

AGENCY BILL ANALYSIS - 2026 REGULAR SESSION

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: February 6, 2026 **Check all that apply:**
Bill Number: HB 153 **Original** **Correction**
 Amendment **Substitute** X

Sponsor: <u>Meredith A. Dixon, Kristina Ortez</u> Short Title: <u>Low-Carbon Construction Material Rebate Act</u>	Agency Name and Code Number: <u>State Ethics Commission 410</u> Person Writing <u>Grace Su</u> Phone: <u>505-859-9625</u> Email <u>Grace.su@sec.nm.gov</u>
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY26	FY27		
	\$25 million (through 2029)		General Fund

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY26	FY27	FY28		

(Parenthesis () indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY26	FY27	FY28	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

This bill, with an effective date of July 1, 2026, concerns (1) the establishment and administration of a “low-carbon construction material rebate program” by the New Mexico Department of Environment (“department”) and (2) the creation of the “environmental product declaration program” and its power and duties.

Section 4 of the bill states that this program would provide financial incentives to material buyers who purchase low-carbon construction material and that the rebates will be provided subject to appropriation.

Section 5 of the bill provides that the department shall establish emissions baselines for conventionally produced covered construction materials that are based on either regional industry-average emissions data, or the best available data source as determined by the department, and that the department shall review and adjust emissions baselines and emissions every three years. The department will require legislative authorization to increase allowable emissions levels.

Section 6 of the bill provides the limits for the rebates that material buyers shall be eligible for if they buy low-carbon construction material and how the department shall prioritize distribution of rebates. The limits are a maximum rebate of \$500,000 per project and a maximum rebate of \$10 million statewide per fiscal year. **Section 7** of the bill delineates the verification and certification requirements for a material buyer to receive a rebate and grants the department authority to conduct audits and inspections regarding program compliance.

Section 8 of the bill requires the department to submit an annual report to the governor and legislator annually, and to make rebate awards and program data publicly available on its website. **Section 9** of the bill concerns anti-fraud provisions. **Section 12** of the bill creates the “environmental product declaration programs” and describes its powers and duties. **Section 14** of this bill appropriates \$25 million from the general fund to the department for expenditure in fiscal years 2027 to 2029 to provide rebates under the program.

FISCAL IMPLICATIONS

SIGNIFICANT ISSUES

This bill triggers scrutiny under the Anti-Donation Clause, Article IX, Section 14 of the New Mexico Constitution¹ because the proposed rebates to be offered under the program concern the expenditure of public funds. The Anti-Donation Clause applies to all transfers of value from the State to private parties and prohibits all state and local government subsidies that do not fall

¹ The Anti-Donation Clause provides that “Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation [...] except as provided in Subsections A through H of this section.” N.M. Const. art. IX, § 14.

under certain exceptions. The Anti-Donation Clause prohibits the State from simply donating public money from the general fund operating account to favored private companies (unless an exception in Subsections A through H applies).²

Based upon the rebate program's structure as currently written, it raises concerns under the Anti-Donation Clause because it would provide a rebate from public funding of up to \$500,000 per construction project to private individuals, without the private individuals providing something of value to the State and without an apparent applicable exception under the Anti-Donation Clause for this funding.

In analyzing whether there is a violation of the Anti-Donation Clause, the doctrine that has emerged from case law follows a two-step analysis. First, is the transfer of public funds at issue a pledge of credit or donation to or in aid of any person, association, or corporation? As discussed below, if the public entity receives something in exchange for the transfer of funds, it is likely not to be considered a "donation." Second, if the transfer is a pledge of credit or a donation, does an exception provided by Subsections A through H of the Anti-Donation Clause apply?

To determine whether a transfer of public funds constitutes a "donation" and implicates the Anti-Donation Clause, courts have held that the transfer is not a "donation" when the State receives value in exchange for transferring public money based upon contract law.³ Courts have focused on whether the public-entity donor, (e.g., the State, the county, or the municipality) receives some commitment or performance in exchange for the transfer in distinguishing if a transfer of public money is a non-binding, donative promise or not.

The Courts do not focus on whether the transfer is generally in the public interest and the Courts have never held that a transfer of public funds is exempt from the Anti-Donation Clause simply because it is in the public interest. Indeed, the New Mexico Supreme Court has explicitly stated that "[t]he constitution makes no distinction as between 'donations', whether they be for a good cause or a questionable one. It prohibits them all."⁴ Here, it could be argued that the rebate program creates downstream benefits that flow to the public because it would encourage the purchase of low-carbon, as opposed to high-carbon, construction materials. Anticipated benefits from these purchases, however, would likely not provide adequate value to the state under

² See *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) ("The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for real product. . . .").

³ See *Pierce v. State*, 1996-NMSC-001, ¶ 29 n.12 (rejecting challenge to statutorily conferred pension benefits because pension benefits are not a gratuity but value exchanged for work received by the public employer); *City of Gallup v. N.M. State Park & Recreation Comm'n*, 1974-NMSC-084, ¶ 9 (rejecting an anti-donation claim because, under agreement, state would receive title to 640 acres in Red Rock State Park, \$1.5M for construction, and maintenance and operation of the park for the life of lease contract with Gallup); *White v. Board of Educ. of Silver City*, 1938-NMSC-009, ¶ 31 (rejecting challenge because board of education "will get value received for every dollar put into the enterprise" of a bond issue to build a school to join state and local schools); *Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32 (rejecting challenge to severance benefits because "severance pay is deemed to be in the nature of wages that have been earned"); *State ex rel. Office of State Eng'r, et al. v. Lewis, et al.*, 2007-NMCA-008, ¶ 51 (rejecting challenge to Pecos River rights settlement because, in exchange for funds, State received land and water rights, as well as settlement of claims in suit); cf. *City of Raton v. Ark. River Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) (Browning, J.) ("The Court does not believe it should evaluate whether the agreement was a good or bad deal under the Anti-Donation Clause, but merely check for adequate consideration.").

⁴ *State ex rel. Sena v. Trujillo*, 1942-NMSC-044, ¶ 22.

contract law. Yet, it is important to note that if the rebate is sufficiently conditional, such that the buyers of low-carbon construction materials must satisfy a set of conditions that the State demands, then the rebate might be more analogous to a unilateral contract that the State offers as opposed to a donation or unconditional subsidy.

As the bill is currently written, however, there does not seem to be any conditions on the buyers of these materials except that they purchase the materials and submit the requisite documentation under Section 7 of the bill. It is questionable as to whether the purchase of low-carbon construction materials alone and the submission of verification documentation certifying the materials are low-carbon would constitute sufficient consideration under New Mexico law to prevent the rebate from being a donation because the purchase of these materials by buyers and the submission of certification documentation do not form a contractual relationship between the buyers and the State, where the State would receive something of value specifically because of the implementation of the rebate program. For example, in a situation where a buyer might have already intended to buy low-carbon construction materials regardless of the existence of the rebate program, it is unclear that the State would receive any bargained-for performance or obligation from the buyer in exchange for paying the buyer public money in the form of a rebate.

In contrast, if the funding were provided, for example, under a sufficient grant structure, it is possible it would more clearly provide consideration. The Commission has previously concluded:

Government grant agreements often include the essential elements of a contract (including consideration) and establish what is ordinarily regarded as a contractual relationship between the government and a grantee. In exchange for grant funds, grantees ordinarily agree to: (i) performance of a specific project that the government desires; (ii) prudent management of grant funds; and (iii) satisfaction of conditions required by the grant award instrument, including reports to the government on the use of grant funds. That set of promises by the grantee is value that government receives in exchange for the grant funds, and the formation of a contract between the government and grantee allows the government, if necessary, to sue to enforce the conditions of a grant agreement. Where the contemplated agreements meet the requirements of a contract, [a state agency] would receive something of value in exchange for the funds, and therefore the exchange would not be a “donation” violative of the Anti-Donation Clause.⁵

Moreover, since the Anti-Donation Clause prohibits the State from directly subsidizing private companies when there is no applicable exception under Subsections A through H, it also likely prohibits the State from indirectly subsidizing private companies, at least where the New Mexico

⁵ State Ethics Comm'n Adv. Op. 2024-06 (Dec. 13, 2024) (available at <https://nmoneSOURCE.com/nmos/secap/en/item/19122/index.do>) (footnotes omitted) (citing *Henke v. U.S. Dept. of Commerce*, 83 F. 3d 1445, 1450 (D.C. Cir. 1996); *United States v. Marion Cnty. Sch. Dist.*, 625 F.2d 607, 609 (5th Cir. 1980)).

Supreme Court has not interpreted the Anti-Donation Clause to allow the subsidy.⁶

Finally, any Anti-Donation Clause analysis must also consider the exceptions provided for in Subsections A through H. Those enumerated exceptions provide the categories of those subsidies that the people of New Mexico have deemed as sufficiently in the public's interest to remove them from the Clause's anti-subsidy scope. It is not clear, however, that any of those exceptions would apply in this instance.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If this bill is not enacted, buyers of low-carbon construction materials will not receive financial incentives from the department for purchases of low-carbon construction materials. From the information provided in the bill, the environmental impact from how many buyers would have bought low-carbon instead of high-carbon construction materials is unclear.

AMENDMENTS

⁶ See, e.g., NMSA § 7-2-18.3(E) (regarding the new solar market development income tax credit).