JULY-AUGUST 2025
VOL. 25-7

PRATT'S ENERGY LAW REPORT

LexisNexis

Pratt's Energy Law Report

VOLUME 25 **NUMBER 7** **July-August 2025**

LexisNexis®

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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] Pratt's Energy Law Report [page number] (LexisNexis A.S. Pratt);
Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 Pratt's Energy Law Report 4 (LexisNexis A.S. Pratt)

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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(2025–Pub.1898)

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New York Passes Climate Superfund Legislation

By George C. Hopkins, Jon Solorzano, Benjamin S. Lippard, Kelly Rondinelli, Alyssa Sieja and Justine Jia*

In this article, the authors examine a new law in New York that requires certain fossil fuel producers and refiners with sufficient connections to New York to pay into a state "climate Superfund" an amount commensurate with the entity's past global greenhouse gas emissions over an eighteen-year period.

New York Governor Kathy Hochul has signed the Climate Change Superfund Act (CCSA or the Act) into law. The Act requires certain fossil fuel producers and refiners with sufficient connections to New York to pay into a state "climate Superfund" an amount commensurate with the entity's past global greenhouse gas (GHG) emissions over an eighteen-year period.

The New York State Department of Environmental Conservation (NYSDEC) will collect $75 billion from these entities over the next 25 years. New York intends to use these funds to pay for climate change-related infrastructure projects and other climate-related expenses.

The CCSA is the second of its kind, behind Vermont's Climate Superfund Act, and is just one of many similar bills proposed in other states.

On May 1, 2025, the federal government bought suit against New York (and, separately, Vermont) alleging that the climate Superfund laws are unconstitutional on multiple grounds. More specifically, the federal government argues that both laws are preempted by the Clean Air Act, violate due process, violate the interstate and foreign commerce clauses, and infringe on the federal government's authority over foreign affairs.

CHALLENGES

In addition to the federal government's lawsuit, the CCSA also faces legal challenges on two other separate fronts.

On February 6, 2025, twenty-two states and four industry groups sued New York[1] in federal court, and, on February 28, 2025, four other groups, including the U.S. Chamber of Commerce and American Petroleum Institute (API), filed

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* The authors, attorneys with Vinson & Elkins LLP, may be contacted at ghopkins@velaw.com, jsolorzano@velaw.com, blippard@velaw.com, krondinelli@velaw.com, asieja@velaw.com and jjia@velaw.com, respectively.

[1] https://www.texasattorneygeneral.gov/sites/default/files/images/press/NY%20Superfund%20Complaint%20Filed.pdf.

a similar suit[2] challenging the Act in a different federal court. Both suits seek a declaration that the CCSA is unlawful and an injunction prohibiting New York from enforcing it.

The lawsuits challenge the constitutionality of the statute on several grounds. First, the suits allege that the CCSA violates constitutional principles of cooperative federalism as it seeks to impose liability on out-of-state actors for conduct outside New York. Second, the plaintiffs argue that the CCSA violates the Supremacy Clause of the Constitution because it is preempted by the federal Clean Air Act's regulation of greenhouse gas emissions. The suits further claim that the CCSA's retroactive liability scheme violates the Due Process Clause of the Fourteenth Amendment. Indeed, the states and industry groups argued in their February 6, 2025, complaint that the Act's retroactive application is "fundamentally unfair." Other causes of action include allegations that the CCSA violates the Eighth Amendment prohibition on excessive fines, the Commerce Clause by discriminating against economic interests important to other states, and the Fifth Amendment prohibition on unconstitutional takings. These claims mirror those brought by the Chamber and API against Vermont's Climate Superfund Act, enacted last year.

The lawsuits come alongside amendments[3] to the CCSA signed into law by Governor Hochul on February 28, 2025. The amended CCSA imposes liability for emissions from 2000-2024, six years longer than the original period, eliminates the minority interest liability provision we discuss below in its entirety, requires entities to pay their cost recovery demands in full rather than over 25 years, and sets forth a new process by which responsible parties can challenge the cost recovery demand. The amended CCSA also authorizes the NYSDEC to seek information from entities that may be needed to make liability determinations and provides additional time – until June 2027 rather than December 2026 – for the NYSDEC to develop implementing regulations.

THE NEW YORK LAW

On December 26, 2024, New York passed the CCSA, finding that "'fossil fuel companies' historic contribution to the buildup of greenhouse gases" is "largely responsible for climate change." As a result, the state would seek to impose liability on such companies for the costs of climate change adaptive infrastructure improvements. The CCSA, which imposes strict liability upon fossil fuel producers, creates a "Climate Change Adaptation Cost Recovery Program" to recover costs that will then be held in a fund, akin to the federal

[2] https://assets.law360news.com/2304000/2304967/nysupercomp.pdf.

[3] https://legislation.nysenate.gov/pdf/bills/2025/S824.

"Superfund" program established under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Although styled as a "climate Superfund" act, there appear to be important differences between the CCSA and CERCLA. For instance, while CERCLA imposes a tax on oil and certain chemical products as a way to raise funds for environmental cleanup[4] – a tax that appears substantively similar in effect to cost recovery demands associated with fossil fuel production under the CCSA – those taxes are forward-looking, not retroactive. Understood as a retrospective cost recovery remedy, the CCSA approach appears more aggressive, with no apparent requirement to prove causation (as distinct from CERCLA's attenuated causal nexus requirements), the imposition of liability determinations through an administrative process rather than judicial decision, and no express contribution remedy against other fossil fuel users that also contributed to any problems faced by New York (the existence of such remedies was a major factor in courts upholding the constitutionality of CERCLA's liability scheme[5]). Such differences may well provide arguments to support challenges to the CCSA that it oversteps constitutional limits on retroactive liability.

The Definition of a Responsible Party Draws Upon Arguably Nebulous Concepts of a State Nexus and Could Abrogate the Concept of Limited Shareholder Liability for Liable Entities

The CCSA requires the NYSDEC impose cost recovery demands on fossil fuel producers and refiners deemed "responsible parties" under the Act. These parties encompass any entity that (1) "was engaged in the trade or business of extracting fossil fuel or refining crude oil" at any point between January 1, 2000, and December 31, 2024 (the Covered Period); (2) "is determined by the [NYSDEC] to be responsible for more than one billion tons of covered GHG emissions" during the Covered Period; and (3) "has sufficient connection with the state [of New York] to satisfy the nexus requirements of the U.S. Constitution."[6]

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[4] 26 U.S.C. § 9507(b). While the original taxes expired in 1995, they were reinstated through 2032 by the Inflation Reduction Act of 2022. Pub. L. No. 117-169, tit. I, § 13601(b), 136 Stat. 1818, 1982 (2022) (codified at 26 U.S.C. § 9507).

[5] See, e.g., United States v. Conservation Chem. Co., 619 F. Supp. 162, 216 (W.D. Mo. 1985) ("The right of contribution operates to insulate defendant from being exposed to liability for more than its 'fair share' (which has not yet been determined).").

[6] The nexus to New York requirement of having "sufficient connection with the state [of New York] to satisfy the nexus requirements of the U.S. Constitution" remains ambiguous. Based on analysis of the legislative history of the law, it seems unclear how the New York legislators intend to apply the New York state nexus under the US Constitution.

All Emissions Are Covered, But the "Responsibility Mechanism" Appears to Encompass Only a Narrow Group of Parties

Covered GHG emissions under the Act are those attributable to the total amount of fossil fuels extracted and the total amount of crude oil refined during the covered period by a responsible party.[7] Notably, the law does not include any limit on the geographic scope of the GHG emissions the NYSDEC will consider in assessing the cost recovery demand. Indeed, the covered GHG emissions are not limited to those emitted in or even connected to New York.[8] However, the entities defined as responsible under this Act are only those engaged in a "fossil fuel business," which is defined as a "business engaging in the extraction of fossil fuels or the refining of petroleum products." This definition thus excludes parties that use the fossil fuels, which would include the power industry in the case of coal.

Two other important limitations will play key roles in defining who is liable under the Act: only entities with covered GHG emissions in excess of 1 billion tons of CO_2 emissions during the period in question are liable; and the requirement that the "responsible party" must have a "sufficient connection with the state to satisfy the nexus requirements of the United States constitution" in order to be liable under the Act.

The Calculation of Cost Recovery Demands

Cost recovery demands are based on an responsible party's covered GHG emissions in excess of one billion tons. To determine the amount of GHG emissions attributable to an entity, the statute empowers NYSDEC to compel information from companies regarding their past practices and activities, use emissions factors consistent with New York's Climate Leadership and Community Protection Act, and use data obtained from the New York Department of Taxation and Finance.

The CCSA requires NYSDEC to collect $75 billion from responsible parties over the next 25 years. In theory, a responsible party under the Act will be held liable for an amount that bears the same ratio to $75 billion as that party's

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[7] While the law as originally passed would have held companies that hold a "minority interest" of greater than 10% in a responsible entity liable for cost recovery demands, amendments signed into law by Governor Hochul on February 28, 2025 eliminated this provision and replaced it with concepts of ownership interests having certain "control" rights over a reporting entity. This risk of liability may have implications for any parties that are in joint ventures or hold interests in portfolio companies through private equity or similar structures, but would be unlikely to ensnare holders of minor amounts of publicly traded stock.

[8] The New York legislative history includes an approximate list of covered companies that have purportedly released more than 1 billion tons. This list could be supplemented and revised in due course.

applicable share of covered GHG emissions bears to the total amount of covered GHG emissions from all responsible parties.

A cost recovery demand under CCSA that has been imposed upon a party can be challenged by the responsible party filing a request for reconsideration with NYSDEC within 60 days of service of the demand if within the United States and within 90 days for service outside the United States. Cost recovery demands may be adjusted if the responsible party shows "to the satisfaction of the department" that the demand should be updated or, for parties refining petroleum products, whether a portion of the demand is attributable to the refining of crude oil extracted by another responsible party. The Act does not specify a procedure for appealing NYSDEC's ruling on a reconsideration request.

Although $75 billion is a substantial sum, the New York legislature believes that this represents a "small percentage" of the costs the state will bear to repair and adapt infrastructure to withstand climate change-driven events over the next 25 years. Payments into the fund will be used for infrastructure projects aimed at adapting to and mitigating the effects of climate change, climate-driven public health initiatives, and responses to extreme weather events, including: upgrading stormwater drainage systems, coastal wetlands restoration, upgrades to roads and bridges, undertaking preventative healthcare programs, retrofitting sewage treatment plants vulnerable to flooding, and upgrading parts of the electrical grid to increase resilience. The law requires that at least 35% of the funds are put towards climate change adaptive infrastructure projects that benefit disadvantaged communities.

Under the Act, NYSDEC has until June 2027, to promulgate regulations implementing the law, including adopting methodologies to identify responsible parties, determine their covered GHG emissions, and issue notices of cost recovery demands. Payments generally must be paid in full on December 31, 2028.

NYSDEC must also publish a climate change adaptation and resilience plan by July 26, 2026, to guide the dispersal of funds paid pursuant to the program and identify potential, proposed, and ongoing climate infrastructure projects within the state.

OTHER STATE LAWS

State governments are increasingly taking action on climate issues. New York is the second state after Vermont to enact a climate Superfund law. Vermont's Climate Superfund Act (the Vermont Law), which was passed on May 30, 2024, is analogous to the CCSA in many ways but covers GHG emissions from 1995 to 2024 – a longer time period than the CCSA. Similar laws have been

proposed in California, Maryland, Massachusetts, and New Jersey, but have not meaningfully advanced to date, but such state legislation could see new momentum following the enactment of the New York law. These developments come alongside climate financial reporting laws passed in California and proposed in New York, Illinois, Minnesota, and Washington.

POTENTIAL IMPACTS

Producers and refiners and their stockholders may face a number of negative consequences from the CCSA. Because the Act imposes strict liability for past GHG emissions – not present or future activities – those deemed "responsible parties" will face cost recovery demands imposing substantial new and retroactive liability upon their past lawful activities. Moreover, there is nothing in the Act indicating that any payments under this liability scheme would have any impact on their exposure to any other claims that may be made in the future by New York in any climate change litigation. Aggressive interpretations of the New York nexus requirements and the application of CCSA to extraterritorial fossil fuel production and use could cast a very broad net indeed. The Act may also impact mergers and acquisitions activity, since buyers will need to consider the impact of cost recovery demands. Industry groups have also raised the alarm, in a letter to Governor Hochul, that consumers may also face increased costs due to the Act. The fossil fuel industry groups warn that cost recovery demands may increase responsible parties' operating costs, which may then be passed on to consumers.