

STATE OF NEW YORK

9417

IN SENATE

May 25, 2022

Introduced by Sen. KRUEGER -- read twice and ordered printed, and when printed to be committed 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:

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

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

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

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

25 3. Based on decades of research it is now possible to determine with
26 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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1 phere by specific fossil fuel companies over the last 70 years or more,
2 making it possible to assign liability to and require compensation from
3 companies commensurate with their emissions during a given time period.

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

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

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

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

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

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

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

46 ARTICLE 76

47 CLIMATE CHANGE ADAPTATION COST RECOVERY PROGRAM

48 Section 76-0101. Definitions.

49 76-0103. The climate change adaptation cost recovery program.

50 § 76-0101. Definitions.

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

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

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

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

14 4. "Controlled group" means two or more entities treated as a single
15 employer under section 52(a) or (b) or section 414(m) or (o) of the
16 Internal Revenue Code. In applying subsections (a) and (b) of section
17 52, section 1563 of the Internal Revenue Code shall be applied without
18 regard to subsection(b)(2)(C). For purposes of this article, entities in
19 a controlled group are treated as a single entity for purposes of meet-
20 ing the definition of responsible party and are jointly and severally
21 liable for payment of any cost recovery demand owed by any entity in the
22 controlled group.

23 5. "Cost recovery demand" means a charge asserted against a responsi-
24 ble party for cost recovery payments under the program for payment to
25 the fund.

26 6. "Covered greenhouse gas emissions" means, with respect to any enti-
27 ty, the total quantity of greenhouse gases released into the atmosphere
28 during the covered period, expressed in metric tons of carbon dioxide
29 equivalent, resulting from the use of fossil fuels or petroleum products
30 extracted, produced, refined, or sold by such entity.

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

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

37 9. "Entity" means any individual, trustee, agent, partnership, associ-
38 ation, corporation, company, municipality, political subdivision, or
39 other legal organization, including a foreign nation, that holds or held
40 an ownership interest in a fossil fuel business during the covered peri-
41 od.

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

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

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

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

50 14. "Greenhouse gas" shall have the same definition as in section
51 75-0101 of this chapter.

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

55 16. "Petroleum products" shall have the same definition as in section
56 1-103 of the energy law.

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

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

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

14 § 76-0103. The climate change adaptation cost recovery program.

15 1. There is hereby established a climate change adaptation cost recov-
16 ery program administered by the department.

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

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

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

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

25 d. To accept and collect payment from responsible parties;

26 e. To identify climate change adaptive infrastructure projects;

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

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

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

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

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

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

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

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

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

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

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

26 i. If there is any addition to the original amount of the cost recov-
27 ery demand for failure to timely pay any installment required under this
28 subdivision, a liquidation or sale of substantially all the assets of
29 the responsible party (including in a proceeding under U.S. Code: Title
30 11 or similar case), a cessation of business by the responsible party,
31 or any similar circumstance, then the unpaid balance of all remaining
32 installments shall be due on the date of such event (or in the case of a
33 proceeding under U.S. Code: Title 11 or similar case, on the day before
34 the petition is filed). The preceding sentence shall not apply to the
35 sale of substantially all of the assets of a responsible party to a
36 buyer if such buyer enters into an agreement with the department under
37 which such buyer is liable for the remaining installments due under this
38 subdivision in the same manner as if such buyer were the responsible
39 party.

40 4. Within one year of the effective date of this article, the depart-
41 ment shall promulgate such regulations as are necessary to carry out
42 this article, including but not limited to:

43 a. adopting methodologies using the best available science to deter-
44 mine responsible parties and their applicable share of covered green-
45 house gas emissions consistent with the provisions of this article;

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

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

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

55 e. adopting procedures for identifying climate change adaptive infras-
56 tructure projects eligible to receive qualifying expenditures, including

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

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

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

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

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

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

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

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

36 § 97-k. Climate change adaptation fund. 1. There is hereby established
37 in the custody of the comptroller and the commissioner of taxation and
38 finance a special revolving fund to be known as the "climate change
39 adaptation fund" for the purpose of receiving moneys through cost recov-
40 ery demands and issuing funds for qualifying expenditures pursuant to
41 the climate change adaptation cost recovery program established in arti-
42 cle seventy-six of the environmental conservation law.

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

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

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

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

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

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

17 § 8. This act shall take effect immediately.