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December 30, 2024

New York Enacts Law Fining Companies for Past Greenhouse Gas Emissions

Bill Requires Large Energy Companies to Pay $75 Billion into "Climate Superfund"

SUMMARY

On Thursday, December 26, 2024, New York Governor Kathy Hochul signed into law the "Climate Change Superfund Act" (S.2129-B/A.3351-B), which had been awaiting her approval since June. The law applies to companies that "engaged in the trade or business of extracting fossil fuel or refining crude oil and [are] determined [] to be responsible for more than one billion tons of covered greenhouse gas emissions" from 2000 to 2018, and requires them to pay a combined rate of $3 billion per year for 25 years into a "Climate Superfund."[1] The law is limited to companies that have a "sufficient connection with the state to satisfy the nexus requirements" of the U.S. Constitution.[2]

Each company's payment will be proportionate to its prior emissions.[3] The program operates under a theory of strict liability, meaning the fines are assessed based on a company's historic greenhouse gas contributions; no finding of wrongdoing is required.[4] New York will need to first promulgate regulations, which will take place within one year of the law's enactment, before specific penalties are assessed.[5] Although the statute's language is targeted at fossil fuel producers and oil refiners, it will remain unclear until regulations are issued as to whether other participants in the energy industry will be covered by the law. Even if they are not, if the law survives legal scrutiny, it could set a precedent for states seeking retroactive penalties from other businesses operating in the energy sector, or businesses operating in other sectors of the economy, on a strict liability basis.

IMPLICATIONS OF S.2129-B

New York is the second state to have enacted Climate Change Superfund legislation, with Vermont enacting a similar law earlier this year. Similar bills have been proposed in other states, including California, Maryland, Massachusetts, and New Jersey. Should these states enact similar legislation, energy producers may find themselves facing hundreds of billions of dollars in penalties. These state statutes would be in addition to the various lawsuits that state and local governments have brought against energy companies alleging that those companies' contributions to climate change have caused increased governmental expenditures.

There are various legal theories that targeted companies might consider using to fight state superfund laws.

Preemption. Energy companies could argue that federal laws, like the Clean Air Act, preempt state action under the Supremacy Clause of the Constitution. In 2021, the U.S. Court of Appeals for the Second Circuit (which hears appeals of federal cases brought in Vermont, New York, and Connecticut) held that municipalities cannot use state tort law to hold multinational oil companies liable for damages allegedly caused by global greenhouse gas emissions, due in part to federal preemption. *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). The U.S. Supreme Court is now deciding whether to take up this question in light of a contrary decision from the Supreme Court of Hawaii. *Sunoco LP v. City* & *Cnty. of Honolulu, Hawaii*, 143 S. Ct. 1795 (2023).

Connection to New York. The U.S. Constitution prevents states from imposing liability on parties that have insufficient "minimum contacts" with the state such that the state can fairly exercise authority over them. *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Here, although the law purports to require a "sufficient nexus" between New York and the energy companies, the companies can argue that there is an insufficient link between their activities and the alleged injuries in New York. There is also a plausible argument that New York's demand for payments is punitive because it makes these companies pay, regardless of whether or not they caused any specific harm in the state.

Retroactivity/Due Process. The impacted companies may also wish to argue that the law impermissibly imposes retroactive liability, which is disfavored under the Due Process Clause. Many courts have upheld the form of retroactive liability used by CERCLA, the federal act upon which these bills are modeled. *See, e.g.*, *ASARCO LLC* v. *Goodwin*, 756 F.3d 191 (2d Cir. 2014). However, the combination of retroactivity, strict liability, arguably "excessive fines," and the incredible difficulty in determining which companies have historically been responsible for which amounts on greenhouse gas emissions could allow targeted companies to argue that the law violates the Due Process clauses of the federal and state constitutions.

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ENDNOTES

[1] S.2129-B § 76-0101(7), (20).

[2] *Id.* § 76-0101(20).

[3] *Id.* § 76-0103(3)(b).

[4] *Id.* § 76-0103(2)(a).

[5] *Id.* § 76-0103(4)(a).

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