

STATE OF NEW YORK

3351

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Introduced by M. of A. DINOWITZ, PAULIN, L. ROSENTHAL, GLICK, BENEDETTO, SIMON, BURGOS, TAPIA, EPSTEIN, DARLING, DICKENS, ZINERMAN, STECK, THIELE, KELLES -- 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:

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

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

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1 environmental damage should pay for its cleanup. No similar program
2 exists yet for the pollution of the atmosphere by greenhouse gas buildup
3 as a result of burning fossil fuels.

4 3. Based on decades of research it is now possible to determine with
5 great accuracy the share of greenhouse gases released into the atmos-
6 phere by specific fossil fuel companies over the last 70 years or more,
7 making it possible to assign liability to and require compensation from
8 companies commensurate with their emissions during a given time period.

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

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

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

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

38 6. Payments by historical polluters into the climate change adaptation
39 cost recovery program would be used for new or upgraded infrastructure
40 needs such as coastal wetlands restoration, storm water drainage system
41 upgrades, and energy efficient cooling systems in public and private
42 buildings, including schools and public housing, all of which are neces-
43 sary to protect the public safety and welfare in the face of the growing
44 impacts of climate change. At least 35%, with a goal of at least 40% of
45 the overall benefits of program spending would go to climate change
46 adaptive infrastructure projects that directly benefit disadvantaged
47 communities.

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

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

54 ARTICLE 76

55 CLIMATE CHANGE ADAPTATION COST RECOVERY PROGRAM

56 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, repair, or adapt to negative impacts caused by climate change, and to assist communities, households, and businesses in preparing for future climate change-driven disruptions. Such projects include but are not limited to restoring coastal wetlands and developing other nature-based solutions and coastal protections; 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; undertaking preventive health care programs and providing medical care to treat illness or injury caused by the effects of climate change; relocating, elevating, or retrofitting sewage treatment plants vulnerable to flooding; installing energy efficient cooling systems and other weatherization and energy efficiency upgrades and retrofits in public and private buildings, including schools and public housing; upgrading parts of the electrical grid to increase stability and resilience, including supporting the creation of self-sufficient clean energy microgrids; addressing urban heat island effects through green spaces, urban forestry, and other interventions; and responding to toxic algae blooms, loss of agricultural topsoil, and other climate-driven ecosystem threats to forests, farms, fisheries, and food systems.

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

1 an ownership interest in a fossil fuel business during the covered peri-
2 od.

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

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

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

9 13. "Fund" means the climate change adaptation fund established pursu-
10 ant to section ninety-seven-m of the state finance law.

11 14. "Greenhouse gas" shall have the same definition as in section
12 75-0101 of this chapter.

13 15. "Nature-based solutions" shall mean projects that utilize or mimic
14 nature or natural processes and functions and that may also offer envi-
15 ronmental, economic, and social benefits, while increasing resilience.
16 Nature-based solutions include both green and natural infrastructure.

17 16. "Notice of cost recovery demand" means the written communication
18 informing a responsible party of the amount of the cost recovery demand
19 payable to the fund.

20 17. "Petroleum products" shall have the same definition as in section
21 1-103 of the energy law.

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

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

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

35 § 76-0103. The climate change adaptation cost recovery program.

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

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

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

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

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

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

47 e. To identify climate change adaptive infrastructure projects;

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

50 g. To allocate funds in such a way as to achieve a goal that at least
51 forty percent of the qualified expenditures from the program, but not
52 less than thirty-five percent of such expenditures, shall go to climate
53 change adaptive infrastructure projects that benefit disadvantaged
54 communities as defined in section 75-0101 of this chapter.

55 3. a. A responsible party shall be strictly liable, without regard to
56 fault, for a share of the costs of climate change adaptive infrastruc-

1 ture projects, including their operation and maintenance, supported by
2 the fund.

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

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

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

19 e. In determining the amount of greenhouse gas emissions attributable
20 to any entity, an amount equivalent to nine hundred forty-two and one-
21 half metric tons of carbon dioxide equivalent shall be treated as
22 released for every million pounds of coal attributable to such entity;
23 an amount equivalent to four hundred thirty-two thousand one hundred
24 eighty metric tons of carbon dioxide equivalent shall be treated as
25 released for every million barrels of crude oil attributable to such
26 entity; and an amount equivalent to fifty-three thousand four hundred
27 forty metric tons of carbon dioxide equivalent shall be treated as
28 released for every million cubic feet of fuel gases attributable to such
29 entity.

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

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

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

48 i. If there is any addition to the original amount of the cost recov-
49 ery demand for failure to timely pay any installment required under this
50 subdivision, a liquidation or sale of substantially all the assets of
51 the responsible party (including in a proceeding under U.S. Code: Title
52 11 or similar case), a cessation of business by the responsible party,
53 or any similar circumstance, then the unpaid balance of all remaining
54 installments shall be due on the date of such event (or in the case of a
55 proceeding under U.S. Code: Title 11 or similar case, on the day before
56 the petition is filed). The preceding sentence shall not apply to the

1 sale of substantially all of the assets of a responsible party to a
2 buyer if such buyer enters into an agreement with the department under
3 which such buyer is liable for the remaining installments due under this
4 subdivision in the same manner as if such buyer were the responsible
5 party.

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

9 i. adopting methodologies using the best available science to deter-
10 mine responsible parties and their applicable share of covered green-
11 house gas emissions consistent with the provisions of this article;

12 ii. registering entities that are responsible parties under the
13 program;

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

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

21 v. adopting procedures for identifying and selecting climate change
22 adaptive infrastructure projects eligible to receive qualifying expendi-
23 tures, including legislative budget appropriations, issuance of requests
24 for proposals from localities and not-for-profit and community organiza-
25 tions, grants to private individuals, or other methods as determined by
26 the department, and for dispersing moneys from the fund for qualifying
27 expenditures. When considering projects intended to stabilize tidal
28 shorelines, the department shall encourage the use of nature-based
29 solutions. Total qualifying expenditures shall be allocated in such a
30 way as to achieve a goal that at least forty percent of the qualified
31 expenditures from the program, but not less than thirty-five percent of
32 such expenditures, shall go to climate change adaptive infrastructure
33 projects that benefit disadvantaged communities as defined in section
34 75-0101 of this chapter.

35 b. The department shall hold at least two public hearings, one in-per-
36 son and one virtual, on proposed regulations, with a minimum of thirty
37 days' public notice.

38 5. Within two years of the effective date of this article, the depart-
39 ment shall complete a statewide climate change adaptation master plan
40 for the purpose of guiding the dispersal of funds in a timely, effi-
41 cient, and equitable manner to all regions of the state in accordance
42 with the provisions of this chapter. In completing such plan, the
43 department shall:

44 a. collaborate with the department of state, empire state development,
45 the department of agriculture and markets, the New York state energy
46 research and development authority, the department of public service,
47 and the New York independent systems operator;

48 b. assess the adaptation needs and vulnerabilities of various areas
49 vital to the state's economy, normal functioning, and the health and
50 well-being of New Yorkers, including but not limited to: agriculture,
51 biodiversity, ecosystem services, education, finance, healthcare, manu-
52 facturing, housing and real estate, retail, tourism (including state and
53 municipal parks), transportation, and municipal and local government.

54 c. identify major potential, proposed, and ongoing climate change
55 adaptive infrastructure projects throughout the state;

1 d. identify opportunities for alignment with existing federal, state,
2 and local funding streams;

3 e. consult with stakeholders, including local governments, businesses,
4 environmental advocates, relevant subject area experts, and represen-
5 tatives of disadvantaged communities; and

6 f. provide opportunities for public engagement in all regions of the
7 state.

8 6. The department, the department of taxation and finance, and the
9 attorney general are hereby authorized to enforce the provisions of this
10 article.

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

17 8. Moneys received from cost recovery demands shall be deposited in
18 the climate change adaptation fund established pursuant to section nine-
19 ty-seven-m of the state finance law.

20 9. a. Projects funded pursuant to this article shall require compli-
21 ance with prevailing wage requirements pursuant to section two hundred
22 twenty of the labor law.

23 b. Any state entity or municipality receiving at least twenty-five
24 million dollars (\$25,000,000) from funds allocated pursuant to this
25 article for a project costing greater than fifty million dollars
26 (\$50,000,000) shall require use of apprenticeship agreements as defined
27 by article twenty-three of the labor law, with pre-apprenticeship direct
28 entry providers registered with the department of labor.

29 c. i. Any state entity or municipality receiving at least twenty-five
30 million dollars (\$25,000,000) from funds allocated pursuant to this
31 article for a project which involves the construction, reconstruction,
32 alteration, maintenance, moving, demolition, excavation, development or
33 other improvement of any building, structure or land, shall be subject
34 to section two hundred twenty-two of the labor law.

35 ii. Any privately owned project receiving funds allocated pursuant to
36 this title which utilizes a project labor agreement on such project
37 shall not be subject to article eight of the labor law.

38 d. If determined applicable, a municipality or state entity may
39 require that the private owner of a project, or a third party acting on
40 the owner's behalf, enter into a labor peace agreement with at least one
41 bona fide labor organization either:

42 i. where such bona fide labor organization is actively representing
43 non-construction employees; or

44 ii. upon notice by a bona fide labor organization that is attempting
45 to represent non-construction employees. For purposes of this section
46 "labor peace agreement" means an agreement between an entity and labor
47 organization that, at a minimum, protects the state's proprietary inter-
48 ests by prohibiting labor organizations and members from engaging in
49 picketing, work stoppages, boycotts, and any other economic interfer-
50 ence.

51 e. i. Any municipality or state entity, or a third party acting on
52 behalf and for the benefit of the municipality or state entity, in each
53 contract for construction, reconstruction, alteration, repair, improve-
54 ment or maintenance of a project receiving funds under this article that
55 is a public work, shall ensure that such contract contains a provision
56 that the structural iron and structural steel used or supplied in the

1 performance of the contract or any subcontract thereto and that is
2 permanently incorporated into the public work, shall be produced or made
3 in whole or substantial part in the United States, its territories or
4 possessions. In the case of a structural iron or structural steel prod-
5 uct, all manufacturing must take place in the United States, from the
6 initial melting stage through the application of coatings, except metal-
7 lurgical processes involving the refinement of steel additives. For the
8 purposes of this subdivision, "permanently incorporated" shall mean an
9 iron or steel product that is required to remain in place at the end of
10 the project contract, in a fixed location, affixed to the public work to
11 which it was incorporated. Iron and steel products that are capable of
12 being moved from one location to another are not permanently incorpo-
13 rated into a public work.

14 ii. The provisions of paragraph a of this subdivision shall not apply
15 if the head of the department, agency, or municipal entity constructing
16 the public work, in his or her sole discretion, determines that the
17 provisions would not be in the public interest, would result in unrea-
18 sonable costs, or that obtaining such steel or iron in the United States
19 would increase the cost of the contract by an unreasonable amount, or
20 such iron or steel, including without limitation structural iron and
21 structural steel, cannot be produced or made in the United States in
22 sufficient and reasonably available quantities and of satisfactory qual-
23 ity.

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

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

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

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

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

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

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

1 gations in which the comptroller is authorized to invest pursuant to
2 section ninety-eight-a of this article.

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

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

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

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

19 § 8. This act shall take effect immediately.