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New York Ushers in New Era of Climate Liability and Litigation with the Climate Change Superfund Act

Client Alerts

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On February 6, 2025, twenty-two states and four energy industry organizations and businesses filed a lawsuit challenging New York's "climate superfund" law.[1] This law, signed on December 26, 2024 by New York Governor Kathy Hochul, creates a new state fund for climate change mitigation efforts—with proceeds derived from mandatory contributions by the largest fossil fuel companies subject to New York's personal jurisdiction. Modeled off the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[2] New York's Climate Change Superfund Act[3] will require a select group of companies to pay $75 billion over 25 years into New York's Climate Change Adaptation Fund.[4] This law and the litigation challenging it merit close attention from all involved in the energy industry, as they illustrate the challenging dynamics at play, as States and private companies seek to navigate a changed political environment in which the federal government is less likely to seek to address climate change or to fund solutions to it.

The Climate Change Superfund Act

The Climate Change Superfund Act adds Article 76 to New York's Environmental Conservation Law, creating the Climate Change Adaptation Cost Recovery Program.[5] It is a strict liability law applied to "Responsible Parties"—parties that New York deems responsible for more than 1 billion metric tons of greenhouse gas emissions between January 1, 2000 and December 31, 2018.[6] Only entities that are subject to New York's personal jurisdiction (as defined by the "nexus requirements of the United States Constitution") are considered Responsible Parties.[7] The law holds Responsible Parties liable for a proportional share of the total greenhouse gas emissions above 1 billion metric tons emitted by all Responsible Parties.[8] Responsible Parties are required to pay their proportion of $75 billion into the Climate Change Adaptation Fund beginning on September 30, 2026.[9] A Responsible Party can also elect to spread that payment out over 24 years.[10]

Many details of the scheme are yet to be filled in, including which companies New York will deem to be Responsible Parties. But given the large number of energy companies with business connections

to New York, many important companies in the energy industry face potential exposure.

The Constitutional Challenge

A recent lawsuit brings a sweeping challenge to New York's superfund law. It depicts the law as an attempt to impose New York's preferred policy on out-of-state energy producers, and to use the liability the law imposes to fund New York's own priorities. In particular, the lawsuit presents the following claims:

(1) Preemption Under Federal Common Law: According to the suit, the law improperly attempts to regulate conduct beyond New York's borders and operates in areas where a uniform federal rule of decision is necessary—energy policy and, given the law's potential international reach, foreign relations.

(2) Preemption Under the Clean Air Act[11] : The suit argues that penalizing energy producers out of state is inconsistent with Second Circuit law that State lawsuits related to emissions may only be "brought under the law of the pollution's source state."[12]

(3) Violation of the Dormant Commerce Clause: The suit argues that the law effectively targets out-of-state producers, impermissibly regulates extraterritorially, and imposes burdens on interstate commerce that are "clearly excessive" under the *Pike* balancing test.

(4) Violation of the Due Process Clause: Per the suit, the law impermissibly imposes retroactive liability because it (a) effectively punishes energy producers for conduct that was lawful at the time; and (b) imposes its liability in an arbitrary fashion by reaching only conduct from 2000 to 2018 and reaching only some entities responsible for greenhouse gas emissions (omitting, *e.g.*, agriculture, transportation, and end users).

Notably, CERCLA—on which the law was modeled—survived due process challenges.[13] But the law has developed substantially since those decisions,[14] and the complaint's arguments seek to distinguish those decisions. The New York law, for example, arguably differs from CERCLA in only imposing liability on some allegedly responsible parties (whereas CERCLA's broad liability scheme encompasses all parties that fit within the statute's four categories of liable parties). CERCLA, moreover, funds remediation at a particular site—and the projects potentially funded by New York's law are more broad ranging.[15]

(5) Violation of the Equal Protection Clause: The suit argues that New York has violated equal protection by attempting to impose liability on a group of companies that are largely outside New York, when other companies that also contributed greenhouse gas emissions are within New York, and yet fall outside of the law.

(6) Violation of the Eighth Amendment: The Eighth Amendment prohibits excessive finds, and the lawsuit alleges that the law amounts to a penalty regime that imposes excessive liability on a disfavored group of producers.

(7) Takings Clause Violation: According to the suit, the law amounts to a regulatory taking because it requires a disfavored group of producers to fund remediation projects based on lawful conduct, when those projects should be funded (if at all) by the public at large.

Based on these arguments, the suit seeks declaratory and injunctive relief that would render the law unenforceable.[16]

The Broader Climate Liability Landscape

The Climate Change Superfund Act is the latest iteration of attempts to address climate change at the state level. State common law and constitutional lawsuits have seen varying degrees of success in seeking to hold companies liable for climate change. Massachusetts[17] and the City of New York[18] have both sued companies with fossil-fuel interests—litigation that is ongoing. In Montana, child activists successfully convinced the state supreme court that it was unconstitutional for the state legislature to prohibit consideration of greenhouse gas emissions in the environmental review process.[19] Meanwhile, New York's law follows a similar law enacted by Vermont (which is also facing legal challenges), and more laws will follow.

State law–based actions in this area, and lawsuits challenging those actions, are likely to remain an active area over the next four years. As the first several weeks of the new presidential administration has confirmed, the federal government is poised to limit its regulation of greenhouse gas emissions and reduce funding for climate change mitigation. Many states, however, take a different view. And those states may seek to use the means available to them to chart their own course on this issue. Meanwhile, a new focus on affordability in the energy space is going to make these fights especially contentious on both sides, as some states (like New York) may seek additional sources of funding given the federal government's retreat from this area even as other states (like those that have challenged New York's law) seek to protect what they view as the interests of their own citizens and businesses. The action on these issues, moreover, may occur with even greater pace given the recent trend across the country that states of all perspectives have become more muscular in their litigation efforts.

Jenner & Block stands prepared to counsel clients through the many challenges that arise in this area, leveraging its cross-disciplinary approach to help navigate the most complicated issues of law, business, and policy.

Footnotes

[1] Complaint, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. Feb. 6, 2025).

[2] 42 U.S.C. § 9601 *et seq*.

[3] Climate Change Superfund Act, S.2129-B/A.3351-B (codified at N.Y. Envtl. Conserv. § 76-0101 et seq. ((2024)).

[4] *See* N.Y. State Fin. § 97-m.

[5] *Supra* note 3.

[6] N.Y. Envtl. Conserv. Law §§ 76-0101(20), 76-0103(3).

[7] § 76-0101(20).

[8] § 76-0103(3).

[9] §§ 76-0101(1), 76-0103(3)(g), (h).

[10] §§ 76-0101(1), 76-0103(3)(g), (h).

[11] 42 U.S.C. §§ 7401-7671q.

[12] *Supra* note 1 at ¶ 133 (quoting *City of New York v. Chevron Corporation*, 993 F.3d 81, 100 (2d Cir. 2021)).

[13] *E.g., United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986).

[14] For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 514, 537 (1998), a plurality of the Supreme Court enjoined a statute meant to provide benefits to coal industry retirees on takings grounds because the statute singled out certain businesses based on "conduct far in the past, and unrelated to any commitment [they] made or to any injury they caused." Concurring in the judgment, Justice Kennedy held instead that the statute violated due process because of its retroactive application to a company that played no role in creating the expectation, nor the tenuous financial stability of benefits for coal industry retirees. *Id.* at 547, 550.

[15] Some potential examples of mitigation projects listed in the Climate Change Superfund Act include wetland restoration and energy efficiency upgrades in buildings. *Supra* note 3 at §2(6).

[16] *Supra* note 1 at 69.

[17] *Commonwealth v. Exxon Mobil Corp.*, 1984CV03333 (Mass. Super. Ct. filed Oct. 24, 2019).

[18] *City of New York v. Exxon Mobil Corp.*, 451071/2021 (N.Y. Sup. Ct. filed Apr. 22, 2021).

[19] *Held v. State*, 2024 MT 312, ¶ 68.

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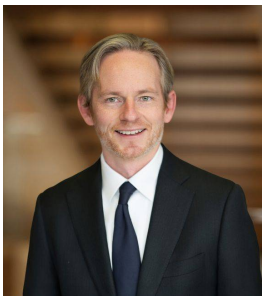

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