STATE OF NEW YORK

10556

IN ASSEMBLY

July 6, 2022

Introduced by COMMITTEE ON RULES -- (at request of M. of A. Dinowitz) -- read once and referred to the Committee on Environmental Conservation

AN ACT to amend the environmental conservation law, in relation to establishing the climate change adaptation cost recovery program; and to amend the state finance law, in relation to establishing the climate change adaptation fund

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "climate change superfund act".

§ 2. Legislative findings. The legislature finds and declares the following:

1. Climate change, resulting primarily from the combustion of fossil fuels, is an immediate, grave threat to the state's communities, environment, and economy. In addition to mitigating the further buildup of greenhouse gases, the state must take action to adapt to certain consequences of climate change that are irreversible, including rising sea levels, increasing temperatures, extreme weather events, flooding, heat waves, toxic algal blooms and other climate-change-driven threats. Maintaining New York's quality of life into the future, particularly for young people, who will experience greater impacts from climate change over their lifetimes, will be one of the state's greatest challenges over the next three decades. Meeting that challenge will require a shared commitment of purpose and huge investments in new or upgraded infrastructure.

2. New York has previously adopted programs now in place - the inactive hazardous waste disposal site (state superfund) program and the oil spill fund - to remediate environmental damage to lands and waters based on the principle that, where possible, the entities responsible for environmental damage should pay for its cleanup. No similar program exists yet for the pollution of the atmosphere by greenhouse gas buildup as a result of burning fossil fuels.

3. Based on decades of research it is now possible to determine with great accuracy the share of greenhouse gases released into the atmos-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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phere by specific fossil fuel companies over the last 70 years or more, making it possible to assign liability to and require compensation from companies commensurate with their emissions during a given time period.

4. It is the intent of the legislature to establish a climate change adaptation cost recovery program that will require companies that have contributed significantly to the buildup of climate change-driving greenhouse gases in the atmosphere to bear a proportionate share of the cost of infrastructure investments required to adapt to the impacts of climate change in New York state.

5. a. The obligation to pay under the program is based on the fossil fuel companies' historic contribution to the buildup of greenhouse gases that is largely responsible for climate change. The program operates under a standard of strict liability; companies are required to pay into the fund because the use of their products caused the pollution. No finding of wrongdoing is required.

b. Nonetheless, the legislature recognizes that the actions of many of the biggest fossil fuel companies have been unconscionable, closely reflecting the strategy of denial, deflection, and delay used by the tobacco industry. In spite of the information provided by their own scientists that the continued burning of fossil fuels would have catastrophic results, these companies hid the truth from the public and actively spread false information that the science of climate change was uncertain when in fact it was beyond controversy. This breach of the public trust was breathtaking in its scope and consequences, and it continues to this day.

c. In 2022, the fossil fuel industry has taken advantage of several overlapping global crises to earn immense profits, charging record high prices while aggressively rejecting any responsibility for the costs of its business activities. While all the profits accrue to the companies, all of the costs of climate change are paid by taxpayers. This is a market failure that needs to be addressed through policy change.

5. Payments by historical polluters into the climate change adaptation cost recovery program would be used for new or upgraded infrastructure needs such as sea walls, storm water drain system upgrades and air conditioning in public buildings, including school buildings, all of which are necessary to protect the public safety and welfare in the face of the growing impacts of climate change. At least 35% of the overall benefits of program spending would go to climate change adaptive infrastructure projects that directly benefit disadvantaged communities.

6. This act is not intended to intrude on the authority of the federal government in areas where it has preempted the right of the states to legislate. This act is remedial in nature, seeking compensation for damages resulting from the past actions of polluters.

§ 3. The environmental conservation law is amended by adding a new article 76 to read as follows:

ARTICLE 76

CLIMATE CHANGE ADAPTATION COST RECOVERY PROGRAM

Section 76-0101. Definitions.

76-0103. The climate change adaptation cost recovery program.

§ 76-0101. Definitions.

For the purposes of this article the following terms shall have the following meanings:

1. "Applicable payment date" means September thirtieth of the second calendar year following the year in which this article is enacted into law.

2. "Climate change adaptive infrastructure project" means an infrastructure project designed to avoid, moderate, or repair damage caused by climate change. Such projects include but are not limited to the building of sea walls and coastal defenses; upgrading storm water drainage systems; making defensive upgrades to roads, bridges, subways, and transit systems; preparing for and recovering from hurricanes and other extreme weather events; relocating, elevating, or retrofitting sewage treatment plants vulnerable to flooding; installing air conditioning and other upgrades and retrofits in public buildings, including schools; and responding to toxic algae blooms, loss of agricultural topsoil, and other climate-driven ecosystem threats to forests, farms and fisheries.

3. "Coal" shall have the same definition as in section 1-103 of the energy law.

4. "Controlled group" means two or more entities treated as a single employer under section 52(a) or (b) or section 414(m) or (o) of the Internal Revenue Code. In applying subsections (a) and (b) of section 52, section 1563 of the Internal Revenue Code shall be applied without regard to subsection(b)(2)(C). For purposes of this article, entities in a controlled group are treated as a single entity for purposes of meeting the definition of responsible party and are jointly and severally liable for payment of any cost recovery demand owed by any entity in the controlled group.

5. "Cost recovery demand" means a charge asserted against a responsible party for cost recovery payments under the program for payment to the fund.

6. "Covered greenhouse gas emissions" means, with respect to any entity, the total quantity of greenhouse gases released into the atmosphere during the covered period, 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 entity.

7. "Covered period" means the period that began January first, two thousand and ended on December thirty-first, two thousand eighteen.

8. "Crude oil" means oil or petroleum of any kind and in any form, including bitumen, oil sands, heavy oil, conventional and unconventional oil, shale oil, natural gas liquids, condensates, and related fossil fuels.

9. "Entity" means any individual, trustee, agent, partnership, association, corporation, company, municipality, political subdivision, or other legal organization, including a foreign nation, that holds or held an ownership interest in a fossil fuel business during the covered period.

10. "Fossil fuel" shall have the same definition as in section 1-103 of the energy law.

11. "Fossil fuel business" means a business engaging in the extraction of fossil fuels or the refining of petroleum products.

12. "Fuel gases" shall have the same definition as in section 1-103 of the energy law.

13. "Fund" means the climate change adaptation fund established pursuant to section ninety-seven-k of the state finance law.

14. "Greenhouse gas" shall have the same definition as in section 75-0101 of this chapter.

15. "Notice of cost recovery demand" means the written communication informing a responsible party of the amount of the cost recovery demand payable to the fund.

16. "Petroleum products" shall have the same definition as in section 1-103 of the energy law.

17. "Program" means the climate change adaptation cost recovery program established under section 76-0103 of this article.

18. "Qualifying expenditure" means an authorized payment from the fund in support of a climate change adaptive infrastructure project, including its operation and maintenance, as defined by the department.

19. "Responsible party" means any entity (or a successor in interest to such entity described herein), which, during any part of the covered period, was engaged in the trade or business of extracting fossil fuel or refining crude oil and is determined by the department to be responsible for more than one billion tons of covered greenhouse gas emissions. The term responsible party shall not include any person who lacks sufficient connection with the state to satisfy the nexus requirements of the United States Constitution.

§ 76-0103. The climate change adaptation cost recovery program.

1. There is hereby established a climate change adaptation cost recovery program administered by the department.

2. The purposes of the program shall be the following:

a. To secure compensatory payments from responsible parties based on a standard of strict liability to provide a source of revenue for climate change adaptive infrastructure projects within the state.

b. To determine proportional liability of responsible parties pursuant to subdivision three of this section;

c. To impose cost recovery demands on responsible parties and issue notices of cost recovery demands;

d. To accept and collect payment from responsible parties;

e. To identify climate change adaptive infrastructure projects;

f. To disperse funds to climate change adaptive infrastructure projects; and

g. To ensure that at least thirty-five percent of the qualified expenditures from the program shall go to climate change adaptive infrastructure projects that directly benefit disadvantaged communities as defined in section 75-0101 of this chapter.

3. a. A responsible party shall be strictly liable, without regard to fault, for a share of the costs of climate change adaptive infrastructure projects, including their operation and maintenance, supported by the fund.

b. With respect to each responsible party, the cost recovery demand shall be equal to an amount that bears the same ratio to thirty billion dollars as the responsible party's applicable share of covered greenhouse gas emissions bears to the aggregate applicable shares of covered greenhouse gas emissions of all responsible parties.

c. The applicable share of covered greenhouse gas emissions taken into account under this section for any responsible party shall be the amount by which the covered greenhouse gas emissions attributable to such responsible party exceeds one billion metric tons.

d. Where an entity owns a minority interest in another entity of ten percent or more, the calculation of the entity's applicable share of greenhouse gas emissions taken into account under this section shall include the applicable share of greenhouse gas emissions taken into account under this section by the entity in which the responsible party holds a minority interest, multiplied by the percentage of the minority interest held.

e. In determining the amount of greenhouse gas emissions attributable to any entity, an amount equivalent to nine hundred forty-two and one-half metric tons of carbon dioxide equivalent shall be treated as released for every million pounds of coal attributable to such entity;

an amount equivalent to four hundred thirty-two thousand one hundred eighty metric tons of carbon dioxide equivalent shall be treated as released for every million barrels of crude oil attributable to such entity; and an amount equivalent to fifty-three thousand four hundred forty metric tons of carbon dioxide equivalent shall be treated as released for every million cubic feet of fuel gases attributable to such entity.

f. The commissioner may adjust the cost recovery demand amount of a responsible party refining petroleum products (or who is a successor in interest to such an entity) if such responsible party establishes to the satisfaction of the commissioner that a portion of the cost recovery demand amount was attributable to the refining of crude oil extracted by another responsible party (or who is a successor in interest to such an entity) that accounted for such crude oil in determining its cost recovery demand amount.

g. Payment of a cost recovery demand shall be made in full on the applicable payment date unless a responsible party elects to pay in installments pursuant to paragraph h of this subdivision.

h. A responsible party may elect to pay the cost recovery demand amount in nine annual installments, twenty percent of the total due in the first installment and ten percent of the total due in each of the following eight installments. If an election is made under this paragraph, the first installment shall be paid on the applicable payment date and each subsequent installment shall be paid on the same date as the applicable payment date in each succeeding year.

i. If there is any addition to the original amount of the cost recovery demand for failure to timely pay any installment required under this subdivision, a liquidation or sale of substantially all the assets of the responsible party (including in a proceeding under U.S. Code: Title 11 or similar case), a cessation of business by the responsible party, or any similar circumstance, then the unpaid balance of all remaining installments shall be due on the date of such event (or in the case of a proceeding under U.S. Code: Title 11 or similar case, on the day before the petition is filed). The preceding sentence shall not apply to the sale of substantially all of the assets of a responsible party to a buyer if such buyer enters into an agreement with the department under which such buyer is liable for the remaining installments due under this subdivision in the same manner as if such buyer were the responsible party.

4. Within one year of the effective date of this article, the department shall promulgate such regulations as are necessary to carry out this article, including but not limited to:

a. adopting methodologies using the best available science to determine responsible parties and their applicable share of covered greenhouse gas emissions consistent with the provisions of this article;

b. registering entities that are responsible parties under the program;

c. issuing notices of cost recovery demand to responsible parties informing them of the cost recovery demand amount; how and where cost recovery demands can be paid; the potential consequences of nonpayment and late payment; and information regarding their rights to contest an assessment;

d. accepting payments from, pursuing collection efforts against, and negotiating settlements with responsible parties; and

e. adopting procedures for identifying climate change adaptive infrastructure projects eligible to receive qualifying expenditures, including

legislative budget appropriations, issuance of requests for proposals from localities and not-for-profit and community organizations, grants to private individuals, or other methods as determined by the department, and for dispersing moneys from the fund for qualifying expenditures. Total qualifying expenditures shall be allocated in such a way as to ensure at least thirty-five percent of the qualified expenditures from the program shall go to climate change adaptive infrastructure projects that directly benefit disadvantaged communities as defined in section 75-0101 of this chapter.

5. The department, the department of taxation and finance, and the attorney general are hereby authorized to enforce the provisions of this article.

6. The department or the department of taxation and finance shall provide an opportunity to be heard to any responsible parties that seek to contest a cost recovery demand. Determinations made in favor of a petitioner after such hearing shall be final and conclusive. A determination in favor of the state may be appealed under article seventy-eight of the civil practice law and rules.

7. Moneys received from cost recovery demands shall be deposited in the climate change adaptation fund established pursuant to section ninety-seven-k of the state finance law.

8. a. The department shall conduct an independent evaluation of the climate change adaptation cost recovery program. The purpose of this evaluation is to determine the effectiveness of the program in achieving its purposes as defined in subdivision two of this section.

b. Such evaluation shall be provided to the governor, the temporary president of the senate and the speaker of the assembly on or before January first of the second calendar year following the year in which this article is enacted into law, and annually on or before September thirtieth thereafter.

c. Any entity contracted by the department to conduct such evaluation shall receive prompt payment of all moneys due upon completion of such evaluation.

§ 4. The state finance law is amended by adding a new section 97-k to read as follows:

§ 97-k. Climate change adaptation fund. 1. There is hereby established in the custody of the comptroller and the commissioner of taxation and finance a special revolving fund to be known as the "climate change adaptation fund" for the purpose of receiving moneys through cost recovery demands and issuing funds for qualifying expenditures pursuant to the climate change adaptation cost recovery program established in article seventy-six of the environmental conservation law.

2. No monies shall be expended from the fund for any project except qualifying expenditures pursuant to the program, including their operation and maintenance, as well as reasonable costs incurred by the department of environmental conservation for administering the program.

3. Revenues in the fund shall be kept separate and shall not be commingled with any other moneys in the custody of the comptroller or the commissioner of taxation and finance. All deposits of such revenues shall, if required by the comptroller, be secured by obligations of the United States or of the state having a market value equal at all times to the amount of such deposits and all banks and trust companies are authorized to give security for such deposits. Any such revenues in such fund may, upon the discretion of the comptroller, be invested in obligations in which the comptroller is authorized to invest pursuant to section ninety-eight-a of this article.

4. All payments of moneys from the fund shall be made on the audit and warrant of the comptroller.

§ 5. Availability of additional remedies. Nothing in this act shall be deemed to preclude the pursuit of a civil action or other remedy by any person. The remedies provided in this act are in addition to those provided by existing statutory or common law.

§ 6. Severability. If any word, phrase, clause, sentence, paragraph, section, or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the word, phrase, clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

§ 7. Construction. This act, being necessary for the general health, safety, and welfare of the people of this state, shall be liberally construed to effect its purpose.

§ 8. This act shall take effect immediately.