

# EXAMINING STATE CLIMATE SUPERFUND BILLS

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## OVERVIEW

- “Climate Superfund” legislation imposes retroactive joint and several liability much more aggressively than traditional Superfund
- Pending lawsuits raise serious challenges to the legal viability of such laws

## CLIMATE SUPERFUND LAWS – MUCH MORE AGGRESSIVE THAN CERCLA LIABILITY SCHEME

- Disregard of corporate separateness:
  - “It is a general principle of corporate law deeply ‘ingrained in our economic and legal systems’ that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998)
- Joint and several liability is not mandated by CERCLA:
  - “Joint and several liability is not mandated under CERCLA; Congress intended that the federal courts impose joint and several liability only in appropriate cases, applying common-law principles.” *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 901 (5<sup>th</sup> Cir. 1993)
- Joint and several liability among corporate affiliates expressly imposed by recent climate Superfund statutes. 10 V.S.A. 24A: 596(5)(B) (Vermont); 76-0101 Sec. 5, 11 (2025) (New York)

## CLIMATE SUPERFUND LAWS – MUCH MORE AGGRESSIVE THAN CERCLA LIABILITY SCHEME

- CERCLA retains some causation requirements, albeit diminished relative to common law:
  - Release of hazardous substance must have caused the incurrence of response costs
  - Defenses, e.g. divisibility, based on causation: “In so ruling we candidly admit that causation is being brought back into the case—through the backdoor, after being denied entry at the front door—at the apportionment stage.” *U.S. v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993)
- In contrast, no showing of causation or specific connection to specific alleged injury required under climate Superfund laws. 10 V.S.A. 24A: 598(b) (liability calculated based on emissions ratios)(Vermont); 76-0101 Sec. 8 (same) (New York)

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- CERCLA was intended to broadly apply to all parties responsible for an environmental release.
  - “The Act's broad reach extends liability to all those contributing to—from generation through disposal—the problems caused by hazardous substances.” *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992)
- New York/Vermont climate Superfund laws focus only on a narrow set of parties and do not apply to:
  - End users of fossil fuels
  - Other potential sources of GHG emissions, such as agriculture and waste management
- In New York, jurisdictional carve outs based on minimum contacts only increase the liability for remaining parties.

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- CERCLA allows liable parties to seek contribution from other parties that also contributed to the injury.
  - “In order to ameliorate the harshness of joint and several liability, those who are found jointly and severally liable may bring a contribution action against other liable parties.” *Pakootas v. Teck Cominco Metals, Ltd.*, 868 F.Supp.2d 1106, 1110 (E.D. Wash. 2012)
- State climate Superfund statutes generally provide no similar remedies.
  - New York’s climate Superfund statute now provides the opportunity to identify new responsible parties, but the window to do so is short (60 or 90 days) 76-0101 Sec. 4.a.V(4)
  - Vermont statute appears to allow some disaggregation between extraction and refining. 10 V.S.A. 24A: 598(e)

## CLIMATE SUPERFUND LAWS – MUCH MORE AGGRESSIVE THAN CERCLA LIABILITY SCHEME

- CERCLA provides defenses, for example in cases where the government has acted arbitrarily and capriciously.
  - “The availability of judicial discretion in combination with a “sufficient cause” defense under CERCLA cures any potential constitutional deficiency based on *Ex Parte Young*. Other courts that have addressed this issue under CERCLA have found that the “sufficient cause” defense cures any possible constitutional problems stemming from the fines and penalties possible under sections 106 and 107.” *General Electric Company v. Johnson*, 362 F.Supp.2d 327, 342 (D.D.C. 2005)
- CERCLA requires a liable party must be connected to a specific facility as owner, operator, or arranger. 42 U.S.C. 9607(a).
- A private party’s liability under CERCLA is limited to response actions conducted consistently with the National Contingency Plan. 42 U.S.C. 9607
- State climate Superfund laws do not contain meaningful defenses or limitations on the kinds of projects for which liability can be imposed.

## CLIMATE SUPERFUND LAWS – MAIN ARGUMENTS IN JUDICIAL CHALLENGES

- Federal preemption
  - Constitutional preemption
  - Federal common law/Clean Air Act preemption
- Due process/retroactive liability
  - “Harsh and oppressive” retroactive penalty on lawful conduct
  - “Arbitrary and irrational” punishment based on flawed calculations
  - Unconstitutionally vague penalty
  - Lack of procedural safeguards
- Commerce Clause
- Excessive Fines Clause
- Unconstitutional taking