Published on *The National Law Review* https://natlawreview.com

Navigating the Impacts of New York’s Climate Superfund Legislation

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On December 26, 2024, New York Governor Kathy Hochul signed the Climate Change Superfund Act (S.2129-B/A.3351-B) into law. The legislation will require fossil fuel companies to pay $75 billion over the next 25 years to fund state infrastructure projects to mitigate flooding, extreme heat, and recovery from natural disasters. This extremely aggressive measure invoking state police power to assign costs for climate change has been met with sharp criticism and will be challenged forcefully in court.

Key Provisions

- **Business Pays Principle**: The law requires the New York State Department of Environmental Conservation (DEC) to collect $3 billion each year for the next 25 years from “responsible parties” which, are defined as any company with connections to New York that extracted fossil fuels or refined crude oil and that DEC determines is responsible for more than 1 billion tons of greenhouse gas emissions. Incorporating certain IRS definitions, the law also provides that entities in a “controlled group” will be treated as a single entity to meet the definition of responsible party. The contribution due from each company or controlled group will be proportional to the company’s overall contribution to greenhouse gas emissions. The law is loosely modeled after the potentially responsible party (PRP) concept established in the 1980 federal Superfund legislation, under which parties that contributed waste containing hazardous substances may be held responsible for remediating all or part of listed sites.
- **Climate Resilience Projects**: Funds will be allocated to projects that protect communities from climate-related hazards, including coastal protection and flood mitigation systems. DEC will choose where to distribute the funds, although no less than 35% of the funds must go toward climate-change-adaptive infrastructure projects that directly benefit disadvantaged communities.

Implications for Businesses

- **Copycat Legislation**: The New York legislation is modeled after similar legislation passed in Vermont last year. Other states are following New York and Vermont's lead and are likely to consider similar legislation in the coming year, with California, Maryland, Massachusetts, and New Jersey having already proposed such legislation.
- **Legal Challenges Ahead**: Challenges to the law are certain and likely will focus on federal preemption, the Dormant Commerce Clause, Equal Protection, Due Process, and state constitutional problems, among other issues.
- **Compliance Requirements**: The new legislation seeks to hold parties responsible for emissions between 2000-2018. If the law is upheld, significant litigation will follow any of DEC's calculations of individual greenhouse gas emissions from up to 25 years ago. DEC has one year from the December 26, 2024, effective date to promulgate regulations for the program's implementation. Thereafter, it must adopt a master plan within two years, outlining how funds from the program will be disbursed.
- **Strategic Planning**: Businesses should consider the likelihood not only of copycat legislation from state to state but also the potential of forward-looking legislation that accounts for ongoing emissions.

Conclusion

Fossil fuel companies with connections to New York should, of course, pay close attention to the new legislation, including both litigation and the regulatory proceedings to implement the law. The new law is of interest even to companies without connections to New York because it has become increasingly common for states with aggressive climate policies to copy novel climate legislation from other states. The new legislation is also of potential concern to companies beyond the fossil fuel sector because one logical outgrowth of the legislation could be to seek to impose similar taxes on other industries deemed to be significant sources of greenhouse gas emissions.

National Law Review, Volume XV, Number 6