M E M O R A N D U M

TO: Interested Persons
FROM: Rachel Rothschild, Assistant Professor, University of Michigan Law School
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DATE: 3/29/2023
RE: American Petroleum Institute Opposition to a Climate Superfund Act

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I. Introduction

This memorandum responds to the American Petroleum Institute (API)'s statement in opposition to the "Climate Change Superfund Act." As detailed below, API's claim that the bill may be unconstitutional is not supported by case law on similar types of environmental legislation. Nor is there support for API's claim that the state climate superfund is preempted by the Clean Air Act.

Response: Retroactive Law Making and Due Process

There are numerous examples of retroactive liability laws that have withstood constitutional challenges under the due process clause.[1] These include environmental laws that impose retroactive liability on polluters just like the New York state climate superfund.[2] The appropriate inquiry under due process is not the "amount of potential liability," but whether the application of retroactive liability is based on a "legitimate legislative purpose furthered by rational means."[3] Courts have unanimously found that environmental improvements are a legitimate government purpose, and that it is rational to impose retroactive liability for environmental harms upon parties who "created and profited" from activities that caused the pollution.[4] Nor is the liability imposed in the state climate superfund bill "severely disproportionate" to the parties' contributions to the problem or the harm incurred.[5] Furthermore, the potentially responsible parties should have expected that they would be subject to regulation

[1] *See e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).
[2] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 174 (4th Cir. 1988) (upholding retroactive application of liability for hazardous waste pollution).
[3] *See* Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."); *see also* United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 101 (N.D.N.Y. 1999) (explaining that "economic legislation enjoys a 'presumption of constitutionality' that can be overcome only if the challenger establishes that the legislature acted in an arbitrary and irrational way").
[4] *See, e.g.*, United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986); O'Neil v. Picillo, 883 F.2d 176, 183 n.12 (1st Cir. 1989).
[5] *See, e.g.*, Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1347 (Fed. Cir. 2001) (rejecting a due process challenge to the 1992 Energy Policy Act and noting that the responsible parties were only liable for a portion of the cleanup costs from uranium processing).

and/or liability for their greenhouse gas emissions after the year 2000. The companies knew that climate change was a serious global problem and were operating in a highly regulated industry at that time.[6] All of these factors indicate that a state climate superfund would not infringe on these companies due process rights.[7]

Response: The State Climate Superfund May Constitute a Taking

The state climate superfund's imposition of liability on responsible parties for the environmental harms that result from their activities is not a taking.[8] In evaluating a "regulatory" taking, courts examine several factors, including "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[9] Under this framework, courts have repeatedly upheld environmental laws and regulations that impose financial costs on polluters for environmental harms.[10] The responsible parties under a state climate superfund reap significant private profits from their activities while the public bears the broader health and environmental costs; these profits dwarf the financial liabilities imposed by the bill. And as noted above, it is unreasonable for companies to have expected no government regulation of fossil fuels after the year 2000.[11]

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[6] On the relevance of operating in a highly regulated industry with clear potential for environmental harm, see Monsanto Co., 858 F.2d at 174 ("While the generator defendants profited from inexpensive waste disposal methods that may have been technically 'legal' prior to CERCLA's enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment.").

[7] *See* United States v. Alcan Aluminum Corp., 315 F.3d 179, 190 (2d Cir. 2003) ("We are in accord with this consistent authority that both pre- and post-dates Eastern Enterprises. As a consequence, holding Alcan jointly and severally liable under CERCLA for the cleanup costs incurred at PAS and Fulton does not result in an unconstitutional taking adverse to Alcan, or a deprivation of its right to due process.");

[8] *See* United States v. Conservation Chem. Co., 619 F. Supp. 162, 217 (W.D. Mo. 1985) ("What defendants have loosely referred to as a 'taking' is, in reality, nothing more than an attempt to transform a substantive due process challenge of an economic regulation (which is subject only to the 'rational purpose' and 'arbitrary and capricious' standards), into a confiscation of defendants' property rights. This characterization is, however, inappropriate and the claim lacks merit.").

[9] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124-25 (1978).

[10] *See, e.g.*, Alcan Aluminum Corp., 315 F.3d at 190; United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 734 (8th Cir. 1986) ("Appellants also summarily argue retroactive application of CERCLA constitutes an unconstitutional taking of property. We disagree."); United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 100 (N.D.N.Y. 1999) (distinguishing Eastern Enterprises v. Apfel from environmental liability in the context of a hazardous waste superfund because in the latter case the liability was connected to an environmental harm, rather than imposed for "no reason"); United States v. Dico, Inc., 189 F.R.D. 536, 543 (S.D. Iowa 1999) ("[T]he only rationale embraced by at least five judges in Eastern Enterprises is that retroactive application of the Coal Act to Eastern did not violate the Takings Clause. It therefore remains settled in this circuit that retroactive application of CERCLA does not violate either the Due Process or Takings Clauses.").

[11] *See* Peter H. Howard and Minhong Xu, *Enacting the "Polluter Pays" Principle: New York's Climate Change Superfund Act and Its Impact on Gasoline Prices*, INST. POL'Y INTEGRITY 14 (2022), https://policyintegrity.org/files/publications/Polluter_Pays_Policy_Brief_v2.pdf (discussing reasons firms should expect liability for greenhouse gas emissions and noting that potentially responsible parties like Exxon, BP, Shell, and Chevron already put a price on carbon internally to account for this expected liability).

Response: The State Climate Superfund Imposes Arbitrary, Excessive Fines that May Violate Due Process

The financial liability imposed under the state climate superfund is not arbitrary or excessive. Responsible parties must contribute funds in proportion to the amount of greenhouse gas emissions that result from their products;[12] an overwhelming number of scientific studies have connected greenhouse gas emissions to climate change and its attendant effects. Nor are the fines excessive given oil company revenue, market capitalization, and profits,[13] as well as the expected environmental damage to New York.

Courts have repeatedly found that the imposition of financial liability on parties that caused past environmental harm does not violate due process.[14] No court has suggested that the state needs precision in calculating liability in order to satisfy due process requirements.[15]

Response: Use of Strict Liability Standard and the Nexus between Fine and Liability

Legislatures and the courts have historically imposed strict liability on parties engaging in a variety of harmful activities, including those that injure the environment, under the reasoning that the party who engaged in the activity for a specific purpose or profit is in the best position to absorb the cost of those harms.[16] In the environmental context, the requirement that companies who engaged in the polluting activity pay the costs of any resulting damage is known as the "polluter pays" principle, a longstanding legal doctrine.[17] Here, the responsible parties are not

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[12] *See* Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 553 (6th Cir. 2001) (upholding CERCLA's constitutionality from due process and takings challenges, noting that "[a]lthough the economic impact on [the party] of retroactive CERCLA application is potentially significant, it is also directly proportional to [the party's] prior acts of pollution).

[13] *See* Howard and Xu, *supra* note 11, at 16.

[14] *See* Alcan Aluminum Corp., 315 F.3d at 190; Dico, Inc., 189 F.R.D. at 543; Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d at 552 (finding no due process violation for imposing liability on hazardous waste polluters because "Congress acted rationally by spreading the cost of cleaning hazardous waste sites to those who were responsible for creating the sites. Cleaning abandoned and inactive hazardous waste disposal sites is a legitimate legislative purpose which is furthered by imposing liability for response costs upon those parties who created and profited from those sites."); United States v. Newmont USA Ltd., No. CV-05-020-JLQ, 2007 U.S. Dist. LEXIS 63726, at *14 (E.D. Wash. Aug. 28, 2007) ("[C]ourts that have been asked to reconsider whether CERCLA's retroactive liability scheme is constitutional in light of Eastern Enterprises have "uniformly held that CERCLA continues to pass constitutional muster.'");

[15] *See* United States v. Hardage, Case No. CIV-86-1401-P, 1989 U.S. Dist. LEXIS 17878, at *14 (W.D. Okla. Nov. 28, 1989) (finding that the imposition of joint and several liability for parties who caused environmental harms that were "indivisible" did not violate due process); United States v. Conservation Chem. Co., 619 F. Supp. 162, 214 (W.D. Mo. 1985) ("there is no support for the underlying premise . . . that imposition of joint and several liability creates a constitutional question. . . The application of the principle of joint and several liability where there is indivisible injury resulting from multiple causes has been applied in many contexts, without constitutional challenge"); *see also Monsanto Co.*, 858 F.2d at 174.

[16] *See* Alexandra Klaas, *From Reservoirs to Remediation: The Impact of CECLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 907 (2004) (noting that "strict liability has been historically applied through common law and statutory developments in a wide range of areas," including environmental pollution).

[17] Boris N. Mamlyuk, *Analyzing the Polluter Pays Principle through Law and Economics*, 18 SOUTHEASTERN ENV'T L.J. 39, 41-42 (2009) ("In domestic law, the polluter pays principle states that polluting entities are legally and financially responsible for the harmful consequences of their pollution.").

just "one segment of the economy" but those who engaged in the activity and profited from it. API's statements here are thus policy critiques of the bill rather than arguments about its legal validity. API may wish that the doctrine of strict liability didn't exist, or believe that New York should add a causation requirement to the bill, but the legislature is legally allowed to impose strict liability on responsible parties and determine financial contributions based on greenhouse gas contributions.

Response: Disproportionate Penalties

It is reasonable for the New York state legislature to impose joint and several liability on responsible parties for the harms resulting from climate change, thus requiring some companies to pay more to help with adaptation and mitigation efforts. This is the approach taken in other environmental laws where the harms cannot be specifically attributed to individual polluters as well as situations where some responsible parties are insolvent or otherwise unable to contribute to remedying the environmental damages resulting from their activities.[18]

Response: Federal Preemption

The state climate superfund is not preempted by the Clean Air Act. Under the Clean Air Act, states do not need permission from the federal government to enact environmental laws, on climate change or any other air pollution problem. The Clean Air Act takes what is known as a "cooperative federalist" approach to air pollution problems, preserving state authority to regulate more stringently than the federal government through a savings clause,[19] with a few specific exceptions like setting new motor vehicle emission standards.[20] The Clean Air Act's savings clause would apply to a state climate superfund in the same way it does to state laws concerning other types of pollution problems.[21]

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[18] *See* United States v. Monsanto Co., 858 F.2d 160, 172 (4th Cir. 1988) (noting that under CERCLA the uniform federal rule is that if parties "cause a single and indivisible harm [], they are held liable jointly and severally for the entire harm").

[19] S*ee* 42 U.S.C. § 7416 (2022) ("Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."); *see also* Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 817 (2008) ("The Clean Air Act was the first modern federal environmental statute to employ a 'cooperative federalism framework,' assigning responsibilities for air pollution control to both federal and state authorities.").

[20] *See* 42 U.S.C.S. § 7543(a) (2022) ("No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines . . ."). Another exception concerns the Acid Rain trading provisions. *See* Clean Air Mkts. Group v. Pataki, 338 F.3d 82 (2d Cir. 2003).

[21] Indeed, many states have programs to address greenhouse gas emissions; though different in form than a state climate superfund, the same principles of federalism and preemption analysis apply. *See, e.g.*, William Funk, *Constitutional Implications of Regional CO2 Cap-and-Trade Programs: The Northeast Regional Greenhouse Gas Initiative as a Case in Point*, 27 J. ENV'T L. 353, 357 (2009) (explaining that the regional greenhouse gas initiative should not be preempted by federal law, at least until a federal cap-and-trade program passes Congress).

The decision of the U.S. Court of Appeals for the Second Circuit in *City of New York v. Chevron Corp* does not suggest that the Clean Air Act preempts legislation like a climate superfund.[22] The *Chevron* case solely concerned whether nuisance lawsuits against fossil fuel companies could be brought under state law or whether they had to be brought under federal common law.[23] Musings from the Second Circuit about whether the federal government is better positioned to address climate change are immaterial to a legal analysis of preemption. Only Congress – not the Second Circuit – has the power to amend the Clean Air Act and preempt state action; under the Act's current framework, states have the authority to create a climate superfund.

[22] *See*, *e.g.*, Jonathan Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17 J. L., ECON. & POL'Y 217, 221 (2022) (criticizing the 2nd circuit decision for holding "that state law claims against fossil fuel companies are preempted, despite the lack of any preemptive legislative action, implicit or otherwise . . . [w]hether state law nuisance actions are to be preempted is a choice for Congress to make, and is a choice Congress has not yet made").
[23] City of N.Y. v. Chevron Corp., 993 F.3d 81, 91 (2d Cir. 2021)