

# THE FUTURE OF CLIMATE SUPERFUND LAWS

by Sarah McGovern

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The emerging state “Climate Superfund” laws present a much-needed solution to a challenging problem. As climate change has progressed, numerous plaintiffs have tried yet so far failed to hold fossil fuel producers accountable for their products’ emissions and the resulting damage to their communities. The Vermont and New York Climate Superfund laws that establish a statutory framework for climate liability attempt to resolve this problem, requiring companies to pay for the cost of various climate change-related disasters across those states.

At the beginning of 2025, industry and certain states filed two separate lawsuits against Vermont and New York, challenging their respective Climate Superfund laws. The two complaints raise nearly identical claims, and both are governed by law in the U.S. Court of Appeals for the Second Circuit. The outcome there may likely be determined by the precedent established in *City of New York v. Chevron Corp.*, in which the court found that New York City could not apply state nuisance law to recover damages for greenhouse gas (GHG) emissions under principles of federal preclusion and preemption by the Clean Air Act (CAA).<sup>1</sup>

This Comment analyzes four claims raised in the complaints, which present robust constitutional questions, and concludes that the new laws may likewise be struck down in that circuit due to issues of federal preclusion and preemption. Although the court may well find that no Due Process Clause or Commerce Clause issues are implicated, it need only find one constitutional problem to invalidate the state laws at issue. While these Climate Superfund laws will likely not survive review in the Second Circuit, similar state laws may survive review elsewhere.

Since New York and Vermont passed their Climate Superfund laws, at least 10 other states have moved forward with similar bills in jurisdictions spanning the federal circuits.<sup>2</sup> In places not burdened by holdings like *City of New York*, creative lawyers may have an opportunity to convince courts of these laws’ constitutionality and the urgent need for Climate Superfunds. Although the

legal fight is just beginning, the fact remains that states increasingly bear an ever-growing financial burden of climate change, and the U.S. Congress continues to remain silent in relieving it. Given this reality, we should expect to see increasing pressure on courts to address this harm by upholding Climate Superfunds, regardless of the outcome in the Second Circuit.

This Comment begins with background on the pitfalls of climate change-related litigation, highlighting how this has paved the way for state Climate Superfund laws. Part II provides an overview of the New York and Vermont laws and their embodiment of the “polluter-pays” concept. Part III analyzes current legal challenges to these laws, including the plaintiffs’ federal preclusion, CAA preemption, and Due Process Clause and Commerce Clause claims, and finds that, at least in the Second Circuit, the suits will likely be found to be precluded and preempted by the CAA. Part IV suggests that creative lawyers in other states or circuits may have an opportunity to convince the courts of these laws’ constitutionality and the urgent need for Climate Superfunds. Part V concludes.

## I. Background

As climate change has progressed, numerous plaintiffs have tried and so far failed to establish legal liability for the resulting damage to their communities. Given the mounting harm associated with climate change, state legislatures are now looking to other legal tools for recovery. This trend has given rise to the Vermont and New York Climate Superfund laws, which establish a statutory framework for climate liability, thus creating a path for those states to recover from climate-related harm outside of the constraints of tort law.

One early case exemplifying the failure to hold fossil fuel producers accountable in federal court was *Native Village of Kivalina v. ExxonMobil Corp.*, where Alaska villagers brought a public-nuisance claim for climate change and the subsequent harmful rise in sea levels.<sup>3</sup> The U.S. Court of Appeals for the Ninth Circuit found the case posed a political question, since the court would have to determine a number for a reasonable amount of emissions to then determine liability, running afoul of the separation of powers.<sup>4</sup> Thus, the case was nonjusticiable and the court never

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1. 993 F.3d 81, 91-92 (2d Cir. 2021).  
2. Rachel Rothschild et al., *Examining State Climate Superfund Legislation*, 55 ELR 10251 (June 2025), <https://www.elr.info/articles/elr-articles/examining-state-climate-superfund-legislation>.

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3. 696 F.3d 849, 853 (9th Cir. 2012).

4. *See id.* at 854, 858.

reached the merits.<sup>5</sup> The court also found that plaintiffs lacked standing, explaining they could not show the named defendants caused injury given the possibility of harmful emissions coming from other sources or unnamed parties.<sup>6</sup> The plaintiffs could not show it was defendants' emissions that directly caused their harm, thus ending the litigation.<sup>7</sup>

In *City of New York*, the city attempted to pursue damages for global fossil fuel producers' GHG emissions under state tort law.<sup>8</sup> However, the Second Circuit found that the state common-law claims were preempted by federal common law, which in turn was displaced by the CAA.<sup>9</sup> The effect of awarding plaintiffs damages for defendants' emissions would be regulating emissions, which is the realm of the CAA.<sup>10</sup> Because of this preemption, the plaintiff again was unable to reach the merits and was denied an opportunity for a remedy, whatever the observable harms of climate change.<sup>11</sup> These two cases illustrate the challenges of using nuisance law to hold fossil fuel producers responsible for their role in climate change and its subsequent harm.

A potential counter to this trend is *City & County of Honolulu v. Sunoco LP*, a state-law case in which the plaintiff governments seek to hold companies liable under various tort claims for deceptive marketing campaigns and misleading "the public about dangers and environmental impact of using fossil fuel products."<sup>12</sup> Although still in litigation, this case may reach the merits, providing a workable legal theory for plaintiffs. The Supreme Court of Hawaii held that the plaintiffs' claims are not preempted by federal common law or the CAA because seeking damages for deceptive marketing practices does not equate with regulating emissions.<sup>13</sup> Importantly, the plaintiffs do not target the tortious conduct of creating emissions, but the conduct of the deceptive marketing practices.<sup>14</sup>

This theory avoids the pitfalls of the previously mentioned cases, and may become the first claims that will be successful in obtaining a remedy for harm caused by fossil fuels. On January 13, 2025, the U.S. Supreme Court denied the defendant fossil fuel companies' petitions for certiorari, allowing the litigation to continue on the state level.<sup>15</sup> However, this case may also prove to be an outlier. Uncertainty about the litigation path has helped give rise to the Vermont and New York Climate Superfund laws.<sup>16</sup>

## II. Summary of Climate Superfund Laws

In May 2024, Vermont passed the Climate Superfund Act, a first-of-its-kind law that requires fossil fuel companies to pay the cost of various weather disasters across the state.<sup>17</sup> The law allows Vermont's attorney general to mandate contributions from significant sources of pollution, like ExxonMobil and Shell, for their calculated share of climate change-related costs within Vermont.<sup>18</sup> The law provides that, using emissions data from 1995 to 2024, the required payments will be calculated "based on the impact each company's products had on climate change."<sup>19</sup> Then, the exact amounts will be determined "based on calculations of the degree that they directly contributed to weather disasters in Vermont, and how much money those events cost the State."<sup>20</sup> The money collected under the Vermont Climate Superfund Act will create a fund for climate change adaptation projects, "including nature-based solutions and flood protections, upgrading stormwater drainage systems, making proactive upgrades to roads, bridges, railroads, and transit systems, and more."<sup>21</sup>

Shortly after the legislation was passed in Vermont, in June 2024, New York followed suit with a similar law.<sup>22</sup> Under New York's Climate Change Superfund Act, the state would require fossil fuel companies to pay \$75 billion over a 25-year period.<sup>23</sup> Like Vermont, the revenue New York receives will be used to fund climate change adaptation measures, such as adjusting to rising sea levels and extreme weather events.<sup>24</sup>

Under the Vermont law, companies that may be deemed "responsible parties" are entities that "engaged in the trade or business of extracting fossil fuel or refining crude oil," with "fossil fuel" defined as coal, petroleum products, and fuel gases.<sup>25</sup> The state must determine that the entities are accountable for more than one billion metric tons of GHG emissions between January 1, 1995, and December 31, 2024.<sup>26</sup> The state must further develop rules to implement the law, which includes "methodologies required to identify responsible parties and calculate [GHG] emissions allegedly caused by each responsible party."<sup>27</sup> To be found a responsible party, companies must be accountable for more than "one billion metric tons of GHG emissions globally over the period covered, and the company must have some

5. *See id.* at 858.

6. *Id.* at 867-68.

7. *Id.*

8. *City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d Cir. 2021).

9. *Id.* at 95.

10. *Id.* at 96.

11. *Id.* at 86 (dismissing the action).

12. 153 P.3d 1173, 1173 (Haw. 2023).

13. *Id.* at 1205.

14. *Id.* at 1206.

15. *City & Cnty. of Honolulu*, 153 P.3d 1173, *cert denied*, *Sunoco LP v. City & Cnty. of Honolulu*, No. 23-947, 2025 WL 76706, at \*1 (U.S. Jan. 13, 2025).

16. *See* N.Y. ENV'T CONSERV. LAW §76-0103(3) (McKinney 2024); VT. STAT. ANN. tit. 10, §598 (West 2024); Amanda G. Halter et al., *New York's "Climate Superfund" Bill Becomes Law, Part of a Trend*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Jan. 6, 2025), <https://www.pillsburylaw.com/en/news-and-insights/climate-superfund-new-york.html>.

17. Erin Evans & Dayna Smith, *Superfund Me: A High-Level Overview of Climate Change Superfund Bills*, VT. J. ENV'T L., <https://vjl.vermontlaw.edu/top-ten/2025-top-ten/2024/12/superfund-me-a-high-level-overview-of-climate-change-superfund-bills> (last visited July 7, 2025).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Emily Eisner, *Fact Sheet: Climate Change Superfund Act*, FISCAL POL'Y INST. (July 24, 2024), <https://fiscalpolicy.org/fact-sheet-climate-change-superfund-act>.

23. *Id.*

24. *Id.*

25. Chris Kelleher, *Vermont and New York Are First in Climate Superfund Laws*, COUNCIL STATE GOV'TS E. REG'L CONF. (June 27, 2024), <https://csg-erc.org/vermont-and-new-york-are-first-in-climate-superfund-laws>.

26. *Id.*

27. *Id.*

physical or economic connection to the state.<sup>28</sup> Importantly, the law does not impose restrictions on any future production by fossil fuel companies.<sup>29</sup>

This polluter-pays concept is not new. In 1980, Congress created Superfund, or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>30</sup> Under CERCLA, the U.S. Environmental Protection Agency (EPA) can compel potentially responsible parties liable for contamination to perform cleanup or alternatively to pay damages for contaminated sites.<sup>31</sup> Importantly, CERCLA brings in a wide variety of responsible parties including current owners, past owners, arrangers, and transporters, who all may be held strictly liable for contamination costs, including contamination that has spread to neighboring property.<sup>32</sup>

Under CERCLA, parties may also be held liable for actions that occurred before the statute was passed, making the liability retroactive.<sup>33</sup> Alternatively, courts have found that because the problems caused by the waste are ongoing, the statute is a reimbursement obligation and thus not retroactive or unconstitutional.<sup>34</sup> Vermont and New York have subsequently adopted a similar basic framework, creating a system by which they may recover costs incurred as a result of climate change and the fossil fuels produced by responsible companies.

### III. Legal Challenges

At the beginning of 2025 industry and certain states filed two separate lawsuits, one against Vermont and one against New York, challenging their respective Climate Superfund laws.<sup>35</sup> The two complaints raise nearly identical claims, and both are governed by law in the Second Circuit.<sup>36</sup> The plaintiffs state, first, that due to the history of federal law governing harm arising from interstate GHG emissions, the state law is precluded.<sup>37</sup> Second, they aver that the state laws are preempted by the CAA.<sup>38</sup>

Third, plaintiffs raise a Due Process Clause issue, arguing that retroactive penalties are an arbitrary and irrational method of attributing climate change costs.<sup>39</sup> Fourth, they raise a Commerce Clause issue, stating that the laws dis-

criminate against the economic interests of other states.<sup>40</sup> Lastly, they raise two smaller claims: an Eighth Amendment claim for excessive fines<sup>41</sup> and a Takings Clause claim under the Fifth Amendment.<sup>42</sup> In the New York case, the plaintiffs also raise an equal protection claim and state constitutional claims.<sup>43</sup>

The first four claims and the likelihood they will succeed are analyzed below, as they present robust constitutional questions and reflect the potential for successful climate change laws in Vermont and New York going forward. Unfortunately, despite the need for states to recover for the harms of climate change, the challenges of federal preclusion and CAA preemption will likely not be overcome by the states in the Second Circuit, and the laws will probably be struck down as unconstitutional.

Challenges to the Climate Superfund laws continued to grow over the course of the year, and have gained the special attention of the Donald Trump Administration. Since these first two complaints were filed, West Virginia and 23 other states filed a complaint in intervention against Vermont, adding their objections to the constitutionality of the Climate Superfund there as well as in New York.<sup>44</sup> In addition, on May 1, 2025, the U.S. Department of Justice (DOJ) filed separate lawsuits against Vermont and New York challenging the laws' constitutionality.<sup>45</sup>

The federal government's complaints allege the state laws are preempted by the CAA, violate the Due Process Clause and Commerce Clause, and are preempted as interfering in the federal area of foreign affairs.<sup>46</sup> As such, they focus to a much larger degree than the previously filed complaints on the Climate Superfund laws' potential regulation of foreign entities and affairs. Other than this difference, however, the substance of the claims echoes much of what has already been said by other plaintiffs with a focus on the CAA, the Due Process Clause, and the Commerce Clause.

Given the similarity of the complaints, this additional legal action by the Trump Administration seems to be an offensive action against the states to ensure climate initiatives are successfully dismantled.<sup>47</sup> In April, the Administration issued an Executive Order announcing a plan to protect "American energy from state overreach," and directing DOJ to block state and local climate initiatives

28. *Id.*

29. *Id.*

30. Cornell Law School Legal Information Institute, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, [https://www.law.cornell.edu/wex/comprehensive\\_environmental\\_response\\_compensation\\_and\\_liability\\_act\\_%28cercla%29](https://www.law.cornell.edu/wex/comprehensive_environmental_response_compensation_and_liability_act_%28cercla%29) (last visited July 7, 2025).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* See, e.g., *United States v. Monsanto*, 858 F.2d 160 (4th Cir. 1988).

35. See Complaint, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

36. See Complaint at 25-62, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 37-64, *West Virginia*, No. 1:25-cv-00168.

37. Complaint at 25, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 37, *West Virginia*, No. 1:25-cv-00168.

38. Complaint at 38, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 43, *West Virginia*, No. 1:25-cv-00168.

39. Complaint at 43, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 51, *West Virginia*, No. 1:25-cv-00168.

40. Complaint at 51, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 47, *West Virginia*, No. 1:25-cv-00168.

41. Complaint at 55, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 60, *West Virginia*, No. 1:25-cv-00168.

42. Complaint at 58, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 62, *West Virginia*, No. 1:25-cv-00168.

43. Complaint at 58, *West Virginia*, No. 1:25-cv-00168.

44. See Complaint in Intervention, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Vt. filed May 1, 2025).

45. Press Release, U.S. Department of Justice Office of Public Affairs, Justice Department Files Complaints Against Hawaii, Michigan, New York, and Vermont Over Unconstitutional State Climate Actions (May 1, 2025), <https://www.justice.gov/opa/pr/justice-department-files-complaints-against-hawaii-michigan-new-york-and-vermont-over>.

46. See Complaint, *United States v. New York*, No. 1:25-cv-03656 (S.D.N.Y. filed May 1, 2025); Complaint, *United States v. Vermont*, No. 2:25-cv-463 (D. Vt. filed May 1, 2025).

47. Claire Brown & Karen Zraick, *Trump Is Picking New Climate Fights With States. Here's Why*, N.Y. TIMES (May 6, 2025), <https://www.nytimes.com/2025/05/06/climate/trump-climate-change-state-lawsuits.html>.

or laws “that threaten American energy dominance and our economic and national security.”<sup>48</sup> Initially, the Order seemed like more of a signal to the states of the Administration’s stance on climate initiatives.<sup>49</sup>

However, the subsequent legal actions filed in May against New York and Vermont signal the Administration’s deeper intention to be involved in state law as relates to fossil fuel companies and climate change.<sup>50</sup> By filing its own suits against the states rather than intervening in the pending lawsuits, DOJ is making an even more aggressive intervention into state law.<sup>51</sup> Michael Gerrard, founder of the Columbia University Sabin Center for Climate Change Law, calls this involvement in already pending environmental litigation “highly unusual.”<sup>52</sup> Thus, despite the duplicative nature of DOJ’s complaints, the Trump Administration has launched a unique and aggressive attack against Climate Superfund laws, asserting federal power over states in a way that has rarely been seen.

Regardless of which case or plaintiff reaches the merits first, these challenges will likely be successful despite states’ needs to recover for the harms attributable to climate change. As explored below, the challenges of federal preclusion and CAA preemption will likely not be overcome by the states in the Second Circuit, and their laws will likely be struck down as unconstitutional.

### A. Federal Preclusion

The plaintiffs claim that under the Supremacy Clause of the U.S. Constitution, federal law must govern a state’s attempt to impose liability for GHG emissions because such an issue implicates interstate and international interests, and thus presents uniquely federal interests.<sup>53</sup> In arguing that these state laws are precluded by federal law, the plaintiffs cite *City of New York*, a Second Circuit precedent in which the court found that New York City could not apply state nuisance law to recover damages for GHG emissions.<sup>54</sup>

In its reasoning, that court explained that “[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution.”<sup>55</sup> Because interstate air pollution implicates federal interests that are not compatible with state law, such as the need for a uniform rule of decision and the interests of federalism, application of federal law is necessary.<sup>56</sup>

Although the city argued it was not regulating emissions and simply sought to hold fossil fuel producers liable for the effects of emissions in New York, the court found this was not the case.<sup>57</sup> Instead, the city was trying to “hold the Producers liable, under New York law, for the effects of emissions made around the globe over the past several hundred years.”<sup>58</sup> Thus, because of the size of this case, state law could not apply.<sup>59</sup> The effect of a substantial damages award would be the regulation of fossil fuel producers’ emissions and behavior beyond the borders of New York State.<sup>60</sup>

In reaching this point, the court reasoned that because GHG emissions mix in the atmosphere, these molecules cannot be traced to their original source.<sup>61</sup> Emissions in New York may contribute no more to damaging climate events like flooding in New York than do emissions from China, and vice versa.<sup>62</sup> However, GHGs emitted by any given fossil fuel producer are still present in New York’s atmosphere. If New York were allowed to apply state law and collect damages in this case, producers would have to take steps to mitigate liability by limiting emissions in every state and country, ignoring the relevant local laws.<sup>63</sup> For this reason, the court found the rights of states and relations with foreign nations to be implicated, and thus applied federal law rather than state law.<sup>64</sup>

Unfortunately for Climate Superfund laws, the analogy to *City of New York* is hard to escape. Like the state-law nuisance claim, Climate Superfund laws are imposing liability based on emissions.<sup>65</sup> Fossil fuels are produced, and may be burned, in states other than Vermont and New York, and the total liability is calculated based on total emissions tied to a responsible party.<sup>66</sup> In both instances, these emissions are not specific to a given state or country<sup>67</sup>; rather, the states seek to recover based on the total emissions by responsible parties, regardless of location.<sup>68</sup> Thus a company producing fossil fuels in West Virginia or China could be held responsible under state law for its effect on Vermont or New York, implicating interstate and international interests.<sup>69</sup>

Under the Climate Superfund laws, responsible parties would have to decrease emissions in every state and country to avoid future liability. Although *City of New York* is dealing with a nuisance claim and the Climate Superfunds

48. *Id.*

49. *Id.*

50. *See id.*

51. *See* Euronews Green, “A Surprising Debatement”: Trump Administration Sues Four States Over Climate Lawsuits and Laws, EURONEWS (May 2, 2025), <https://www.euronews.com/green/2025/05/02/a-surprising-debatement-trump-administration-sues-four-states-over-climate-lawsuits-and-laws>.

52. *Id.*

53. Complaint at 25-26, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint at 38, 42, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

54. *City of New York v. Chevron Corp.*, 993 F.3d 81, 91-92 (2d Cir. 2021). *See* Complaint at 26-27, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 43, *West Virginia*, No. 1:25-cv-00168.

55. *City of New York*, 993 F.3d at 91.

56. *Id.* at 91-92.

57. *Id.* at 93.

58. *Id.* at 92.

59. *See id.*

60. *Id.* at 92-93.

61. *Id.* at 92.

62. *Id.* (quoting *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011)).

63. *Id.*

64. *Id.* at 93-94.

65. N.Y. ENV’T CONSERV. LAW §76-0103(3)(a)-(b) (McKinney 2024); VT. STAT. ANN. tit. 10, §598(b) (West 2024).

66. *See* N.Y. ENV’T CONSERV. LAW §76-0103(3)(a)-(b); VT. STAT. ANN. tit. 10, §598(b).

67. *See* N.Y. ENV’T CONSERV. LAW §76-0103(3)(a)-(b); VT. STAT. ANN. tit. 10, §598(b).

68. *See* N.Y. ENV’T CONSERV. LAW §76-0103(3)(a)-(b); VT. STAT. ANN. tit. 10, §598(b).

69. *See* N.Y. ENV’T CONSERV. LAW §76-0103(3)(a)-(b); VT. STAT. ANN. tit. 10, §598(b).

are cost-recovery statutes, the end effect on responsible parties is the same, with fossil fuel producers limiting their products' emissions nationally and globally.<sup>70</sup> This result of regulating emissions is what concerned the court in *City of New York*, making the finding of federal preclusion very applicable here.<sup>71</sup> Given that the Second Circuit has already found state law to be precluded in these situations by federal law in *City of New York*, the Climate Superfunds will likely be found precluded by federal law.<sup>72</sup> Although perhaps a creative argument could be made to avoid the application of federal law, the defendants will likely struggle to distinguish this case from *City of New York* and may very well lose with such damning precedent.

## B. Preemption by the CAA

The plaintiffs also claim that the Climate Superfund laws are preempted by the CAA.<sup>73</sup> Preemption is also based on the Supremacy Clause of the Constitution, which invalidates state laws that interfere with or are contrary to federal law.<sup>74</sup> Although the Climate Superfund laws are not expressly preempted, the court will likely find that they are implicitly preempted by the CAA.

The U.S. Supreme Court has further delineated preemption into different types.<sup>75</sup> Preemption may first be either express or implied.<sup>76</sup> A state law is expressly preempted when Congress includes language in a federal statute that explicitly withdraws specific powers from the states.<sup>77</sup> Implied preemption is not explicitly stated, but can be inferred based on the structure or purpose of a statute.<sup>78</sup> The inference can be made through conflict preemption, when a state law conflicts with a federal law in such a way that it is impossible for a private party to comply with both laws.<sup>79</sup> Preemption can also be inferred through obstacle preemption, when the state law is an obstacle to the execution of a congressional statute.<sup>80</sup> Last, preemption can be inferred through field preemption, when a federal law occupies a certain legislative field and it seems that Congress left no room for the states to supplement.<sup>81</sup>

The CAA does not expressly preempt the Climate Superfund laws. In fact, the Act only has one express preemption clause, which provides that “[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor

vehicles or new motor vehicle engines subject to this part.”<sup>82</sup> This provision only prohibits state regulation of emissions related to new motor vehicles.<sup>83</sup> Also, the CAA includes a savings clause that provides that no provisions of the Act:

shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that . . . such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under [the Clean Air Act or an EPA-approved State Implementation Plan].<sup>84</sup>

Considering this language as it applies to the Climate Superfund laws, Congress appears to have expressly preserved the right of states to create laws respecting the limitation or abatement of air pollution. The Climate Superfunds can be understood to do just that, creating incentives to limit emissions and create funds for abatement, among other things.<sup>85</sup> Thus, Climate Superfunds are not expressly preempted by the CAA.

Whether the CAA implicitly preempts Climate Superfund laws is a more difficult question. First, field preemption is not helpful in answering this question. The CAA is known for its cooperative federalism framework, meaning it “preserves state primacy in implementing and enforcing standards, and issuing permits.”<sup>86</sup> The Act reserves roles for both the state and federal governments, and thus the field is not completely occupied by federal law.<sup>87</sup> On this basis, it cannot be inferred that Congress left no room for state law supplements in the field of air quality regulation.<sup>88</sup>

Further, the Climate Superfund laws are occupying a field untouched by the CAA: remedies.<sup>89</sup> Pat Parenteau, emeritus professor at Vermont Law School’s Environmental Law Center and a former EPA regional counsel, explained that “[p]reemption would suggest that the only remedy for regulating emissions is whatever remedies the Clean Air Act provides, and [that law doesn’t] include seeking damages. It just covers pollution control mechanisms, not payment of damages . . . . That [CAA] statute only regulates the sources of emissions, the power plants.”<sup>90</sup> Thus, there is nothing in the CAA that deals with backward-looking cost recovery as the Climate Superfunds do, making field preemption unlikely.

Preemption of Climate Superfund laws may be implied through conflict and obstacle preemption. Plaintiffs

70. See *City of New York v. Chevron Corp.*, 993 F.3d 81, 92-93 (2d Cir. 2021).

71. See *id.*

72. See *id.*

73. Complaint at 38, Chamber of Com. v. Moore, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint at 43, West Virginia v. James, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

74. *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 86-87 (2d Cir. 2003).

75. Scott Gallisdorfer, *Clean Air Act Preemption of State Common Law: Greenhouse Gas Nuisance Claims After AEP v. Connecticut*, 99 VA. L. REV. 131, 141 (2013).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 142.

83. *Id.*

84. *Id.* at 143 (quoting 42 U.S.C. §7416 (2006)).

85. See N.Y. ENV’T CONSERV. LAW §76-0103 (McKinney 2024); VT. STAT. ANN. tit. 10, §598 (West 2024).

86. Gallisdorfer, *supra* note 75, at 144.

87. *Id.*

88. *Id.*

89. Olivia Gieger, *Vermont’s Climate Superfund Faces First Legal Challenge From Fossil Fuel Interests*, INSIDE CLIMATE NEWS (Jan. 25, 2025), <https://insideclimatenews.org/news/25012025/vermont-superfund-faces-first-legal-challenge/>.

90. *Id.*

point to the Clean Water Act (CWA) case *International Paper Co. v. Ouellette*<sup>91</sup> as dispositive of the preemption question, given the similarities between the CWA and the CAA.<sup>92</sup> In that case the plaintiffs, who lived on the Vermont side of Lake Champlain, filed a lawsuit against International Paper Company.<sup>93</sup> The company had discharged into Lake Champlain on the New York side, but due to the effects in Vermont, plaintiffs filed a nuisance claim under Vermont law.<sup>94</sup>

In evaluating whether the savings clause of the CWA prevented preemption of the claims, the Supreme Court analyzed the structure of the Act.<sup>95</sup> It found that in setting effluent limitations for a given state, both the federal government and the state consider the costs and benefits of any particular level of regulation, and thus the Act limits administration of the permitting system to the state in which a given discharge takes place.<sup>96</sup> Therefore, a discharge occurring in New York is permitted by the New York system.<sup>97</sup> This system forces each given state to consider its own costs and benefits, balancing economic factors with the need for environmental regulation, keeping incentives in check.<sup>98</sup> If the CWA allowed non-source states to administer permits for out-of-state sources, that state would only consider the benefits of more stringent standards without considering the costs.<sup>99</sup>

For example, if Vermont were allowed to bring a nuisance claim against an out-of-state New York source under its own nuisance law, it would only consider the benefits to itself, and not the costs to New York of imposing a nuisance standard.<sup>100</sup> The structure of the CWA would be undermined.<sup>101</sup> Whatever standards were set by New York and approved by EPA could be overridden by Vermont nuisance law, giving Vermont's law the final say on regulation as opposed to the federal government.<sup>102</sup> This problem could then be exacerbated since a single discharge could reach the waters of multiple states, subjecting a given company to varying, uncertain standards across states.<sup>103</sup> The Court concluded that a claim brought by Vermont under Vermont state law against a New York company that discharged into Lake Champlain on the New York side was preempted by the CWA.<sup>104</sup>

The Court did find, however, that some state claims were preserved under the savings clause of the CWA.<sup>105</sup> If the law of the source state were applied to a discharge, the

goals of the CWA would not be frustrated because a source would only be subject to a single set of standards, and the necessary costs and benefits would have been fully considered.<sup>106</sup> Thus, Vermont could bring a claim against the New York company under New York law without implicating the CWA.

Turning back to the CAA, its savings clause mirrors that of the CWA.<sup>107</sup> The CAA's savings clause is similarly vague, and understanding what types of state law it preserves requires analysis of the Act's structure. Similar to the CWA, the CAA operates with source states setting the regulatory scheme, so the source states each consider the costs and benefits of the standards they set.<sup>108</sup> Then, to account for the transient nature of air pollution, the Act allows states to influence each other's standards by petitioning EPA under §126.<sup>109</sup> EPA can then revise a state's emissions standards to mitigate interstate effects.<sup>110</sup> Thus, the provisions of the CAA do not provide a way for affected states to subject other states to their own emission standards.<sup>111</sup> EPA acts as an intermediary between states to ensure they are considerate of their neighbors.<sup>112</sup>

The consideration of this framework alongside the Court's concern in *International Paper Co.* regarding one state's ability to usurp the purpose of the CWA weighs in favor of a similar scheme of preemption in the CAA context.<sup>113</sup> If Vermont, for example, could sue New York based on Vermont law, Vermont would usurp the state's emission-setting power and throw off the consideration of various costs and benefits.<sup>114</sup> Additionally, because of the dispersal of air pollution, if states could apply their own emission standards to out-of-state sources, a source could become subject to 50 different state emission standards, which was the very concern of the Court in *International Paper Co.*<sup>115</sup> Thus, the holding in *International Paper Co.* is applicable to the CAA, and when the Court's concerns in that case are applied to the CAA, the Act seems to preempt the application of one state's law to an out-of-state source.<sup>116</sup>

In applying these preemption principles to the Climate Superfunds, the question becomes whether these statutes are actually setting emission requirements. The Court in *International Paper Co.* was particularly concerned with undermining the framework of the CWA by creating inconsistent standards across states.<sup>117</sup> Extending these ideas to the CAA, the same concerns would be implicated if New York or Vermont were setting emission standards and applying them to out-of-state fossil fuel producers. However, the Climate Superfund laws are at their core

91. 479 U.S. 481, 497 (1987).

92. Complaint at 40, Chamber of Com. v. Moore, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint at 5, West Virginia v. James, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

93. Gallisdorfer, *supra* note 75, at 146.

94. *Id.*

95. *Id.* at 147.

96. *Id.* at 147-48.

97. *See id.* at 148.

98. *Id.*

99. *Id.*

100. *See id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 148-49.

105. *Id.* at 149.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 149-50.

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id.* at 148.

compensatory. They are not on their face emission standard-setting, but they measure past emissions.<sup>118</sup>

The plaintiffs would likely argue that the laws in essence are regulating emissions. When past emissions are penalized, the companies will naturally try to limit future liability by cutting future emissions. Then, if each state creates a compensatory scheme and measures damages by past emissions, the result will be that of regulating emissions. Each state may measure these emissions differently, creating the situation that the Court in *International Paper Co.* warned of. Whichever state creates the most stringent regime would likely become the national regulator of GHG emissions as companies try to limit future liability, usurping the federal role in administering the CAA. The effect of Climate Superfund laws, the plaintiffs would say, would completely undermine the CAA. Although not directly regulating emissions, the results of Climate Superfund laws are such that the court will likely find the laws impliedly preempted by the CAA. Framing this effect differently will be a challenge for the defendant states.

### C. Due Process

The plaintiffs also claim that Climate Superfund laws violate the Due Process Clause of the Fourteenth Amendment by arbitrarily and irrationally imposing retroactive penalties.<sup>119</sup> Under the Due Process Clause, statutes that impose liability for economic activity are unconstitutional where they are “demonstrably arbitrary or irrational.”<sup>120</sup> Despite likely challenges to the states’ ability to accurately and fairly calculate the plaintiffs’ impact on states and the retroactive nature of the laws, the court will likely find no due process violation.

The plaintiffs claim the Climate Superfund laws and the subsequent regulations cannot accurately and fairly calculate the impact on the states from GHG emissions or attribute those emissions to certain energy producers.<sup>121</sup> This claim challenges the scientific validity of attribution science, which has already been questioned by the oil and gas industry.<sup>122</sup> Regardless of whether questioning the science itself would be successful, it is true that the Climate Superfunds only impose liability on a select group of GHG contributors.<sup>123</sup> The laws impose liability on fossil fuel producers, but ignore other emissions sources like agriculture, and ignore the role of power plants and others who burn the fuel.<sup>124</sup> Thus, the plaintiffs see this scheme as “unfairly

and arbitrarily overestim[ing] producers’ purported impacts on climate change.”<sup>125</sup>

In addition, in challenging the attribution science and the chosen responsible parties, the plaintiffs may also question the total amount of liability assigned to each producer as arbitrary or irrational. For instance, the New York law seeks to recover \$75 billion from responsible parties and to use a formula based on the amount of GHGs emitted to calculate what percentage is owed by each party.<sup>126</sup> Vermont’s law is similar in that the Vermont Agency of Natural Resources will calculate the total harm to Vermont from GHG emissions in the past 30 years and find liability based on producers’ share of emissions.<sup>127</sup> The laws themselves reference the cost of various projects, their connection with climate change, the fossil fuel producers, and the need for such projects as a result of the producers’ actions.<sup>128</sup>

However, the connection between the producers and the harm is naturally attenuated, and thus feels arbitrary compared to the comparative surety of liability of responsible parties under CERCLA. In a CERCLA case, “potentially responsible parties” are defined as current owners and operators of a facility, past owners and operators of a facility, generators and arrangers of hazardous waste disposal, and transporters of hazardous waste to a contaminated site.<sup>129</sup> Liability is triggered for these parties when hazardous wastes are present at a facility, there is a release of these hazardous substances, and response costs will be incurred.<sup>130</sup> There is a natural connection between a party that falls into the statutory definition of partially or wholly responsible for the harm and the project to remediate the site.<sup>131</sup> The money collected from a responsible party goes to remediating a site that they had a hand in contaminating.<sup>132</sup> CERCLA has never been found to be arbitrary and irrational in violation of due process.<sup>133</sup>

This natural connection between a fossil fuel producer and a remedial project or even a state fund is more attenuated. The plaintiffs will likely argue that because some fossil fuel producers are omitted from the calculation, and that once emissions are created those emissions are mixed in the atmosphere, there is no way of knowing which producers are responsible for the harm done in Vermont or New York specifically. In other words, the producers held liable may not be the ones actually responsible for the harm. This attenuated connection, the plaintiffs may say, makes the liability imposed arbitrary and irrational.<sup>134</sup>

118. See N.Y. ENV’T CONSERV. LAW §76-0103 (McKinney 2024); VT. STAT. ANN. tit. 10, §598 (West 2024).

119. See Complaint at 43, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Va. filed Dec. 24, 2024); Complaint at 51, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

120. *Duke Power Co. v. Carolina Env’t Study Grp.*, 438 U.S. 59, 83 (1978).

121. See Complaint at 47, *Chamber of Com.*, No. 2:24-cv-01513; Complaint at 52, *West Virginia*, No. 1:25-cv-00168.

122. Martin Lockman & Emma Shumway, *State “Climate Superfund” Bills: What You Need to Know*, SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. (Mar. 14, 2024), <https://blogs.law.columbia.edu/climatechange/2024/03/14/state-climate-superfund-bills-what-you-need-to-know/>.

123. *Id.*

124. *Id.*

125. Complaint at 47, *Chamber of Com.*, No. 2:24-cv-01513.

126. S. 2129-A, 2023-2024 Leg. (N.Y. 2023) (enacted).

127. S. 259, 122d Gen. Assemb. (Vt. 2024) (enacted).

128. See S. 2129-A, 2023-2024 Leg. (N.Y. 2023); S. 259, 122d Gen. Assemb. (Vt. 2024).

129. U.S. EPA, *Superfund Liability*, <https://www.epa.gov/enforcement/superfund-liability> (last updated Apr. 10, 2025).

130. *Id.*

131. *See id.*

132. *Id.*

133. *See generally* *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

134. *See* *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 880 (9th Cir. 2012) (dismissing the case on standing grounds because the plaintiffs could not prove the defendant fossil fuel companies were directly responsible for the climate harm caused, given the numerous industries and unnamed parties at play).

However, for air pollution maybe this attenuation is acceptable. Although the laws do not target 100% of the parties who are actually responsible, perhaps the states can argue that because the laws hold those parties who are proportionally, overwhelmingly responsible for only a portion of the actual harm, the laws are not arbitrary and irrational. The Vermont and New York laws define “responsible party” similarly.<sup>135</sup> Vermont seeks to hold liable

any entity or a successor in interest to an entity that 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 Agency attributable to for more than one billion metric tons of covered greenhouse gas emissions during the covered period. The term responsible party does not include any person who lacks sufficient connection with the State to satisfy the nexus requirements of the U.S. Constitution.<sup>136</sup>

Thus, the responsible emitters captured by the law are only those who have emitted more than one billion metric tons of GHGs.<sup>137</sup> Although it is unclear how many fossil fuel producers this brings within the scope of liability currently, the science suggests that more than 67% of all historical emissions can be attributed to 181 entities, and more than one-third of these emissions can be attributed to 26 producers.<sup>138</sup>

Notably, in 2023 only 36 companies were linked to more than half of all global GHG emissions, according to the Carbon Majors database, a proposed tool for assessing liability under the Climate Superfund laws.<sup>139</sup> The New York law goes further, citing science that “has determined that the largest one hundred fossil fuel producing companies are responsible for more than 70% of global greenhouse gas emissions since 1988.”<sup>140</sup> Thus, although 100% of emissions are not accounted for, there is a group of producers who scientifically are overwhelmingly responsible for GHG emissions.

Further, New York does not seek compensation for 100% of all climate change-related harm.<sup>141</sup> The New York law specifies:

The cost to the state of climate adaptation investments through 2050 will easily reach several hundred billion dollars, based on an array of estimates for projects impacting different regions across the state, far more than the \$75 billion being assessed on the fossil fuel industry. For example, upgrading New York City’s sewer system to deal with regularly-occurring large rain events

is estimated to cost around \$100 billion; a single project proposed by the Army Corps of Engineers to protect New York City from storm-driven flooding is estimated to cost \$52 billion; protecting Long Island from extreme weather is estimated to cost at least \$75-\$100 billion; a recent study from the State Comptroller found that from 2018 to 2028, 55 percent of New York State localities’ municipal spending outside of New York City was or will be related to climate change and that in fiscal year 2023-2024 alone, New York City planned to spend \$829 million on projects dedicated exclusively to adaptation and resilience, with an additional \$1.3 billion on projects that are partially for these purposes. These are only a few examples of the numerous projects that are now or will soon be needed across the state.<sup>142</sup>

Here, New York makes it abundantly clear that the \$75 billion it intends to raise by imposing liability is a fraction of the total costs.<sup>143</sup>

In *Commonwealth Edison Co. v. United States*, the government attempted to impose remediation costs on Edison and other utility companies under the Energy Policy Act, which allowed for government recovery of cleanup costs from uranium processing facilities.<sup>144</sup> The law excluded foreign utilities from assessment, but the court found that exclusion of these utilities “does not mean that the liability imposed on the domestic utilities is severely disproportionate.”<sup>145</sup> Although the “production from these plants ha[d] been divided almost evenly between the government and commercial sectors,” the utilities were only being asked to pay one-third of the remediation costs.<sup>146</sup> Thus, although there may be foreign utilities involved, plaintiff utilities were only being asked to pay a fraction, and therefore they could not say the amount they were asked to pay was severely disproportionate to their actions.<sup>147</sup> The court found no due process violation as a result, because without the liability imposed being “severely disproportionate,” it could not be found to be arbitrary or irrational.<sup>148</sup>

Applying the rationale of this case to the Climate Superfund laws, New York’s law will likely not be found unlawful on due process grounds. As shown, New York seeks to hold a fraction of GHG emitters liable for a portion of the actual costs, like the government in *Commonwealth Edison Co.*<sup>149</sup> As long as New York’s calculations of liability are not “severely disproportionate,” which they do not appear to be, plaintiffs will be unable to show the law is arbitrary or irrational. Vermont’s law may be a different story, however. Vermont is currently in the process of creating rules that will identify the amount of money it seeks to recover and who will be required to pay.<sup>150</sup> Without more information,

135. N.Y. ENV’T CONSERV. LAW §76-0101(21) (McKinney 2024); VT. STAT. ANN. tit. 10, §596(22) (West 2024).

136. VT. STAT. ANN. tit. 10, §596(22).

137. *Id.*

138. *Carbon Majors: 2023 Data Update*, CARBON MAJORS (Mar. 2025), <https://carbonmajors.org/briefing/The-Carbon-Majors-Database-2023-Update-31397>.

139. *Id.*

140. S. 2129-B, 2023-2024 Leg. (N.Y. 2023) (enacted).

141. *Id.*

142. *Id.*

143. *See id.*

144. 271 F.3d 1327, 1346-47 (Fed. Cir. 2001).

145. *Id.* at 1347.

146. *Id.*

147. *Id.*

148. *Id.*

149. S. 2129-B, 2023-2024 Leg. (N.Y. 2023) (enacted).

150. S. 259, 122d Gen. Assemb. (Vt. 2024) (enacted).

it is not clear how Vermont will fare in arguing against a due process violation.

The second issue the plaintiffs raise is that the Climate Superfund laws violate the Due Process Clause because of retroactive application.<sup>151</sup> Retroactive liability and environmental remediation have consistently been upheld under CERCLA, which holds responsible parties liable for past pollution.<sup>152</sup> In evaluating whether the retroactivity of a statute violates the Due Process Clause, courts consider “whether the regulated party could have reasonably expected that it would be free from the regulatory exaction. . . . [I]f the regulated party could have reasonably expected that it would be subject to regulation, there can be no constitutional Due Process violation.”<sup>153</sup>

Courts accordingly apply a three-factor test: “First, was the company operating in a highly regulated industry? Second, did the company know of the problem at the time it engaged in the activity? Third, in the light of the regulatory environment at the time of the activities, could the [regulation] have been reasonably anticipated?”<sup>154</sup> Considering this standard, the court will likely find no due process violation, as the fossil fuel producers could have reasonably expected to be subject to regulation in this way.

First, fossil fuel producers operate in a highly regulated industry. The CAA was originally passed in 1970, and thus air quality and the presence of pollutants have been regulated for more than 50 years.<sup>155</sup> Then, in 2007, the Supreme Court found in *Massachusetts v. Environmental Protection Agency* that GHGs may be regulated under the CAA as a pollutant, leading to subsequent regulations.<sup>156</sup>

The states individually have also regulated GHG emissions. In 2005, New York and six other Northeast states created the Regional Greenhouse Gas Initiative, which is a cap-and-trade system to reduce carbon emissions from power plants.<sup>157</sup> New York has also taken steps to regulate methane, the second-largest contributor to climate change, with its Methane Reduction Plan that includes 25 actions to reduce methane emissions.<sup>158</sup> Most recently, New York adopted regulations to require power plants to meet even more stringent emissions standards for carbon dioxide, looking toward ending coal use.<sup>159</sup> The state has also banned drilling and offshore oil and gas exploration.<sup>160</sup> Lastly, New

York codified the Green New Deal, which seeks to reduce GHG emissions by 85% by 2050.<sup>161</sup>

Vermont has adopted similarly ambitious GHG regulations and targets over the years. In 2009, the state set emission reduction goals to 50% below 1990 levels by 2028, and 75% below 1990 levels by 2050.<sup>162</sup> Vermont also joined the Regional Greenhouse Gas Initiative to set limits on carbon dioxide emissions.<sup>163</sup> In addition, New York and Vermont both have elaborate permitting and licensing requirements that control the production and burning of fossil fuels.<sup>164</sup> Not only are GHG emissions regulated at the federal level, but they are also thoroughly regulated on the state level. Thus, fossil fuel producers operate in a highly regulated industry, making future regulation expected, weighing in favor of the Climate Superfunds being in line with due process.

Second, the producers likely knew of the climate problem in the time frame outlined by the statutes. The Vermont law seeks to hold fossil fuel producers liable for emissions from 1995 to 2024.<sup>165</sup> New York seeks to hold producers liable for emissions from 2000 to 2018.<sup>166</sup> The history and knowledge of climate change has an early beginning, with scientists as early as the 19th century conducting experiments suggesting carbon dioxide and other gases could collect in and insulate the atmosphere.<sup>167</sup>

This knowledge became mainstream in 1988 when the world experienced the hottest summer yet, marked with wildfires and droughts.<sup>168</sup> Scientists began to sound the alarm, gaining media attention.<sup>169</sup> In June 1988, National Aeronautics and Space Administration (NASA) scientist James Hansen testified to Congress, saying he was “99 percent sure” that global warming was upon us.<sup>170</sup> In 1989, the Intergovernmental Panel on Climate Change was created within the United Nations to analyze the science of climate change and its consequences.<sup>171</sup>

Coinciding with these developments in the 1980s, scientists began to predict the ramifications of climate change, such as rising sea levels, “severe heat waves, droughts and more powerful hurricanes fueled by rising sea surface

151. See Complaint at 43, Chamber of Com. v. Moore, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint at 52, West Virginia v. James, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

152. See, e.g., United States v. Alcan Aluminum Corp., 315 F.3d 179, 190 (2d Cir. 2003).

153. *Commonwealth Edison Co.*, 271 F.3d at 1347.

154. *Id.* at 1348.

155. U.S. EPA, *40th Anniversary of the Clean Air Act*, <https://www.epa.gov/clean-air-act-overview/40th-anniversary-clean-air-act> (last updated Mar. 11, 2025).

156. JENIFER COLLINS, ENVIRONMENTAL AND ENERGY STUDY INSTITUTE, FACT SHEET: TIMELINE OF EPA ACTIONS ON GREENHOUSE GASES (2014), [https://www.eesi.org/files/FactSheet\\_EPA\\_timeline\\_092214.pdf](https://www.eesi.org/files/FactSheet_EPA_timeline_092214.pdf); *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 532 (2007).

157. NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, HISTORY OF DEC: HIGHLIGHTS & ENVIRONMENTAL MILESTONES, [https://extapps.dec.ny.gov/docs/administration\\_pdf/dectimeline.pdf](https://extapps.dec.ny.gov/docs/administration_pdf/dectimeline.pdf).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. CLIMATE GROUP, VERMONT APPENDIX (2020), <https://www.theclimategroup.org/sites/default/files/2020-10/Vermont-appendix.pdf>.

163. *Id.*

164. See Vermont Department of Environmental Conservation, Agency of Natural Resources, *Green Mountain Power Permit*, <https://dec.vermont.gov/waste-management/hazardous-waste/hazardous-waste-permitting/green-mountain-power-permit> (last visited July 7, 2025); New York State Department of Environmental Conservation, *Air Facility Permits, Registrations, and Fees*, <https://dec.ny.gov/environmental-protection/air-quality/controlling-pollution-from-facilities/permits-registrations-fees> (last visited July 7, 2025); New York State Department of Environmental Conservation, *Drilling & Mining Permits*, <https://dec.ny.gov/regulatory/permits-licenses/drilling-mining-permits> (last visited July 7, 2025); VT. STAT. ANN. tit. 29, §541 (West 2022).

165. S. 259, 122d Gen. Assemb. (Vt. 2024) (enacted).

166. S. 2129-B, 2023-2024 Leg. (N.Y. 2023) (enacted).

167. *Climate Change History*, HISTORY.COM (May 28, 2025), <https://www.history.com/articles/history-of-climate-change>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

temperatures.”<sup>172</sup> These findings culminated in the passage of the Kyoto Protocol, a global agreement to reduce GHG emissions, in 1997.<sup>173</sup> The agreement called for reduction of GHGs across 41 countries and the European Union.<sup>174</sup> These emission-reducing activities and climate activism continued into the 21st century with the release of *An Inconvenient Truth* by Al Gore, the creation of the Paris Climate Agreement, and the beginning of the climate strikes led by Greta Thunberg.<sup>175</sup>

This brief history shows the increase in knowledge of the climate problem throughout the final decades of the 20th century. By 1997, the scope of understanding of climate change and GHG emissions was so broad and thorough that international action was taken to regulate and limit emissions with the Kyoto Protocol.<sup>176</sup> Given this broad knowledge and history of the climate problem, it is no coincidence that the states chose 1995 and 2000 as the beginning of the covered period for liability, a time frame where the connection between GHG emissions and a changing climate was already clear. Because the covered period for liability begins in the mid to late 1990s, when knowledge of climate change was mainstream, a court would likely find that fossil fuel producers knew of the climate problem in the time frame outlined by the statutes, thus weighing against a violation of due process.

The third factor that should be considered is “in the light of the regulatory environment at the time of the activities, could the [regulation] have been reasonably anticipated?”<sup>177</sup> Given the regulatory environment at the time of the emissions, a regulation remedying harm done from GHG emissions could be anticipated, but perhaps not one that puts the whole blame on fossil fuel producers. With the increasing damage caused by climate change and the scientific connection between GHG emissions and climate change, it is reasonable that fossil fuel producers could have expected to be held liable for the harm their industry has caused.

That said, fossil fuel producers have never been the whole conversation when attributing the cause of climate change. According to EPA, the breakdown of GHG emissions in the United States by economic sector in 2022 is as follows: industry—22%, residential and commercial—31%, transportation—29%, and agriculture—10%.<sup>178</sup> Land use, land use change, and forestry also contribute but are offset by carbon sequestration and thus are not included in the percentages.<sup>179</sup> Therefore the data show that the fossil fuel producers identified by the statutes are not the only emitters of GHGs, as the statutes omit agriculture and land

use/forestry.<sup>180</sup> Plaintiffs may say the Climate Superfunds are not reasonably anticipated because they are the only listed potentially responsible parties, while that is factually not the case.

However, the states may reply that the plaintiffs are not being held solely liable and thus the laws are reasonably expected. As previously discussed, in New York specifically, plaintiffs are only going to be held liable for a fraction of the actual harm caused in the state.<sup>181</sup> They will thus likely be held liable for the proportion of the harm they are responsible for, not more. If the court agrees that science and history provide that the regulation or liability of fossil fuel producers for some harm was reasonably expected, the court would probably also agree that being held liable for a fraction of the total harm in New York was also reasonably expected.

With each of these three factors leaning against a due process violation due to the retroactive nature of the Climate Superfunds, the laws will likely not be found unconstitutional on this ground. Thus, despite likely challenges to the states’ ability to accurately and fairly calculate the plaintiffs’ impact on states and the retroactive nature of the laws, the court will likely find no due process violation.

#### D. Commerce Clause

The Constitution gives Congress the power to regulate commerce with foreign nations and among the states.<sup>182</sup> Plaintiffs cite the dormant Commerce Clause, arguing the Climate Superfund laws are, in essence, regulating interstate and international commerce.<sup>183</sup> “State laws offend the Commerce Clause when they seek to ‘build up . . . domestic commerce’ through ‘burdens upon the industry and business of other States.’”<sup>184</sup> Although these statements may be true, the question is whether a state statute imposing liability on a primarily out-of-state actor rises to the level of regulating commerce. Following the Supreme Court holding in *National Pork Producers Council v. Ross*, the most recent narrowing of the “dormant Commerce Clause” doctrine, the likely answer to this question is no, and a court would likely find no dormant Commerce Clause issue in this case.<sup>185</sup>

In *National Pork Producers Council*, the plaintiffs challenged a California law that “forbids the in-state sale of whole pork meat that comes from breeding pigs (or their immediate offspring) that are ‘confined in a cruel manner.’”<sup>186</sup> However, “because California imports almost all the pork it consumes, most of [the law’s] compliance

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.*

177. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1347 (Fed. Cir. 2001).

178. U.S. EPA, *Sources of Greenhouse Gas Emissions*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last updated Mar. 31, 2025).

179. *Id.*

180. *See* N.Y. ENV’T CONSERV. LAW §76-0101(21) (McKinney 2024); VT. STAT. ANN. tit. 10, §596(22) (West 2024).

181. *See* S. 2129-B, 2023-2024 Leg. (N.Y. 2023) (enacted).

182. U.S. CONST. art. I, §8, cl. 3.

183. Complaint at 51, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint at 47, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

184. *National Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023).

185. *See id.*

186. *Id.* at 362.

costs will be borne by out-of-state firms.”<sup>187</sup> The plaintiffs then brought suit alleging a violation of the dormant Commerce Clause, saying the law impermissibly burdened interstate commerce.<sup>188</sup> The Supreme Court has held that state laws violate the dormant Commerce Clause when they seek to “build up . . . domestic commerce” through “burdens upon the industry and business of other States.”<sup>189</sup>

Applying this language to the case at hand, arguing that the Climate Superfund laws implicate the dormant Commerce Clause, the plaintiffs would likely say that because most fossil fuel producers are located outside of New York and Vermont, and these states are seeking great sums of money from these producers, the economies of New York and Vermont are being built up while burdening the industry in other states. However, New York and Vermont are seeking money to remedy harm done by these out-of-state producers, which is very different from the behavior that the dormant Commerce Clause seeks to prevent.

In *National Pork Producers Council*, the Court discusses the antidiscrimination principle that lies at the core of the dormant Commerce Clause.<sup>190</sup> By analyzing various cases, the Court finds that the role of the dormant Commerce Clause is “preventing purposeful discrimination against out-of-state economic interests.”<sup>191</sup> These cases typically look like a state imposing some law that interferes with the price of out-of-state goods<sup>192</sup> or mandating that certain products be manufactured in state as opposed to out of state.<sup>193</sup> There is no rule “against laws that have the ‘practical effect’ of ‘controlling’ extraterritorial commerce.”<sup>194</sup>

The Climate Superfund laws likely fall into this latter category as laws that have the practical effect of controlling extraterritorial commerce, thus avoiding implicating the dormant Commerce Clause. The laws certainly do target certain types of parties: fossil fuel producers.<sup>195</sup> However, by targeting these parties, New York and Vermont are not purposely discriminating against out-of-state interests. Like the pork in *National Pork Producers Council*, where the majority of the industry was out of state and subject to regulation, the fact that the majority of this fossil fuel industry is outside New York and Vermont does not make the laws discriminatory.

The laws do not seek to build up the fossil fuel industries in New York or Vermont at the expense of those industries in other states, which is more like the activity that the dormant Commerce Clause seeks to prevent. Instead, the laws seek to hold fossil fuel producers, which happen to be out

of state, liable for harmful action.<sup>196</sup> If these laws happen to also affect interstate commerce, this effect does not make them inherently discriminatory, as the Court found in *National Pork Producers Council*.<sup>197</sup> Thus, the court would likely find that the Climate Superfund laws do not violate the Commerce Clause by implicating the dormant Commerce Clause.

In sum, at the beginning of 2025, two lawsuits were filed challenging the Climate Superfund laws.<sup>198</sup> The two complaints raise nearly identical claims, and both are governed by law in the Second Circuit.<sup>199</sup> After analyzing four claims raised in the complaints, which present robust constitutional questions, the Climate Superfund laws will likely be found unconstitutional due to issues of federal preclusion and preemption by the CAA. Although the court may find no Due Process Clause or Commerce Clause issues implicated, it need only find one constitutional problem to invalidate the state laws.

#### IV. Beyond the Second Circuit

Although these Climate Superfunds likely may not survive review in the Second Circuit, similar state laws may survive review elsewhere. As previously discussed, the Second Circuit has spoken to the federal preclusion issue at hand here in *City of New York*, in which the court found that New York City could not apply state nuisance law to recover damages for GHG emissions.<sup>200</sup> Because the Climate Superfunds seek to receive money under a compensatory scheme that achieves the same result as receiving money as damages, all the court’s concerns outlined in *City of New York* should also apply to the Climate Superfunds. Because of this precedent, defendant states Vermont and New York will likely not avoid federal preclusion and preemption by the CAA.

However, since New York and Vermont have passed their Climate Superfund laws, at least 10 other states have moved forward with similar bills across the federal circuits: in the First Circuit, Massachusetts and Rhode Island; in the Second Circuit, Connecticut; in the Third Circuit, New Jersey and Delaware; in the Fourth Circuit, Maryland and Virginia; in the Sixth Circuit, Tennessee; and in the Ninth Circuit, California, Oregon, and Hawaii.<sup>201</sup> Unlike the Second Circuit, which is limited by the holding in *City of New York*, it is highly possible that these other circuits have not yet spoken to the issue of federal preclusion or CAA preemption in this context, or may view these issues differently. Without binding precedent, creative law-

187. *Id.*

188. *Id.*

189. *Id.* at 369 (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)).

190. *Id.*

191. *Id.* at 371.

192. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

193. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

194. *National Pork Producers Council*, 598 U.S. at 375.

195. N.Y. ENV’T CONSERV. LAW §76-0101(21) (McKinney 2024); VT. STAT. ANN. tit. 10, §596(22) (West 2024).

196. See *Evans & Smith*, *supra* note 17; *Eisner*, *supra* note 22.

197. See *National Pork Producers Council*, 598 U.S. at 375.

198. See Complaint, *Chamber of Com. v. Moore*, No. 2:24-cv-01513 (D. Vt. filed Dec. 24, 2024); Complaint, *West Virginia v. James*, No. 1:25-cv-00168 (N.D.N.Y. filed Feb. 6, 2025).

199. See Complaint, *Chamber of Com.*, No. 2:24-cv-01513; Complaint, *West Virginia*, No. 1:25-cv-00168.

200. *City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d Cir. 2021).

201. *Polluters Pay: How States Are Filling the Federal Climate Funding Gap in 2025*, NAT’L CAUCUS ENV’T LEGISLATORS (Mar. 3, 2025), <https://www.nceleviro.org/articles/polluters-pay-how-states-are-filling-the-federal-climate-funding-gap-in-2025/>.

yers in these states may have an opportunity to convince the courts of these laws' constitutionality and the urgent need for Climate Superfunds.

However, with large sums of money on the line for fossil fuel producers, we can expect litigation wherever these laws are passed. Due to the constitutional questions raised and the urgent issues implicated, it would also be unsurprising to see a circuit split on the constitutionality of these laws and possibly Supreme Court review in the coming years. As states increasingly bear the ever-growing financial burden of climate change, and Congress continues to remain silent in relieving this burden, we should expect to see increasing pressure on courts to address this harm in upholding Climate Superfunds.

## **V. Conclusion**

As plaintiffs have tried and failed to hold fossil fuel producers accountable for climate change-related damage, New York and Vermont have taken steps toward a solution.

Their Climate Superfunds establish a statutory framework for climate liability, adopting a polluter-pays approach.

Despite New York's and Vermont's efforts, lawsuits brought by industry, other states, and the Trump Administration will likely defeat these laws in the Second Circuit. The plaintiffs' arguments of federal preclusion and CAA preemption may hold sway there, given damning precedent in *City of New York*. And the Trump Administration has been unusually aggressive in asserting its involvement, filing collateral challenges instead of intervening in the already pending litigation.

However, with 10 or more other states moving forward with enacted or proposed Climate Superfunds, the fight will not end in New York and Vermont. In other jurisdictions, creative lawyers will have an opportunity to convince courts of these laws' constitutionality and urgency. As states continue to bear the burden of climate change, there will be increasing pressure to uphold Climate Superfunds and find a vehicle for making polluters pay, whatever the immediate outcome.