From: Kassie Siegel
To: Jana Staniford
Cc: Jessica Gordon
Subject: Follow-ups
Date: Monday, November 27, 2023 3:39:20 PM
Attachments: Rothschild_Response to API memo_3.29.23.pdf
ThePlattnerPerspective_Costs of Climate Change.pdf

Hi Jana,

Thanks so much for taking the time to talk – it is wonderful to meet you.

Here is a little info about the Climate Change Superfund Act that passed the NY Senate this year. In short, the bill would collect $75 billion over 25 years by establishing the climate change adaptation cost recovery program and requiring companies responsible for substantial greenhouse gas emissions to pay into the program. The bill summary, text, and other info is here: https://www.nysenate.gov/legislation/bills/2023/S2129/amendment/A

Here's one news article from this session.

I'm also attaching a short piece that very concisely discusses some of the main initial questions one might have about such legislation, as well as a short memo responding to assertions from the American Petroleum Institute about the NY bill.

I look forward to being in touch. All best, Kassie

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Coping With the Costs of Climate Change: Make the Polluters Pay

by Robert D. Plattner

Robert D. Plattner

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In this installment of The Plattner Perspective, Plattner reviews New York Senate bill S. 9417, which would require polluting companies deemed responsible parties to pay the state $30 billion over 10 years to cover a portion of the state's anticipated costs incurred in adapting to climate change.

Preface

There is a life lesson that thoughtful parents teach their kids when the kids are quite young. The lesson is this — "If you make a mess, it is your responsibility to help clean it up."

I. Introduction

As Captain Obvious would be happy to point out, most articles in *Tax Notes State* are about state and local taxes — this article is not. That is because climate change will severely test the ability of state governments to govern, including the essential task of raising the new revenues needed to build an infrastructure capable of protecting the health and welfare of its citizens. State governments will have no choice but to look beyond traditional taxes for revenues sufficient to respond to the wrenching effects of pollution-driven climate change. Where will that revenue come from? A good place to start is with those who made the mess.

New York Senate bill S. 9417, the Climate Change Superfund Act, sponsored by Sen. Liz Krueger (D), would tap into a revenue stream for adapting to climate change based on the bedrock rule of good behavior cited above.[1] For purposes of the grown-up world of public policy, substitute "pollution" for "mess" and restate the guiding principle as "polluters pay." That is, the entities responsible for pollution should be financially liable for the resulting harms.[2] Under S. 9417, the major fossil fuel companies, who bear primary responsibility for the buildup of greenhouse gases in the atmosphere, would pay billions of dollars to New York over a decade as compensation for part of the costs incurred by the state and its localities in dealing with the climate change crisis.

II. The Backdrop

A. What the Future Holds

As stated in the legislative findings of S. 9417, climate change, resulting primarily from the combustion of fossil fuels, poses a grave, immediate threat to New York's communities, environment, and economy. New York has responded with an ambitious effort to advance a sustainable low-carbon energy future,[3] but the state must also respond to the consequences of

[1] N.Y. Senate bill S. 9417 (2021-2022 session), sponsored by Krueger, chair of the Senate Finance Committee. The corresponding Assembly bill, A. 10556, is sponsored by Assembly member Jeff Dinowitz (D).

[2] *See, e.g.*, Boris N. Mamyluk, "Analyzing the Polluter Pays Principle through Law and Economics," 12 *Southeastern Env't L.J.* 39, 41-42 (2009).

[3] Chapter 106, N.Y. Laws of 2019, enacting the "Climate Leadership and Community Protection Act."

climate change that are irreversible. These include rising sea levels, warmer temperatures, extreme weather events, flooding, toxic algal blooms, and other climate change-driven threats. The state's response will entail a huge investment in upgraded infrastructure, including money for sea walls and other basic coastal defenses; upgrades of stormwater drainage systems; defensive upgrades to roads, bridges, subways, and transit systems; moving, raising, and retrofitting sewage treatment plants; and installing air conditioning in public buildings, including schools. Major expenditures will be required to strengthen the public health system to address a range of climate change impacts that can threaten the water supply or cause increased incidences of diseases such as Lyme disease and West Nile virus. The price tag for the next two decades may well exceed $150 billion.

B. A Broken Moral Compass

Liability under the Climate Change Superfund does not require any finding of wrongdoing. Nonetheless, it should be underscored that many of the largest companies in the fossil fuel industry committed a profound breach of the public trust. There is irrefutable evidence that many of the multinational oil giants were aware of the disastrous long-term effects of burning fossil fuel as early as the 1970s. In response, they first chose to conceal the damning scientific knowledge they had acquired. Later, they engaged in a successful decades long campaign of deception to convince the public that climate change science was uncertain when they knew better.[4] The industry's strategy was remarkably successful in perpetuating the status quo while climate change evolved from a solvable problem to an existential threat. The world is several decades behind where it otherwise might be in converting to a carbon-free energy system.

The industry's moral failure to look beyond its own bottom line is breathtaking. Even so, and despite the indisputable evidence, the industry has never acknowledged its wrongdoing, and some of the major players continue to traffic in disinformation. They assert, for example, that they are committed to investing in renewable energy in a significant way, but the actual level of investment is a tiny percentage of overall investment. Likewise, they tout approaching their target of achieving "net zero" carbon emission, but their calculation conveniently excludes the carbon emissions from the use of their products that are the leading cause of the greenhouse gases warming the planet. These attempts to deceive are so common they have acquired a name — greenwashing.[5] Lawmakers, unless and until convinced otherwise, should be on guard for more of the same from the industry.

III. The Climate Change Superfund Act

A. Conceptual Overview

The Climate Change Superfund Act is modeled on existing state and federal programs (CERCLA)[6] structured to implement the principle of "polluters pay." The state's Inactive Hazardous Waste Disposal Site Remediation program,[7] known as the state Superfund, and the state's oil spill law[8] are long-standing programs that seek compensation to pay for the remediation of polluted sites. Under the state and federal Superfund programs, the standard is strict liability, imposed jointly and severally.

The Climate Change Superfund is the first "polluters pay" program to target air pollution, specifically greenhouse gas emissions. The primary source of these emissions is the combustion of fossil fuels — coal, oil, and natural gas — extracted, refined, and sold by some of the world's most profitable and powerful corporations.[9]

[4] *See, e.g.*, Complaint of Plaintiff State of Vermont in *Vermont v. ExxonMobil*, Superior Court of Vermont, Chittenden Unit, Civil Division, Sept. 14, 2021, at 15-35.

[5] *Id.* at 43-62.

[6] The Comprehensive Environmental Response, Compensation and Liability Act, also known as Superfund, P.L. 96-510, 42 U.S.C. section 9601 et seq.

[7] Inactive Hazardous Waste Disposal Sites, New York Environmental Conservation Law, chapter 43-B, article 27, section 1301 et seq.

[8] The Oil Spill Law, chapter 845, Laws of 1977.

[9] Work on the Climate Change Superfund legislation began in New York in 2019. Federal legislation loosely modeled on New York's "polluters pay" initiative sponsored by Sen. Chris Van Hollen, D-Md., received serious consideration in the Senate in 2021 as a revenue measure that could help pay for environmental program initiatives but was ultimately rejected. The focus has since returned to state legislation.

Under the proposal, polluting companies deemed responsible parties, described below, would, as a group, pay $30 billion over 10 years to the state to pay for a portion of the state's anticipated costs in adapting to climate change. Each responsible party would pay its share of the $30 billion based on its percentage share of total greenhouse gas emissions by all responsible parties between 2000 and 2018. At least 35 percent of the funds would be spent to benefit communities that have been historically disadvantaged by the state's environmental policies.[10]

For the Superfund to work, the state must be able to determine these proportionate shares — which might seem a tall order. In fact, it can do so with a good deal of precision. The shares are readily determined in part because the applicable science dictates that the concentration of greenhouse gases in the atmosphere is roughly constant everywhere. That is, a company responsible for, say, 5 percent of total greenhouse gas emissions by the fossil fuel industry is responsible for that same 5 percent at any and every given location around the globe. The second essential element in the determination of company-specific shares is the work of researchers, led by Richard Heede,[11] who has used company data reported to the government to determine the amount of product placed into the stream of commerce by every large fossil fuel company. Formulas for each of the fossil fuels convert the amount of product into an amount of greenhouse gas emitted into the atmosphere. These formulas are written into the bill language.[12]

A key feature of the program is that assessments against the companies are not taxes but demands for compensation for damages resulting from past behavior. This distinction has favorable economic and legal consequences, discussed below. Most importantly, unlike a carbon tax or hike in gas taxes, the economic incidence of Superfund compensation assessments would fall almost exclusively on the corporations and their shareholders, not consumers. On the legal front, the nature of the payments as assessments for damages to New York resulting from past behavior should defeat any argument that the state is trying to regulate industry activities in an area in which the federal Clean Air Act preempts state action.

As noted, the total claim assessed against the industry is set at $30 billion payable over 10 years. To put that figure in perspective, it is well less than half the expected spending by the state and its localities on climate change over the next decade. Meanwhile, the industry is recording record profits. Saudi Aramco earned nearly $50 billion in profits in the second quarter of this year.

The program would be administered by the Department of Environmental Conservation (DEC), which would promulgate regulations necessary for its implementation.[13] The Climate Change Adaptation Fund would be established in the law with money deposited in the fund kept separate from other revenues and available only to be expended on qualifying activities.[14]

B. S. 9417 — Section by Section

1. Legislative Findings

The bill begins with legislative findings enumerating the threats climate change poses for New York. The findings expound on the "polluters pay" principle and describe how the program would work; condemn the industry for its unthinkable behavior in deceiving the public about the catastrophic long-term consequences of the continued burning of fossil fuel; highlight the record profits the industry is recording in 2022; detail the kinds of projects that would be funded; and state the intention not to intrude where federal law has preempted states' right to legislate.[15]

[10] S. 9417, section 3, adding section 76-0101 et seq. to the Environmental Conservation Law (ECL), at ECL 76-0103(4)(e).

[11] Richard Heede leads the Climate Accountability Institute's carbon majors project. His publications include "Carbon Majors: Accounting for Carbon and Methane Emissions 1854-2010" (2019).

[12] S. 9417, section 3 at ECL section 76-0103(3)(e).

[13] S. 9417 at ECL section 76-0103(4).

[14] S. 9417, section 4, adding a new section 97-k to the State Finance Law.

[15] S. 9417, section 2.

2. Definitions

Among the key definitions:

"Responsible party" is the term applied to a fossil fuel company subject to an assessment under the program. A responsible party is an entity in the fossil fuel business responsible for more than 1 billion tons of greenhouse gas emissions during 2000-2018. The definition excludes any entity with whom the state lacks sufficient nexus under the due process clause of the federal Constitution.[16]

"Covered greenhouse gas emissions" is defined, for any potential responsible party, as the total quantity of greenhouse gases released into the atmosphere during the identified period 2000-2018, expressed in metric tons of carbon dioxide equivalent, resulting from the use of fossil fuels or petroleum products extracted, produced, refined, or sold by such party.[17]

A "notice of cost recovery demand" is the written communication from DEC informing a responsible party of the charge asserted against it under the program.[18]

A "climate change adaptive infrastructure project" is defined as a project designed to avoid, moderate, or repair damage caused by climate change, with many examples provided.[19]

A "qualified expenditure" is an authorized payment from the fund in support of a climate change adaptive infrastructure project.[20]

3. Program Details

A new section 76-103 of the Environmental Conservation Law establishes the climate change adaptation cost recovery program. The section outlines the purposes and structure of the program; details the method for calculating the cost recovery demand amount for each fossil fuel company found to be a responsible party; requires DEC to promulgate regulations to implement the program, including the identification of responsible parties, the procedures for issuing notices of cost recovery demands, the collection of payments for those demands, and the procedures for identifying eligible projects; authorizes the Department of Taxation and Finance and the attorney general, along with DEC, to enforce the provisions of the act; entitles companies to contest proposed actions in an administrative proceeding with judicial appeal rights; and requires DEC to conduct an independent evaluation of the program.[21]

4. The Fund

A new section 97-k of the State Finance Law establishes the Climate Change Adaptation Fund under the comptroller and the commissioner of taxation and finance and authorizes the fund to receive payments and issue funds for qualifying expenditures.[22]

5. Nonexclusive Remedy

Section 5 of the bill states that nothing in the act is intended to preclude the pursuit of civil actions or other remedies. There are now more than two dozen suits nationwide filed by states and localities seeking damages from a handful of oil companies based on common law theories of public nuisance and common law or statutory consumer fraud. These cases have been caught up in procedural battles for years, but the furthest along are finally entering the discovery phase in state court proceedings.[23]

IV. The Polluters — Responsible Parties

Preliminary research like that the DEC would be required to undertake to determine assessment amounts produced the following outcomes:

- Approximately 35 fossil fuel companies would qualify as responsible parties and face assessments. Of these, 12 would be domestic investor-owned companies, 12 foreign investor-owned utilities, and 11 state-owned enterprises.
- Three domestic-owned companies would be among the top 10 polluters — ExxonMobil USA, Chevron USA, and ConocoPhillips USA. Domestic-owned companies would in

[16] S. 9417, section 3 at ECL section 76-0101(19).

[17] S. 9417, section at ECL section 76-0101(6).

[18] S. 9417, section at ECL section 76-10101(15).

[19] S. 9417, section at ECL section 76-0101(2).

[20] S. 9417, section at ECL section 76-0101(18).

[21] S. 9417, section at ECL section 76-0103(1-8).

[22] S. 9417, section 4.

[23] S. 9417, section 5.

total be charged with less than 20 percent of total assessments.
- Major foreign investor-owned companies include Shell (Dutch) and BP (British); and
- Saudi Aramco would be the single biggest payer.

V. Economic Incidence

Although it's not obvious to those untrained in economics — a group I belong to — the Superfund proposal has a huge political advantage over a carbon tax or excise tax on motor fuel. In brief, because an assessment is based solely on past activities, it does not directly affect the cost of new fossil fuel production. Thus, set at a reasonable level, the assessment should have a negligible, if any, effect on gasoline prices at the pump.

Stated differently, in a market economy, firms can be expected to charge prices that maximize their profits. The price at which profits are maximized for any good will be a function of the cost of production and demand. Firms will increase the price of their goods up to the point at which the marginal increase in profits from the price increase is offset by a decline in profits because of a reduction in demand for the good. If the oil companies can increase their profits by raising prices, they will do so. Faced with an assessment based on past activity that would not affect future production costs, the price point for maximizing profits would not change. The assessment would be a one-time fixed cost that would be borne by the owners of the business.

A second economic consideration constraining firms from raising prices is that the assessments imposed on individual firms will vary from zero to several billion dollars. A firm that faced a large assessment and sought to pass that cost along to consumers through higher prices would lose market share to firms that had small assessments or no assessment at all and maintained their prices.

To be clear, the Superfund does not have the signaling effect a carbon tax would have — that is, it does not encourage changes in consumer behavior toward more environmentally friendly sources of energy. In that respect, a carbon tax is preferable. But a carbon tax is a non-starter in the current political environment, and tens of billions of dollars are needed to address climate change. There is a great deal to be said in favor of a program that can raise billions of dollars in revenue from an industry that has generated enormous profits while polluting the planet's atmosphere yet shows no inclination to help mitigate the harm.

VI. Legal Issues[24]

A. Due Process — Retroactivity and Proportionality

On occasion, laws that impose economic liability retroactively have been struck down by the courts on due process grounds. There is little likelihood, however, that a due process claim based on retroactivity would prevail in this instance. The test courts generally apply is whether the government has shown that retroactive application of the law has a legitimate state purpose furthered by rational means. Regarding CERCLA, the courts have unanimously found that pollution remediation is a legitimate government purpose and that it is rational to impose liability for the cost of remediation on parties who created and profited from activities that caused the problem.

Also, courts will consider whether a liability imposed by a state on a defendant that is severely disproportionate to the harm suffered violates due process. The state Superfund program should pass muster for both constitutional issues. It addresses a harm resulting from historic activity and imposes costs on those that profited from the activities that caused the problem in proportion to both the total harm done by the industry as a whole and the percentage share of each company of that total.

B. Preemption by the Clean Air Act

Under the Constitution's supremacy clause, federal action will override state law when Congress intends to preempt state authority to act. Preemption may be explicit or implicit.

[24]The discussion of legal issues that follows incorporates legal analysis done by the Institute for Policy Integrity at the New York University Law School. A copy of the memorandum of law, prepared by Rachel Rothschild of the Institute's staff, who recently joined the faculty of the University of Michigan Law School, is available at Rothschild, "Memorandum," Institute for Policy Integrity, Apr. 16, 2022.

Implicit preemption can occur when the federal government regulation intends to "occupy the field," when federal and state law directly conflict, or when a state law would pose an obstacle to implementation of the federal law.

The courts have historically followed a doctrine known as the "presumption against preemption" in cases of federal statutes dealing with environmental pollution. A review of the legislative history of the Clean Air Act and relevant case law leads to the conclusion that it is highly unlikely a court would find that the Clean Air Act preempts New York's proposed Climate Change Superfund. There is ample precedent to support a state's authority to control air pollution more stringently than the federal government so long as state actions do not interfere with the federal regulatory scheme. The Climate Change Superfund program addresses only retroactive liability for greenhouse gas emissions and imposes liability only for in-state damages. It would therefore pose no obstacle to an Environmental Protection Agency permitting process, nor would it improperly seek to control emissions from out-of-state sources. Also, the EPA's authority to regulate greenhouse gases was further limited by the Supreme Court's decision this June in *West Virginia v. EPA*, weakening the argument that the federal government has occupied the field.[25]

C. Jurisdictional Due Process

The proposal is intended to apply to all parties New York can legally reach under New York's long-arm statute, the Foreign Sovereign Immunities Act, and the due process clause of the Constitution. Engaging in the marketing, sale, or distribution of fossil fuels in the United States with the reasonably foreseeable consequence that this fuel will be used in New York should be sufficient to create the minimum contacts necessary to find proper jurisdiction given the relationship between the combustion of fossil fuels and climate change harms. In contrast, a court may well be skeptical of extending jurisdiction when the only contact between the fossil fuel company and the state is the fossil fuel company's contribution to worldwide greenhouse gas emissions. In any event, a constitutional claim based on jurisdiction would pose an "as applied" challenge that would not attack the constitutionality of the statute as a whole.

D. Commerce Clause Issues

There is no relevant precedent supporting a claim that the program violates the commerce clause. Most significantly, the commerce clause prohibits discrimination against interstate commerce, and there is nothing in the proposal that discriminates between in state and out-of-state activities. An argument could be asserted that the program imposes an undue burden on interstate commerce, but that would be misplaced under the facts here. The argument being offered is more appropriately one of proportionality, with the operative constitutional provision being the due process clause.

VII. Conclusion

While modeled on existing, successful programs based on the principle of making polluters pay, the Climate Change Superfund is nonetheless groundbreaking legislation that will undoubtedly face strident opposition from the fossil fuel industry and litigation should it be enacted, with the outcome several years down the road. But that journey is better started sooner rather than later, as the costs of climate change continue to mount and the industry garners record profits. It would be best for other states not to sit on the sidelines and wait to see what happens in New York, only to realize some years later that the state has a judgment against fossil fuel companies for more than $15 billion dollars while they have not yet introduced legislation. The states cannot afford to let those years go by before seeking to make the polluters pay. ■

[25] *West Virginia v. Environmental Protection Agency*, 590 U.S. ___ (2022).

M E M O R A N D U M

TO: Interested Persons
FROM: Rachel Rothschild, Assistant Professor, University of Michigan Law School
Affiliated Scholar, Institute for Policy Integrity, NYU School of Law
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)