally recognized within climate science -- that preservation and expansion of forests is absolutely critical to combat the climate crisis, and that when forests are cut and then replanted the eventual replacement carbon storage occurs so far into the future that the net effect over the crucial next decade is starkly negative. The science also tells us that burning of wood to produce electricity produces more carbon dioxide, per BTU, than burning coal. Reliance on continued or increased burning of wood, by continuing to foster increased use of renewable resources and continuing to define renewables as including wood, would render any Global Warming Solutions Act a travesty

of its title. The existing draft Act does that. The Act could turn out to be worse than doing nothing. In contrast, the law recently adopted in NY excludes biomass from the definition of renewable sources and contains requirements of specified gigawatt amounts (not “goals”) of wind and solar that must be acquired by 2025, 2030 and 2035 to meet electric generation needs (§ 4, adding § 66-p to the public service law).

Similarly, large-scale hydro-electric production, which floods large areas of forest and wetlands, causes release of enormous amounts of methane. It also precludes carbon sequestration in these areas. It does not combat the climate crisis. The existing draft Act, however, could have the effect of increasing reliance on large-scale hydro.

### **Section 1 LEGISLATIVE FINDINGS**

The General Assembly finds that:

- (1) Human-caused climate change poses a serious threat to the people of Vermont, the United States and the world.
- (2) Climate change is both caused and exacerbated by ~~carbon~~ greenhouse gas emissions that result from human activity.
- (3) It is in the interest of the people, in order to protect the public health, preserve the environment, and promote the general welfare, that the State reduce economy-wide ~~carbon~~ greenhouse gas emissions and preserve and expand carbon sequestration by its forests, soils and other resources, in order to address the problem of climate change.
- (4) Vermont’s forests sequester carbon; preservation and expansion of Vermont forests is critical to combatting climate change; replanting of forests to again sequester carbon does not result in significant carbon sequestration for decades.
- (5) Large-scale hydroelectric generation may result in emission of substantial amounts of greenhouse gasses and precludes sequestration of carbon in flooded areas.
- (6) Pursuant to 3 V.S.A. §§ 152 157 and 159, the Attorney General defends the State of Vermont against claims that the State is not complying with Vermont laws; therefore, if the State fails to implement the law as the General Assembly intends, it may be necessary for a private attorney general to be appointed to implement the intent of the General Assembly by bringing actions to enforce this Act.
- (7) The purpose of this bill is to create a fair, workable, cost-effective and legally enforceable system by which Vermont will be able to reduce its economy-wide ~~carbon~~ greenhouse gas emissions by ~~75~~ 100 percent by 2050 while maintaining and increasing its carbon sequestration.

### **Section 3. GREENHOUSE GAS REDUCTION REQUIREMENTS**

578(a). The standards in the draft should be modified to reflect the IPCC findings:

- (1) 25 percent by January 1, 2025;
- (2) 40 percent by 2030;

- (3) 50 percent by January 1, 2035;
- (4) Net zero emissions for electricity by 2040;
- (5) 60 percent by January 1, 2045; and
- (6) 75 100 percent by January 1, 2050.

578(e), (f), (g) and (h). Change “2025 greenhouse gas reduction requirement” to “2025 and 2030 greenhouse gas reduction.”

578(i) & (j). Change “2035 greenhouse gas reduction requirement” to “2035 and 2040 greenhouse gas reduction and net zero requirements.”

#### **Section 4 ABROGATION**

Section 578a(a) and (b) should be amended in order to refer to section 578b, on enforcement, rather than section 578.

The word “rigorous” should be replaced by “protective” or followed by “and protective.” Citizen suit provisions are not “rigorous,” which refers to standards. They are, or are not, protective, because they do or do not allow citizens to bring enforcement actions.

#### **Section 5 ENFORCEMENT.**

The citizen suit provision may be ruled unenforceable for lack of standing, as noted above. The concept of a “private attorney general,” however, has been approved of by the courts when, as here, the Attorney General has conflict and cannot bring claims. New language is needed so that, if a court does hold that citizens lacks standing, a private attorney general will be appointed to enforce the law. (If a citizen or citizen group does have standing, the private attorney general would not be appointed.) Amend existing 578b(b)as follows:

##### 578b Enforcement

- (a) The Attorney General may investigate violations of section 578 of this title. If the Attorney General finds that a person has violated or is violating section 578 of this title, the Attorney General may bring an action in the Civil Division of the Washington Superior Court or in the Civil Division of the Superior Court of any county where venue lies.
- (b) Any person aggrieved by a violation of section 578 of this title may bring an action in the Civil Division of the Superior Court of Washington or in the Civil Division of the Superior Court of the county in which the person resides or has his or her personal place of business. In the event that any Court determines i) that the action seeks relief against the State or any officer or employee of the State or any agency, board or commission of the State, for alleged failure to take legally required action to reduce emissions of greenhouse gases under section 578, ii) that the person lacks standing under the State or federal constitution to bring the claim, and iii) that the Attorney General is not seeking that relief, or cannot lawfully seek that relief, the Court shall appoint an experienced member of the Vermont bar to act as a private attorney general to bring the claim and the Court shall not dismiss the claim on the grounds of lack of standing. The member of the bar shall not be compensated by the State for her or his

time, but shall be awarded all costs and expenses, including expert witness fees, incurred in litigating the claim if she or he prevails with respect to the claim or any part thereof.

### **New Section 7 COMPREHENSIVE ENERGY PLAN and ELECTRIC PLAN**

Without language such as proposed below, the basic purpose of the Act would be severely undermined. The less protective current Comprehensive Energy Plan and the less protective current Energy Plan, and future plans, otherwise would control PUC decisions.

Section 578d is added to state:

578d. The deadlines, standards and requirements established or authorized in this Act shall supersede all deadlines, standards and requirements in the Comprehensive Energy Plan and in the Electric Plan that are less rigorous, and in applying 30 V.S.A. § 248 and all other provisions of Title 30, the Public Utility Commission shall apply the deadlines, standards and requirements established or authorized by this Act.

### **New Section 8 FOREST PRESERVATION AND EXPANSION**

Section 8002 of Title 30 is amended as follows:

As used in this chapter:

(21) "Renewable energy" means energy produced using a technology that relies on a resource that is being consumed at a harvest rate at or below its natural regeneration rate.

(A) For purposes of this subdivision (21), methane gas and other flammable gases produced by the decay of sewage treatment plant wastes or landfill wastes and anaerobic digestion of agricultural products, byproducts, or wastes, or of food wastes shall be considered renewable energy resources, but no other form of solid waste, other than silvicultural waste, shall be considered renewable.

(B) For purposes of this subdivision (21), no form of nuclear fuel shall be considered renewable.

(C) The only portion of electricity produced by a system of generating resources that shall be considered renewable is that portion generated by a technology that qualifies as renewable under this subdivision (21).

(D) The Commission by rule may add technologies or technology categories to the definition of "renewable energy," provided that technologies using the following fuels shall not be considered renewable energy supplies: coal, oil, propane, and natural gas.

(E) In this chapter, renewable energy refers to either "existing renewable energy" or "new renewable energy."

(F) For purposes of this subdivision (21), no form of wood fuel shall be considered renewable unless the use is demonstrated to provide a net reduction in greenhouse gas emissions as compared to coal, oil and natural gas, and, unless the use will result in no net loss of carbon sequestration over the first decade of its use.

(G) For purposes of this subdivision (21), no form of hydro-electric generation that inundates more than 100 acres of land shall be considered renewable unless the use is demonstrated to provide a net reduction in greenhouse gas emissions as compared to coal, oil and natural gas, and, unless the use will result in no net loss of carbon sequestration over the first decade of its use.

END