A New Horizon: State Climate Superfund Laws

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On July 1, 2024, Vermont's Climate Superfund Act (S 259) went into effect. The law, which is the first of its kind, imposes strict liability on fossil fuel extractors[1] and crude oil refiners who are accountable for 1 billion metric tons or more of covered greenhouse gas ("GHG") emissions[2] between January 1, 1995 and December 31, 2024, requiring them to pay for their share of the costs incurred by the State due to climate change. Based on the results of "source attribution" research into which sectors contribute most to climate-related harms, and the "polluter pays" principle, the purpose of the law is to hold the largest polluters — fossil fuel companies — responsible for their share of the damages the State has suffered due to climate change. Vermont's law is modeled on the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) which holds parties responsible for hazardous waste sites strictly liable to clean up the contamination or fund the cleanup costs.

Vermont's law establishes the Climate Superfund Cost Recovery Program at the Agency of Natural Resources (the "Agency") and a Fund administered by the Agency's Climate Action Office into which the cost recovery payments by responsible entities are deposited. The Agency will issue a "cost recovery demand" to responsible parties specifying the amount that the party owes, which amount will reflect the same ratio of the party's share of the cost to the State and its residents from the emission of covered GHGs during the covered period as the responsible party's applicable share of covered GHG emissions compared to the aggregate applicable shares of covered GHG emissions resulting from the use of fossil fuels extracted or refined during the covered period. As a practical matter, it is unclear how each entity's GHG emissions will be calculated, and the law directs the Agency to develop rules to implement the law's requirements, including methodologies to identify responsible parties and determine their share of covered GHG emissions.

The Fund will then be used to pay for “climate change adaptation projects” — projects that address, mitigate or adapt to negative impacts caused by climate change and are designed to assist in preparing for future disruptions caused by climate-change. Such projects include, among others, public infrastructure upgrades, preparing for and recovering from extreme weather events and implementing energy efficiency upgrades.

Legislators in other states — including New York, California, Maryland and Massachusetts — have proposed legislation similar to that of Vermont’s Climate Superfund Act.

The New York “Climate Change Superfund Act” was passed in both the Senate and the Assembly but has yet to be signed into law by Democratic Governor Kathy Hochul. The NY bill, like Vermont’s Climate Superfund Act, would impose strict liability and establish a Climate Change Adaptation Cost Recovery Program, through which the New York Department of Environmental Conservation (the “Department”) would seek payments from responsible parties — parties engaged in the trade or business of extracting fossil fuel or refining crude oil who are determined by the Department to be responsible for more than 1 billion metric tons of covered GHG emissions between January 1, 2000 and December 31, 2018.[3]

Unlike Vermont’s law, the NY bill is designed to achieve a set amount of total cost recovery from the fossil fuel industry — $75 billion — which it anticipates reaching in 25 years based on fossil fuel companies’ collective contributions of $3 billion annually, such that each responsible party’s cost recovery demand would be equal to the same ratio to $75 billion as the responsible party’s applicable share of covered GHG emissions bears to the aggregate applicable shares of covered GHG emissions of all responsible parties. Similar to Vermont, the bill directs the Department to develop implementing regulations, including methodologies to identify responsible parties and determine their share of covered GHG emissions.

The legislation proposed but not yet enacted in California, Maryland and Massachusetts also aims to hold accountable entities responsible for emitting more than 1 billion metric tons of GHG, though the covered period differs from 2000 to 2018 (Massachusetts) to 2000 or 2020 (California and Maryland). Like the New York bill, the Massachusetts and Maryland bills aim to reach a set amount of cost recovery over a 25-year period, with the goal being $75 billion in Massachusetts and $9 billion in Maryland.

Anticipated Legal Challenges

While the Vermont law is likely to galvanize similar legislation in other states, it is also likely to spur legal challenges. Fossil fuel companies and their associated political and industrial organizations are expected to challenge the Vermont Climate Superfund Act and any future similar state laws in court, likely on the basis of the federal preemption doctrine, due process and other grounds.

Opponents are likely to argue that state regulation of GHG emissions is implicitly preempted by existing federal law, such as the Clean Air Act (CAA). Courts have reached different conclusions as to whether states may impose liability for global GHG emissions and whether states are preempted from regulating GHG emissions remains an open question.[4]

Opponents also are likely to challenge the fairness of the climate Superfund legislation on the grounds that the law only holds fossil fuel companies accountable for climate-related damage, while imposing no liability on other major sources of GHG emissions. The liability structure set forth in the Vermont law could also be attacked on the grounds that the state's basis for the liability imputed to each "responsible party" is "arbitrary or irrational" and runs afoul of the Due Process clause.[5]

In addition to legal challenges, there is also the practical concern that these climate superfund laws could drive business out of the state or result in increased consumer costs.

What happens to Vermont's Climate Superfund Act and similar legislation proposed in other states remains to be seen, but one thing is clear: in the absence of federal action, state governments will continue to lead the charge on combatting climate change, including through innovative legislative measures.

Summer Associate, Madeleine Sebastian, assisted with writing this client alert.

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[1] Fossil fuel includes coal, petroleum products and fuel gases.

[2] Covered GHGs means the total quantity of GHGs released during the covered period as a result of the use of fossil fuels extracted or refined by an entity.

[3] Covered GHGs means the total quantity of GHGs released during the covered period, including from the extraction, storage, production, refinement, transport, manufacture, distribution, sale and use of fossil fuels or petroleum product extracted, produced, refined, or sold by such entity.

[4] See *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) (holding that New York City could not pursue damages against global fossil fuel producers under state tort law for global GHG emissions on the grounds that state common law claims were preempted by federal common law, and federal common law was preempted by the federal CAA); *But See City and County of Honolulu, Hawaii v. Sunoco LP*, 537 P.3d 1173 (Hawai'i 2023) (allowing the City and County of Honolulu to proceed in its climate change lawsuit against fossil fuel companies).

[5] See *Usery v. Turner Elkhorn Mining Co.,* 428 U. S. 1, 428 U. S. 15 (1976).

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