2025 ENVIRONMENTAL LAW FORUM

2025 Seminar Material

MI0622.25

New Jersey Institute for Continuing Legal Education

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2025 ENVIRONMENTAL LAW FORUM

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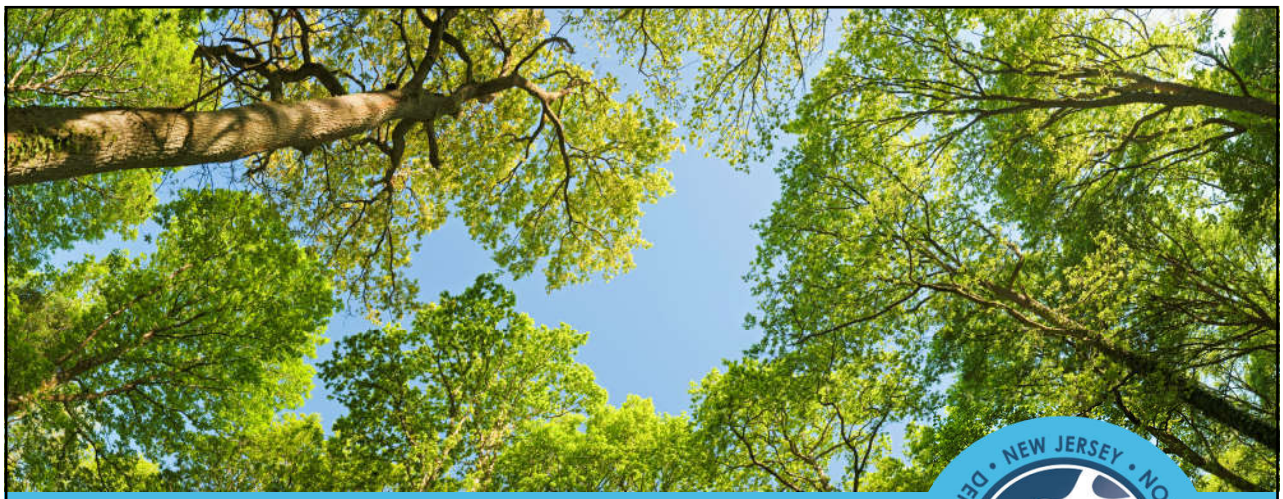
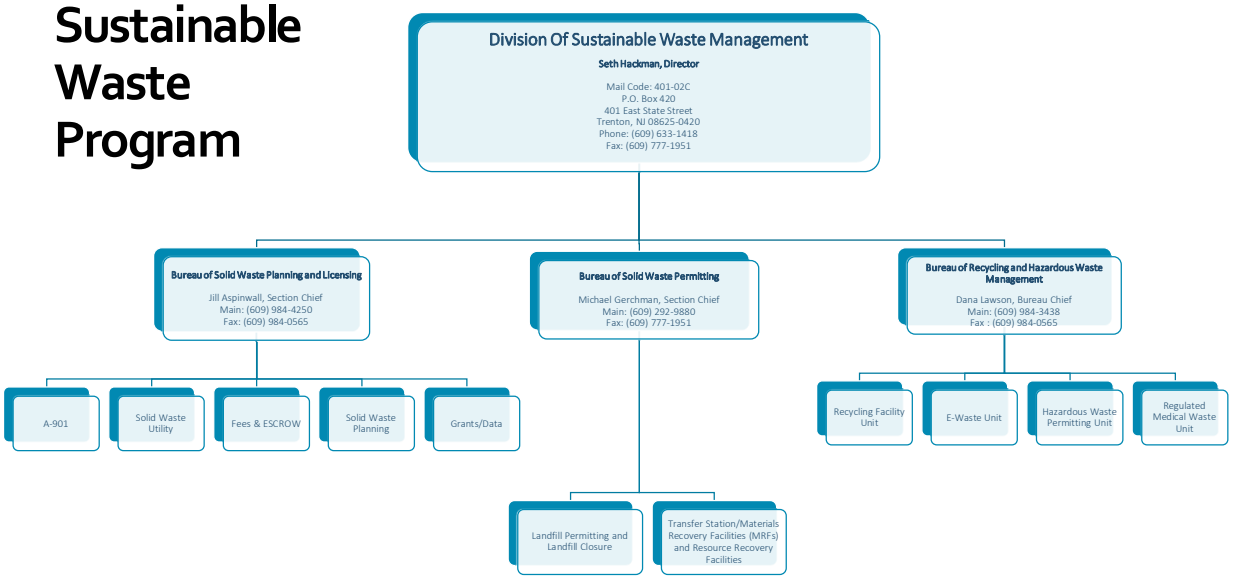


NJDEP Sustainability and Solid Waste Updates

Seth Hackman, Director, Division of Sustainable Waste Management
Mike Hastry, Director, Division of Waste & UST Compliance & Enforcement

1. Division of Sustainable Waste Management - Updates
2. Food Waste – Recycling Law and Regulatory Updates
3. Other Rule Updates
   - -Single-use Reduction Law
   - -Recycled Content Law
   - -Outdoor food waste composting
   - -E-waste regulatory changes
   - -Hazardous Waste
4. A-901/Dirty Dirt Law – Regulatory Updates

Updated Sustainable Waste Program



Updated Sustainable Waste Program

https://www.nj.gov/dep/dshw/

Vision/Goals

- **Continue to research reduce, reuse and recycle initiatives and improve education and outreach**
- **Focus on scrap metal shredding and battery management**
- **Update our regulations to reflect changes in technology**

Improving Regulatory and Permitting Oversight

- **Structured support for EJ Process**
- **Rules Updates:**
  - Enacted: Single-use Reduction
  - Proposed: Food Waste Recycling
  - In Draft: Recycled Content, Dirty Dirt, EV Battery, Composting Modifications
- **Coming Soon: Updated website and more data available on the web**

Food Waste Reduction Efforts

- Legislative goal to reduce food waste by 50% of 2017 levels by the year 2030
- Food Waste Recycling and Food Waste-to-Energy Law rulemaking and reporting

- Support the new Office of Food Security Advocate Executive Committee
- Grants to colleges/universities in NJ - Recycling Enhancement Act Higher Education Fund
- Outdoor composting and tiered permitting rule modifications

Food Waste Recycling and Food Waste-to-Energy Production Act (P.L. 2020, c. 24)

- **Signed into law on April 14, 2020**
- **DEP tasked with implementation**
  - Rules and regulations in progress
- **Requires large food waste generators that generate a projected average of 52 or more tons per year, and are located within 25 road miles of an authorized food waste recycling facility, to source separate and recycle their food waste**
- **Established a Food Waste Recycling Market Development Council**

What is Food Waste as defined by the Law?

- Food processing vegetative waste
- Food processing residue generated from processing and packaging operations
- Overripe produce
- Trimmings from food
- Food product over-runs from food processing
- Soiled and unrecyclable paper generated from food processing
- Used cooking fats, oil, and grease

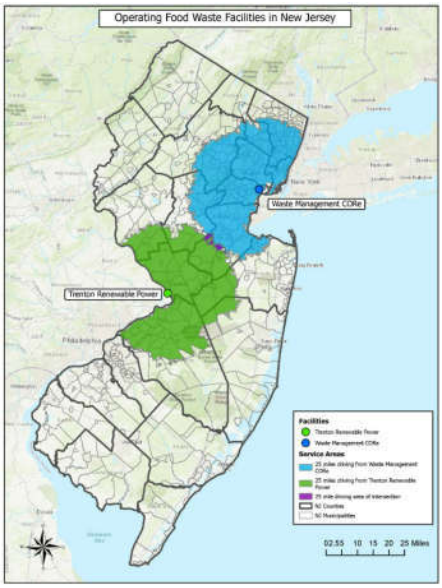
Food Waste Does Not Include…

Food donated by the generator for human consumption

Any waste generated by a consumer after the generator issues or sells food to the consumer

Authorized Food Waste Recycling Facilities

Trenton Renewable Power
1600 Lamberton Road
Trenton, NJ 08611



Waste Management CORe
847 Flora St
Elizabeth, NJ 07201

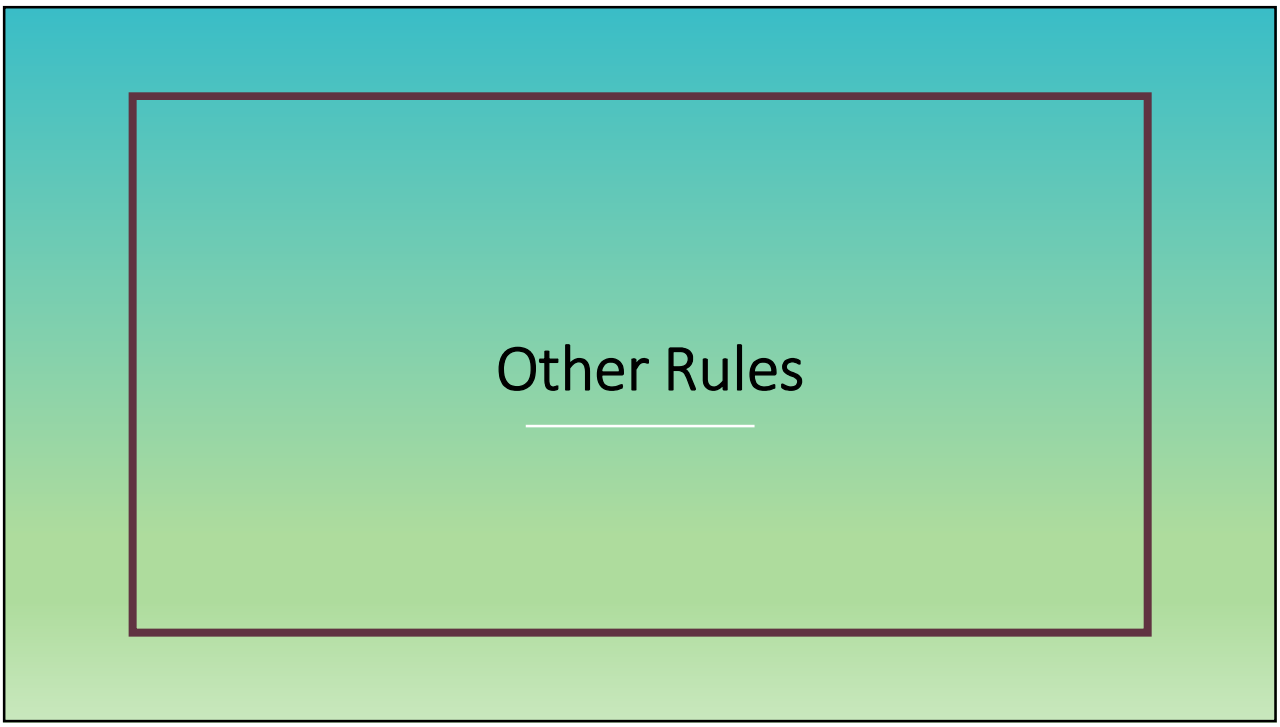
https://www.nj.gov/dep/dshw/food-waste-recycling-law/food-waste-recycle-facilities.html

Other Methods of Recycling Food Waste

- **Enclosed on-site composting or anaerobic or aerobic digestion of its source separated food waste in accordance with standards adopted by DEP**
- **Alternative authorized food waste recycling methods**
  - recycling food waste at the site at which it is generated as authorized by DEP
  - treating food waste at the site at which it is generated pursuant to a permit issued by DEP
  - sending food waste for offsite use for agricultural purposes, including as animal feed
  - sending food waste offsite for treatment with sewage sludge in an anaerobic digester for renewable natural gas or biogas recovery as authorized by DEP
  - any other method of recycling or reuse of food waste, as authorized by DEP

Food Waste Recycling and Food Waste-to-Energy Production Law

- Next Steps:
- Proposal published in NJ Register on August 5, 2024
- Public comment period closed – October 4, 2024
- Anticipated Adoption – Summer 2025


Other Rules

Single-use Reduction Law – N.J.A.C. 7:26L

- Adopted on – April 7, 2025
  - Clarified exemption on hot food packaging bag
  - Included compostable plastic as a prohibited single-use item
  - More details on Department's review of wavier applications

Recycled Content Law

- Next Steps:
- Still under review
- Anticipated Proposal – Fall 2025
- Anticipated Adoption – Spring/Summer 2026


Other Rule Updates
• Recycling Rules – stakeholdering outdoor food waste composting and tiered permitting.
• E-waste – regulatory changes for consistency with July 2017 law amendments.
• Hazardous Waste – rulemaking update to conform with federal program per RCRA requirement.

A-901 Licensing

NJDEP is the licensing agency and works in conjunction with the Office of the Attorney General (OAG) and the NJ State Police to:

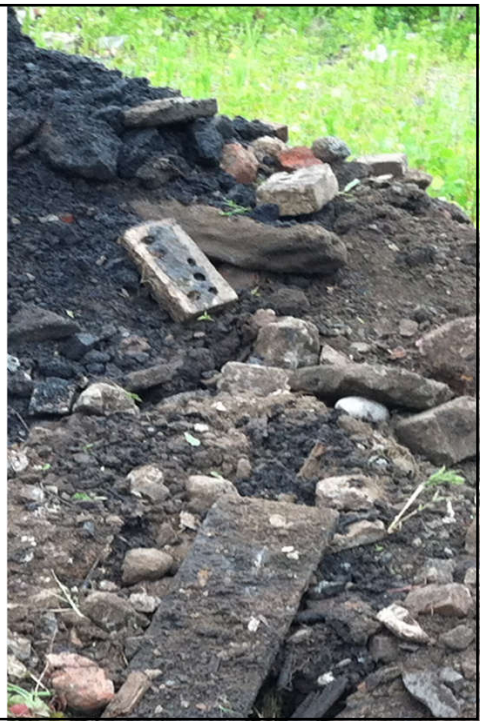
- **ensure applicants possess the requisite integrity, reliability, expertise and competence to operate in the waste industry or provide provisions of soil and fill recycling.**
- **exclude persons with known criminal records, habits or associates from participation.**

Dirty Dirt Law

Two – Fold:

- Fixes to some key definitions in the general A901 rules
  - broker, consultant, engaging, key employee

- Extends A-901 licensing requirements to persons conducting "soil and fill recycling services," defined as "services provided by persons engaging in the business of the collection, transportation, processing, brokering, storage, purchase, sale or disposition, or any combination thereof, of soil and fill recyclable materials."
  - Initial Registration with NJDEP no later than July 14, 2022
  - Registrants must apply for A-901 license no later than 30 days after rule promulgation



Broker

"Broker" - means a person who for direct or indirect compensation arranges agreements between a business concern and its customers for the collection, transportation, treatment, storage, processing, transfer or disposal of solid waste or hazardous waste, or the provision of soil and fill recycling services

Examples:

- The person solicits or recruits a business concern engaged in solid or hazardous waste services or soil and fill recycling services for a customer in need of those services.
- The person participates in negotiations between a business concern engaged in solid or hazardous waste services or soil and fill recycling services and a person in need of such services
- The person receives direct or indirect compensation in connection with the transaction

Consultant

"Consultant" - means a person retained by a business concern to furnish specialized advice to the business concern regarding the provision of solid or hazardous waste services or the provision of soil and fill recycling services. "Consultant" shall not include a person who performs functions for a business concern and holds a professional license from the State in order to perform those functions.

- The Department interprets this exclusion to be for occupations such as lawyers, accountants, etc. that are not performing functions that engage in soil and fill recycling services.

Key Employee

"**Key employee**" means any individual employed or otherwise engaged by the applicant, the permittee, or licensee, in a supervisory capacity or empowered to make discretionary decisions with respect to the solid waste, hazardous waste, or soil and fill recycling operations of the applicant, permittee, or licensee; any family member of an officer, director, partner, or key employee, employed or otherwise engaged by the applicant, permittee, or licensee; or any broker, consultant, or sales person employed or otherwise engaged by, or who does business with, the applicant, permittee, or licensee, with respect to the solid waste, hazardous waste, or soil and fill recycling operations of the applicant, permittee, or licensee.

Engaging in the business

"Engaging in the business" - means deriving any type of benefit, financial or otherwise, through a contract or otherwise, from the collection, transportation, treatment, processing, brokering, storage, transfer, or disposal of solid waste or hazardous waste, or the collection, transportation, processing, brokering, storage, purchase, sale, or disposition of soil and fill recyclable material, singly or in combination – whether obtained from a location within or outside the State of New Jersey - by directly performing those services, or by securing the performance of those services for another or on behalf of another…

Soil and fill recyclable material

"Soil and fill recyclable material" means non-putrescible aggregate substitute, including, but not limited to, broken or crushed brick, block, concrete, or other similar manufactured material; soil or soil that may contain aggregate substitute or other debris or material, generated from land clearing, excavation, demolition, or redevelopment activities that would otherwise be managed as solid waste, and that may be returned to the economic mainstream in the form of raw materials for further processing or for use as fill material. "Soil and fill recyclable material" shall not include:

1. Class A recyclable material, as defined at N.JA.C. 7:26A-1.3;

2. Class B recyclable material, as defined at N.J.A.C. 7:26A-1.3, that is shipped to a Class B recycling center approved by the Department for receipt, storage, processing, or transfer in accordance with N.J.S.A. 13:1E-99.34(b);

3. Beneficial use material for which the generator has obtained a certificate of approval or that is categorically approved pursuant to N.J.A.C. 7:26-1.7(g); and

4. Virgin quarry products including, but not limited to, rock, stone, gravel, sand, clay, and other mined products.

Some additional exemptions from having to file for a license:

- **Exclusively handles <u>non-restricted soil and fill recyclable material</u>**
  - "Non-restricted soil and fill recyclable material" means non-water-soluble, non-putrescible, non-decomposable, inert solid material that is not mixed with solid waste, is not hazardous waste, and does not contain concentrations of one or more contaminants that exceed the residential soil remediation standards for the ingestion-dermal pathway or inhalation exposure pathway, whichever are more stringent, as set forth at N.J.A.C. 7:26D, Remediation Standards. Such material includes, but is not limited to, rock, soil, sand, gravel, and source-separated recyclable material, such as concrete, block, brick, glass and clay/ceramic products, that has been broken, crushed or otherwise processed to be unrecognizable as a discrete manufactured product.
  - Requires annual certification

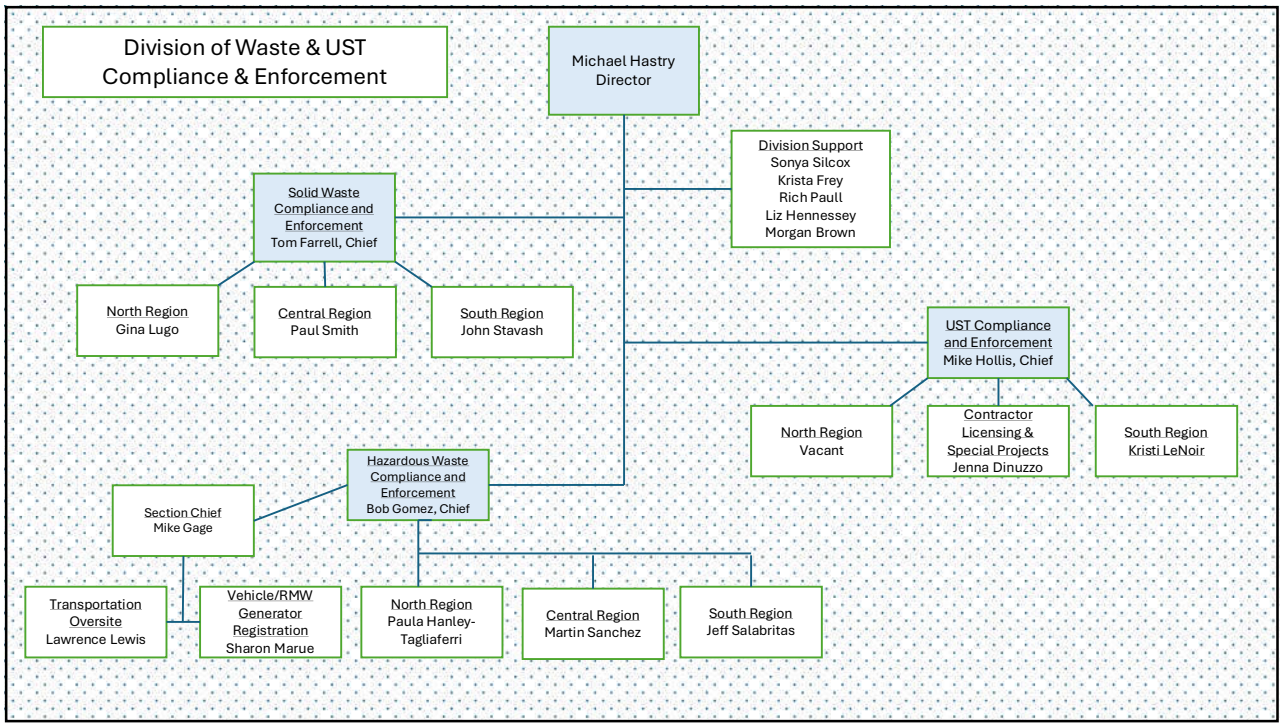
- **Exclusively handles <u>de-minimis quantities</u> of non-restricted soil and fill recyclable material**
  - generates less than 15 cubic yards per day;
  - when maintaining a storage yard, stores less than 100 cubic yards of non-restricted soil and fill recyclable material on site at any time;
  - transports non-restricted soil and fill recyclable material using a truck or trailer that has a loading capacity of less than 15 cubic yards; and
  - where required by law, possesses a Home Improvement Contractor license or trade license issued by the New Jersey Division of Consumer Affairs.
  - maintain records

Class B Recycling Centers

- The Department is currently updating the Recycling regulations at N.J.A.C. 7:26A to modify the definition of Class B Recyclable Material to include soils. This would enable the Class B Recycling centers that process soils to be exempt from the requirement to obtain an A-901 license provided they adhere to their Class B Recycling Center Agreements as approved by the Department
- Class B recycling facilities that accept bulk soil separately from approved Class B materials are considered to be performing “soil and fill recycling services,” and are required to obtain an A-901 License.

Next Steps for Dirty Dirt Rule

- Proposal published in NJ Register on – January 21, 2025
- Public comment period closed – April 21, 2025
- Anticipated adoption – End of CY 2025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Thank You!

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Natural Resource Damage Claims

The Current State of Play in New Jersey

Presenters

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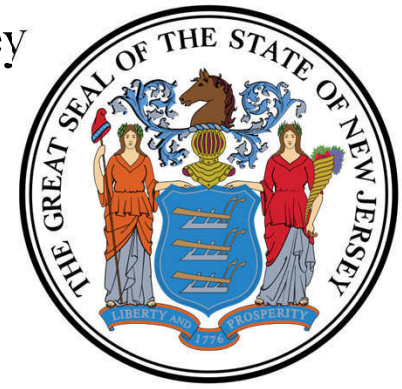
Manko, Gold, Katcher & Fox, LLP

Overview

- Background on NRD
- Legal Successes, Setbacks, and Trends
- Interplay of New Jersey NRD and Other Regulatory Initiatives
- The Future of NRD in New Jersey



Background

- Public Trust Doctrine
- Spill Compensation and Control Act

N.J.S.A. 58:10-23.11 Spill Compensation and Control Act

58:10-23.11 Short Title

This act shall be known and may be cited as the "Spill Compensation and Control Act."

58:10-23.11a Legislative Findings and Declaration

The Legislature finds and declares: that New Jersey's lands and waters constitute a unique and delicately balanced resource; that the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; that the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; that the State is the trustee, for the benefit of its citizens, of all natural resources within its jurisdiction; and that the storage and transfer of petroleum products and other hazardous substances between vessels, between facilities and vessels, and between facilities, whether onshore or offshore, is a hazardous undertaking and imposes risks of damage to persons and property within this State.

Background

NJ State Constitution

New Jersey Constitution – 2017 Amendments

Article VIII, Section II, Paragraph 9

"The amount annually credited pursuant to this paragraph shall be dedicated, and shall be appropriated from time to time by the Legislature, for paying for costs incurred by the State to **repair, restore, or replace** damaged or lost natural resources of the State, **or permanently protect** the natural resources of the State, **or for paying the legal or other costs incurred** by the State to pursue **settlements and judicial and administrative awards** relating to natural resource damages."

Basics

- Types of Natural Resources
  - Land, air, water
  - Fish, shellfish, wildlife, biota
- Types of compensation
  - Land Preservation
  - Restoration
  - Monetary Compensation

Process

- Natural Resource Damage Assessment
  - Resource Equivalency Analysis
  - Habitat Equivalency Analysis
- Settlement/Litigation
- Draft Settlement/Consent Judgment
- Public Comment
- Finalize
- Compensation

2018 New Day Initiative

August 2018

- Pohatcong Valley Superfund
- Port Reading Refinery
- Deull Fuel Company

December 2018

- Puchack Wellfield

First NRD cases brought by the state since 2008

Administrative Order 2023-08

Current state policy on NRD

- Encourages a "collaborative process with responsible parties"
- Discounted NRD valuation
- Directed ONRR to develop technical assistance for the assessment of natural resource injuries
- Sets forth a basic initial procedure for proactive engagement with ONRR

Legal Successes, Setbacks & Trends

- Right to a Jury Trial
- Public Nuisance
- Expert Testimony
- Weight of Federal Case Law
  - *NJDEP v. Handy & Harman*
- Novel Theories

Mediation & Settlement

- Pros and cons of early alternative resolution proceedings
- Lack of developed factual and expert evidence
- Time and financial considerations
- Notable NRD Settlements
- Recent challenges to NRD settlements

Interplay of NRD Initiatives & Other Regulatory Initiatives

- Environmental Justice
- Emerging Contaminants

The Future of NRD in New Jersey

- Impact of Decreased Federal Funding
- Legal Cases to Watch
  - *NJDEP v. DuPont*
- Climate Change Considerations

Questions?

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LAND USE REGULATION, WAREHOUSE SPRAWL, THE INLAND FLOOD PROTECTION RULES AND HOME RULE-- CHALLENGES AND OPPORTUNITIES
TIRZA WAHRMAN, ESQ.

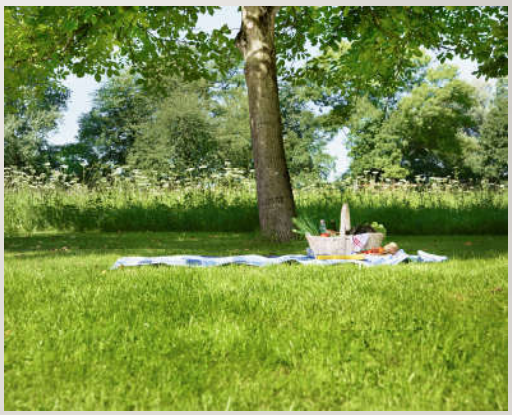
1

What are the drivers that make New Jersey an attractive State for the siting of warehouses?

--Population density in New Jersey and along the Northeast Corridor;
--Port of New York and New Jersey– second busiest in the U.S.;
--easily accessible from eastern Pennsylvania via I-78;
--Industries devoted to the movement and storage of goods employ 12.2 per cent (1 out of 8) of employed New Jersey residents
--what are the financial incentives for towns and municipalities to approve warehouse construction? Do township and municipal planning boards have too much discretion to "green light" warehouse projects that bring traffic, air pollution and enhanced flood risk with them? Is the legal standard of "arbitrary and capricious" that applies to planning boards sufficient to protect communitie from lax decisionmaking? See Complaint, Gonzalez, et al. Twp. of West Windsor, dkt no. 2205-22

Source: Tim Evans, New Jersey Future, January 2022

- What are possible constraints on warehouse growth?
- --Traffic congestion—estimates in State Planning Commission guidance, issued September 2022 (1,752 trucks per day for every 1,000,000 square feet of warehouse space); **https://nj.gov.state/planning/index.shtml**
- --Impacts on air quality, noise
- --Siting decisions--- Brownfield sites vs open space
- --Are local planning boards the appropriate decisionmakers? Bridgepoint 8—West Windsor– a case study in poor siting of proposed 7 warehouses on flood-prone land



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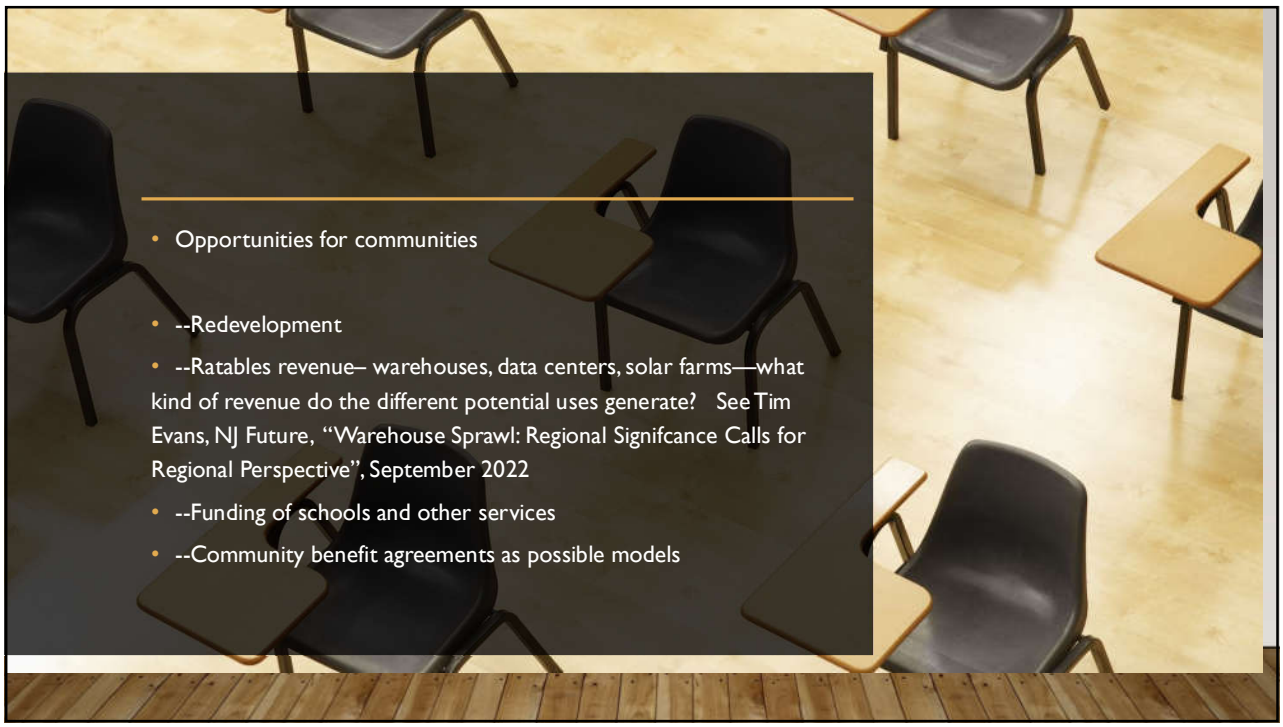

• Opportunities for communities
• --Redevelopment
• --Ratables revenue– warehouses, data centers, solar farms—what kind of revenue do the different potential uses generate? See Tim Evans, NJ Future, "Warehouse Sprawl: Regional Signifcance Calls for Regional Perspective", September 2022
• --Funding of schools and other services
• --Community benefit agreements as possible models

4

The Inland Flood Protection Rules

Amending the Stormwater Management Rules at NJAC 7:8 and the Flood Hazard Area Control Act (FHACA) at NJAC 7:13.

In effect on July 2023; intended to ensure the use of current precipitation data and reliable climate science to aid NJ communities to manage the risks associated with climate change.

What will the impact of imposing these new requirements be on proposed warehouse projects?

5

Should the Warehouse Siting Guidance be Adopted and Codified?

The Warehouse Siting Guidance, published by the New Jersey State Planning Commission in September 2022, recommends the following "best practices."

--require communities to confer with neighboring communities before a warehouse project is proposed for siting;

--require the township or municipality to conduct a cost-benefit analysis, weighing the impacts of traffic congestion, flood risk and impacts on air quality.
https://state/planning/index.shtml

--to have teeth: it should be codified into law. Will it be?

Any questions or comments about this presentation:
twahrmanesq@gmail.com
973 222 8394

Land Resources Regulatory Update: The ever-changing landscape of New Jersey Land Resources law

Implications to Remediation Projects, Operational Facilities and Redevelopment Associated with the NJ Resilient Environments and Landscapes (REAL) Rule

Mark Pietrucha, P.E. LSRP

1

What is REAL?

- REAL = Resilient Environments and Landscapes
- With the proposed REAL– Resilient Environments and Landscapes – reforms, New Jersey is the first state in the nation to initiate a comprehensive update of land resource protection regulations focused on impacts of a changing climate.

REAL Facts

Nearly two-thirds of New Jersey's coastline is at high, or very high, risk to coastal erosion.

98% of our coastline is projected at medium, or very high risk, to sea- level rise.

More than half a million acres of New Jersey land is highly vulnerable to coastal hazards.

Current projections indicate as much as 5.1 feet of sea-level rise is likely by 2100.

dep.nj.gov/njreal/overview

3

CAFE

- CAFE = Climate Adjusted Flood Elevation
- Lowest floor requirements for residential and critical buildings
  - Special Flood Hazard Areas
    - AE Zone – Floor surface must be at or above CAFE + 1 foot
    - Coastal AE and VE Zones – bottom of lowest horizontal structural member must be at or above CAFE + 1 foot

www.nj.gov/dep/workgrpoups/docs/njpact-20210115-real-pres.pdf

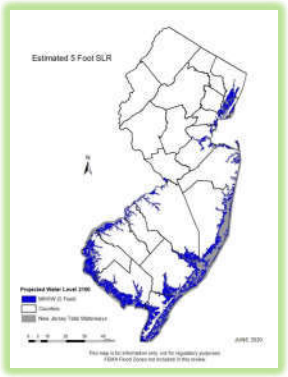
CAFE

- Tidal Flood Areas
  - Proposed CAFE in tidal areas is five feet above FEMA 100-year flood elevation to account for expected rises in sea level
- Fluvial Flood Hazard Areas – 2 Options
  - CAFE is highest of:
    - FEMA 500-year flood + 1 foot
    - DEP flood hazard area design flood elevation + 2 feet
    - FEMA's 100-year + 3 feet
  - Calculate the flood hazard area limits using hydrologic and hydraulic calculations based on 125% of the future 100-year discharge

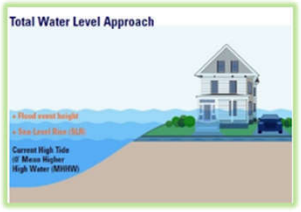
www.nj.gov/dep/workgrpoups/docs/njpact-20210115-real-pres.pdf

IRZ

- IRZ = Inundation Risk Zone
  - Consists of currently dry land that is expected to be inundated by tidal water daily or permanently by 2100
  - Encompasses all land that lies below the IRZ elevation which calculated by adding five feet to the elevation of the mean higher high water (MHHW)

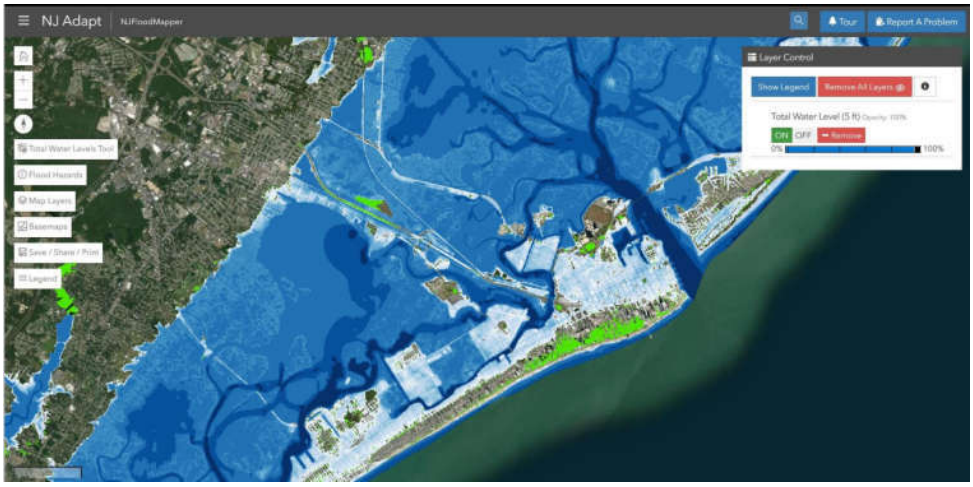


- See it today at www.njfloodmapper.org
  - Website designed/created to provide user-friendly visualization tool for those making coastal decisions



www.nj.gov/dep/workgrpoups/docs/njpact-20210115-real-pres.pdf

IRZ


NJ Adapt
NJFloodMapper
Tour
Report A Problem
Layer Control
Show Legend
Remove All Layers
Total Water Level (5 ft)
ON
OFF
Remove
0%
100%
Total Water Levels Tool
Flood Hazards
Map Layers
Basemaps
Save / Share / Print
Legend

IRZ

- Development in the IRZ will be subject to more protective standards than the remainder of the floodplain beyond it
- An applicant asserting that using a GIS layer to determine the IRZ results in an incorrect location can alternately determine the elevation of the ground at the MHHW line along the tidal waterway(s) in proximity to the site in question. Where multiple elevations determined in this manner are within proximity of the site, the highest ground elevation shall be selected. The IRZ encompasses all land within five feet vertically of the MHHW line.

www.nj.gov/dep/workgrpoups/docs/njpact-20210115-real-pres.pdf

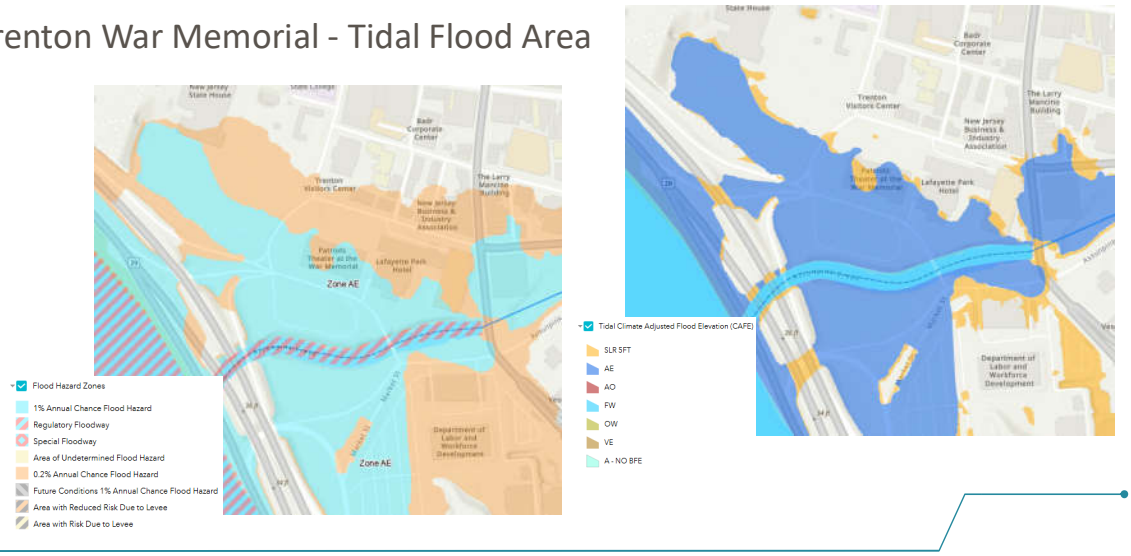
CAFE/IRZ area boundaries – NJ Flood Indicator Tool

Ocean Resort - Tidal Flood Area

9

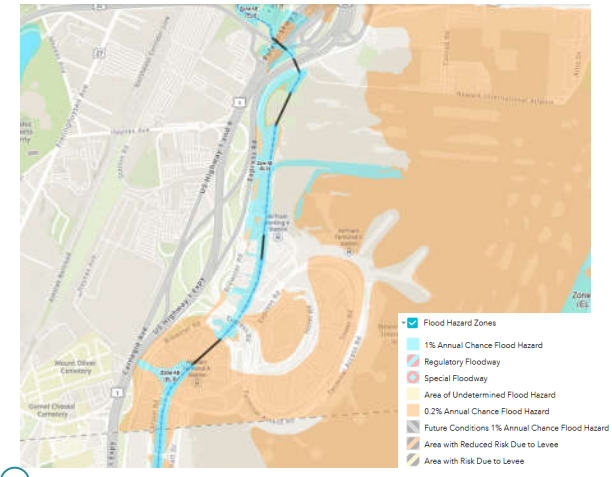
CAFE/IRZ area boundaries – NJ Flood Indicator Tool

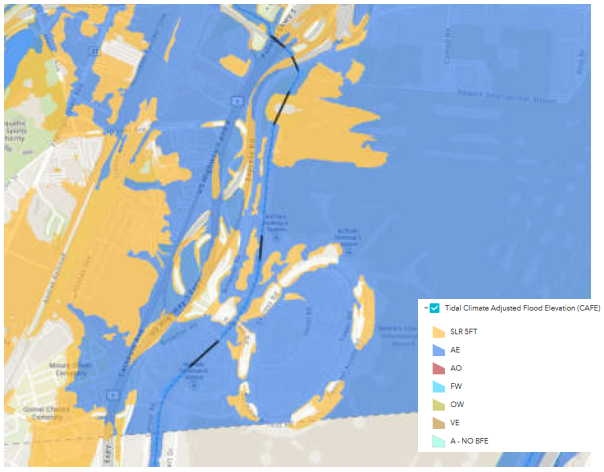
Trenton War Memorial - Tidal Flood Area



CAFE/IRZ area boundaries – NJ Flood Indicator Tool

Newark Liberty Airport - Tidal Flood Area





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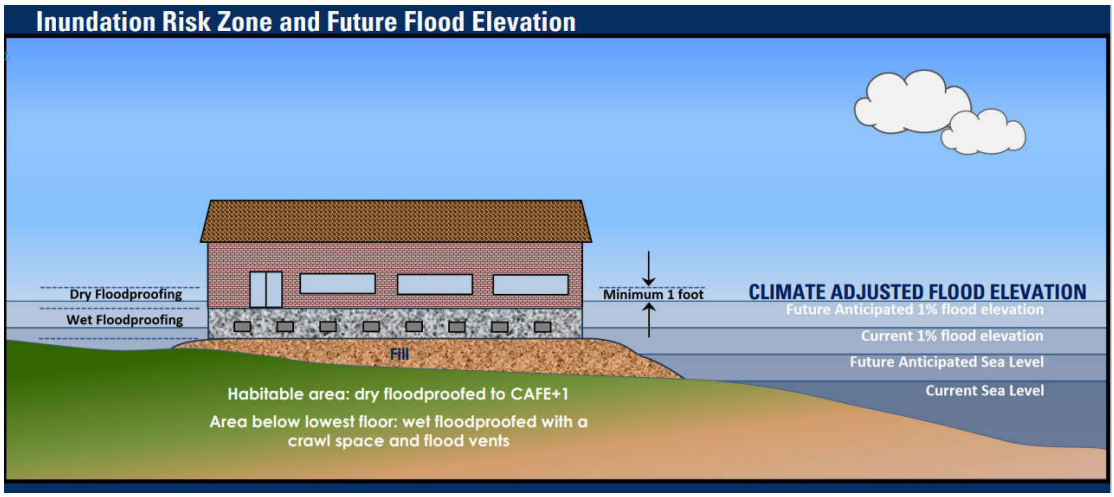
What does this mean for NJ development/redevelopment projects?



dep.nj.gov/wp-content/uploads/njreal/real-session-1-slr-and-irz-20240520.pdf

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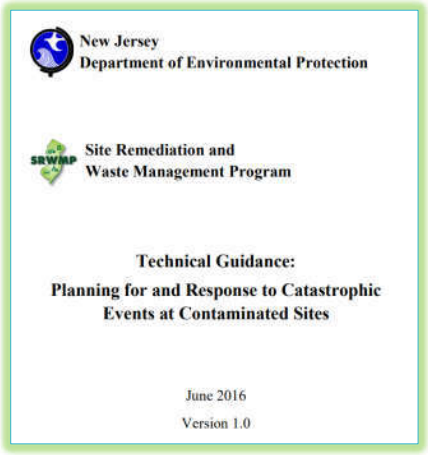
What does this mean for NJ remediation projects?

- Hint: Check out NJDEP Technical Guidance: Planning for and Response to Catastrophic Events at Contaminated Sites
  - Provides guidance to assess vulnerabilities of contaminated sites.
  - Acts as a reminder that some degree of planning should be considered, whether a simple list of important contacts, a stand-alone Catastrophic Event Plan, or facility-wide plans concerning environmental activities/infrastructure required by regulation for operating facilities.



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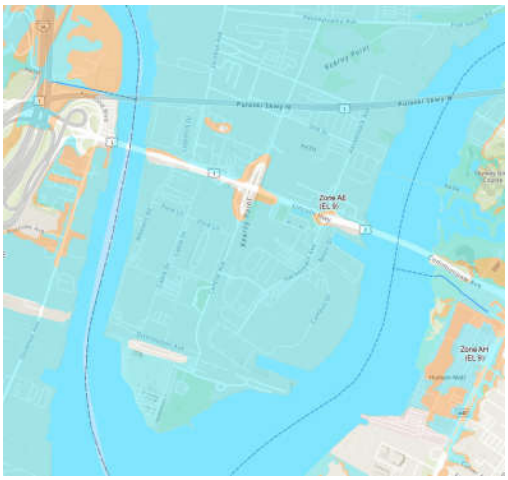
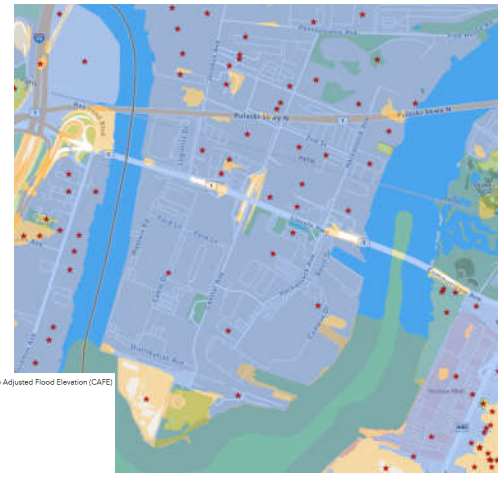
dep.nj.gov/wp-content/uploads/srp/response_to_catastrophic_events.pdf

CAFE/IRZ area boundaries – NJ Flood Indicator Tool/GeoWeb

South Kearny- Tidal Flood Area





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Example: American Cyanamid Superfund

- Bridgewater, New Jersey
- 435-acre site formerly used to manufacture chemicals
- 27 impoundments and lagoons used for disposal of chemical sludge and wastes
- Remediation of soil and ground water contaminated with volatiles, semi-volatiles and metals includes:
  - Ground water pump and treat systems
  - Some impoundments will be left in place/stabilized/solidified
  - Permanent capping systems

www.epa.gov/superfund/climate-adaptation-profile-American-cyanamid

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Example: American Cyanamid Superfund

- Vulnerable to Climate Change Impacts
  - Most of site is located within 100-year floodplain

Locations of impoundments 1 through 5 and a flood control berm in flood hazard areas designated by the Federal Emergency Management Agency.

www.epa.gov/superfund/climate-adaptation-profile-American-cyanamid

Example: American Cyanamid Superfund

- Post Hurricane Irene tropical storm (2011)
  - 7” of rain in 48 hours
  - Widespread flooding across site
  - Destruction of trailers
  - Loss of electricity needed to run P&T systems

Flooding at the American Cyanamid Superfund Site in 2011.

www.epa.gov/superfund/climate-adaptation-profile-American-cyanamid & www.epa.gov/arc-x/American-cyanmid-superfund-site-reduces-climate-exposure

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Example: American Cyanamid Superfund

- Actions taken to increase resiliency to flooding threats and better manage risks associated with increases in frequency and intensity of future storms
  - Raised the critical electrical instrumentation five feet higher than the flood level reached by Hurricane Irene's flood waters.
  - Installed submersible pumps in bedrock wells to maintain hydraulic control during future flood events.
  - Reinforced the berms of two impoundments to increase their strength and prevent flood-related scour.

Elevated electrical controls for full-scale groundwater extraction.

Reinforcement of impoundment berms in the south area.

www.epa.gov/arc-x/American-cyanmid-superfund-site-reduces-climate-exposure

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Example: American Cyanamid Superfund

- Actions taken to increase resiliency to flooding threats and better manage risks associated with increases in frequency and intensity of future storms
  - Set a minimum design standard, specifying that all future capping systems be designed to withstand a 1-in-500 year flood event.
  - Developed flood plans including river stage monitoring, preparation procedures, evacuation plans, chain of command, etc.

Onsite flood-resistant enclosure and bollards on concrete foundations.

www.epa.gov/arc-x/American-cyanmid-superfund-site-reduces-climate-exposure

What does this mean for NJ operational facilities?

- Create a new definition for critical facilities and critical infrastructure as informed by the NFIP and Office of Emergency Management definitions.
- Amend the definition of critical building to be more in line with the Flood Design Classes published by the American Society of Civil Engineers.
- Placing restrictions on construction of facilities in the inundation risk zone.
- Applicant must provide an Owner -Certified Climate Risk Assessment that acknowledges the flooding risks.

www.nj.gov/dep/workgrpoups/docs/njpact-20210115-real-pres.pdf

Example: PSE&G Infrastructure Improvements

- Investment in infrastructure strengthening and upgrades
  - Raising/rebuilding/upgrading equipment at several stations damaged by Hurricane Sandy flooding
  - Replaced 2,000 miles of aging gas lines
  - Upgraded electrical lines and installed more redundant circuits to allow power to be restored faster, especially for critical facilities

nj.pseg.com/newsroom/newsrelease303

HALEY ALDRICH

Thank You!

Mark Pietrucha, P.E., LSRP
Principal
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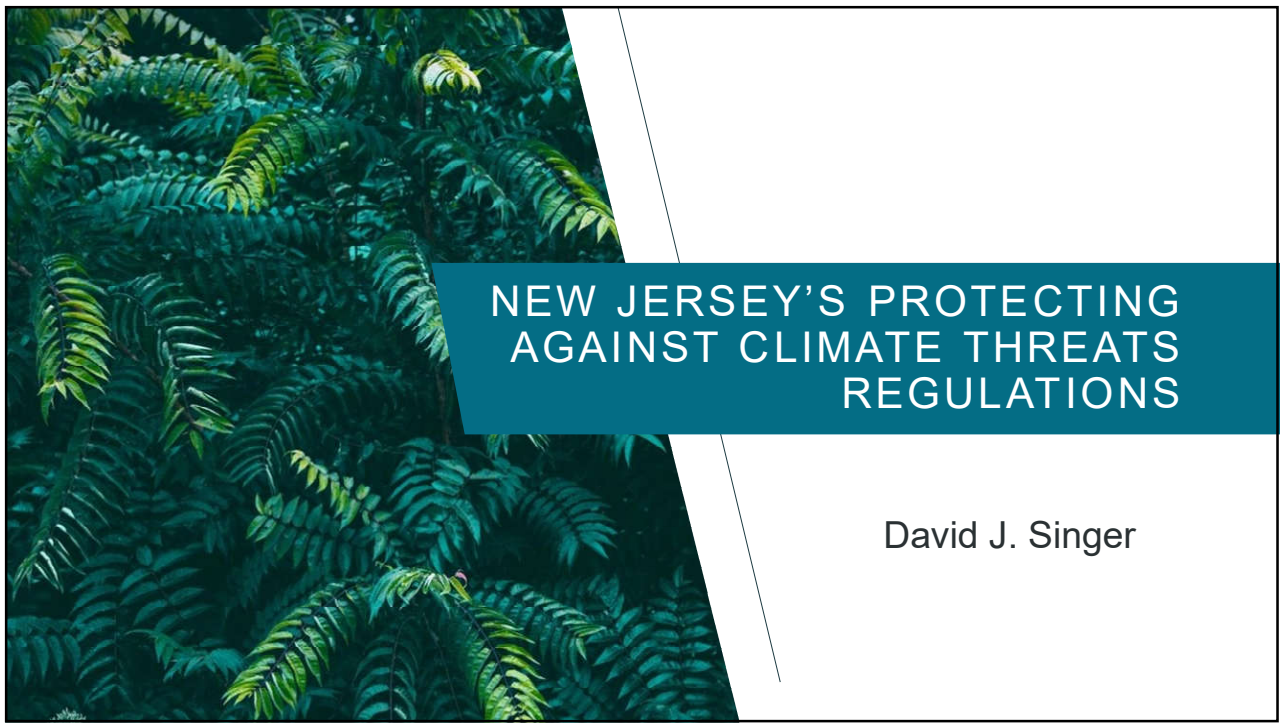

NEW JERSEY'S PROTECTING AGAINST CLIMATE THREATS REGULATIONS
David J. Singer

1

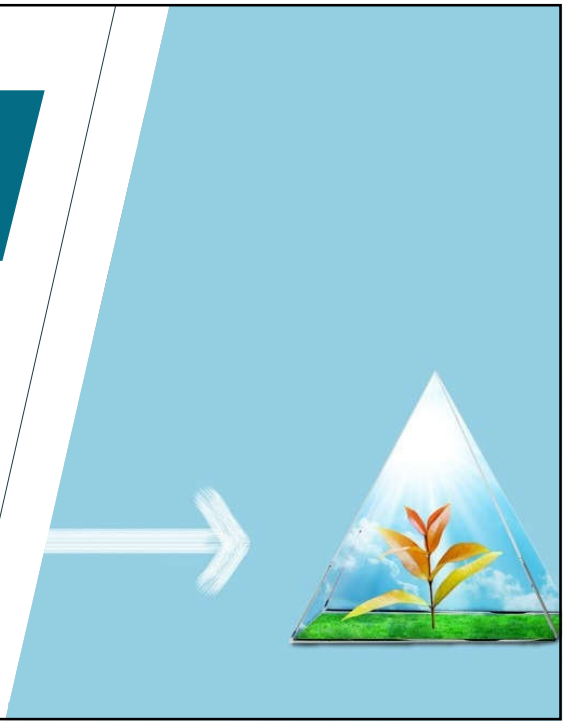
LAND RESOURCE REGULATION UPDATE

- Governor Murphy's Executive Order 100
- Implementation of New Jersey Protecting Against Climate Threats (PACT)
- Introduction to the upcoming Resilient Environments and Landscapes regulation
- Overview of Inland Flood Rules

NEW JERSEY
EXECUTIVE ORDER 100

OVERVIEW OF EXECUTIVE ORDER 100

- Issued January 27, 2020 by Governor Murphy
- Directed the NJ Department of Environmental Protection to adopt Protecting Against Climate Threats (PACT) regulations.
- Executive Order was issued due to New Jersey being vulnerable to the impacts of sea level rise, increased flooding and other adverse impacts of climate change.
- Rutgers University published a report in 2019 titled "New Jersey's Rising Seas and Changing Coastal Storms." This report showed that sea-level rise projections in New Jersey are more than two times the global average.



- Another report released by the Rhodium Group in 2019 found that an estimated $60 billion worth of homes and buildings facing increased risk of flooding from hurricanes, and the estimated annual potential loss to New Jersey from hurricane-related wind and flooding has increased between $670 million and $1.3 billion.
- Based on the risks laid out in the Executive Order, Governor Murphy, directed that the PACT regulations among other climate change initiatives to integrate climate change considerations, such as sea level rise, into its regulatory and permitting programs, including but not limited to:
  - Land use permitting
  - Water supply, stormwater and wastewater permitting and planning
  - Air quality
  - Solid waste and site remediation permitting

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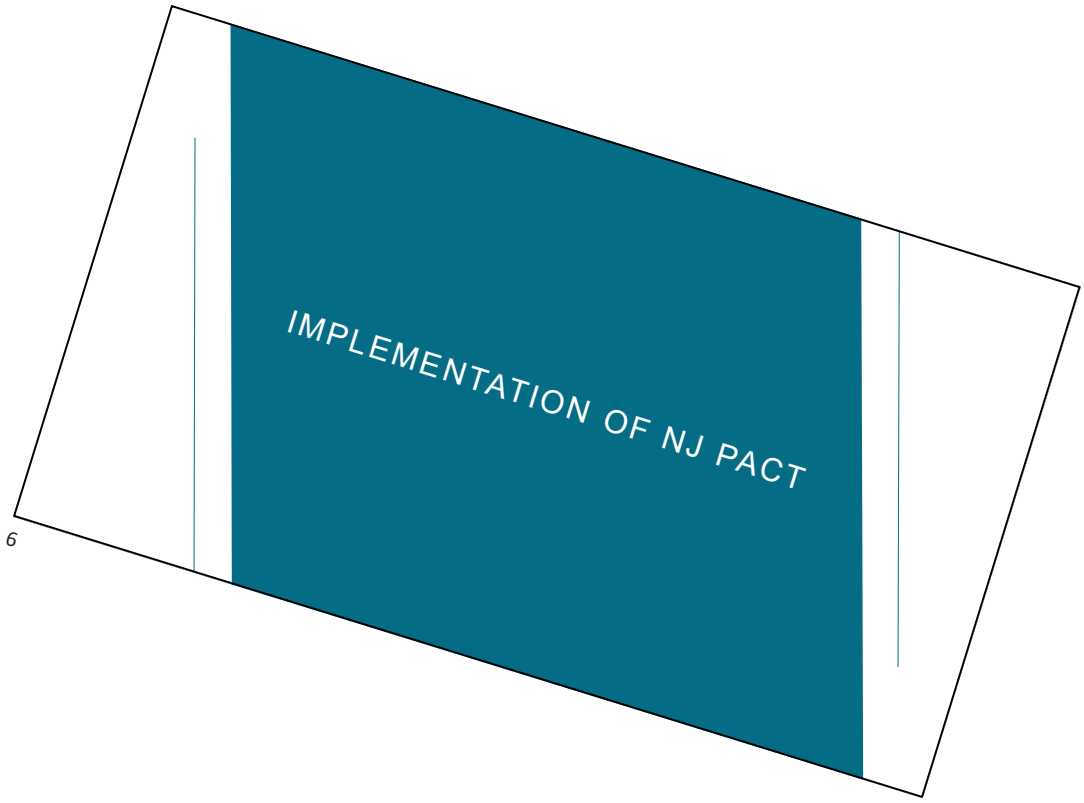
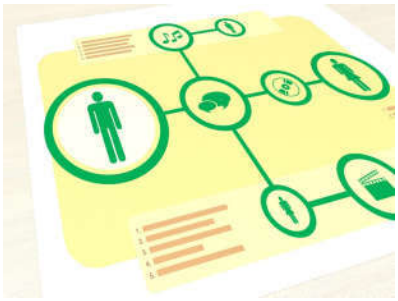

IMPLEMENTATION OF NJ PACT

IMPLEMENTATION OF NJ PACT



NJ INLAND FLOOD RULE:

The NJ Inland Flood Protection Rule is a regulatory update designed to enhance flood resilience in New Jersey. It was adopted on July 17, 2023, as part of the NJ PACT initiative.

RESILIENT ENVIRONMENTS AND LANDSCAPING REGULATION

The NJ Resilient Environments and Landscapes (REAL) Rule is a regulatory update by the New Jersey Department of Environmental Protection (NJDEP) aimed at strengthening climate resilience, as part of the NJ PACT initiative.

OVERVIEW OF THE REAL RULE

New Jersey is the first state in the nation to initiate a comprehensive update of land resource protection regulations focused on impacts of a changing climate.

PROMOTING RESILIENCE
The rule emphasizes the importance of fostering resilience in landscapes and ecosystems to withstand environmental challenges.

ADDRESSING ENVIRONMENTAL CHALLENGES
It identifies various environmental challenges such as climate change, habitat loss, and pollution that impact ecosystems and landscapes.

INTEGRATION INTO PLANNING
The rule aims to integrate resilience principles into planning and regulatory processes for effective environmental management.

8

REAL IMPACTS

The Proposed New Standards

- Ensure that buildings and infrastructure are built for today's conditions and the structure's lifetime.
- Apply only to new development, redevelopment and substantial improvements to buildings.
- **Will not** affect existing development.
- **Will not** create "no build" zones.
- **Will not** require structures to be elevated when doing so is impracticable.

REAL CHANGES

1. **Adjust Coastal Flood Hazard Areas** to account for rising sea levels and attendant storm surge, extending jurisdictional area further inland, requiring higher first-floor elevations or floodproofing for buildings and higher roadways.
2. **Create an Inundation Risk Zone** to address risk for residential building and critical structures proposed in areas of permanent or daily inundation due to sea level rise.
3. **Improve water quality and reduce flooding** by adding sound stormwater management practices in areas where stormwater is not adequately managed.
4. **Encourage nature-based solutions** by working with nature to protect our communities and our resources.
5. **Support renewable energy** by balancing habitat conservation with novel infrastructure demands.
6. **Improve State alignment with FEMA's** National Flood Insurance Program (NFIP) about through clarifying amendments to the FHA rules.
7. **Improve DEP permitting processes** to better track authorizations and permits from start of construction to project completion.

OVERVIEW OF NJ INLAND FLOOD RULE

Was adopted on July 17, 2023 and updated N.J.A.C. 7:8 (Stormwater Management Rules) and N.J.A.C. 7:13 (Flood Hazard Area Control Act Rules).

The rule aims to protect New Jersey's communities from worsening riverine flooding and stormwater runoff by updating existing flood hazard and stormwater regulations with modern data that account for observed and projected increases in rainfall.

Key Points

- New Design Flood Elevation (DFE) raises fluvial (non-tidal) flood elevation mapped by DEP by two feet
- Requires use of future projected precipitation when calculating flood elevations
- Ensures that DEP's Flood Hazard Area permits conform to NJ Uniform Construction Code standards and meet or exceed minimum FEMA National Flood Insurance Program requirements
- Requires stormwater Best Management Practices (BMPs) to be designed to manage runoff for both today's storms and future storms
- Removes use of Rational and Modified Rational methods for stormwater calculations

11

THANK YOU

PORZIO
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NJDEP Inconsistencies
Legal and Technical Implications

- *Debra Rosen, Esq. (Archer)*
- *Robert Chimchirian, PE, LSRP (Roux)*
- *Jacqueline Fusco (Roux)*

1

Disclaimer

- From a practitioner's point of view, these are areas of the regulations that:
  - Are contradictory in nature amongst NJDEP Programs;
  - Difficult to navigate; or
  - Are policy decisions without clear basis in regulations.
- The presenters understand the regulations and work diligently with clients to achieve compliance and as efficiently as possible; however, examples provided in the presentation demonstrate the frustrations of navigating the complex regulatory process which results in:
  - Slower project execution;
  - Higher costs; and
  - Uncertainty and liability.

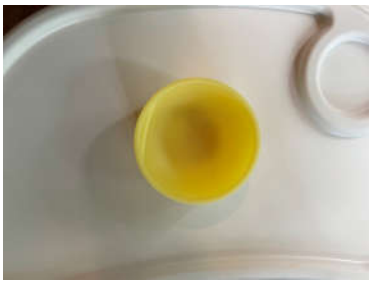
Today's Panel

1. Introduction
2. NJDEP Inconsistencies
   a. Brownfields Act v. SRRA 2.0
   b. Contaminated Site Redevelopment & Remediation v. Land Use
   c. Stormwater v. Surface Water
   d. Solid Waste v. Freshwater wetlands
   e. Americans with Disabilities Act v. Watershed & Land Management
   f. Permit Requirements v. Permitting Requirements
3. Path Forward
4. Questions

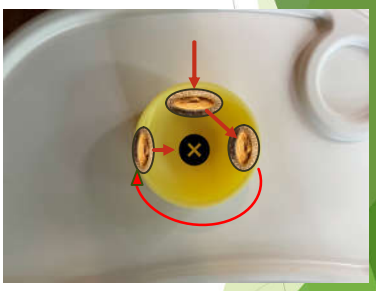
The Oatmeal & Peanut Butter Conundrum

The Boy

The Bowl



The Problem



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BROWNFIELDS ACT VS SITE REMEDIATION REFORM ACT 2.0

(Contradictory Regulations)

- **N.J.S.A. 58:10B-1.3d(2)** - Does not require notification of contamination during due diligence
- **N.J.A.C. 7:26C, 7:26 E & 7:26 I** – Definitions pulled from 7:26C, E & I requires an LSRP to notify the NJDEP if contamination is found during due diligence
  1. A "PA" is "Remediation"
  2. A prospective purchaser fits No. 5 of the PRCR definition
  3. An LSRP is retained by the prospective purchaser
- Proposed Rule Amendment of **N.J.A.C. 7:26C, 7:26 E & 7:26 I** will require **any** person to report a discharge.

TITLE 58. WATERS AND WATER SUPPLY
CHAPTER 10B. HAZARDOUS DISCHARGE SITE REMEDIATION

*** THIS SECTION IS CURRENT THROUGH NEW JERSEY 218th LEGISLATURE ***
*** SECOND ANNUAL SESSION, P.L. 2019 CHAPTER 266 AND JR 22 ***

N.J.A.C. 7:26I

REGULATIONS OF THE NEW JERSEY
SITE REMEDIATION PROFESSIONAL LICENSING BOARD

Statutory authority
N.J.S.A. 58:10C-1 et seq.

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5

Impact of SRRA Rules Proposal Notice Requirements

- Brownfields Act recognizes that New Jersey's industrial history has led to many underutilized, contaminated properties and the State must adopt policies that encourage their use
- The new regulations would have the opposite effect by discouraging real estate deals in New Jersey, especially deals involving contaminated properties, by placing reporting obligations on a prospective purchaser and on the environmental professional engaged by the prospective purchaser
  - Chilling effect of proposed rules will mean fewer brownfields put back into productive use
  - Similar rules proposed two other times and after substantial stakeholder input, removed from proposals

6

CSRR VS LAND USE

(Complex Regulatory Framework)

- Can good engineering practices dictate remedial option selection? – Not always
- Contaminated GW discharging to Surface Water within stormwater swale
  - Convey Surface Water
  - Separate GW & surface water with durable construction
  - Avoid increased flooding
- Engineering evaluation recommended a piped solution to provide most effective remedy
- Complex regulatory environment including:
  - Freshwater Wetlands Regulations (N.J.A.C. 7:7A)
    - State Open Water
  - Flood Hazard Area Control Act Rules (N.J.A.C. 7:13)
    - Tidal Floodplain, 100-year Flood Hazard , Riparian Zone, Hardship Exception

7

STORMWATER VS SURFACE WATER

(NJDEP Policy Decision)

- NJDEP Bureau of Water Allocation (BWA) diversion of **Surface Water** Requires a BWA Permit per N.J.A.C. 7:19
- N.J.A.C. 7:19 does not define **surface water** or **ground water**
- N.J.A.C. 7:14A provides the following definition which comes close:

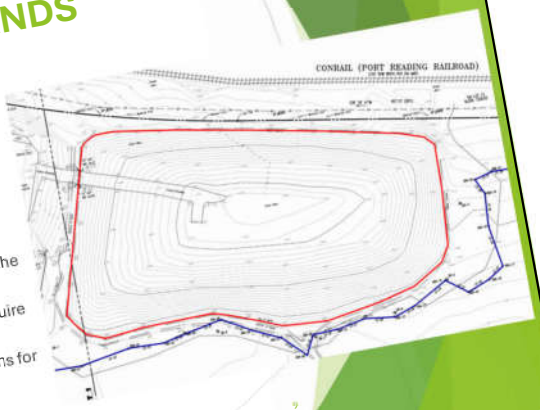
  "Surface water" means water at or above the land's surface which is neither ground water nor contained within the unsaturated zone, including, but not limited to, the ocean and its tributaries, all springs, streams, rivers, lakes, ponds, wetlands, and artificial waterbodies.
- BWA is requiring:
  - Sites which divert over 3.1 mgm to obtain a permit
  - Any GW use onsite triggers:
    - A hydraulic report and potentially aquifer testing

8

SOLID WASTE VS FRESHWATER WETLANDS

(Over Regulation)

- Can a landfill also be a wetland – Maybe
- An open landfill can also be a wetland
  - N.J.A.C. 7:26 requires landfill closure
  - N.J.A.C. 7:7A requires a GP 5 (with no mitigation) – why?
- A closed landfill cannot be a wetland but…
  - Perimeter swales outside the limit of waste can (now or in the future)
  - Required facility maintenance per N.J.A.C. 7:26 could require permits each event per N.J.A.C. 7.7A
  - Cap maintenance can be limited due to timing restrictions for suitable meadow habitat areas for threatened and/or endangered avian species



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AMERICANS WITH DISABILITIES ACT VS WATERSHED & LAND MANAGEMENT

(Perfunctory Approval)

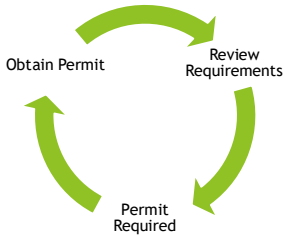
- Do regulations allow for streamlined compliance with ADA - No
- NJT was required to raise a platform for ADA compliance
  - Platform was elevated out of floodway
  - Floodway displacement was reduced
  - Calculations were presented indicating reduced flood risk with elevated platform
  - Hardship waiver would be granted regardless of outcome
- NJDEP Required HEC-RAS modeling a $50K task
- HEC-RAS modeling resulted in comparable results to previously provided calculations

10

PERMIT REQUIREMENTS VS PERMITTING REQUIREMENTS

(Circular Reference)

- NJDEP regulations which require stormwater management (N.J.A.C. 7:26 & N.J.A.C. 7:8) can result in creation of wetlands
- NJPDES permits (N.J.A.C. 7:14A) and landfill permits (N.J.A.C. 7:26) can require disturbance of wetlands and/or riparian areas on a regular basis for maintenance and monitoring
- Compliance with all regulations can result in an endless permitting loop



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Path Forward

- Work with experienced professionals
- Set expectations early
- Interpret regulations conservatively to understand NJDEPs intent
  - Thorough understanding of regulations will minimize surprises throughout project execution
- Seek out and understand NJDEP Policy Decisions v. statutory requirements.
  - Investigate experience from others in industry/trade groups
  - Determine when to push back
- Conduct a comprehensive pre-application with all regulatory stakeholders
- Know when new regulations will be enacted and if there is a grandfathering provision
- Internal NJDEP Dispute Resolution

12

13

ARCHER
ATTORNEYS AT LAW

Links

Site Remediation Reform Act 2.0 v. Brownfields Act

- Title 58 Water and Water Supply Chapter 10B Hazardous Discharge Site Remediation - https://dep.nj.gov/wp-content/uploads/srp/brownfield_csrr_act_njsa_5810b-1.pdf
- Administrative Requirements for Site Remediation - N.J.A.C. 7:26C - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_26c.pdf
- Technical Requirements for Site Remediation - N.J.A.C. 7:26E - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_26e.pdf
- Regulations of the New Jersey Site Remediation Professional Licensing Board - N.J.A.C. 7:26I - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_26i.pdf
- NJDEP Proposed Rules - NJDEP| Rules and Regulations | 20241021a

Contaminated Site Redevelopment and Remediation v. Land use

- Characterization of Contaminated Ground Water to Surface Water Technical Guidance - https://dep.nj.gov/wp-content/uploads/srp/gw_discharge_to_sw_tech_guidance.pdf
- Technical Requirements for Site Remediation - N.J.A.C. 7:26E - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_26e.pdf
- Freshwater Wetlands Protection Act Rules – N.J.A.C. 7:7A - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_7a.pdf
- Flood Hazard Area Control – N.J.A.C. 7:13 - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_13.pdf

Stormwater v. Surface Water (Policy Decision)

- Pollutant Discharge Elimination System – N.J.A.C. 7:14A - https://dep.nj.gov/dwq/all-division-rules-and-regulations/njpdes/
- Stormwater Management Rules – N.J.A.C. 7:8 - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_8.pdf
- Freshwater Wetlands Protection Act Rules – N.J.A.C. 7:7A - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_7a.pdf

Solid Waste v. Freshwater Wetlands

- Division of Solid and Hazardous Waste Rules – N.J.A.C. 7:26 - https://www.state.nj.us/dep/dshw/resource/rules.htm
- Freshwater Wetlands Protection Act Rules – N.J.A.C. 7:7A - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_7a.pdf

American with Disabilities Act v. Watershed & Land Management

- Americans with Disabilities Act - 49 CFR § 37.42A - https://www.ecfr.gov/current/title-49/subtitle-A/part-37#37.42
- ADA Oversight Procedure 35 – ADA Review - https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/117586/op-35-ada-review-06-2018.pdf
- Flood Hazard Area Control – N.J.A.C. 7:13 - https://dep.nj.gov/wp-content/uploads/rules/rules/njac7_13.pdf

Permit Requirements v. Permitting Requirements

- See links above.

Path Forward

- Office of Administrative Hearings and Dispute Resolution https://dep.nj.gov/oahdr/

ROUX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

STATE OF WEST VIRGINIA, STATE OF ALABAMA, STATE OF ARKANSAS, STATE OF GEORGIA, STATE OF IDAHO, STATE OF IOWA, STATE OF KANSAS, COMMONWEALTH OF KENTUCKY, STATE OF LOUISIANA, STATE OF MISSISSIPPI, STATE OF MISSOURI, STATE OF MONTANA, STATE OF NEBRASKA, STATE OF NORTH DAKOTA, STATE OF OHIO, STATE OF OKLAHOMA, STATE OF SOUTH CAROLINA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF TEXAS, STATE OF UTAH, STATE OF WYOMING, WEST VIRGINIA COAL ASSOCIATION, GAS AND OIL ASSOCIATION OF WEST VIRGINIA, INC., AMERICA'S COAL ASSOCIATIONS, and **ALPHA METALLURGICAL RESOURCES, INC.**, *Plaintiffs*, v. **LETITIA JAMES**, in her official capacity as the Attorney General of New York, **SEAN MAHAR**, in his official capacity as Interim Commissioner of the New York State Department of Environmental Conservation, and **AMANDA HILLER**, in her official capacity as the Acting Tax Commissioner of the New York State Department of Taxation and Finance, *Defendants.*	Civil Action No. 1:25-cv-168 (BKS/DJS)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs State of West Virginia, State of Alabama, State of Arkansas, State of Georgia, State of Idaho, State of Iowa, State of Kansas, Commonwealth of Kentucky, State of Louisiana, State of Mississippi, State of Missouri, State of Montana, State of Nebraska, State of North Dakota, State of Ohio, State of Oklahoma, State of South Carolina, State of South Dakota, State of Tennessee, State of Texas, State of Utah, State of Wyoming, West Virginia Coal Association, Gas and Oil Association of West Virginia, Inc., America's Coal Associations, and Alpha Metallurgical Resources, Inc. bring this civil action against Defendants for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. The State of New York believes it can seize control over the makeup of America's energy industry. In an unprecedented effort, New York has set out to impose tens of billions of dollars of liability on traditional energy producers disfavored by certain New York politicians. These energy producers needn't operate in New York before becoming a target. And New York consumers won't bear the brunt of these crushing new costs once they're imposed. Rather, New York intends to wring funds from producers and consumers in *other* States to subsidize certain New-York-based "infrastructure" projects, such as a new sewer system in New York City.

2. The Climate Change Superfund Act is an ugly example of the chaos that can result when States overreach. It imposes retroactive fines on traditional energy producers for their purported *past* contributions to greenhouse gas emissions (a term new York applies to certain substances, N.Y. ENV'T CONSERV. LAW § 75-0101(7)), which were lawful

operations endorsed by both federal and state regulators. And rather than focusing on greenhouse-gas emissions released in New York, the Act punishes a small group of energy producers for global greenhouse gases emitted from *all* sources into the atmosphere from 2000 to 2018. Yet coal, oil, and natural gas were helping New York during that time. They helped keep the lights on in Albany, manufacture the steel that supported New York City's iconic skyscrapers, and fuel the industry that keeps New York ports humming.

3. This liability could be devastating to traditional energy producers. Indeed, the ruinous liability that the Act promises—especially when paired with similar efforts that might arise in other States—could force coal, oil, and natural gas producers to shutter altogether.

4. Unfortunately for New York, the U.S. Constitution has something to say about the State's retroactive and extraterritorial shakedown. Among other things, the Constitution gives Congress the power "[t]o regulate commerce … among the several states." U.S. CONST. art. I, § 8, cl. 3. In creating that grant, the Founders recognized that certain categories of conduct are best regulated through nationwide rules. And the Commerce Clause implies the converse as well: a patchwork of state-by-state regulations on some subjects subverts the States' common interest and must be prohibited.

5. Congress exercised its Commerce Clause power in this context by enacting the Clean Air Act. The Act regulates certain sources' emission of pollutants into the air in a variety of ways. For instance, the Clean Air Act empowers the Environmental Protection Agency to address greenhouse emissions from fossil-fuel-fired energy facilities through New Source Performance Standards. And EPA imposes procedures for new or

substantially modified facilities to use the best available control technology for greenhouse gas emissions. So while States have "the primary responsibility" to prevent and control "air pollution … *at its source*," 42 U.S.C. § 7401(a)(3) (emphasis added), the Clean Air Act gives the federal government the chief role in determining interstate emissions standards.

6. And that choice makes sense. Emissions standards that vary from one State to another would divide the States and counter the goal of promoting interstate trade that helped unite the States under one constitution. So for that reason, decisions about "[t]he basic and consequential tradeoffs involved" in deciding how much fossil-fuel generation there should be in the "coming decades" rest with Congress (and, subject to an appropriate delegation, federal executive agencies). *West Virginia v. EPA*, 597 U.S. 697, 729-30 (2022). Even so, New York has purported to take that task on for itself through the levies in the Act.

7. The Commerce Clause not only vests Congress with the power to regulate interstate trade, but it also "contain[s] a further, negative command" that effectively forbids the enforcement of "certain state [economic regulations] even when Congress has failed to legislate on the subject." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). New York cannot ignore the Commerce Clause and impose rules that fall within the Clause's negative implications. And for that matter, New York cannot "legislate for, or impose its own policy upon[,] the other" States. *Kansas v. Colorado*, 206 U.S. 46, 95 (1907). Yet the Climate Change Superfund Act looks exactly like the "state tariffs" that constituted "one of the chief evils that led to the adoption of the Constitution" and the Commerce Clause. *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549 (2015).

8. The Commerce Clause is hardly the only problem with the Climate Change Superfund Act. Quite the opposite: the Act violates the U.S. Constitution, the New York Constitution, and federal law for several reasons.

9. *First*, the inherent structure of the U.S. Constitution precludes the Act. The Supreme Court has already recognized that States must tread carefully when regulating interstate emissions at all, at least outside the context of a cooperative federalism scheme imposed by Congress. Interstate disputes over air and water resources "demand[]" federal resolution. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972) ("*Milwaukee I*"). If States were instead free to exercise "independent and plenary regulatory authority" over the same emissions—as New York purports to do here—the result would be "chao[s]," including "confrontation between sovereign states," "impossible to predict [] standard[s]," and a wholly "irrational system of regulation." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987). Such dangerous outcomes are just over the horizon if the Climate Change Superfund Act is allowed to stand.

10. The Constitution also recognizes the "equal sovereignty" afforded to all States. *Shelby County v. Holder*, 570 U.S. 529, 544 (2013). "[I]t follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). And "[o]ur system of government … imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Zschernig v. Miller*, 389 U.S. 429, 442-43 (1968). Yet the Act imposes significant penalties on energy producers for harms

allegedly caused by greenhouse gas emissions beyond New York—including emissions from abroad. It shows no regard for equal sovereignty and no awareness of the complications that could arise from direct state involvement in this international problem. The Constitution forbids that extraterritorial effort.

11. *Second*, the Clean Air Act preempts the Climate Change Superfund Act. State laws preempted by a federal statute may not be enforced under the Supremacy Clause. And the Second Circuit has found that the Clean Air Act leaves only a "slim reservoir" of state authority to regulate greenhouse gas emissions outside of the Clean Air Act's regulatory scheme: The Clean Air Act "permit[s] only state lawsuits brought under the law of the pollution's source state." *City of New York v. Chevron Corp.*, 993 F.3d 81, 100 (2d Cir. 2021) (cleaned up). New York's Act authorizes the State to levy billions of dollars in fines for greenhouse gas emissions from sources *beyond* New York's borders. That's outside the "slim reservoir" the Clean Air Act left to the States.

12. *Third*, the Act violates the domestic and foreign Commerce Clauses. By targeting and discriminating against large energy companies located outside of New York, the Act imposes significant barriers to interstate and international trade. Billions of dollars in fines will negatively impact energy production and drive-up energy costs in other States, especially those States that rely heavily on the fossil-fuel-related energy sector, such as West Virginia. And here again, the Act harms the United States' foreign policy by creating contradictory domestic regulatory stances on greenhouse gas emissions.

13. *Fourth*, the Act violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Article One, Section 6 of the New York

Constitution. The Due Process Clause protects citizens from "arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). In serving this principle, the Due Process Clause demands that state law shall not be "unreasonable" or "arbitrary" and it must serve a "real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Here, the Act violates these protections because it imposes a harsh, retroactive penalty against a select few energy producers who lawfully extracted and refined fossil fuels. And it imposes this fine in an unfair and flawed with insufficient procedural safeguards.

14. *Fifth*, the Act violates the Equal Protection Clause of the Fourteenth Amendment. In operation and effect, the Climate Change Superfund Act aims to protect New York energy producers while harming out-of-state ones. According to the U.S. Energy Information Administration, "New York is consistently among the nation's top producers of hydroelectricity." *New York: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Jan. 16, 2025), http://bit.ly/4jMdht2. It also pursues nuclear, solar, and wind energy production. In contrast, producers targeted by the Climate Change Superfund Act—oil, natural gas, and coal—are almost non-existent in New York. The State has no significant proved petroleum reserves, has few natural gas reserves, and has no coal mines or economically viable coal reserves. Thus, the Climate Change Superfund Act "aim[s] to promote domestic industry" in a "purely and completely discriminatory" way, which "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985); *see*, *e.g.*, N.Y. Assemb. A03351-B. Reg. Sess. Transcript (June 7, 2024) (statement of Jeffrey

Dinowitz, Assemblyman), https://tinyurl.com/2mk5pbtx (bill sponsor expressing hope that the bill would force producers to "put the money where it should go," that is, into solar technologies).

15. *Sixth*, the Act imposes an excessive fine in violation of the Eighth Amendment to the U.S. Constitution. The Constitution prohibits the government from imposing excessive fines as a form of punishment. *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 609-10 (1993). But the Act does that by punishing covered energy producers for their purported role in greenhouse gas emissions and their impacts on climate change in New York. And the amount of the penalty is unconstitutionally excessive—subjecting energy producers to hundreds of millions or even billions of dollars in penalties for greenhouse gas emitted over 18 years.

16. *Seventh*, the Act is an unconstitutional taking in violation of the Fifth Amendment to the U.S. Constitution and Article I, Section 7 of the New York Constitution. A regulatory taking occurs when the government goes "too far" in restricting a landowner's ability to use his own property. *74 Pinehurst LLC v. New York*, 59 F.4th 557, 564 (2d Cir. 2023). The Act's retroactive penalties impose substantial economic impact on covered energy producers and significantly interfere with those producers' investment-backed expectations.

17. Plaintiffs thus file this action to vindicate the interests of States, consumers, producers, and employers who will be directly harmed if the Climate Change Superfund Act is allowed to stand. The Court should enjoin Defendants from enforcing the Act and declare it unlawful.

PARTIES

Plaintiffs

18. Plaintiff State of West Virginia is a sovereign State of the United States of America. West Virginia is one of America's leading energy-producing States, ranking fifth among all States in total energy production based on the most recent data. Among other things, the State is the second largest coal producer, fifth largest natural gas producer, and fourteenth largest crude oil producer. West Virginia seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. John B. McCuskey is the Attorney General of West Virginia. He is authorized to bring legal actions on behalf of the State of West Virginia and its citizens.

19. Plaintiff State of Alabama is a sovereign State of the United States of America. Alabama is an energy-rich State with deposits of coal, crude oil, and natural gas. Mining and extraction are major economic drivers. Alabama is also a heavy consumer of traditional energy because some of its major industries, such as the automotive manufacturing and forestry product sectors, are particularly energy intensive. The State generates revenue from the production and use of traditional fuels, such as gasoline. Alabama seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Steve Marshall is the Attorney General of Alabama and is authorized to conduct litigation on behalf of the State and its citizens.

20. Plaintiff State of Arkansas is a sovereign State of the United States of America. Arkansas brings this suit through its attorney general, Tim Griffin. General

Griffin is authorized to "maintain and defend the interests of the state in matters before the United States Supreme Court and all other federal courts." Ark. Code § 25-16-703.

21. Plaintiff State of Georgia is a sovereign State of the United States of America. Christopher M. Carr is the Attorney General of Georgia. He is authorized to bring legal actions on behalf of the State of Georgia and its citizens.

22. Plaintiff State of Idaho is a sovereign State of the United States of America. Raúl R. Labrador is the Attorney General of Idaho. He is authorized to bring legal actions on behalf of the State of Idaho and its citizens.

23. Plaintiff Iowa is a sovereign State of the United States of America. Iowa sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Iowa brings this suit through its attorney general, Brenna Bird. She is authorized by Iowa law to sue on the State's behalf under Iowa Code § 13.2.

24. Plaintiff State of Kansas is a sovereign State of the United States of America. Kris W. Kobach is the Attorney General of Kansas. He is authorized to bring legal actions on behalf of the State of Kansas and its citizens. *See* Kan. Stat. Ann. Sec. 75-702.

25. Plaintiff Commonwealth of Kentucky is a sovereign State of the United States of America. Kentucky is one of America's leading energy-producing States, ranked number five in coal production with some 5% of the nation's output according to the most recent data. Among all sources Kentucky produced 2390.8 trillion BTUs of energy in 2022. Kentucky seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Russell M. Coleman is the duly elected Attorney General of Kentucky. He has constitutional, statutory, and common-law authority to bring suit on behalf of the

Commonwealth and its citizens. *See* Ky. Rev. Stat. § 15.020; *see also Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362–65 (Ky. 2016).

26. Plaintiff State of Louisiana is a sovereign State of the United States of America. Elizabeth B. Murrill is the Attorney General of the State of Louisiana. She is authorized by Louisiana law to sue on the State's behalf. *See* La. Const. art. IV, § 8. Her offices are located at 1885 North Third Street, Baton Rouge, Louisiana 70802.

27. Plaintiff State of Mississippi is a sovereign State of the United States of America. Lynn Fitch is the Attorney General of Mississippi. She is authorized to bring legal actions on behalf of the State of Mississippi and its citizens.

28. Plaintiff State of Missouri is a sovereign State of the United States of America. Andrew Bailey is the Attorney General of Missouri. He is authorized to bring legal actions on behalf of the State of Missouri and its citizens. Plaintiff Missouri, its political subdivisions, and its citizens are harmed by Defendants' actions. Coal provides two-thirds of Missouri's electricity output, the fourth highest of any State. Missouri is also a net energy consumer and is greatly harmed by increases in energy prices.

29. Plaintiff State of Montana is a sovereign State of the United States of America. Montana is an energy-producing state, rich in fossil fuels. Montana ranks 12th in oil production and 20th in natural gas production nationally. Montana is the sixth-largest coal producing state. Montana seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Austin Knudsen is the Attorney General of Montana. He is authorized to bring legal actions on behalf of the State of Montana and its citizens.

30. Plaintiff State of Nebraska is a sovereign State of the United States of America. Michael T. Hilgers is the Attorney General of Nebraska. He is authorized to bring legal actions on behalf of the State of Nebraska and its citizens.

31. Plaintiff State of North Dakota is a sovereign State of the United States of America. North Dakota is an energy-producing powerhouse and obtains a large share of its tax revenue directly and indirectly from the development of natural resources. Among other sources of energy production, North Dakota is ranked third among the States in crude oil production, seventh among the States in coal production (first in lignite coal production), and ninth among the States in natural gas production. Drew Wrigley is the Attorney General of North Dakota and is authorized to "[i]nstitute and prosecute all actions and proceedings in favor or for the use of the state." N.D.C.C. § 54-12-01(2).

32. Plaintiff State of Ohio is a sovereign State of the United States of America. Ohio is one of America's leading energy-producing States, ranking eighth among all States in total electricity production as of 2023. Among other things, Ohio also had the fourth-largest electricity sales in the nation, and was the largest oil producing-state east of the Mississippi River. Ohio seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Dave Yost is the Attorney General of Ohio. He is authorized to bring legal actions on behalf of the State of Ohio and its citizens.

33. Plaintiff State of Oklahoma is a sovereign State of the United States of America. Oklahoma sues to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests. Oklahoma brings this suit by and through its Attorney General, Gentner Drummond, who is authorized by Oklahoma law to sue on Oklahoma's behalf. *See*

Okla. Stat. tit. 74, § 18b(A)(2)-(3). His offices are located at 313 Northeast 21st Street, Oklahoma City, Oklahoma, 73105.

34. Plaintiff State of South Carolina is a sovereign State of the United States of America. Alan Wilson is the Attorney General of South Carolina. He is authorized to bring legal actions on behalf of the State of South Carolina and its citizens.

35. Plaintiff State of South Dakota is a sovereign State of the United States of America. Marty Jackley is the Attorney General of South Dakota. He is authorized to bring legal actions on behalf of the State of South Dakota and its citizens.

36. Plaintiff the State of Tennessee is a sovereign State of the United States of America. Tennessee is home to a leading coal-production company, among other members of the energy protection industry, and sues to vindicate its sovereign, quasi-sovereign, and proprietary interests. Jonathan Skrmetti, the Attorney General and Reporter of Tennessee, is authorized by statute to try and direct "all civil litigated matters … in which the state … may be interested." Tenn. Code Ann. § 8-6-109(b)(1).

37. Plaintiff State of Texas is a sovereign State of the United States of America. Texas brings this suit through its attorney general Ken Paxton. He is the chief legal officer of the State of Texas and has the authority to represent Texas in civil litigation. *Perry v. Del Rio*, 67 S.W.3d 85, 92 (Tex. 2011).

38. Plaintiff State of Utah is a sovereign State of the United States of America and a significant contributor to energy production. According to recent data, Utah is the fourteenth largest coal producer, thirteenth largest natural gas producer, and ninth largest crude oil producer. Similar to West Virginia, Utah seeks to vindicate its sovereign, quasi-

sovereign, financial, and proprietary interests. Derek E. Brown is the Attorney General of Utah. He is authorized to bring legal actions on behalf of the State of Utah and its citizens.

39. Plaintiff State of Wyoming is a sovereign State of the United States of America. Wyoming is one of America's leading energy-producing States, ranking fourth in total energy production based on the most recent data. Wyoming is the largest coal producing state in the United States and holds about one-third of U.S. recoverable coal reserves at producing mines. Wyoming is also the seventh-largest crude oil producer and ranks among the top ten states in both natural gas reserves and marketed natural gas production. Wyoming seeks to vindicate its sovereign, quasi-sovereign, financial, and proprietary interests, including its interest in protecting its citizens. Bridget Hill is the Attorney General of Wyoming. She is authorized to bring legal actions on behalf of the State of Wyoming and its citizens.

40. Plaintiffs West Virginia Coal Association ("WVCA") is a non-profit trade association representing the interests of companies engaged in the mining of coal within the State of West Virginia. WVCA's producing membership accounts for most of West Virginia's underground and surface coal production of both thermal and metallurgical coal. WVCA also represents hundreds of associate members that supply an array of services to the mining industry, including permitting, environmental, and engineering consulting firms; mining equipment manufacturers; coal transportation companies; coal consumers and land and mineral holding companies. WVCA's primary goal is to enhance the viability of West Virginia coal as a source of domestic fuel by facilitating environmentally responsible

coal mining through reasonable, equitable, and achievable state and federal policy and regulation.

41. Plaintiff Gas and Oil Association of West Virginia, Inc. is a non-profit corporation working to promote and protect all aspects of the oil and natural gas industry in West Virginia. GO-WV supports and advocates for its 500 member companies and their thousands of employees, as they contribute to the growth and prosperity of West Virginia by safely providing reliable clean energy to meet the needs of our state and our nation.

42. Plaintiff America's Coal Associations ("ACA") is an organization comprised state coal industry trade associations and coal advocacy groups working together to inform and educate Americans about the coal industry and its vital role in the country's energy and economic security. ACA also advocates for coal and coal-fired electric utilities across the country. ACA develops strategies on national coal policies and regulations impacting the coal industry and voices its position to Congress and other political leaders.

43. The ACA's member-associations[1] represent entities that produce coal in the States responsible for the vast majority of U.S. coal production. Thus, the entities represented by ACA's members will be adversely impacted by the Climate Change Superfund Act's unlawful attempt to levy billions of dollars in fines against all fossil fuel

[1] ACA's members include the following non-profit associations: the Rocky Mountain Mining Institute ("RMMI"); the Kentucky Coal Association ("KCA"); the Illinois Coal Association ("ICA"); Indiana-based Reliable Energy, Inc. ("REI"); the Montana Coal Council ("MCC"); the Ohio Coal Association ("OCA"); the Pennsylvania Coal Alliance ("PCA"); the Texas Mining and Reclamation Association ("TMRA"); the Utah Mining Association ("UMA"); the West Virginia Coal Association ("WVCA"); American Coal Council; Energy Policy Network; Tennessee Mining Association; Women's Mining Coalition; and Wyoming Mining Association ("WMA").

producers who satisfy the act's arbitrary jurisdictional nexus. Together, the members of ACA represent most of the nation's production of thermal and metallurgical coal from both underground and surface mines. The coal producing states represented by the ACA account for 136,000 jobs, $10.6 billion in wages and $2.3 billion in state and local tax revenues and total national economic impact of roughly $43.5 billion. Thermal coal-fired electric generating power plants that located in these states and across the country provide an additional $261 billion in economic activity and 381,000 jobs. The American iron and steel industry, which depends on metallurgical coal produced in these States, accounts for another 547,000 jobs and $186 billion in economic activity.

44. Plaintiff Alpha Metallurgical Resources, Inc. ("Alpha Metallurgical Resources" or "Alpha") is a Tennessee-based mining company. By and through its subsidiaries (collectively with Alpha Metallurgical Resources, "Alpha"), Alpha operates coal mines in both West Virginia, where it operates four surface and twelve underground mines, and Virginia, where it operates two surface and three underground mines. Alpha's mission is to create long-term value for its stakeholders by mining metallurgical coal with a primary focus on safety, environmental stewardship, and efficiency. Alpha, which produced over 16 million short tons of coal in 2023, is one of the largest coal producers in the United States, but it maintains no operations in the State of New York.

Defendants

45. Defendant Letitia James is the Attorney General of New York. Defendant James is responsible for administering and enforcing New York's Climate Change

Superfund Act as well as issuing implementing regulations. Defendant James is sued in her official capacity.

46. Defendant Sean Mahar is the Interim Commissioner of the New York State Department of Environmental Conservation. Defendant Mahar is responsible for administering the Climate Change Superfund Act, including issuing cost recovery demands under the Act to covered energy producers. Defendant Mahar is sued in his official capacity.

47. Defendant Amanda Hiller is the Acting Tax Commissioner of the New York State Department of Taxation and Finance. Defendant Hiller is responsible for administering the "climate change adaption fund," which includes collecting and depositing funds received pursuant to the Act. Defendant Hiller is also responsible for issuing funds for qualifying expenditures under the "climate change adaption cost recovery program." Defendant Hiller is sued in her official capacity.

JURISDICTION AND VENUE

48. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) because this case presents federal questions under the Constitution and laws of the United States.

49. The Court has authority to award relief against Defendants under 42 U.S.C. § 1983. *See Am. Auto. Mfrs. Ass'n v. Cahill*, 53 F. Supp. 2d 174, 185 (N.D.N.Y. 1999). The Court also has equity jurisdiction under *Ex Parte Young*, 209 U.S. 123 (1908), may award injunctive relief under 28 U.S.C. § 1651, and can award declaratory relief under 28 U.S.C. § 2201(a).

50. Venue in this Court is proper under 28 U.S.C. § 1391(b) because Defendants maintain offices and conduct their business in the Northern District of New York. *See Smolen v. Brauer*, 177 F. Supp. 3d 797, 801 (W.D.N.Y. 2016) ("For the purposes of venue, state officers 'reside' in the district where they perform their official duties.").

51. This Court has authority to grant the requested declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2022, and its inherent equitable powers.

STANDING

52. Plaintiff States have standing to sue in their sovereign and quasi-sovereign capacities.

53. Plaintiff States are injured by Defendants' attempts to use their law to impose billions of dollars in fines on traditional energy companies for actions conducted by Plaintiff States and their residents within Plaintiff States' borders. Doing so interferes "with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989).

54. The Act is a form of regulation. "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *BMW*, 517 U.S. at 572 n.17. The "obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). By applying their law extraterritorially, Defendants have offended equal sovereignty.

55. Each Plaintiff State likewise has an "interest in not being discriminatorily denied its rightful status within the federal system." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 607 (1982). A State is denied that equal right when another State tries to exercise jurisdiction over it, its interests, and its citizens in violation of federal law. As further explained below, the Climate Change Superfund Act does exactly that here.

56. Plaintiff States also have standing as sovereigns based on their impending loss of tax revenue if the sale of certain energy products in their States is diminished. *Wyoming v. Oklahoma,* 502 U.S. 437, 447 (1992); *see also Dep't of Com. v. New* York, 588 U.S. 752, 767 (2019) (indirect loss of funding suffices for standing). Many Plaintiff States, including West Virginia, derive substantial revenue from severance taxes and other special taxes derived from the energy production that the New York law targets.

57. "Jurisdiction is also supported by the States' interest as *parens patriae.*" *Maryland v. Louisiana,* 451 U.S. 725, 737 (1981). A State may act as the "representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way." *Id.*

58. Here, Plaintiff States have an "interest in protecting [their] citizens from substantial economic injury presented by" the Act's attempt to regulate nationwide energy policy. *Id.* at 739. In addition, considering coal, oil, and natural gas's central roles in producing key industrial products (including petrochemicals and steel), the Act threatens to upend vast swathes of Plaintiff States' economies even beyond the energy sector. Even when "no question of boundary is involved, nor of direct property rights belonging to the complainant state[s], … it must surely be conceded that if the health and comfort of the

inhabitants of a state are threatened"—and here, as well, their constitutional rights—"the state is the proper party to represent and defend them." *Kansas,* 185 U.S. at 141-42; *see also Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 338 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (finding *parens patriae* standing where State's "quasi-sovereign interests involve[ed] … concern for the health and well-being—both physical and economic—of [their] residents in general" (cleaned up)); *Georgia v. Pa. R. Co.*, 324 U.S. 439, 447 (1945) ("The rights which Georgia asserts, parens patriae, are those arising from an … scheme, it is said, has injured the economy of Georgia.").

59. Plaintiff States also have standing as purchasers of energy. States purchase massive quantities of energy in performing their sovereign duties. The Act will make energy less affordable and less available, *see City of New York*, 993 F.3d at 93, harming Plaintiff States' ability to exercise their sovereign functions. *See Maryland*, 451 U.S. at 737 ("It is clear that the plaintiff States, as major purchasers of natural gas whose cost has increased as a direct result of Louisiana's imposition of the First-Use Tax, are directly affected in a 'substantial and real' way so as to justify their exercise of this Court's original jurisdiction."); *Orangeburg v. FERC,* 862 F.3d 1071, 1074 (D.C. Cir. 2017) ("[T]he city has demonstrated an imminent loss of the opportunity to purchase a desired product (reliable and low-cost wholesale power).").

60. Plaintiff States' standing is confirmed by *Pennsylvania v. West Virginia*, in which the Supreme Court exercised original jurisdiction to stop constraints imposed by West Virginia on the commercial flow of natural gas to neighboring states. 262 U.S. 553 (1923). The Court recognized Pennsylvania's standing both "as the proprietor of various

public institutions and schools" that use gas for fuel and "as the representative of the consuming public whose supply will be similarly affected." *Id.* at 591.

61. Likewise, in *Maryland v. Louisiana*, the Supreme Court held that Maryland and other States had standing to sue Louisiana over its tax on pipeline companies, as the plaintiff States asserted "substantial and serious injury to their proprietary interests as consumers of natural gas as a direct result of the allegedly unconstitutional actions of Louisiana." 451 U.S. at 739. The plaintiff States there also had an "interest in protecting [their] citizens from substantial economic injury presented by imposition of the [tax]." *Id.*

62. As in each of these prior cases, Plaintiff West Virginia, its political subdivisions, and its citizens are harmed by the Act and Defendants' actions. The country runs on West Virginia energy. In 2021, for instance, West Virginia was the 5th highest producer of total energy in the United States. *State Profile and Energy Estimates: West Virginia*, U.S. ENERGY INFO. ADMIN., https://tinyurl.com/2yubrfet (last updated Jan. 18, 2024). Coal and natural gas make up the bulk of that production. *Id.* In other words, West Virginia is both a substantial producer and consumer of the energy sources that the Act means to target.

63. The Bureau of Economic Analysis reports that in 2023, employees in West Virginia working in oil and gas extraction received over $271 million in compensation, and employees in pipeline transportation received over $170 million. *SAGDP4N Compensation of Employees,* U.S. BUREAU OF ECON. ANALYSIS, https://tinyurl.com/ddsp67h. These revenue streams would be threatened by the ruinous liability of the Act; substantial economic injury is imminent.

64. In Fiscal Year 2022, West Virginia received close to $700 million in tax revenue from the State severance tax on coal and natural gas. *Severance Taxes*, W.V. TAX DIV. at 3, https://tinyurl.com/zvamv8cj (last visited Jan. 14, 2025). Here again, this important source will be diminished by lowered production resulting from the levies in the Climate Change Superfund Act.

65. West Virginia is but one of many States that the Climate Change Superfund Act injures.

66. For instance, Plaintiff State of Montana, its political subdivisions, and its citizens are similarly harmed by the Act and Defendants' actions. Montana provides invaluable energy production for the United States. Montana ranks 12th in oil production and 20th in natural gas production nationally. As of 2022, Montana had 45,000 plus total oil wells and 5,000 plus active wells. Montana has the nation's largest recoverable coal reserves, about 30 percent of the US total reserves, accounting for about 5 percent of US coal production. In 2023, Montana mined approximately 28 million tons of coal. The Act improperly targets the State of Montana, both as a producer and consumer of energy.

67. According to a study by the American Petroleum Institute, the oil and gas industry supported nearly 57,000 jobs, 8 percent of the state's total employment, and contributed over $7 billion toward the state's economy in 2021.

68. In 2024, $77,151,000 in severance taxes was paid by Montana Coal Producers. The coal severance tax funds a variety of programs across the state, including education. In 2023, coal mines also paid approximately $5,105,485 in property taxes to the counties where the mines are located.

69. Similarly, Plaintiff State of North Dakota, its political subdivisions, and its citizens are harmed by the Act and Defendants' actions. North Dakota is ranked third among the States in crude oil production, seventh among the States in coal production (first in lignite coal production), and ninth among the States in natural gas production. *See* U.S. Energy Info. Admin., *North Dakota State Profile*, https://www.eia.gov/state/?sid=ND (last accessed Feb. 3, 2025). Those industries employ thousands of people in communities large and small across the State, and North Dakota obtains a large share of its State revenues—billions of dollars annually—directly and indirectly from the development of those natural resources. Those, jobs, communities, and State revenues will all be severely impacted by the ruinous liability that the Act threatens to impose.

70. Likewise, Plaintiff State of Oklahoma, its political subdivisions, and its citizens are harmed by the Act and Defendants' actions. Oklahoma is a leader in the nation's production of energy. For example, in 2022, Oklahoma was the 7th highest producer of total energy in the United States. *State Profile and Energy Estimates: Oklahoma*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/state/?sid=OK. Much of the energy production in Oklahoma is in the form of natural gas and crude oil production. In 2023, Oklahoma was the nation's 6th largest producer of marketed natural gas and producer of crude oil. *Id.* That same year, Oklahoma's 5 crude oil refineries had a combined processing capacity of about 547,000 barrels per calendar day, which is about 3% of the U.S. total refining capacity. *Id.*

71. The Act will cause significant harm to Oklahoma, including creating risks to Oklahoma's economy. In 2024, Oklahoma's oil and natural gas production contributed over

$60 billion annually in total economic impact in Oklahoma. *2024 Economic Impact in Oklahoma*, OKLAHOMA ENERGY RESOURCES BOARD, https://oerb.com/wp-content/uploads/2025/01/Economic-Impact_Full-Report.pdf. Oklahoma's oil and natural gas industry impacts twenty-three percent of total statewide economic activity and supports over 255,000 jobs. *Id.*

72. Further, the Act will deprive the State of Oklahoma of millions of dollars in revenue to support schools, roads, bridges, and other public priorities. The oil and natural gas industry recently contributed $3.2 billion in total taxes, including $132 million to the revenue stabilization fund in Oklahoma in 2024. *Id.* The Act would threaten this significant source of tax revenue for the State of Oklahoma.

73. Similarly, Plaintiff State of Utah, its political subdivisions, and its citizens are harmed by the Act and Defendants' actions. Utah provides invaluable energy production for the United States. For example, in 2023, Utah was the ninth largest producer of crude oil in the country. U.S. Crude Oil Production by State, 1995-2023, https://tinyurl.com/ye25sve3 (last visited on February 5, 2025). In addition, Utah ranks as a significant producer of natural gas and coal. The Act improperly targets the State of Utah, both as a producer and consumer of energy.

74. The Utah Division of Oil, Gas and Mining estimates that, for Fiscal Year 2021, Utah received over $260 million in tax revenue and royalty/lease payments related to natural gas, crude oil, coal, and other minerals. Utah's revenues will be diminished based on New York's Climate Change Superfund Act.

75. In short, these and other States will be substantially harmed in a variety of ways by the Act.

76. In addition, Plaintiff West Virginia Coal Association and Plaintiff Gas and Oil Association of West Virginia each have associational standing to bring this challenge because: (1) at least one of each of their members has individual standing to sue in its own right; (2) challenging the Act is germane to Plaintiffs' respective purposes; and (3) members' individual participation is unnecessary in this purely legal challenge. *See Hunt v. Wash. State Apple Advert. Comm*'n, 432 U.S. 333, 343 (1977); *Do No Harm v. Pfizer Inc.*, 96 F.4th 106, 112 (2d Cir. 2024). An order enjoining Defendants from enforcing the Act against Plaintiffs' covered members would redress the harm to those members of being forced to pay cost-recovery demands under the Act.

77. At least one member from both West Virginia Coal Association and Gas and Oil Association of West Virginia has individual standing to sue. *See Do No Harm*, 96 F.4th at 112-13 (elements of individual standing). The Act is expected to lead to cost recovery demands to at least some of Plaintiffs' members. New York has made clear that it will issue targeted companies cost recovery demands for hundreds of millions or billions of dollars. Targeted companies will then be forced to expend time and resources to argue that they do not owe any money to New York under the unlawful Act in defending against a cost-recovery demand. So each company has standing in its own right.

78. Challenging the Act is germane to the purposes of both the West Virginia Coal Association and the Gas and Oil Association of West Virginia. Both represent their members in advocating against and challenging laws that negatively impact their members'

businesses, including laws that impose unreasonable and unlawful financial and regulatory burdens on the private sector.

79. For much the same reason, Plaintiff Alpha Metallurgical Resources, Inc. has standing. Alpha was a coal producer in years covered by the Climate Change Superfund Act and remains a leading domestic producer of coal today. A memorandum issued by the bill's sponsors identified Alpha—using the name under which it operated until 2021, Contura Energy—among the "covered companies" under the Act. Alpha thus faces a credible threat of enforcement.[2] Even if the Act is never enforced against Alpha, the burden it imposes on the interstate commerce in coal will place Alpha and the other members of the industry at a competitive disadvantage to producers of alternative sources of energy. Finally, the discriminatory effects of the law will disproportionately harm Alpha and other energy producers doing business in West Virginia and other coal producing States in the Central Appalachian region. These injuries will be remedied by the relief from the Climate Change Superfund Act sought in this Action.

FACTUAL ALLEGATIONS

Operation and Regulation of Traditional Energy Production

80. Traditional energy—that is coal, oil, and natural gas—is essential to American prosperity. Today, fossil fuels account for more than 83% of American energy production. *See Monthly Energy Review*, U.S. ENERGY INFO. ADMIN. (Jan. 2025),

[2] Alpha reserves any and all arguments that the Act could not lawfully be enforced against it, including any argument that it does not have a "sufficient connection with [New York] to satisfy the nexus requirements of the United States Constitution." N.Y. ENV'T CONSERV. LAW § 76-0103.

https://tinyurl.com/52puxu2w. Fossil fuel production employs millions of Americans, contributes billions to the economy each year, and provides the energy reliability and security that's necessary to keep the American economic engine running. Altogether, "energy from generally plentiful and affordable supplies of fossil fuels … has been considered one of the important enablers of domestic economic growth." Victor K. Der, *Carbon Capture and Storage: An Option for Helping to Meet Growing Global Energy Demand While Countering Climate Change*, 44 U. RICH. L. REV. 937, 938 (2010). And that's especially true in energy-centric locales like West Virginia.

81. Coal, one of the oldest and most abundant fossil fuels, has played a central role in industrialization and energy production since the Industrial Revolution. *See Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865, 866 (1999). Its use drives advancements in manufacturing, transportation, and electricity generation. Though coal's exceptional importance in generating steam for electricity generation is perhaps the use that first comes to mind, America is quite literally built on coal. Metallurgical coal is the "raw material for coke, a key ingredient in steel manufacturing," and "[t]here is no present substitute for metallurgical coal." Michael R. Drysale, *Farewell to Coal?*, 65 RMMLF-INST 17-1, 17-3 (2016).

82. Even as the sector has evolved in recent years, exports continue to "project[] that coal will remain the nation's largest energy source for, at least, several decades." Sam Kalen, *Coal's Plateau and Energy Horizon?*, 34 PUB. LAND & RESOURCES L. REV. 145, 147 (2013). For good reason: coal (along with natural gas) is essential to maintaining reliability, especially when weather conditions don't allow renewables to generate electricity. *See*

MISO, *Miso's Response to the Reliability Imperative* at 1 (Feb. 2024), https://tinyurl.com/ya7tz7y9 (noting the need for "new dispatchable generation"—that is, generation "that can be turned on and off and adjusted as needed"). Because "coal mining operations presently contribute significantly to the Nation's energy requirements," Congress has found that it is "essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry." 30 U.S.C. § 1201(b); *see also id.* § 1201(j) ("[S]urface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation"). And coal production continues to grow internationally, as countries like China, India, and Indonesia have seen production increase significantly. *See* INT'L ENERGY AGENCY, *Coal Mid-Year Update* (July 2024), https://tinyurl.com/mvkpfnzw.

83. Natural gas is critical to America's story, too, even as it has come on the scene more recently. Now, it is widely used for electricity generation, home heating, and industrial applications. *See* Josh Lute, *LNG Terminals: Future or Folly?*, 43 WILLAMETTE L. REV. 621, 627 (2007). It is also a key component in the production of chemicals. The development of liquefied natural gas technology has expanded its accessibility, making it a flexible and globally traded energy resource. In short, "[n]atural gas is one of the most important energy resources in the world today." Lincoln L. Davies & Victoria Luman, *The Role of Natural Gas in the Clean Power Plan*, 49 J. MARSHALL L. REV. 325, 327 (2015). And "[t]he United States Department of Energy predicts that domestic consumption of natural gas will grow steadily and significantly over the next twenty years as the demand for energy in the United States expands." James B. Lebeck, *Liquefied Natural Gas*

Terminals, Community Decisionmaking, and the 2005 Energy Policy Act, 85 TEX. L. REV. 243, 246 (2006).

84. No one doubts oil's importance, either. Along with gas, it is one "of our most important natural resources." *Burford v. Sun Oil Co.*, 319 U.S. 315, 320 (1943). Most obviously, oil drives the U.S. transportation sector, which in turn facilitates most all the nation's economy. *Use of Energy Explained: Energy Use for Transportation*, U.S. ENERGY INFO. ADMIN., https://tinyurl.com/43byhxkw (updated Aug. 16, 2023). It's also a key raw material in petrochemical industries. It is thus "essential to modern society." Keith B. Hall, *Hydraulic Fracturing and the Baseline Testing of Groundwater*, 48 U. RICH. L. REV. 857, 858 (2014). And along with natural gas, oil is expected to supply about 60% of the country—and the world's—energy supply in the years to come. *Id.; see also* Mot. for Leave to File Bill of Compl. 7-13, *Alabama v. California*, 2024 WL 4426505 (May 22, 2024) (No. 22O158).

85. Perhaps recognizing benefits like these, "fossil fuels remain the federal government's favorite energy source," Molly Elkins, *Winds of Change: Using the Tax Regime to Facilitate the Renewable Energy Transition*, 22 HOUS. BUS. & TAX L. J. 77, 85 (2021), despite vocal opposition from some quarters (and despite sometimes-unlawful attacks on the industry during the last administration). In fact, coal, oil, and natural gas have been regulated *and encouraged* by the United States government for years, including during the years the New York Climate Change Superfund Act now proposes to levy upon. "The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and

overseas projects, and leases for fuel extraction on federal land." *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020). Quite simply, America relies on traditional energy.

86. New York has long relied on traditional energy, too. Although New York law requires the State to obtain 70% of its electricity from renewable resources by 2030, its current production of nuclear power and hydropower are insufficient to meet its energy needs. NYSERDA, DRAFT CLEAN ENERGY STANDARD BIENNIAL REVIEW 53 (July 1, 2024), https://tinyurl.com/mryc4x3d. So it relies on traditional energy—primarily natural gas—to meet its demands. For example, in 2023, natural gas-fired power plants accounted for almost three-fifths of New York's generating capacity and provided 46% of the State's electricity net generation. *New York State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN. (Jan. 16, 2024), https://tinyurl.com/mvypfrsk. New York also imports substantial amounts of coal for domestic use, much of it from Pennsylvania.

87. But even though New York remains an aggressive *consumer* of fossil fuels, it produces next to none of them. New York has few natural gas reserves, so most of its natural gas comes from out of state, including from Plaintiff States. *Id.* New York also gets its fuel ethanol from out of state. New York's only fuel ethanol production plant has a capacity of about 62 million gallons per year, and the State consumes about 534 million gallons of fuel ethanol annually. *Id.* In sum, the State depends on energy supplies from elsewhere—usually traditional energy—to meet nearly 85% of its energy needs. *Id.* This structure incentivizes New York to impose aggressive regulation on fossil-fuel producers in other States to "gain an economic comparative advantage" relative to the producing States. Jason Scott Johnston, *Climate Change Confusion and the Supreme Court: The*

Misguided Regulation of Greenhouse Gas Emissions Under the Clean Air Act, 84 NOTRE DAME L. REV. 1, 50 (2008).

88. These energy choices—and the benefits that come with them—entail necessary tradeoffs. All energy use, including energy deriving from "renewable" sources, creates some pollution. Traditional energy is no different. So while encouraging fossil fuel use in New York and the other 49 States, Congress has also acted to regulate those industries to address consequences like pollution and climate change.

89. Concerned that these pollutants harmed the environment, Congress used its power under our Constitution to regulate the emission of pollutants in the Clean Air Act in 1970. The Act employes a "cooperative federalis[t]" approach, which places "primary responsibility for enforcement on state and local governments." *N.Y. Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 319-20 (2d Cir. 2003). But each State only gets to determine "how best to achieve EPA emissions standards *within its domain*." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (emphasis added). Nothing in the Clean Air Act empowered States to regulate interstate gas emissions emanating from outside their borders. Instead, the Clean Air Act reserves for EPA the role as "primary regulator of [domestic] greenhouse gas emissions." *Id.*

90. In other words, the Clean Air Act leaves only a "slim reservoir" of state authority to regulate greenhouse gas emissions *outside* of the Act's regulatory scheme. *City of New York*, 993 F.3d at 100. That means the Clean Air Act "permit[s] only state lawsuits brought under the law of the pollution's *source* state." *Id.* (cleaned up). And Congress's laws concerning interstate emissions trump inconsistent state laws.

New York's Attempt to Unilaterally Target Select Traditional Energy Producers With Punitive Measures

91. New York, however, was not satisfied with the Clean Air Act's provisions limiting greenhouse gas emissions. U.S. courts have not held coal, oil, and natural gas companies liable for the effects of climate change. *See Big Oil in Court – The latest trends in climate litigation against fossil fuel companies*, ZERO CARBON ANALYTICS (Sept. 11, 2024), https://tinyurl.com/59acz4zr. Even so, New York legislators decided that traditional energy producers were, in fact, akin to "tobacco companies" who "lied about" the consequences of their products and were later forced to settle for "zillions of dollars." N.Y. Assemb. A03351-B. Transcript (statement of Jeffrey Dinowitz, Assemblyman), https://tinyurl.com/2mk5pbtx; *see also id.* (bill sponsor insisting that targeted companies were "committing egregious harm to the environment and I think they knew it, they knew it from day one. They covered it up, they lied about it[,] and people are suffering as a result of it").

92. New York thus passed the "climate change superfund act," which authorizes the State to levy billions of dollars in fines on fossil fuel companies over the next two decades for their alleged contribution to greenhouse gas emissions. N.Y. ENV'T CONSERV. LAW § 76-0103. Those payments are then paid into a fund to support projects to address the alleged effects of climate change. *Id.*

93. The Act targets the largest energy producers that satisfy a jurisdictional "nexus" with New York. The Act applies to "[r]esponsible part[ies]"—"any entity (or a successor in interest to such entity described herein), which, during any part of the covered

period, was engaged in the trade or business of extracting fossil fuel or refining crude oil and is determined by the department to be responsible for more than one billion tons of covered greenhouse gas emissions." N.Y. ENV'T CONSERV. LAW § 76-0101(20). Ordinary end users—that is, those not engaged in the business of extraction—are not included as responsible parties.

94. The Act's coverage definition excludes "any person who lacks sufficient connection with the state to satisfy the nexus requirements of the United States Constitution." *Id.* The Act does not provide any explanation for what "nexus" might be sufficient.

95. The Act's "[c]overed period" runs from January 1, 2000 through December 31, 2018. N.Y. ENV'T CONSERV. LAW § 76-0101(7).

96. "Covered greenhouse gas emissions" means "the total quantity of greenhouse gases released into the atmosphere during the covered period, expressed in metric tons of carbon dioxide equivalent." N.Y. ENV'T CONSERV. LAW § 76-0101(6). The Act targets producers based on greenhouse gas emissions that are released not only during each producer's extraction and refinement of fossil fuels but also for those greenhouse gas emissions that are generated by the end users of those fuels—users over whom that producer exercised no control. *Id.*

97. The Act does not list specific covered energy producers, but it does call out the largest domestic oil, gas, and coal producers as "bear[ing] a much higher share of responsibility for climate damage to New Yort State than is represented by" the Act's fines.

N.Y. S. 2129 §2(6)(c). So the Act makes clear that it targets, among other entities, energy producers like ExxonMobil Corporation and Shell USA, Inc.

98. The Act imposes a penalty on out-of-state energy producers. The Act imposes severe, retroactive, and arbitrary penalties on out-of-state energy producers through a "cost recovery demand." N.Y. ENV'T CONSERV. LAW § 76-0103(3)(b). Only producers to whom New York attributes more than "one billion metric tons" of carbon dioxide are subject to a demand under the Act. *Id.* § 76-0103(c). On information and belief, no entity in the State of New York would qualify as a liable "responsible party" under that definition. A list of anticipated "covered companies" under the Act in a memorandum issued by the bill's sponsors did not include any producer with operations in New York. And a bill sponsor declared on the Act's passage that it was intended only to make "Big Oil" pay. *See* Liz Krueger, *Governor Signs Climate Change Superfund Act*, OFF. OF N.Y. STATE SENATOR LIZ KRUEGER (Dec. 26, 2024), https://tinyurl.com/47brs745.

99. Under the Act, the New York Department of Environmental Conservation is to issue "notices of cost recovery demands" to "responsible part[ies]." N.Y. ENV'T CONSERV. LAW § 76-0103(4)(a)(iii). Those parties will be held "strictly liable" for their purported share of greenhouse gas emissions; the notices will demand payment to the State as punishment for that purported liability. *Id.*, § 76-0103(3)(a).

100. The Act provides a method to calculate each responsible party's cost recovery demand.

101. First, the Act sets the total assessment rate at $3 billion per year, with a goal of raising $75 billion over 25 years. S. 2129 §2(6)(c). It is not clear where the Assembly

derived this figure; the bill sponsor suggested he simply "didn't want it to be too little, [and] … didn't want it to be too much." N.Y. Assemb. A03351-B. Transcript (statement of Jeffrey Dinowitz, Assemblyman), https://tinyurl.com/2mk5pbtx. Similarly, the legislative findings only obliquely say that the total assessment "represents a small percentage of the extraordinary cost to New York State for preparing from and preparing for climate-driven extreme events over the next 25 years." N.Y. S. 2129 § 2(6)(c).

102. Second, each responsible party's "cost recovery demand" equals the responsible party's alleged proportionate share of covered greenhouse gas emissions (again, as defined by the statute to span a period from 2000 to 2018, N.Y. ENV'T CONSERV. LAW § 76-0101) applied to an aggregate payment $75 billion, N.Y. ENV'T CONSERV. LAW § 76-0103(2)(b). Although labelled a "responsible party," the targeted producer is "strictly liable, without regard to fault." *Id.* § 76-0103(3). Thus, the Act codifies a form of market-share liability. "Market-share liability has been one of the most controversial doctrines in tort law, with a strong plurality of courts rejecting the doctrine on the ground that it radically departs from the fundamental tort principle of causation." Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV. 447 (2006).

103. Third, in determining the amount of greenhouse gas emissions attributable to a given responsible party, the Act includes specific metrics for coal, crude, and fuel gases. *Id.* § 76-0103(3)(e). Every million pounds of coal represents 942.5 metric tons of carbon dioxide; every million barrels of crude oil represents 432,180 metric tons of carbon dioxide;

and every million cubic feet of fuel gas represents 53,440 metric tons of carbon dioxide. *Id.* It is not clear how these purported equivalencies were determined.

104. The Act's calculation of responsible parties' cost recovery demands is not limited to greenhouse gas emissions in New York. Rather, the penalties are calculated based on global emissions. *See* N.Y. ENV'T CONSERV. LAW § 76-0101(6) (defining covered emissions to include "the total quantity of greenhouse gases released into the atmosphere"). Specifics are left largely to the implementing agency. N.Y. ENV'T CONSERV. LAW § 76-0103(4). For instance, it is not clear if costs will be reapportioned if New York is unable to collect against a foreign-controlled entity (like Saudi Aramco) because of sovereign immunity.

105. Responsible parties must either pay the cost recovery demand in full by the applicable payment date, which the Act provides is September 30, 2026, *see* N.Y. ENV'T CONSERV. LAW § 76-0101(1), or in 24 annual installments with 8% of the total due in the first installment, and 4% due in each of the following 23 installments, *id.* § 76-0103(3)(h).

106. The Act uses penalties paid by out-of-state energy producers to subsidize a "climate change adaptation fund." N.Y. ENV'T CONSERV. LAW § 76-0103(8). These funds will be used for various "climate change adaptation infrastructure projects," including restoring coastal wetlands, upgrading stormwater drainage systems, preparing for hurricanes and other extreme weather events, and "undertaking preventive health care programs and providing medical care to treat illness or injury caused by the effects of climate change supporting." *Id.* § 76-0101(2).

107. The Act also requires at least 35% of program benefits to go to projects that directly benefit disadvantaged communities. N.Y. S. 2129 § 2(6)(d). These "disadvantaged communities" include "members of groups that have historically experienced discrimination on the basis of race or ethnicity." N.Y. ENV'T CONSERV. LAW § 75-0111(1)(c)(ii).

108. The Act's supporters anticipate that this law is only the beginning. On passage, Assemblyman Jeffrey Dinowitz proclaimed that New York had "set[] a precedent for the nation to follow." *Governor Hochul Signs Landmark Legislation Creating New Climate Superfund*, GOVERNOR KATHY HOCHUL (Dec. 26, 2024), https://tinyurl.com/4j7xnrc2. And supporters hoped these "punitive measures" would spur other, similar actions in New York in 2025, too. *Id.* (quoting Sierra Club Atlantic Chapter Conservation Director Roger Downs).

CLAIMS FOR RELIEF

COUNT I

Federal Preemption Under the U.S. Constitution

109. All allegations above are incorporated by reference.

110. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land." U.S. CONST. art. VI. In ratifying the Supremacy Clause, the States "surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies." *Rhode Island v. Massachusetts*, 37 U.S. 657, 737 (1838).

111. Alongside granting States the right to self-govern, the Constitution also ensures that States co-exist with "equal sovereignty." *Shelby County*, 570 U.S. at 544. The Constitution requires comity—the respect each State must give to each other State's right to self-govern. *See Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 245 (2019) (observing that the Constitution incorporates some forms of comity between the states). To preserve this balance, each State may legislate only within its own jurisdiction. *See Bonaparte*, 104 U.S. at 594 ("No State can legislate except with reference to its own jurisdiction."). The result is that "the statutes of Missouri" cannot be the governing authority in "the State of New York." *See N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

112. One way a State violates "equal sovereignty" is by "impos[ing] economic penalties" intended to change out-of-state conduct that is lawful where it occurred. *See Gore*, 517 U.S. at 572. A State is entitled to regulate only "persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880); *see also Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

113. The Act invades the equal sovereignty of other States by unconstitutionally imposing liability and penalties on energy companies outside of New York for greenhouse gas emissions produced by lawful activities outside of New York's borders. Other than acknowledging that a responsible party must "satisfy the nexus requirements of the United States Constitution," N.Y. ENV'T CONSERV. LAW § 76-0101(20), the Act applies to "the *total* quantity of greenhouse gases released into the atmosphere" over an 18-year period. *Id.* § 76-0101(6) (emphasis added). The emissions are not said to originate from New York.

The decisions that led to those emissions are not said to have occurred in New York. The effects of those emissions are not said to have unique effects on the State of New York. So the greenhouse gas emissions New York seeks to penalize have no direct connection to the State. New York is thus attempting to "directly regulate[] transactions which take place … wholly outside the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality op.).

114. On top of that, Plaintiff States and their citizens are directly affected by New York's Act. Massive fines will inevitably lead to increased energy costs and decreased energy production. The Act does not identify any in-state, out-of-state laws, or federal laws violated during the covered period. Instead, it imposes fines for greenhouse gas naturally released during any "extraction, storage, production, refinement, transport, manufacture, distribution, sale, and use of fossil fuels or petroleum products." N.Y. ENV'T CONSERV. LAW § 76-0101(6). All these are allegedly lawful activities by the covered energy producers. But the only conceivable way for these producers to avoid facing similar levies seriatim for other periods will be for them to change their behavior in Plaintiff States and elsewhere. This approach effectively regulates *intrastate* energy production elsewhere, even though regulation of intrastate energy matters is a core state function. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

115. Because the Act regulates out-of-state energy producers that operate lawfully within their respective states, the Act violates the principles of comity and equal sovereignty the Constitution protects.

116. What's more, in crafting the Constitution, the "Framers split the Atom of sovereignty" between federal and state governments. *U.S. Term Limits Inc., v. Thornton*, 514 U.S. 779, 838 (1995) (Kenndy J., concurring).

117. The Act directly undermines principles of federalism by inserting state law into an area where there is a strong "need for a uniform rule of decision," *Milwaukee I*, 406 U.S. at 105 n.6. Federal law must "remain[] unimpaired for dealing … with essentially federal matters," *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947), that is, those matters implicating "uniquely federal interests … committed by the Constitution and laws of the United States to federal control." *Boyle v. United States*, 487 U.S. 500, 504 (1998) (cleaned up). Uniquely federal interests exist where the application of state law "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943).

118. The U.S. Supreme Court has already recognized that laws and litigation purporting to address climate issues do in fact implicate a "special federal interest," *Am. Elec. Power Co.*, 564 U.S. at 424, such that applying "the law of a particular State would be inappropriate," *id. at 422.* Federal law addresses subjects "where the basic scheme of the Constitution so demands," including "air and water in their ambient or interstate aspects." *Id.* at 422 (quoting *Illinois*, 406 U.S. at 103); *accord City of New York*, 993 F.3d at 91. And federal authorities maintain exclusive control over the interstate energy markets, another subject necessarily implicated here. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016). Were States entitled to go their own way on such subjects, energy companies

would face tremendous "vagueness" and "uncertainty," and States would risk "chaotic confrontation" with each other. *Ouellette*, 479 U.S. at 496.

119. Despite this need for federal control and national uniformity, the Climate Change Superfund Act purports to assume control over these issues. It imposes a unique and atypical means of regulating interstate air and the production of interstate energy. It decides that greenhouse gas emissions must be punished and assigns liability for them based on a *global* perspective. "A state may mandate that products for sale in the state meet certain specifications; it may not, however, as a condition of doing business in the state, require that the manufacturer meet those specifications everywhere." Tyler L. Shearer, *Locating Extraterritoriality: Association for Accessible Medicines and the Reach of State Power*, 100 B.U. L. REV. 1501, 1543 (2020).

120. As Judge Henry Friendly observed, "'[e]nvironmental protection is undoubtedly an area 'within national legislative power,'" *Am. Elec. Power*, 564 U.S. at 421 (quoting Henry Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421-22 (1964)). In other words, "[t]he[] sovereign prerogatives" that New York purports to exercise in the Act "are now lodged in the Federal Government." *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007).

121. In short, New York's "attempt to set national energy policy through its own … laws would effectively overrule the policy choices made by the federal government and other [S]tates." *Minnesota by Ellison v. Am. Petroleum Inst.*, 63 F.4th 703, 719 (8th Cir. 2023) (cleaned up) (Stras, J., concurring). If allowed to stand, the Act would "scuttle the nation's carefully created system for accommodating the need for energy production and

the need for clean air. The result would be a balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010).

122. The Constitution also prohibits and preempts state actions interfering with foreign federal relations. *Zschernig*, 389 U.S. at 442-43. "Our system of government … imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Id.* This "field of foreign affairs" is entrusted to "the President and the Congress." *Id.* at 432. So while States may interact with other nations, they cannot do so in a way "where there is evidence of clear conflict [with] the policies" adopted by the federal government. *See Am. Ins. Ass'n v. Garamendi*, 539, U.S. 396, 421 (2003). Likewise, "when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power, the Supremacy Clause prevents the state statute from taking effect." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012) (en banc).

123. But the Act launches such an intrusion by expanding its reach internationally. Though the Act has an ill-defined "nexus" requirement, it expressly contemplates demanding money from "foreign nation[s]." N.Y. ENV'T CONSERV. LAW § 76-0101(9). And because New York is a populous state with huge energy needs, the Act will likely cover foreign energy producers. Indeed, most of New York's oil comes from Canada. *New York State Profile and Energy Estimates*, *supra*. Early lists of potential targets included companies in the United Kingdom, France, Brazil, Australia, Russia, Switzerland, Norway, Spain, South Africa, Colombia, and Italy—including some sovereign-controlled producers.

124. Allowing a single State like New York to enact a law that interferes with the federal government's response to a global policy challenge like greenhouse gas emissions "sow[s] confusion and needlessly complicate[s] the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *City of New York*, 993 F.3d at 103. Here, the Act imposes $75 billion in after-the-fact sanctions on energy companies for the very conduct, based on the same theory of harm, that is the focus of national diplomatic efforts.

125. This effort intrudes upon the federal government's foreign affairs power by "bypass[ing] the various diplomatic channels that the United States uses to address this issue, such as the U.N. Framework and the Paris Agreement." *Id.* That's especially the case where "the United States' longstanding position in international climate-change negotiations is to oppose the establishment of liability and compensation schemes at the international level." *Id.* at 103 n.11.

126. Because the Act violates Constitutional law protecting equal sovereignty and the United States foreign policy, it is preempted under the Supremacy Clause.

127. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT II

Preemption Under the Clean Air Act

128. All allegations above are incorporated by reference.

129. State laws that are expressly preempted by a federal statute may not be enforced under the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

130. When a state attempts to insert itself in a regulatory field expressly reserved for the federal government, those state laws are preempted. Indeed, "[i]t is a familiar and well-established principle that the Supremacy Clause … invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 712-13 (1985). Because federal law does not necessarily need to explicitly preempt state laws, *see Ouellette*, 479 U.S. at 491, unconstitutional interference arises when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County*, 471 U.S. at 713 (cleaned up).

131. Congress enacted the Clean Air Act to address a national concern over air pollution. *See* 42 U.S.C. § 7401(b)(1) (describing how the purpose of the Clean Air Act was to "protect and enhance the quality of the Nation's air resources"). While States have "the primary responsibility" to prevent and control "air pollution … *at its source*" under the Clean Air Act, 42 U.S.C. §7401(a)(3) (emphasis added), the Act deems EPA to be "the best suited [entity] to serve as primary regulator of greenhouse gas emissions." *Am. Elec. Power Co.*, 564 U.S. 410, 427 (2011). And because greenhouse gases present a "national question," any regulatory decisions must be informed by "our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* at 427.

132. In implementing the Clean Air Act, EPA must engage in a "complex balancing" act that considers "the appropriate amount of regulation in any particular greenhouse gas-producing sector," along with "our Nation's energy needs and the possibility of economic disruption." *Am. Elec. Power Co.*, 564 U.S. at 427. To achieve this

balance, the Act grants EPA the ability to categorize which entities fall under the Act's regulatory scheme. *See* 42 U.S.C. § 7411(b), (d). Under this authority, EPA has placed coal, oil, and natural gas producers under Clean Air Act jurisdiction. *See Clean Air Act Standards and Guidelines for the Oil and Natural Gas Industry*, EPA, https://bit.ly/3WhsGrc (last visited Jan. 14, 2025). Indeed, although the lawfulness of particular measures is still a matter of some dispute, the past administration purported to aggressively employ its Clean Air Act powers to regulate greenhouse gas emissions and fossil-fuel-related activities. *See Biden-Harris Administration Finalizes Suite of Standards to Reduce Pollution from Fossil Fuel-Fired Power Plants*, EPA (Apr. 25, 2024), https://tinyurl.com/muyf3f6s.

133. Here, the Clean Air Act does not authorize New York's Act. The Second Circuit has already interpreted the Clean Air Act to "permit only state lawsuits brought under the law of the pollution's source state." *City of New York*, 993 F.3d at 100. By extension, an attempt by a State to regulate out-of-state pollutants is thus prohibited, whether through direct attempts like an "imposition of pollution standards" or indirect like imposing an "obligation to pay" or an "award of damages." *Id.* at 92. In other words, the Clean Air Act reflects the national, federal-level solution to the problem of interstate pollution. There is "no room for a parallel track." *Am. Elec. Power*, 564 U.S. at 425; *see also Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) (collecting authorities establishing that claims based on the "law of a non-source state" are preempted by the Clean Air Act).

134. The Clean Air Act preempts New York's Act because it imposes liability on energy producers for greenhouse gas emissions emitted outside of New York. The Act demands "recovery" from "responsible parties"—i.e., any business involved in "extracting fossil fuel or refining crude oil"—for their "strict liability" role in global warming. *See* N.Y. ENV'T CONSERV. LAW §§ 76-0101, 76-0103(3)(c). The statute will affect any "responsible party" provided they have a "sufficient connection to New York under the "constitution's nexus requirements." *Id.* § 76-0101. It does not limit itself to the production or emission of greenhouse gases within the State of New York. It imposes the law of a non-source State across the board.

135. Allowing New York to penalize energy producers for out-of-state emissions would "undermine [the] regulatory structure" provided by the Clean Air Act and would "lead to chaotic confrontation between sovereign states." *Ouellette*, 479 U.S. at 496-97 (cleaned up). The Second Circuit has at least once before struck down a New York law as preempted under the Clear Air Act, where the law did "not set requirements for air pollution control or abatement within New York, but, rather, attempt[ed] to control emissions in another state." *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003) (cleaned up). So too here.

136. Because the Clean Air Act preempts New York's Act, the Climate Change Superfund Act may not be enforced against Plaintiffs and Plaintiffs' citizens.

137. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT III

Violation of the Commerce Clause

138. All allegations above are incorporated by reference.

139. The Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate Commerce … among the several States." U.S. CONST. art. I, § 8, cl. 3. This affirmative grant of power also supplies a "dormant" limitation on States' ability to affect interstate commerce. *Healy*, 491 U.S. at 326 n.1. Under the dormant Commerce Clause doctrine, a State may not regulate in a way designed to "benefit in-state economic interests by burdening out-of-state competitors." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192 (1994). "[T]he Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (cleaned up). Indeed, a "long line of cases" confirm that "the Court will not hesitate to strike down a state law shown to have extraterritorial scope and an adverse impact on commerce occurring wholly outside the enacting state." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 63 F.3d 652, 659 (7th Cir. 1995).

140. So a State violates the dormant Commerce Clause when it "discriminat[es] against interstate commerce." *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355, 373 n. 18 (1994). Such discrimination "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

141. The Climate Change Act violates the dormant Commerce Clause because it discriminates against the important economic interests of other States by specifically targeting energy producers headquartered in other States with clearly excessive penalties. *See Nat'l Pork Prods. Council v. Ross*, 598 U.S. 356, 364 (2023). The Act discriminates against the economic interests of every other State by raising the costs of energy production by imposing massive fines on energy producers. While New York produces a small amount of natural gas, "[m]ost of the natural gas consumed … is produced in other states." *New York State Profile and Energy Estimates*, *supra*. The same is true for New York's oil consumption. *Id.* And New York has no coal producers. New York companies will not be targeted, only out-of-state ones. Indeed, the bill sponsor, in speaking in support of the bill, proudly and repeatedly touted how funds resulting from the Act would not be drawn from New York taxpayers. N.Y. Assemb. A03351-B. Transcript (statement of Jeffrey Dinowitz, Assemblyman), https://tinyurl.com/2mk5pbtx.

142. The Act also harms other States that depend largely on traditional energy production, like West Virginia, by penalizing them. New York leaves off the table its own preferred sources, like wind, solar, or other renewable energy sources. New York's clean energy sector makes up about a third of its energy market, *see* THOMAS P. DINAPOLI, RENEWABLE ELECTRICITY IN NEW YORK STATE 1 (Aug. 2023), but it needs to increase production if it is going to meet the statutorily required 70 percent of electricity coming from renewable energy sources by 2030. N.Y. PUB. SERV. LAW § 66-p (Consol. 2023). The Act appears to be an avenue to paying for that shift.

143. And indeed, the Act takes money from out-of-state energy producers and makes that money available to in-state clean energy producers. The Act earmarks the money for use in "Climate change adaptive infrastructure projects," *see* N.Y. ENV'T CONSERV. LAW § 76-0101(2), which can be made available to "private individuals." *Id.* § 76-0103(4)(a)(v). Those infrastructure projects could mean anything New York considers "designed to avoid, moderate, repair, or adapt to negative impacts caused by climate change." *Id.* § 76-0101(2). So if a private nuclear plant decided it wanted to improve infrastructure that makes it more efficient and competitive than out-of-state covered energy producers, it could receive those funds. It only would need to show that its improvements would mitigate climate damage simply—an easily satisfied standard for a clean-energy producer—as nearly any upgrade could be framed as addressing climate change.

144. What's more, the Act's imposition of retroactive strict liability means no out-of-state energy producer deemed responsible can escape payment. So by the Act's plain terms, the Act causes substantial harm to interstate commerce. *Cf. Pork Prods.*, 598 U.S. at 386-87 (noting that out-of-state pork producers' choice to be subject to California's law disfavors a finding of substantial harm to interstate commerce).

145. Overall, the Act's burdens on interstate commerce—upending the national energy markets, engendering hostility among the States, and raising costs to out-of-state persons—are "clearly excessive in relation to the putative local benefits," which consist only of a sum of money. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). That

disproportionality reveals New York's true purpose of attacking disfavored industries elsewhere.

146. The foreign Commerce Clause also restricts states from enacting laws that burden or discriminate against foreign commerce. U.S. CONST. art. I, § 8, cl. 3. This doctrine safeguards the federal government's exclusive authority to regulate international trade and ensures that the United States speaks with one voice to foreign countries. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). A unified approach is essential to maintain diplomatic consistency and avoid fragmented or conflicting state-level policies that could undermine national interests. *See id.* So the federal government's "scope of the foreign commerce power" is "greater" than the state's commerce power. *Id.* at 448. In application, this doctrine does not allow state laws to "excessive[ly] interfere" with foreign affairs. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66 (1st. Cir. 1999), *aff'd sub nom.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). This includes prohibiting state laws that "impos[e] a different, state system of economic pressure" against a foreign entity than what the federal government would impose. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000).

147. The Act violates the foreign Commerce Clause. The United States deals with 86 different countries to import close to 9 million petroleum barrels daily. *How much petroleum does the United States import and export?*, U.S. ENERGY INFO. ADMIN., https://bit.ly/40nFH53 (last visited Jan. 8, 2025). The United States also works cooperatively with foreign governments to "coordinate a global response to climate change and greenhouse gas emissions." *City of New York*, 993 F.3d at 88. But because the Act

covers any producer with "sufficient connection" to the state, it could easily cover foreign oil and gas producers. N.Y. ENV'T CONSERV. LAW § 76-0101(20). Indeed, the Act expressly lists foreign entities as a potential "responsible party." *See id.* 76-0101(9). A foreign entity then would face payment demands to the tune of billions, thus impacting their local costs, and bringing harm to their countries. This antagonism, in turn, will substantially affect the United States' foreign policy on coordinating efforts to combat greenhouse emissions.

148. The Act violates the dormant Commerce Clause and foreign Commerce Clause.

149. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT IV

Violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution

150. All allegations above are incorporated by reference.

151. The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

152. The Due Process Clause's "touchstone" principle is protecting individuals against "arbitrary action of government." *Wolff*, 418 U.S. at 558. In serving this principle, the Due Process Clause demands that state law shall not be "unreasonable" nor "arbitrary" and serve a "real and substantial relation to the object sought to be attained." *Nebbia*, 291

U.S. at 525. In other words, "a legitimate legislative purpose furthered by rational means" must exist. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

153. With "fundamental fairness" as its polestar, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 24 (1981), the Clause is particularly concerned with retroactive laws because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). And the principle that legislation usually applies only prospectively … protects vital due process interests, ensuring that individuals … have an opportunity to know what the law is before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later." *Opati v. Republic of Sudan*, 590 U.S. 418, 425 (2020). That's especially important for "unpopular groups or individuals" who may be targeted by retroactive laws. *See Landgraf*, 511 U.S. at 266.

154. The New York Act violates the Due Process Clause because its retroactive application is fundamentally unfair. It does this in two ways.

155. *First*, the Act imposes a harsh retroactive penalty on energy producers for greenhouse gas emissions emitted as long as 25 years ago and sweeps in over 18 years of conduct. So rather than confining the penalties to a "short and limited" period, *E. Enters. v. Apfel*, 524 U.S. 498, 526 (1998), the Act punishes energy companies for lawful actions taken long ago with no opportunity to know what the law was before they acted. *See id.* at 549-50 (Kennedy, J., concurring in the judgment and dissenting in part) (concluding that a law that "create[ed] liability for events which occurred 35 years ago" violated due process).

Especially considering how climate science has evolved over time, and activities during the relevant period were actually *encouraged* by relevant governmental authorities (New York included), it is not the case that the targeted companies "could have reasonably expected to be liable for a share of the remediation costs" over the course of this period. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1330 (Fed. Cir. 2001).

156. *Second*, the Act imposes an arbitrary and irrational punishment on energy producers that indicates the Act is ultimately "a means of retribution." *See Landgraf*, 511 U.S. at 270. Start with the Act's coverage period from January 1, 2000 to December 31, 2018. New York has no sound basis for choosing this 18-year period. Yes, the bill says that by 2000 "the science of climate change was well established and no reasonable corporate actor could have failed to anticipate regulatory action to address its impacts," N.Y. S. 2129 § 2(7), but that clashes against congressional legislation like the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act, which were passed decades before 2000 to address environmental concerns. Nor does it explain why 2018 is the end of the coverage date when greenhouse gas emissions continue to go in the atmosphere.

157. Not only does the Act lack a sound basis for choosing this eighteen-year period, it does not (and cannot) fairly attribute specific impacts in New York from specific greenhouse gas emissions. "Greenhouse gases, once emitted, become well mixed in the atmosphere, meaning U.S. emissions can affect not only the U.S. population and environment, but other regions of the world as well." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74

Fed. Reg. 66496, 66514 (Dec. 15, 2009). The converse is true, too: emissions from other regions of the world can affect New York. So the Act's attempt to blame specific energy producers for the purported impacts to New York from climate change caused by greenhouse gas emissions can't be done in a scientific way. It is even more arbitrary and unreasonable to assume that specific emissions from specific places caused specific weather events that then gave rise to a need for remediation.

158. New York tries to avoid this problem by including a method to determine the amount of greenhouse gas emissions attributable to any entity, N.Y. ENV'T CONSERV. LAW § 76-0103(3)(d), but the Act does not explain how it has arrived at its numbers. And as the Act acknowledges, it targets only a small number of large traditional-energy producers—it ignores greenhouse gas emissions from agriculture, farm animals, transportation, and more. End users are entirely excluded from the calculus unless those end users also happen to be producers. So ultimately, the energy producers are the sacrificial lamb for *all* greenhouse gas emissions—whether they caused them or not. The Act unfairly targets a small, disfavored group of energy producers for lawful actions taken over twenty years ago while ignoring the emissions produced from other sources.

159. *Third*, the Act imposes significant liability in an "imprecise manner" with none of the "protections" that are ordinarily afforded before punitive measures like these are imposed. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The Act tasks the New York Department of Conservation with determining whether a party is somehow "responsible for more than one billion tons of covered greenhouse gas emissions." The Act does not explain when a party becomes "responsible" for emissions, how such

emissions are to be measured, what sources will be used to determine responsibility, and how proportions will then be assigned. Instead, the Act promises only that the Department will adopt "methodologies using the best available science." N.Y. ENV'T CONSERV. LAW § 76-0103(4)(a)(i). Yet the law does not even provide clear pathways for targeted companies to challenge any of these determinations after the fact.

160. *Fourth*, even aside from the length of the covered period and the problems with attributing climate harms to certain emissions, the Act's retroactive application standing alone violates the Due Process Clause. The Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." *Bank Markazi v. Peterson*, 578 U.S. 212, 229 (2016). Generally, due process "does not permit the retroactive application of a statute if it has especially harsh and oppressive consequences." *Greenberg v. Comptroller of the Currency*, 938 F.2d 8, 11 (2d Cir. 1991). "The determination of whether a statute is impermissibly retroactive looks to whether application of the statutory provision attaches a new disability, in respect to transactions or considerations already past and should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Peralta-Taveras v. Att'y Gen.*, 488 F.3d 580, 584 n.2 (2d Cir. 2007).

161. All the relevant factors here show that the Act's retroactivity offends the U.S. Constitution. Producers had no warning that they would be held monetarily responsible for any perceived effects from the lawful emissions of greenhouse gases, particularly in a State with which they might have no connection whatsoever. The federal government, for

instance, did not even state a concern with greenhouse gas emissions under the Clean Air Act until 2009. Nothing suggests that even New York environmental regulators raised objections to the intrastate emission of greenhouse gases in New York. Instead, producers operated under the assumption that they were providing a useful product that produced substantial value for consumers, including government end-users. By conforming with the Clean Air Act and other environmental regulations, the producers had a reasonable expectation that they would not face additional liability. But now, they face ruinous costs, especially if other States accept New York's invitation to follow its "precedent" and impose additional retroactive sanctions based on the same emissions that New York purports to levy upon. None of this is lawful. *See Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 462 (D.C. Cir. 2017) (Kavanaugh, J.) ("[E]ven if EPA has statutory authority to retroactively disapprove the replacement of an ozone-depleting substance with [hydroflurocarbons], EPA plainly may not impose civil or criminal penalties on a manufacturer based on the manufacturer's past use of HFCs at the time when EPA said it was lawful to use HFCs.").

162. Because the Act violates the Constitution's due process protections, it cannot be enforced against Plaintiffs.

163. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

CLAIM V

Violation of the Due Process Clause of Article One § 6 of the New York Constitution

164. All allegations above are incorporated by reference.

165. The Due Process Clause of the New York State Constitution provides that no "person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I, § 6. "[T]he New York State Constitution's guarantees of equal protection and due process are virtually coextensive with those of the U.S. Constitution." *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 628 (S.D.N.Y. 1999), *aff'd*, 234 F.3d 1261 (2d Cir. 2000).

166. Like the federal constitution, the New York Constitution protects against certain retroactive applications of state law. "In order to comport with due process, there must be a persuasive reason for the potentially harsh impacts of retroactivity." *U.S. Bank Tr., N.A. as Tr. for LSF9 Master Participation Tr. v. Miele*, 197 N.Y.S.3d 656, 670 (N.Y. Sup. Ct. 2023).

167. First, as noted, the covered energy producers lacked any warning of a change in legislation, and it was entirely reasonable for them to rely on existing law covering their emissions during the covered period. They had no suggestion that they would be on the hook for billions of dollars to upgrade New York's infrastructure. What's more, during that period, "attribution science" (science connecting extreme weather events to climate change) was in its infancy, and still is subject to uncertainty. *See* JONATHAN D. HASKETT, CONG. RSHC. SERV., R47583, IS THAT CLIMATE CHANGE? THE SCIENCE OF EXTREME EVENT ATTRIBUTION 1-10 (2023). Hinging liability for vast infrastructure projects on unsettled science does not serve "a compelling public interest." *Vill. of Hempstead v. SRA Realty Corp.*, 617 N.Y.S.2d 794, 795 (N.Y. App. Div. 1994).

168. Second, "[c]onsideration of the scope of the legislation is critical to a rational basis analysis," including the "length of the retroactivity period." *U.S. Bank Tr.*, 197

N.Y.S.3d at 670. The length of the retroactive period is 18 years. New York courts have struck down retroactive laws covering far shorter periods. Eighteen years is an excessive amount of time for a law to retroactively apply.

169. Third, the public purpose of the retroactive application does not justify these extreme measures. "Retroactive legislation that reaches particularly far into the past and that imposes liability of a high magnitude relative to impacted parties' conduct raises substantial questions of fairness." *HSBC Bank USA, N.A. v. Besharat*, 195 N.Y.S.3d 380, 391 (N.Y. Sup. Ct. 2023). And here, the law imposes substantial liability for lawful—even expressly permitted—conduct over a long stretch of time. *See* All. of Am. Insurers v. Chu, 571 N.E.2d 672, 678 (N.Y. 1991) (explaining that "reliance on pre-existing law" is an appropriate consideration in evaluating a retroactive law). This punitive measure disrupts the settled expectations of the producers and the States within which they sit—that they could earn an appropriate return on the useful products that they provided.

170. Applying these factors shows New York's Act violates its Due Process law and causes significant and irreparable harm to Plaintiffs.

171. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

CLAIM VI

Violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution

172. All allegations above are incorporated by reference.

173. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

174. The Supreme Court "has consistently held that while a State may impose conditions on the entry of foreign corporations to do business in the State, once it has permitted them to enter, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny." *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117, 119 (1968). Unjustified differential treatment violates the Equal Protection Clause.

175. New York has not offered any legitimate purpose for distinguishing between large producers of three specific fuel types (all based outside of New York) and all other greenhouse-gas emitters (many of which are based inside New York).

176. If the aim of the statute were actually remediation, then legislation would be rationally related to such a purpose if it actually sought remediation from all the relevant emitters. Yet New York obviously did not take such an approach. The only reasonable supposition, then, is that New York defined "responsible" companies in such a way as to avoid placing any burden on any New York taxpayers. "[T]he purpose of [this] legislation … was discrimination itself." *Douglas by Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1247 (7th Cir. 1989); *see, e.g.*, N.Y. Assemb. A03351-B. Transcript (statement of Jeffrey Dinowitz, Assemblyman), https://tinyurl.com/2mk5pbtx (bill sponsor: "I just think that there are two sides here. Either on the side of our constituents or on the side of the big oil companies. I don't think there's any in between.").

177. Plaintiffs therefore seek prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT VII

Violation of the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution

178. All allegations above are incorporated by reference.

179. The Act imposes an excessive fine in violation of the Eighth Amendment of the U.S. Constitution. U.S. CONST. amend. VIII.

180. The Eighth Amendment provides in its Excessive Fines Clause that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. It is incorporated against the states under the Fourteenth Amendment's Due Process Clause. *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

181. The "Excessive Fines Clause limits the government's power to extract payments … as punishment for some offense." *Austin*, 509 U.S. at 609-10 (cleaned up). Because the "notion of punishment … cuts across the division between" civil and criminal law, the Clauses' protections extend to any statute that "serve[s] in part to punish." *Id.* at 610. This includes civil sanctions that are not solely remedial but also serve "either retributive or deterrent purposes." *Id.* In other words, the Clause also "protects against excessive civil fines." *Hudson v. United States*, 522 U.S. 93, 103 (1997).

182. Courts use a two-step inquiry when determining whether a financial penalty is excessive under the Eighth Amendment. *United States v. Viloski*, 814 F.3d 104, 108 (2d

Cir. 2016). At the first stage, the court determines whether the Excessive Fines Clause applies. *Id.* If it does, then the court looks at whether the fine is unconstitutionally excessive.

183. Here, the Excessive Fines Clause applies to the Act. The key inquiry is whether the fine could be characterized, "at least in part, as punitive." *Viloski*, 814 F.3d at 109 (cleaned up). "[P]urely 'remedial'" fines do not count. *Id.* The Act serves a retributive purpose. It punishes a small group of energy producers for their alleged role in climate change impacts while ignoring other producers, businesses, and consumers. This mismatch between the Act's provisions and its purported goal of mitigating the impacts of climate change shows that the Act's purpose, at least in part, is to punish large energy producers. Likewise, the Act makes no earnest effort to tie the sum of money assigned to these producers to the costs of climate change that the Act is intended to address. And it assigns the liability "without regard to fault," N.Y. ENV'T CONSERV. LAW § 76-0103(3), revealing that the Act is not a true means of allocating responsibility for past harm.

184. The levy is also unconstitutionally excessive. "A [levy] is unconstitutionally excessive if it is grossly disproportional to the gravity of a defendant's offense." *Viloski*, 814 F.3d at 110 (cleaned up). Courts use four factors to test for gross disproportionality: "(1) the essence of the [offense] of the [wrong-doer] and its relation to other [bad acts], (2) whether the [wrong-doer] fits into the class of persons for whom the statute was principally designed, (3) the maximum … fine that could have been imposed, and (4) the nature of the harm caused by the [wrong-doer's] conduct." *Id.* These factors are non-exhaustive. *Id.*

185. The Act's punishment is grossly disproportionate. The Act punishes a select group of energy producers over their lawful activities. The penalty is also based on lawful greenhouse gas emissions. While the Act claims that "the data necessary to attribute proportional responsibility is very robust," N.Y. S. 2129 § 2(7), it is impossible to determine which specific impacts in New York were caused by climate change and impossible to trace those impacts back to specific greenhouse gas emissions from a particular source. *See City of New York*, 993 F.3d at 92 (noting that the gases causing global warming "cannot be traced to their source"). So the Act imposes penalties that overestimate and arbitrarily attribute greenhouse gas emissions to covered energy producers while ignoring the emissions from other sources or other causes of climate change.

186. The resulting fine in the billions is grossly disproportionate and violates the Excessive Fines Clause.

187. Plaintiffs therefore seek prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT VIII

Violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution

188. All allegations above are incorporated by reference.

189. The Act effects a regulatory taking by imposing "cost recovery demands" that require energy producers to hand over funds to New York. N.Y. S. 2129 § 2(4). New York then uses those funds for its Climate Change Adaption Cost Recovery Program

without providing just compensation to energy producers. N.Y. S. 2129 § 2(4). The Court can prospectively enjoin these types of unlawful takings.

190. The Takings Clause of the Fifth Amendment states in part that private property may not "be taken for public use, without just compensation." U.S. CONST. amend. V. This Clause was "made applicable to the States through the Fourteenth Amendment." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005).

191. While "takings problems are more commonly presented … as a physical invasion by the government," "[e]conomic regulation[s]" can also be considered to "effect a taking." *E. Enters.*, 524 U.S. at 522-23.

192. "Regulatory takings analysis requires an intensive ad *hoc* inquiry into the circumstances of each particular case." *Buffalo Tchrs. Fed'n v. Tobe*, 464 F.3d 362, 375 (2d Cir. 2006). Courts consider three factors in determining whether a regulatory taking has occurred: "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017).

193. For the first factor, the economic burden here is significant. A select group of energy producers are forced to pay billions of dollars to fund climate change adaptation projects. *See* N.Y. ENV'T CONSERV. LAW §§ 76-0103(4)(iii), 76-0103(3)(g). Those penalties will have a severe economic impact on energy producers, consumers and businesses, and States throughout the country. So, like *Eastern Enterprises* where the Supreme Court found a "considerable financial burden" where a plaintiff had to make a retroactive payment

of $50 to $100 million, Plaintiffs face a significant economic burden. *E. Enters.*, 524 U.S. at 529.

194. The Act also "substantially interferes" with Plaintiffs' "reasonable investment-backed expectations." *E. Enters.*, 524 U.S. at 532. The key inquiry is whether the regulated entity had "sufficient notice." *Id.* at 535-36. The Takings Clause "provides a … safeguard against retrospective legislation concerning property rights." *Id.* at 533-34. And in *Eastern Enterprises*, the Supreme Court found this factor met primarily because the statute applied retroactively, "attach[ing] new legal consequences to [an employment relationship] completed before its enactment." *See id.* at 532 (quoting *Landgraf*, 511 U.S. at 270). Here, the Act also applies retroactively—an 18-year period running from 2000 to 2018. N.Y. S. 2129 § 2(7). And like *Eastern Enterprises*, the covered energy producers lacked sufficient notice they would be on the hook for billions to New York. As stressed already, energy producers were already complying with federal law and could not have reasonably expected that they would be punished for their lawful behavior. Further, producers made expensive capital expenditures—opening mines, producing energy, building refineries—with the expectation that these substantial outlays would be recovered *without* a multi-billion-dollar outlay piled on top. So the second factor is met here.

195. The third factor, the character of the government's action, may be strengthened in favor of the regulated entity when the "nature of the governmental action … is quite unusual." *E. Enters.*, 524 U.S. at 537. And the Act is quite unusual, targeting a small subset of energy producers and holding them strictly liable for damage that every other greenhouse gas producer has a part to play in—including cows. Amy Quinton, *Cows*

and Climate Change, UCDAVIS (June 27, 2019), https://bit.ly/3WmbbGm (observing that cows are the number one agricultural source of greenhouse gases). What's more, the Court in *Eastern Enterprises* noted this factor was met when a "solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused" because this "implicates fundamental principles of fairness underlying the Takings Clause." 524 U.S. at 537. Likewise, the Act singles out energy producers to bear a substantial financial burden based on past conduct unrelated to any commitment Plaintiffs made to New York. Only one other State has even attempted such a task, and that State (Vermont) is facing legal challenges of its own.

196. For these reasons, the Act effects an unconstitutional regulatory taking.

197. Because the Act violates the Takings Clause, it cannot be enforced against Plaintiffs.

198. If the Act is not declared invalid and enjoined, its significant penalties will cause irreparable harm to the Plaintiffs.

199. Plaintiffs therefore seek prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

CLAIM IX

Violation of the Takings Clause of Article One § 7 of the New York Constitution

200. All allegations above are incorporated by reference.

201. Like its federal counterpart, the New York Constitution prohibits the government from taking "[p]rivate property … for public use without just compensation." N.Y. CONST. art. I, § 7.

202. New York courts, like "[a]ll courts, of course, [are] bound by the United States Supreme Court's interpretations of Federal Statutes and the Federal Constitution." *People v. Kin Kan*, 574 N.E.2d 1042, 1045 (N.Y. 1991).

203. "The guarantee against Takings provided by the New York Constitution is generally treated as coextensive to that of the U.S. Constitution." *Heidel v. Hochul*, No. 20-CV-10462, 2021 WL 4942823, at *9 (S.D.N.Y. Oct. 21, 2021), *aff'd sub nom.*, *Heidel v. Governor of New York*, No. 21-2860-CV, 2023 WL 1115926 (2d Cir. Jan. 31, 2023).

204. As outlined in Count VIII, the Act is an unconstitutional taking of the Plaintiff's property in violation of Article One, Section Seven of New York's Constitution.

205. Plaintiffs are therefore entitled to prospective injunctive relief and declaratory relief under 28 U.S.C. § 2201.

COUNT X

Equitable Relief

206. All allegations above are incorporated by reference.

207. Federal courts have the power to enjoin state officials' unlawful actions. *Armstrong v. Exceptional Child Ctr, Inc.*, 575 U.S. 320, 326 (2015).

208. To decide if injunctive relief is proper, Plaintiffs must "demonstrate … actual success on the merits." *Ognibene v. Parkes*, 671 F.3d 174, 182 (2nd Cir. 2011). Once that's shown, a court considers four factors to determine whether granting injunctive relief is in

the public interest. First, the court considers whether the plaintiff has "suffered an irreparable injury." *World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp.*, 694 F.3d 155, 160 (2d Cir. 2012). Second, whether the "remedies available at law, such as monetary damages, are inadequate to compensate for that injury." *Id.* Third, "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted." *Id.* And fourth, "that the public interest would not be disserved by a permanent injunction." *Id.*

209. As explained above, Plaintiffs will succeed in claims that the Act is barred under the United States Constitution and under federal statutes.

210. All the factors support injunctive relief, too.

211. Plaintiffs face an irreparable injury, satisfying the first factor. Irreparable harm can be shown if a plaintiff "provides evidence of damage that cannot be rectified by financial compensation." *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991) (cleaned up). And the damage alleged must exist "during the interim between the request for an injunction and final disposition of the case on the merits." *Jayaraj v. Scappini*, 66 F.3d 36, 40 (2d. Cir. 1995).

212. Although "[m]onetary loss alone will generally not amount to irreparable harm," a plaintiff can show irreparable harm by "provid[ing] evidence of damage that cannot be rectified by financial compensation." *Borey*, 934 F.2d at 34. That's true where a plaintiff cannot recover damages due to sovereign immunity. *See United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (affirming irreparable injury exists where Eleventh Amendment barred monetary relief for an unconstitutional state action).

213. In this case, any monetary relief Plaintiffs seek would be barred by sovereign immunity. The damage to the States' economies and tax revenues is irreversible. The payments that private parties must make will later be unrecoverable. And targeted companies cannot obtain later recovery if their viability is threatened by the Act itself. So without a preliminary injunction, Plaintiffs will suffer irreparable harm that they could not recover later.

214. For those same reasons, Plaintiffs satisfy the second factor because monetary damages are inadequate to compensate for the injury.

215. The final two factors—the balance of hardship and the public interest—support Plaintiffs. These factors merge when the government is the opposing party because the interests of the State are aligned with those of the public. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And the "Government does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (cleaned up). What's more, if the injunction were not granted, the billions of dollars in fines will be passed on to the public, and energy reliability could well be threatened as targeted companies are forced to make cuts in recognition of these new costs. An injunction is thus in the public's interest.

216. For the reasons given, the Court should enjoin Defendant's enforcement of the Act.

COUNT XI

Declaratory Relief

217. All allegations above are incorporated by reference.

218. For the reasons stated in Counts I through IX, New York's Act is preempted by federal statutes and violates the United States Constitution and New York Constitution.

219. The unlawful portions of the Act are not severable from any other portion that remains. Thus, the entire Act should be rightfully declared unenforceable and void.

220. In any "case of actual controversy within [their] jurisdiction," federal courts have the power to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

221. This Court should use its equitable power to enter a declaration that the entire Act is unlawful.

PRAYER FOR RELIEF

An actual controversy exists between the parties that entitles Plaintiffs to declaratory and injunctive relief. Plaintiffs request that this Court:

A. Declare the Act preempted by federal statutes, otherwise violative of the United States Constitution, and unenforceable under 28 U.S.C. § 2201;

B. Enjoin Defendants from taking any action to implement or enforce the Act;

C. Award Plaintiffs the costs of the action and reasonable attorney's fees; and

D. Grant the Plaintiffs any other relief as may be necessary and appropriate or as the Court deems just and proper.

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Dated: February 6, 2025

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and AMERICAN PETROLEUM INSTITUTE, *Plaintiffs*, v. JULIE MOORE, in her official capacity as the Secretary of the Vermont Agency of Natural Resources and JANE LAZORCHAK, in her official capacity as the Director of the Vermont Agency of Natural Resources Climate Action Office, *Defendants*.	Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Chamber of Commerce of the United States of America and the American Petroleum Institute bring this civil action against Defendants for declaratory and injunctive relief and allege as follows:

INTRODUCTION

1. Vermont's legislature has enacted an unprecedented law, becoming the first State in American history to attempt to impose strict liability on companies based in other States for their purported shares of global greenhouse gas emissions. This law—known as the Climate "Superfund" Act, S.259 ("Act" or "Vermont's Act")—does not limit its regulation to greenhouse gas emissions released in Vermont. Rather, it seeks to punish a narrow set of energy producers[1] for global greenhouse gases emitted from all sources in the atmosphere over the course of three prior

[1] The Act covers certain entities that engage in "the trade or business of extracting fossil fuel," which includes "coal, petroleum products, and fuel gases," or "refining crude oil," which includes "oil or petroleum of any kind." § 596(9), (12), (22). For ease of reference, these entities are referred to as "energy producers" throughout the Complaint.

decades that allegedly caused damage to the State. Vermont is not home to any of the energy producers it hopes to regulate. Nevertheless, it seeks to impose significant monetary penalties on those producers, potentially subjecting other States to increased energy costs, while reaping the financial benefits for its own "climate change adaptation projects" in Vermont.

2. Second Circuit precedent prohibits Vermont's Act. *City of New York v. Chevron Corp.*, 993 F.3d 81, 91-99 (2d Cir. 2021). That precedent makes clear that neither our federal constitutional structure nor the Clean Air Act authorizes a State to impose liability or penalties on out-of-state energy producers for harms arising from out-of-state and global greenhouse gas emissions. *Id.* The Act is therefore precluded by federal law.

3. Vermont has thus exceeded the bounds of its authority, inserting itself into an area of law that is and has historically been controlled only by federal law, upsetting the careful regulatory balance the Clean Air Act establishes, violating the extraterritorial restraints of our federal system, and transgressing the bounds of due process and other constitutional protections. For the reasons explained below, Vermont's Act is unconstitutional and must be enjoined.

4. Vermont's Act requires large out-of-state energy producers, both domestic and international—termed "responsible parties"—to pay "cost recovery demand[s]" to the State of Vermont to fund Vermont's "climate change adaptation projects." § 598(a)(1), (b).[2] The Act holds energy producers "strictly liable" for their purported share of global greenhouse gas emissions. § 598(a)(1). The Act calculates the penalty that individual energy producers must pay based upon the ratio of the total "cost to the State of Vermont and its residents . . . from the emission of covered greenhouse gas[]" emissions and each "responsible party's" purported global share of covered greenhouse gas emissions over the 30-year period from 1995 to 2024. §§ 596(8), 598(a)(1), (b).

[2] Unless otherwise noted, statutory citations are to the 10 V.S.A. chapter 24A.

5. The Act is unconstitutional and a violation of federal law for multiple reasons.

6. *First*, the U.S. Constitution precludes the Act. Under our federal constitutional structure and inherent principles of the Constitution, federal law governs "[w]hen we deal with air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"); *City of New York*, 993 F.3d at 91-92. In such interstate pollution disputes, there is "an overriding federal interest in the need for a uniform rule of decision" and "basic interests of federalism" demand the application of federal law. *Milwaukee I*, 406 U.S. at 105 n.6. "This is because such quarrels often implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *City of New York*, 993 F.3d at 91-92 (citation omitted). Moreover, the inherent structure of the Constitution recognizes the "equal sovereignty" afforded to all States, *see, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 544 (2013), and due process principles provide that a sovereign cannot legislate "except with reference to its own jurisdiction," *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1882), which is "co-extensive with its territory," *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 387 (1818). "[I]t follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). And "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Zschernig v. Miller*, 389 U.S. 429, 432 (1968). Thus, the Act's imposition of liability and significant penalties on energy producers for harms allegedly caused by greenhouse gas emissions beyond Vermont's borders—and beyond the borders of the United States—is barred by the federal Constitution.

7. *Second*, Vermont's Act is preempted by the federal Clean Air Act. "[T]he Supremacy Clause 'invalidates state laws that "interfere with, or are contrary to," federal law.'" *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 86-87 (2d Cir. 2003) (citation omitted). Moreover, "'resort[ing] to state law' on a question" that has historically been governed by federal law "is permissible only to the extent 'authorize[d]' by federal statute." *City of New York*, 993 F.3d at 99 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 411 (7th Cir. 1984) ("*Milwaukee III*")). Therefore, under the Supremacy Clause, state regulation of greenhouse gas emissions is only permissible as authorized by the Clean Air Act. And under the Clean Air Act, only a "slim reservoir" of state authority remains to regulate greenhouse gas emissions outside of the Clean Air Act's regulatory scheme. *Id.* at 100. Specifically, the Clean Air Act "permit[s] only state lawsuits brought under 'the law of the [pollution's] *source* [s]tate.'" *Id.* (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 497 (1987)). Here, because Vermont's Act seeks to impose liability for global greenhouse gas emissions from sources well beyond Vermont's borders, the Clean Air Act preempts it.

8. *Third*, the Act violates the Due Process Clause of the Fourteenth Amendment. Economic legislation violates the protections of due process where it is "arbitrary and irrational," *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)), or where it is particularly "harsh or oppressive," *Canisius Coll. v. United States,* 799 F.2d 18, 25 (2d Cir. 1986) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984)). Here, the Act transgresses those protections because it: (i) imposes an overly harsh and oppressive retroactive penalty for greenhouse gas emissions released over 30 years during which energy producers lawfully extracted and refined fossil fuels; (ii) imposes an irrational and arbitrary punishment based on an unfair and flawed calculation method that singles out a handful of disfavored energy producers and attempts to hold them responsible for

global greenhouse gas emissions emitted by others; (iii) imposes an unconstitutionally vague penalty with the amount of that penalty left to the unfettered discretion of state agencies; and (iv) lacks procedural safeguards to avoid the imposition of arbitrary and excessive penalties.

9. *Fourth*, the Act violates the domestic and foreign Commerce Clauses. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 372-74 (2023); *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 448-49 (1979). The Act discriminates against the important economic interests of other States by targeting large energy companies located outside of Vermont. In doing so, it negatively impacts energy production and costs in other States and penalizes States like Louisiana and Texas that rely heavily on the energy sector. Likewise, the Act infringes on the foreign Commerce Clause by discriminating against the important economic interests of foreign commerce in the energy trade, negatively impacting U.S. trading partners, and inhibiting the federal government's ability to speak with one voice on the issue of foreign trade of energy products.

10. *Fifth*, the Act imposes an excessive fine in violation of the Eighth Amendment to the U.S. Constitution. The Constitution prohibits the government from imposing excessive fines as a form of punishment. *See, e.g.*, *Austin v. United States*, 509 U.S. 602, 609-10 (1993). But that is exactly what the Act does—it punishes covered energy producers for greenhouse gas emissions related to the lawful production and use of their products and those emissions' purported impacts on climate change. And the amount of the penalty is unconstitutionally excessive—subjecting energy producers to hundreds of millions or even billions of dollars in penalties for greenhouse gases emitted over the course of three decades.

11. *Sixth*, the Act effects an unconstitutional taking in violation of the Fifth Amendment to the U.S. Constitution. Even where a law does not involve a physical taking, it can go "too far" so as to amount to an unconstitutional taking. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149

(2021). The Act's retroactive penalties result in a substantial economic impact on covered energy producers, significantly interfere with those producers' investment-backed expectations, and are the result of a targeted effort to unfairly place covered energy producers on the hook for global greenhouse gas emissions and their purported impact on Vermont.

12. For these reasons and more, this Court should enjoin Defendants from enforcing the Act against Plaintiffs' covered members and declare the Act unlawful.

PARTIES & STANDING

13. Plaintiff the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly participates in cases that raise issues of vital concern to America's business community.

14. Plaintiff American Petroleum Institute ("API") is a national, not-for-profit trade association representing all segments of America's oil and natural gas industry. API's approximately 600 members support more than 11.3 million jobs and produce, process, and distribute most of our nation's energy. API's members range from the largest integrated companies to the smallest independent energy producers. API's members include producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API was formed in 1919 as a standards-setting organization. In its over 100 years, API has developed more than 800 standards to enhance operational and environmental safety, efficiency, and sustainability.

15. Plaintiffs have associational standing to bring their challenge because: (1) at least one of their members has individual standing to sue in its own right; (2) challenging the Act is

germane to the Plaintiffs' respective purposes; and (3) members' individual participation is unnecessary in this purely legal challenge. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Do No Harm v. Pfizer Inc.*, 96 F.4th 106, 112 (2d Cir. 2024). An order enjoining Defendants from enforcing the Act against Plaintiffs' covered members would redress the harm to those members of being forced to pay cost recovery demands under the Act.

16. At least one of Plaintiffs' members has individual standing to sue in its own right. *See Do No Harm*, 96 F.4th at 112-13 (elements of individual standing). Although Plaintiffs' members reserve the right to argue that they owe nothing to Vermont under the Act,[3] it is clear that Vermont intends to seek cost recovery demands from at least some of Plaintiffs' members. For example, Vermont has already filed state law tort suits against ExxonMobil and Shell entities for claims related to greenhouse gas emissions. *See infra* ¶ 55. Moreover, public statements by Vermont officials and the legislative history show that Vermont intends to target other energy producers who are members of Plaintiffs, such as Chevron and BP. *See infra* ¶¶ 57-59. Therefore, the State of Vermont, its leaders, and others supporting the Act have made clear that, among other entities, the Act targets the following energy producers for cost recovery demands: Exxon Mobil Corporation, Shell USA, Inc., Chevron Corporation, and BP America, Inc. Each of these companies is therefore injured by the Act—Vermont has made clear that it will issue them cost recovery demands for hundreds of millions or billions of dollars and they will be forced to expend time and resources to argue that they do not owe any money to Vermont under the unlawful Act in defending against a cost-recovery demand. Each company therefore has standing in its own right. All four of those companies are members of both the Chamber and API.

[3] Specifically, Plaintiffs' members expressly reserve the right to argue, among other contentions, that they are not "[r]esponsible part[ies]" under the Act because they "lack[] sufficient connection with the State to satisfy the nexus requirements of the U.S. Constitution." § 596(22).

Chamber and API represent their members in challenging laws that negatively impact their members' businesses, including laws related to environmental issues and laws that impose unreasonable and unlawful financial and regulatory burdens upon the private sector. The Chamber, through its Litigation Center, "fights for business at every level of the U.S. judicial system, on virtually every issue affecting business, including . . . energy and environment [and] . . . preemption." Chamber Litigation Center, U.S. Chamber of Com. (2024), https://perma.cc/E3B5-58ZC. For example, the Chamber recently brought a lawsuit against California on behalf of its members, challenging the State's law requiring companies to make statements of opinion about their greenhouse gas emissions. *See* Complaint, *Chamber of Com. of the U.S. v. Cal. Air Res. Bd.*, No. 2:24-cv-00801 (C.D. Cal. Jan. 30, 2024). The Chamber also files amicus briefs in a wide range of suits, including environmental litigation, throughout the country on behalf of its members. *See, e.g.*, Brief for the Chamber of Com. of the U.S. as Amicus Curiae, *Sunoco LP v. City & County of Honolulu*, No. 23-947 (U.S. Apr. 1, 2024). Likewise, API "represents the [energy] industry in legal proceedings." About API, API (2024), https://perma.cc/3P7Q-GH8C. And API also files amicus briefs in climate-related litigation on behalf of its members. *See, e.g.*, Brief for the Am. Petroleum Inst. et al. as Amici Curiae, *Sunoco LP v. City & County of Honolulu*, No. 23-947 (U.S. Apr. 1, 2024).

18. Plaintiffs bring a purely legal challenge to the Act and are seeking only declaratory and injunctive relief; no individual member participation is necessary.

19. Defendant Julie Moore is the Secretary of the Vermont Agency of Natural Resources. Defendant Moore is responsible for issuing cost recovery demands to covered energy producers under the Act. § 598(g)(1). Defendant Moore is sued in her official capacity.

20. Defendant Jane Lazorchak is the Director of the Vermont Agency of Natural Resources Climate Action Office. As the Director of the Vermont Agency of Natural Resources Climate Action Office, Defendant Lazorchak is responsible for administering the Act's Climate Superfund Cost Recovery Program under the Act. § 597. Defendant Lazorchak is sued in her official capacity.

JURISDICTION & VENUE

21. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a). This Court has authority to grant legal and equitable relief under 42 U.S.C. § 1983 and pursuant to its equity jurisdiction and *Ex parte Young*, 209 U.S. 123 (1908), *see Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016), injunctive relief under 28 U.S.C. § 1651, and declaratory relief under 28 U.S.C. § 2201(a).

22. This Court has personal jurisdiction over Defendants because they reside in or conduct a substantial proportion of their official business in Vermont. Venue is proper in this District under 28 U.S.C. § 1391(b) because Defendants reside in, and the Defendants' conduct giving rise to this civil action occurs in, Vermont.

BACKGROUND

23. **Energy Production in the United States.** The Chamber's and API's members include the United States' largest energy producers. These members lawfully provide energy that the vast majority of Americans use every day as well as jobs for millions of Americans. *See, e.g.*, U.S. Oil and Natural Gas Report Fact Sheet, U.S. Dep't of Energy (Oct. 2020), https://perma.cc/D3UM-7CSJ; How Many Jobs Has the Oil and Natural Gas Industry Created?, API (2024), https://perma.cc/9YLQ-EP58. Fossil fuels account for approximately 80% of all energy sources in the United States. *See* Monthly Energy Review December 2024 at 3, U.S. Energy Info. Admin. (Dec. 2024), https://perma.cc/8RE2-7YU8.

24. For example, oil and gas producers provide energy for all manner of transportation in the United States and around the world, ranging from gasoline for motor vehicles to fuel for tractor trailers and aircraft that transport goods throughout the country and globally. *See, e.g.*, Use of Energy Explained: Energy Use for Transportation, U.S. Energy Info. Admin. (Aug. 16, 2023), https://perma.cc/A32J-9MGF.

25. The refining process that ostensibly will be the subject of Vermont's penalties also creates many important by-products that are used throughout the United States, including smart phones, laptops, clothing (synthetic fibers), glasses, tires, roads, vehicle batteries, sulfur (for lithium mining and fertilizers), plastics (used in medical equipment, toys, and bottles), waxes, asphalt, and lubricants. *See* Products Made From Oil and Natural Gas, U.S. Dep't of Energy, https://perma.cc/URC3-FX2Z; Hydrocarbon Gas Liquids Explained, U.S. Energy Info. Admin. (Dec. 26, 2023), https://perma.cc/5GPK-F6E7; Oil and Petroleum Products Explained, U.S. Energy Info. Admin. (June 20, 2024), https://perma.cc/Y9B4-XSXH. Moreover, natural gas provides cost-effective energy for homes and businesses throughout the country, accounting for 30% of energy used in the United States. Natural Gas Fuel Basics, U.S. Dep't of Energy, https://perma.cc/PFS8-P8J8. "About 40% of the fuel goes to electric power production and the remainder is split between residential and commercial uses, such as heating and cooking, and industrial uses." *Id.* Globally, natural gas accounted for 22.3% of total electricity generation in 2022. World: Natural gas, Int'l Energy Agency https://perma.cc/PJ3Y-3N4U.

26. Although these energy producers—like any other critical industry in the United States—are subject to a variety of government regulations, the work that they do is not only lawful but encouraged and incentivized by the federal government. *See, e.g.*, Natural Gas Laws and Incentives, U.S. Dep't of Energy, https://perma.cc/9WU7-D7V5; Federal Financial Interventions and

Subsidies in Energy in Fiscal Years 2016-2022, U.S. Energy Info. Admin. (Aug. 2023), https://perma.cc/YL3P-FLKB.

27. In Vermont, "about 57% of the energy consumed" is "petroleum-based." Vermont State Profile and Energy Estimates, U.S. Energy Info. Admin. (Dec. 19, 2024), https://perma.cc/4T95-DW4B ("Vermont State Profile"). In fact, "Vermont uses more petroleum per capita than almost two-thirds of the states." *Id.* For example, "[a]lmost 6 in 10 Vermont households use fuel oil, kerosene, or propane to heat their homes, a larger share than in all other states except Maine and New Hampshire." *Id.*

28. The Vermont government has also used (and continues to use) fossil fuels. For example, in fiscal year 2019, 48% of the "energy used to heat" buildings owned by the Vermont Department of Buildings and General Services was from fossil fuels. 2020 Agency Energy Implementation Plan at 14, Vt. Dep't of Buildings & Gen. Servs. (2020), https://perma.cc/K45S-CAA4. Likewise, from fiscal year 2015 to 2020, Vermont's government consumed energy in the form of fossil fuels, including heating oil, propane, natural gas, diesel, and gasoline. *See* State Agency Energy Plan at 7, Vt. Dep't of Buildings & Gen. Servs. (2022), https://perma.cc/FX26-RJR4. "In fiscal year 2015, gasoline accounted for 27% of all energy consumed by state government, more than any other energy resource consumed over the same period." *Id.* Moreover, although Vermont plans to transition its 400 transit vehicles to zero-emissions, it continues to use fossil fuels for transportation as that plan is not projected to be completed until 2050. *See* The Electrification of Vermont's Public Transit Fleet, Vt. Agency of Transp. (2024), https://perma.cc/YG8N-BNEB.

29. **Greenhouse Gas Emissions and Climate Change.** The climate is changing, and humans are contributing to these changes.

30. Greenhouse gas emissions are produced by many different sources, including combustion of fossil fuels, deforestation, livestock farming, use of fertilizers, and fluorinated gases found in everyday products like aerosol sprays and air conditioners. *See* Sources of Greenhouse Gas Emissions, EPA (Oct. 22, 2024), https://perma.cc/B4J7-Y9VJ. Greenhouse gas emissions are also produced by many natural sources. For example, methane is "emitted from a number of natural sources," ranging from "[n]atural wetlands" to "termites, oceans, sediments, volcanoes, and wildfires." Overview of Greenhouse Gases, EPA (Nov. 26, 2024), https://perma.cc/Z2QM-KKNZ.

31. When it comes to fossil fuels, the vast majority of greenhouse gas emissions are the result of fossil fuels' end use, such as combustion emissions from driving a car or flying a plane. *See* Fast Facts on Transportation Greenhouse Gas Emissions, EPA (June 18, 2024), https://perma.cc/Y666-4M2M ("[T]ransportation accounted for the largest portion (28%) of total U.S. GHG emissions in 2022. Cars, trucks, commercial aircraft, and railroads, among other sources, all contribute to transportation end-use sector emissions."); Energy and the Environment Explained: Where Greenhouse Gases Come From, U.S. Energy Info. Admin. (June 18, 2024), https://perma.cc/HTK9-XU2K (explaining that "*[c]onsumption* of fossil fuels accounts for most of the energy-related CO_2 emissions of the major energy-consuming sectors: commercial, industrial, residential, transportation, and electric power" (emphasis added)).

32. The Chamber, API, and their members support actions to help address climate change, including reducing greenhouse gas emissions. *See* The Chamber's Climate Position: 'Inaction is Not an Option', U.S. Chamber of Com. (Oct. 27, 2021), https://perma.cc/9FG4-KGBE ("We support market-based solutions to reduce emissions and support U.S. competitiveness, national security, and American workers."); Climate Change, API (2024), https://perma.cc/PCG5-7Z2Y.

33. The federal government is actively addressing climate change through the reduction of greenhouse gas emissions in a variety of ways. For example, the Environmental Protection Agency ("EPA") measures and monitors greenhouse gas emissions from emissions sources, and it "works with industry and others to reduce greenhouse gas emissions through regulatory initiatives and partnership programs." What EPA Is Doing About Climate Change, EPA (Dec. 9, 2024), https://perma.cc/227X-8LXV; *see also* Climate Change Regulatory Actions and Initiatives, EPA (Dec. 16, 2024), https://perma.cc/JW2L-U8VN (listing various regulatory actions to monitor or reduce greenhouse gas emissions that EPA is taking or plans to take); Greenhouse Gas Emissions Continue to Decline as the American Economy Flourishes Under the Trump Administration, EPA (Nov. 9, 2020), https://perma.cc/C9PE-6HHJ (touting reduction in greenhouse gas emissions under EPA's Greenhouse Gas Reporting Program).

34. Greenhouse gases are emitted from billions of individual sources across the globe into the atmosphere. The migration and impact of these emissions, however, are complex issues. Once released, greenhouse gases quickly disperse and "become well mixed in the atmosphere." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) ("*AEP*") (citation omitted); *see also City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018) (climate-change claims "are ultimately based on the 'transboundary' emission of greenhouse gases"), *aff'd sub nom. City of New York*, 993 F.3d at 81.

35. Therefore, it is impossible to measure accurately and fairly the impact of green-house gas emissions from fossil-fuel consumption attributable to a particular entity in a particular location over the course of a specific 30-year period of time based on all worldwide greenhouse gas emissions in the atmosphere. As the Second Circuit has stated, "Greenhouse gas molecules cannot be traced to their source, and greenhouse gases quickly diffuse and comingle in the

atmosphere. However, because of their rapid and widespread global dispersal, greenhouse gas emissions from each of [the Producers'] fossil fuel products are present in the atmosphere in New York State." *City of New York*, 993 F.3d at 92 (internal record citation omitted). That is why, as the Supreme Court has recognized, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422.

36. Further complicating matters is how greenhouse gas emissions are related to climate change. Individual greenhouse gas emissions themselves do not cause climate impacts. Rather, as the Supreme Court has summarized, it is the combined effect of all global greenhouse gas emissions—from many different natural and human sources—that can cause a "greenhouse" effect that warms the earth's atmosphere, contributing to different climate impacts. *See Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007).

37. Indeed, it is impossible to attribute the alleged impacts of climate change in specific geographic regions to particular sources or categories of greenhouse gas emissions with any accuracy or fairness (especially when those emissions are confined to a specific, decades-long timeframe). Although some academics attempt to make those connections, they rely upon flawed methodologies that cannot withstand scrutiny. *See generally* Marc Marie of Ctr. for Env't Accountability, Response to Request for Information Development of a Climate Superfund Cost Recovery Program at 55-62, Climate Litig. Watch (2024), https://perma.cc/D2EV-RRTQ (aggregating criticisms of attribution methodology).

38. As a further illustration of the impossibility of these flawed methodologies, Associate Professor Justin Mankin of Dartmouth College's Geography Department claimed before the Vermont legislature that "scientists can quantify the economic losses a region like Vermont has endured from the impacts of global warming to date." Written Testimony from Dr. Justin Mankin

Before the Vt. Senate Judiciary Comm. on S. 259, at 1 (Feb. 22, 2024), https://perma.cc/N3ND-2LPQ (emphasis omitted). But even if such quantification is possible, it would fail to resolve the critical issue of connecting particular sources during particular times to those losses. *Cf.* David Barker, *Global Non-linear Effect of Temperature on Economic Production: Comment on Burke, Hsiang, and Miguel*, 21 Econ. J. Watch 35-36 (Mar. 2024), https://perma.cc/UFZ7-DXJK (noting that Mankin's methods relied largely on a previous scientific article that has been criticized for "cherrypick[ing]" and using "data with characteristics that are known to create spurious regression results without making proper adjustments or even acknowledging these characteristics."). Even if Vermont could accurately estimate the price of climate mitigation measures it has taken in the past or plans in the future, that does not mean that Vermont can, with any accuracy, assess what greenhouse gas emissions have had an impact on the State, where those emissions originated from, or how much those specific emissions have affected the State, or how much of the impact to the State is attributable to climate change.

39. This is especially true where Vermont's Act imposes liability for impacts purportedly caused by greenhouse gas emissions over a 30-year period dating back to 1995 but not before. Attempting to isolate greenhouse gas emissions during that timeframe and differentiating between impacts purportedly caused by greenhouse gas emissions before 1995 versus after exacerbates the accuracy problems discussed above, especially when considering that prior to 1995, the technology available and regulatory landscape for greenhouse gas emissions were very different than they were after 1995 (and than they are today).

40. For these reasons, among others, a State like Vermont cannot, with any accuracy or fairness, attribute impacts on specific geographic areas during a defined 30-year period purportedly caused by climate change to atmospheric greenhouse gases emitted by a particular source.

41. **Vermont Targets Out-of-State Energy Producers for Greenhouse Gas Emissions Liability.** Although Vermont and its residents *consume* large quantities of fossil fuels and are deeply dependent on petroleum products, Vermont is not home to any traditional energy producers or refiners. "Vermont has no crude oil reserves or production, nor does it have any petroleum refineries," it "has no natural gas reserves or production," and it "does not have any coal mines or coal reserves." Vermont State Profile, https://perma.cc/4T95-DW4B. Thus, Vermont must import oil and gas products, and it does so from outside the United States. Specifically, Vermont depends on oil and gas from Canada, *id.*, and, in fact, the closest refinery to Vermont is located across the border in Montreal, Canada, *compare* U.S. Energy Atlas: Petroleum Refineries, U.S. Energy Info. Admin. (Jan. 1, 2024), https://perma.cc/GG9F-XCN8, *with* Canadian Refineries, Oil Sands Mag. (2024), https://perma.cc/Z3J7-ZKG5.

42. Rather, Vermont favors renewable energy producers. For example, "Vermont enacted a renewable energy standard (RES) in 2015," which "requires that the state's retail electricity suppliers obtain 63% of their annual electricity sales from eligible renewable sources by 2025, increasing by at least 4% every three years until reaching 100% by 2030, including a 5.8% carve-out for new, in-state, renewable generation at customer-sited facilities with capacities of 5 megawatts or less." Vermont State Profile, https://perma.cc/4T95-DW4B.

43. This makes Vermont quite different from other States that depend largely on production from traditional energy sources like petroleum or natural gas for jobs and economic growth. Texas, for example, "leads the nation in energy production, providing about one-fourth of the country's domestically produced primary energy." Texas State Profile and Energy Estimates, U.S. Energy Info. Admin. (July 18, 2024), https://perma.cc/THR6-9PL5. "Texas produces more crude oil than any other state and accounted for more than two-fifths (43%) of the nation's

production from both onshore and offshore areas in 2023." *Id.* Texas also "has one-fourth of the nation's operable crude oil refineries and about one-third of the total U.S. refining capacity." *Id.* Moreover, "[o]ne-fourth of U.S. proved natural gas reserves and about 30 of the nation's 100 largest natural gas fields are located, in whole or in part, in Texas." *Id.*

44. To take another example, Louisiana "ranks among the top 10 states in both crude oil reserves and crude oil production and accounts for about 1% of both U.S. total oil reserves and production," and the State's "15 oil refineries account for about one-sixth of the nation's refining capacity and can process almost 3 million barrels of crude oil per calendar day." Louisiana State Profile and Energy Estimates, U.S. Energy Info. Admin. (Aug. 15, 2024), https://perma.cc/K6R2-5PNS. Louisiana also "has the third-highest marketed natural gas production and the seventh-highest natural gas reserves among the states." *Id.*

45. Despite Vermont having little to no economic connection to traditional energy producers (except insofar as Vermont and its residents consume and use fossil-fuel products), it has decided to target them for significant and costly regulation. Greenhouse gas emissions are a global phenomenon, emitted from many different sources beyond the energy production industry, all of which are used by and benefit the people of Vermont. Thus, although greenhouse gas emissions are impossible to link from a particular source to a particular environmental impact, Vermont has nonetheless laid unique blame for their release (and their effect on climate change) on a select group of out-of-state energy producers.

46. More than three years ago, Vermont sued multiple out-of-state energy producers in Vermont's own state courts, claiming that the energy producers misled consumers about their products and their impact on climate change. *See* Complaint, *Vermont v. Exxon Mobil Corp.*, No. 21-

CV-02778 (Vt. Super. Ct. Sept. 14, 2021). Among other things, Vermont seeks disgorgement of funds, substantial financial penalties, and other costs. *Id.*

47. Vermont has now decided to take an additional approach, on top of and effectively duplicating the monetary and injunctive relief they are already seeking in state law claims—namely, targeting select out-of-state energy producers through legislation that imposes costly penalties for operating their lawful businesses.

VERMONT S.259

48. The Vermont Legislature has enacted S.259 (Act 122), which it entitled "the Climate Superfund Act."[4] The Governor allowed the bill to become law without his signature on May 30, 2024. The Act took effect on July 1, 2024. S.259 § 7.

49. The Act "established the Climate Superfund Cost Recovery Program . . . to secure compensatory payments from responsible parties based on a standard of strict liability," and those payments are then paid into a fund to support the Vermont Agency of Natural Resources' ("Agency") "climate change adaptation projects." § 597(1).

[4] In enacting S.259, the Vermont Legislature purportedly took some language from the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA," also known as "Superfund"), 42 U.S.C. §§ 9601 *et seq.* But the Vermont Act is entirely different from CERCLA. CERCLA requires all parties (from a wide variety of industries) who owned or operated a hazardous waste site or transported or disposed of particular hazardous substances to clean up (or pay for) the particular contamination at the particular site affected by their conduct. Moreover, costs recoverable under CERCLA must have been spent consistent with a "National Contingency Plan," which provides administrative processes to determine the safest way to clean up a site. *See* 42 U.S.C. § 9607(a). The Vermont Act is neither site-specific nor tied to specific entities associated with the contamination at a polluted site. Rather, the Act includes a glaring mismatch: it imposes strict liability on a handful of energy producers for impacts to the entire State of Vermont purportedly caused by global greenhouse gas emissions and uses the penalties imposed on those energy producers to fund future climate change adaptation projects. Thus, while CERCLA requires remediation of polluted sites, the Vermont Act punishes a specific handful of energy producers for global emissions and uses the fines levied against those producers to fund a variety of the State's desired projects.

50. **The Act Targets Only the Largest Energy Producers That Satisfy a Jurisdictional "Nexus" with Vermont.** The Act applies to "[r]esponsible parties," which it defines as "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." § 596(22). No entity headquartered in Vermont could be a "responsible party" according to this definition; in other words, the law was crafted to apply *only* to entities based outside Vermont. Also notably, the Act's definition fails to account for the vast majority of emitters of human generated greenhouse gases—global end users.

51. The Act's coverage definition "does not include any person who lacks sufficient connection with the State to satisfy the nexus requirements of the U.S. Constitution." *Id.*

52. The Act's "[c]overed period" means "the period that began on January 1, 1995 and ended on December 31, 2024." § 596(8).

53. "Covered greenhouse gas emissions" means "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 extracted or refined by an entity." § 596(7). As noted above, the Act does not differentiate between greenhouse gases emitted during extraction and refining of fossil fuels and greenhouse gas emitted by the end users of fossil fuels.

54. The Act does not list specific covered energy producers, but Vermont's own actions and statements, the Act's legislative history, and responses to the State's requests for information concerning implementation of the Act make clear that Vermont will issue cost recovery demands to one or more of the Chamber's and API's members.

55. *First*, as noted above, Vermont is currently pursuing climate-related claims against multiple energy producers in litigation. *See supra* ¶¶ 16, 46. In that suit, Vermont asserts that Vermont courts have jurisdiction over ExxonMobil and Shell entities, among others. *See* Complaint ¶ 28, *Vermont v. Exxon Mobil Corp.*, No. 21-CV-02778 (Vt. Super. Ct. Sept. 14, 2021); *see also* Attorney General Donovan Files Consumer Protection Suit Against Fossil Fuel Companies, Off. of the Vt. Att'y Gen. (Sept. 14, 2021), https://perma.cc/MUQ4-49WT ("The lawsuit names as defendants Exxon Mobil Corporation [and] Shell Oil Company.").

56. *Second*, in allowing the Act to take effect, Vermont Governor Phil Scott acknowledged that the Act is designed to target "Big Oil." Action Taken by Governor Phil Scott on Legislation - May 30, 2024, Off. of Governor Phil Scott (May 30, 2024), https://perma.cc/M4BY-YR23. Moreover, in testifying before House Committee on the Judiciary, Amy Gendron, the Deputy Secretary of the Agency of Natural Resources, in discussing how to implement the Act, said, "This is not a question of if we should pursue Big Oil but rather when and how." Vt. House Comm. on the Judiciary, House Judiciary - 2024-04-11 - 10:10AM, at 43:00 (Apr. 11, 2024), https://perma.cc/87Y3-K5HT.

57. *Third*, the legislative history of the Act shows that Vermont intends the law to apply to one or more out-of-state energy producers. For example, Richard Heede submitted data to the Legislature purporting to show that the following producers would be sufficiently large to qualify under the Act, assuming that Vermont can exercise jurisdiction over them: ExxonMobil, Shell, BP, and Chevron. *See* Richard Heede, Attributing Emissions to Major Carbon Producers & Holding FF Companies Accountable for Remediation, Vt. Gen. Assembly, Judiciary Comm., Energy & Env't Comm. (Apr. 11, 2024), https://perma.cc/5RFF-AWJP; *see also* Vt. Senate Comm. on Judiciary, Senate Judiciary - 2024-02-22 - 10:30AM, at 14:44 (Feb. 2, 2024), https://perma.cc/SJ9G-

NK6K (similar). That is, according to Mr. Heede's data, "more than one billion metric tons of covered greenhouse gas emissions during the covered period" can purportedly be attributed to these companies. § 596(22).[5]

58. As to jurisdiction, Michael O'Grady, Legislative Counsel, Office of Legislative Counsel, testified to the Senate Committee for the Judiciary that Vermont could assert jurisdiction

[5] The theory behind Vermont's Act—attributing the impacts of global emissions to specific energy producers—is based on Mr. Heede's previous work. Although Mr. Heede's underlying data and methods are flawed and Plaintiffs reserve the right to challenge them, it is clear that Vermont relies upon Mr. Heede's proposed data and methods to identify responsible parties and their purported share of global greenhouse gas emissions. *See, e.g.*, Manuela Andreoni, How to Make Polluters Pay, The New York Times (Apr. 2, 2024), https://perma.cc/SK6P-FVJR ("If the climate superfund bill becomes law in Vermont, the state plans to work with scientists to figure out just how much of the damage was caused by climate change. Then, they will calculate what each oil and gas company contributed to it. For that, they will very likely use a database called 'Carbon Majors.' Richard Heede, the climate researcher who created it, told me he has collected thousands of corporate reports from 122 companies across the world detailing how much fossil fuels they have produced in the last decades."); Adam Aton, Vermont Wants to Make Big Oil Pay. And It's Bringing Receipts., E&E News by POLITICO (May 24, 2024), https://perma.cc/MCS7-P2TA ("'We're in the realm of having full documentation of what each company has contributed,' said Richard Heede, the co-founder of the Climate Accountability Institute and principal investigator for the group's Carbon Majors Project, a dataset of historical emissions that's expected to be a key element of Vermont's effort. 'I'd love to be able to sit down at the table with the leading fossil fuel companies — that Vermont will send a bill to, in due time — and work out any difference of opinion about how much each should contribute, within the realm of relative certainty.'"); Dana Drudmand, Vermont, Other States Push for "Climate Superfund" Bill to Hold Polluting Companies Accountable, Sierra (Feb. 3, 2024), https://perma.cc/7QFB-JBZY?type=standard ("In identifying who those polluters are, the climate Superfund concept draws upon the groundbreaking 'Carbon Majors' research pioneered by Richard Heede."); Jessica Weinkle, Vermont's Fossil Fuel Shakedown, The Breakthrough Institute (Oct. 4, 2024), https://perma.cc/G8SP-J8FM ("Vermont's legislative diagnosis of liability for climate change mirrors the work of Richard Heede, founder of the Climate Accountability Institute. Heede's testimony to the Vermont Judicial Committee included a slide with a list of 10 companies who emitted 1 billion metric tonnes of GHG emissions between 1995 and 2023. The Act indicates that Vermont legislators plan to go head to head with these 10 companies."); Emily Pontecorvo, A Climate Superfund Law Might Be Crazy Enough to Work, Heatmap (Mar. 29, 2024), https://perma.cc/NRK3-VXP8 ("The bill's sponsors also looked to research from Richard Heede."); Alex Brown, Lawmakers Hope to Use This Emerging Climate Science to Charge Oil Companies for Disasters, Washington State Standard (Apr. 18, 2024), https://perma.cc/G3S8-TNJ4 ("If legislature[] in Vermont . . . pass[es] [the] climate Superfund bill[], the state officials who carry [it] out are expected to rely heavily on researcher Richard Heede's 'Carbon Majors' project.").

under the Act over companies such as "Shell" and "Exxon." Vt. Senate Comm. on Judiciary, Senate Judiciary - 2024-02-08 - 9:00AM, at 17:20 (Feb. 8, 2024), https://perma.cc/RLT9-U3SS. Likewise, Anthony Iarrapino, Senior Attorney, Conservation Law Foundation, testified to the House Committee for the Judiciary that "some of the very largest of those that are likely to be responsible parties under this bill based on their amount of emissions" like "Exxon Mobil, Shell Oil," "the AG's office has already asserted jurisdiction over these companies" in its climate lawsuit. Vt. House Comm. on the Judiciary, House Judiciary - 2024-04-24 - 10:05AM, at 1:12:20 (Apr. 4, 2024), https://perma.cc/9VU3-RXVF; *see also* Testimony of Anthony Iarrapino, Esq. to the Vermont House Comm. on Env't & Energy & the House Comm. on Judiciary in Connection with Their Review of S.259 (Apr. 11, 2024), https://perma.cc/6Z3M-ZBFA.

59. Responses to Vermont's request for information related to implementing the Act, *see* Development of a Climate Superfund Cost Recovery Program, Vt. Agency of Nat. Res. (July 23, 2024), https://perma.cc/DYM8-PJJM, confirm that the Act is designed to target at least some specific energy producers. Richard Heede's response includes a specific list of producers he claims are "highly likely 'responsible parties,'" including "ExxonMobil," "Shell," "BP," and "Chevron," among others. Richard Heede, In Response to Request for Information on: Development of a Climate Superfund Cost Recovery Program, at 12 (Oct. 1, 2024), https://perma.cc/D2EV-RRTQ.[6] Notably, Mr. Heede's response and the Act fail to address emissions from end users and other sources that make up the vast majority of global greenhouse gas emissions.

[6] Notably, Defendant Jane Lazorchak, Director of the Vermont Climate Action Office, reached out directly to Mr. Heede to specifically request a response from him to the State's request for information, further demonstrating Vermont's reliance on Mr. Heede. *See* Email from Jane Lazorchak to Richard Heede, at 44 (Aug. 7, 2024, 7:31 AM), https://perma.cc/D2EV-RRTQ.

60. In sum, without waiving any members' right to challenge that they are responsible parties covered by the Act, the State of Vermont, its leaders, and others supporting the Act have made clear that the Act targets, among other entities, the following energy producers: Exxon Mobil Corporation, Shell USA, Inc., Chevron Corporation, and BP America, Inc. *See supra* ¶ 16 & note 3.

61. **The Act Imposes a Penalty on Out-of-State Energy Producers.** The Act imposes severe, retroactive, and arbitrary penalties on out-of-state energy producers through what the Act refers to as "cost recovery demands."

62. Under the Act, the Agency issues "notices of cost recovery demands"[7] to "responsible part[ies]," holding those responsible parties "strictly liable" for their purported share of greenhouse gas emissions and demanding payment to the State as punishment for that purported liability. § 598(a)(1), (f).[8]

63. The Act's directive to the Agency to issue cost recovery demands is mandatory; the Agency has no discretion as to whether to issue payment demands under the Act. *See* § 598(f)

[7] The Act defines "[n]otice of cost recovery demand" as "the written communication from the Agency informing a responsible party of the amount of the cost recovery demand payable to the Fund." § 596(18).

[8] The Act provides that "entities in a controlled group" are "treated . . . as a single entity" and "are jointly and severally liable for payment of any cost recovery demand owed by any entity in the controlled group." § 598(a)(2). By including this definition of "controlled group" within the definition of responsible parties, the Act attempts to hold energy producers liable for global emissions purportedly attributable to not only those producers, but also their affiliated entities—irrespective of whether the State has jurisdiction over any such affiliated entities within the group. Moreover, it provides that if a "responsible party owns a minority interest of 10 percent or more in another entity, the responsible party's applicable share of covered greenhouse gas emissions shall be increased by the applicable share of covered greenhouse gas emissions for the entity in which the responsible party holds a minority interest multiplied by the percentage of the minority interest held by the responsible party." § 598(c).

("The Agency *shall* issue the cost recovery demands required under this section . . . ." (emphasis added)).

64. The Act provides a method to calculate each responsible party's cost recovery demand.

65. First, the State Treasurer calculates a total "cost to the state of Vermont and its residents" from "the emission of covered greenhouse gases during the covered period." § 598(b); *see also* § 599c. Then, each responsible party's "cost recovery demand shall be equal to an amount that bears the same ratio to the cost to the State of Vermont and its residents . . . as the responsible party's applicable share of covered greenhouse gas emissions bears to the aggregate applicable shares of covered greenhouse gas emissions resulting from the use of fossil fuels extracted or refined during the covered period." § 598(b).

66. In other words, the Act's calculation of responsible parties' cost recovery demands is *not* limited to greenhouse gas emissions in Vermont. Rather, it makes energy producers strictly liable for *global* greenhouse gas emissions, and the penalties are calculated with respect to those global emissions, not emissions originating inside Vermont.

67. The Act states that the Agency "shall use the U.S. Environmental Protection Agency's Emissions Factors for Greenhouse Gas Inventories" to "determin[e] the amount of covered greenhouse gas emissions attributable to any entity." § 598(d).

68. Responsible parties must either pay the cost recovery demand in full within six months of receiving notice, § 598(g)(1), or they may elect to pay it in nine annual installments with any "reasonable interest" charged by the Agency, § 598(g)(2). Either way, covered energy producers will be forced to begin paying hundreds of millions or billions of dollars within a matter

of months after receiving notice, which necessitates equitable relief well in advance of that deadline.

69. **The Act Uses Penalties Paid by Out-of-State Energy Producers to Subsidize Vermont's Climate Projects.** The Act provides that "[t]he Agency shall deposit cost recovery payments collected under this chapter to the Climate Superfund Cost Recovery Program Fund." § 598(h).

70. The "Climate Superfund Cost Recovery Program" created by the Act is "administered by the Secretary" to "provide funding for climate change adaptation projects in the State." § 599(a).

71. Thus, under the Act, the penalties paid by responsible parties are placed into the fund, and the Agency may use that fund to pay for its "climate change adaptation projects" consistent with its "Resilience Implementation Strategy," which includes "criteria and procedures for prioritizing climate change adaptation projects eligible to receive monies from the Climate Superfund Cost Recovery Program." § 599a(b)(3)(E).

CLAIMS

COUNT I
FEDERAL PRECLUSION UNDER U.S. CONSTITUTION
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

72. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

73. The Supremacy Clause in Article VI of the Constitution of the United States declares, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI.

74. Under the U.S. Constitution, and Supreme Court and Second Circuit precedent, federal law must govern a State's attempt to impose liability for global greenhouse gas emissions

that cross state lines and national borders because such interstate and international issues present uniquely federal interests and implicate competing interests and equal sovereignty of other States.

75. Applying those constitutional principles and controlling precedent here, Vermont's Act is precluded by federal law and the federal Constitution.

76. **Federal Law Governs Liability For Harms Arising From Interstate Greenhouse Gas Emissions.** Courts have historically held that state law is not competent to govern interstate disputes that present "uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *AEP*, 564 U.S. at 421 (acknowledging that federal law "addresses subjects within national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands" (internal quotation marks omitted)); *Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y.*, 742 F.3d 37, 41 (2d Cir. 2014) (stating that federal law governs where "the relevant federal interest warrants displacement of state law" (internal quotation marks omitted)). That is why courts have applied federal law as the rule of decision in cases ranging from interstate water disputes, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *City of Evansville v. Ky. Liquid Recycling, Inc.*, 604 F.2d 1008, 1018 (7th Cir. 1979), to interstate air carrier liability, *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007). "In these instances," the structure of the U.S. Constitution and "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 641.

77. Therefore, federal law controls state-imposed liability for harms arising from interstate greenhouse gas emissions because such liability implicates "uniquely federal interests." *Rodriguez v. FDIC*, 589 U.S. 132, 136 (2020). As the Second Circuit has already acknowledged, "For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91; *Milwaukee I*, 406 U.S. at 103

("When we deal with air and water in their ambient or interstate aspects," federal law controls); *Ouellette*, 479 U.S. at 492 ("[T]he control of interstate pollution is primarily a matter of federal law."); *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) (federal law governs "the general subject of environmental law and specifically includes ambient or interstate air and water pollution."). Such "controvers[ies]" involving interstate greenhouse gas emissions cannot "be resolved under state law." *Tex. Indus.*, 451 U.S. at 641.

78. Federal law applies to such disputes because they "often implicate two federal interests that are incompatible with the application of state law: (i) the 'overriding . . . need for a uniform rule of decision' on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.'" *City of New York*, 993 F.3d at 91-92 (citation omitted) (alteration in original). In other words, federal law must apply to such disputes to avoid the conflicts that would occur if each of the 50 States were permitted to impose their disparate laws on the same interstate (and international) greenhouse gas emissions in their own preferred way. Such a global issue as greenhouse gas emissions, which "implicat[es] the conflicting rights of [s]tates [and] our relations with foreign nations," is "simply beyond the limits of state law." *Id.* (alteration in original) (quoting *Tex. Indus.*, 451 U.S. at 641).[9]

79. **Constitutional Protections of State Sovereignty Limit States' Ability to Impose Their Laws on Out-of-State Greenhouse Gas Emissions.** Federal law also controls liability for

[9] As explained in detail by the Second Circuit in *City of New York*, it is the unique federal interest in governing interstate greenhouse gas emissions under the U.S. Constitution that provided the justification for recognition of federal common law over this area. 993 F.3d at 91-92. Just as those constitutional structural principles provided justification for recognition of federal common law causes of action in areas such as interstate and international pollution where state law is not competent to govern, those same principles continue to dictate that state law is not competent to govern such areas once Congress has chosen to displace federal common law by replacing it with a federal statute. *See id.* at 91-95.

harms arising from interstate greenhouse gas emissions under constitutional principles of state sovereignty. The inherent structure of the Constitution of the United States recognizes the equal sovereignty afforded to all States. *See Shelby County*, 570 U.S. at 544 ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal* sovereignty' among the States." (emphasis in original) (citation omitted)). This principle of equal sovereignty for each State in the Union is "obvious[]" and the "necessary result of the Constitution" and its establishment of the United States' federal system. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914). "The sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

80. The principle of equal sovereignty limits the ability of a State to "impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Gore*, 517 U.S. at 571.

81. Although States have the sovereign authority to legislate within their own borders, there are constitutional limits on their ability to reach beyond their borders and tread on the sovereignty of other States. *See Bonaparte*, 104 U.S. at 594 ("No State can legislate except with reference to its own jurisdiction. . . . Each state is independent of all others in this particular."); *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 154 (2023) (Alito, J., concurring in part and concurring in the judgment) (The Supreme Court has "long recognized that the Constitution restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests.").

82. Indeed, the Supreme Court has recently counseled that a State may not "directly regulate[] out-of-state transactions by those with no connection to the State." *Nat'l Pork Producers Council*, 598 U.S. at 376 n.1 (emphasis omitted); *see also Gore*, 517 U.S. at 571.

83. This limitation on States' abilities to extend their laws beyond their borders is an "'obviou[s]' and 'necessary result' of our constitutional order," even if it is "not confined to any one clause or section" of the Constitution. *Mallory*, 600 U.S. at 154 (Alito, J., concurring in part and concurring in the judgment) (quoting *N.Y. Life Ins. Co.*, 234 U.S. at 161)); *see id.* at 154 n.2 (collecting cases). Rather, principles of extraterritoriality are "expressed in the very nature of the federal system that the Constitution created and in numerous provisions that bear on States' interactions with one another." *Id.* at 154.

84. These principles are expressed in "not only the Commerce Clause, but also potentially several other constitutional provisions, including the Import-Export Clause, the Privileges and Immunities Clause, . . . the Full Faith and Credit Clause," and the Due Process Clause. *Nat'l Pork Producers Council*, 598 U.S. at 408 (Kavanaugh, J., concurring in part and dissenting in part); *N.Y. Life Ins. Co.*, 234 U.S. at 161 ("The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause.").

85. **The Due Process Clause of the Fourteenth Amendment Limits the Extraterritorial Reach of State Laws.** States violate the Due Process Clause when they impose liability on out-of-state actors for conduct beyond their borders. An important aspect of due process of law is that a sovereign cannot legislate "except with reference to its own jurisdiction," *Bonaparte*, 104 U.S. at 594, which is "co-extensive with its territory," *Bevans*, 16 U.S. (3 Wheat.) at 387; *see Gore*, 517 U.S. at 571; *see also Watson v. Emps. Liab. Assur. Corp.*, 348 U.S. 66, 70 (1954)

(acknowledging "the due process principle that a state is without power to exercise 'extra territorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries").

86. The Due Process Clause is a principal source of protection against extraterritorial extensions of state law. U.S. Const. amend. XIV. The Supreme Court has recently suggested that constitutional principles, including "the Constitution's structure" and "the Due Process Clause," constrain state authority to legislate and enforce law extraterritorially. *Nat'l Pork Producers Council*, 598 U.S. at 376; *see also Mallory*, 600 U.S. at 156 (Alito, J., concurring) (explaining that the Supreme Court's decisions on due process and personal jurisdiction "reflect" a broader principle of "'territorial limitations' on state power"). Other courts too have explained that the Due Process Clause "limits a State's power to extend its law outside its borders"—and in fact is the "most powerful" of the "[t]erritorial limits on lawmaking." *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 380 (6th Cir. 2013) (Sutton, J., concurring). Indeed, the Supreme Court has made clear that States cannot wield tort law to "punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *see Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 818, 821-22 (1985); *see also McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 581 (8th Cir. 1981); *Adventure Commc'ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 435-36 (4th Cir. 1999).

87. **The Foreign Affairs Doctrine Limits States' Abilities to Interfere with the Federal Government's Foreign Affairs.** State law is also incompetent to govern liability based on international greenhouse gas emissions, which implicate the federal government's exclusive power over foreign affairs. The foreign affairs doctrine provides that under the U.S. Constitution, "[o]ur system of government . . . imperatively requires that federal power in the field affecting foreign

relations be left entirely free from local interference." *Zschernig*, 389 U.S. at 432. Under the doctrine, states may not intrude "into the field of foreign affairs which the Constitution entrusts to the President and the Congress," and therefore, state laws are precluded to the extent they have "more than 'some incidental or indirect effect in foreign countries.'" *Id.* at 432, 434.

88. Thus, under this doctrine, "[t]he exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003); *see also In re Assicurazioni Generali. S.P.A.*, 592 F.3d 113, 117-18 (2d Cir. 2010). Likewise, "when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power, the Supremacy Clause prevents the state statute from taking effect." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1074 (9th Cir. 2012) (en banc) (citing *Garamendi*, 539 U.S. at 426).

89. **Federal Constitutional Law Precludes Vermont's Act.** For all of these reasons, the U.S. Constitution structurally precludes the Act's imposition of penalties on energy producers for their purported shares of global greenhouse gas emissions. The U.S. Constitution does not permit a single State like Vermont to dictate energy policy for the remainder of the Union through that State's imposition of liability for harms allegedly arising from global greenhouse gas emissions. Controlling Supreme Court and Second Circuit precedent, which recognizes the necessity of the application of federal law to the uniquely federal interests of interstate and international pollution in order to protect the equal sovereignty of States, and due process limits on States' ability to legislate beyond their borders in the U.S. federal system require that the Act be invalidated under federal law.

90. To start, the "interstate or international nature of" global greenhouse gas emissions "makes it inappropriate for" Vermont's Act "to control" that issue. *Tex. Indus.*, 451 U.S. at 640-41 & n.13 (citation omitted). The Second Circuit's holding in *City of New York* makes this clear.

91. Regardless of whether the Act's penalties are referred to as "cost recovery demands," fines, or fees, the purpose of the Act is straightforward: it is a state effort to impose liability for "global greenhouse gas emissions," *City of New York*, 993 F.3d at 91, by declaring energy producers "strictly liable," § 598(a)(1), for those emissions. In other words, "[i]t is precisely because fossil fuels emit greenhouse gases," which "collectively" impact climate change, that Vermont is seeking penalties against energy producers. *City of New York*, 993 F.3d at 91.

92. Just as a "nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may [not] proceed under [state] law," a State may not attempt to recover such damages for alleged harms arising from global greenhouse gas emissions through statutory penalties. *City of New York*, 993 F.3d at 91. Vermont's Act "does not seek to hold the Producers liable for the effects of emissions released in [Vermont], or even in [Vermont's] neighboring states." *Id.* at 92. Rather, Vermont "intends to hold the Producers liable, under [Vermont] law, for the effects of emissions made around the globe over the past" three decades. *Id.* "In other words," the Act seeks to impose statutory penalties "for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.*

93. The expansive international reach of Vermont's Act is especially problematic. For example, under the Act, oil could be extracted in Asia, refined in Europe, and combusted as gasoline in South America—without ever coming close to the United States. Yet Vermont will attempt to penalize both the extractor and the refiner for any and all of the emissions purportedly associated with that oil upon its conclusion that the extractor and refiner are "responsible parties" under the

global emissions by any source—regardless of those emissions' connection to Vermont. The Act's "nexus" requirement, § 596(22), may make that difficult, but foreign companies may not want to take the risk of being associated at all with the United States at the potential cost of Vermont attempting to force them to pay massive penalties for operating their businesses.

94. Allowing a single State like Vermont to enact a law that interferes with the federal government's response to a global policy challenge like greenhouse gas emissions "sow[s] confusion and needlessly complicate[s] the nation's foreign policy, while clearly infringing on the prerogatives of the political branches." *City of New York*, 993 F.3d at 103. Here, the Act intrudes upon the federal government's foreign affairs power by "bypass[ing] the various diplomatic channels that the United States uses to address this issue, such as the U.N. Framework and the Paris Agreement." *Id.* For example, the Paris Agreement is an international agreement that resulted from collaboration between the United States and other countries around the world and one that the United States joined with the support of many energy producers. *See, e.g.*, Lamar Johnson, ExxonMobil Urges Trump Not to Withdraw from Paris Agreement Again, ESG Dive (Nov. 13, 2024), https://perma.cc/864J-2DJY; Samantha Raphelson, Energy Companies Urge Trump to Remain in Paris Climate Agreement, NPR (May 18, 2017), https://perma.cc/BKB9-2T6Q. Although different Presidents have held different views about whether to remain a party to the Paris Agreement, those presidential decisions highlight the foreign-affairs issues implicated in the federal government's approach to addressing global climate change.

95. Indeed, as the Second Circuit has noted, "the United States' longstanding position in international climate-change negotiations is to oppose the establishment of liability and compensation schemes at the international level." *City of New York*, 993 F.3d at 103 n.11 ("[The United

States] obviously [does] have [a] problem with the idea, and [doesn't] accept the idea, of compensation and liability and never accepted that and we're not about to accept it now." (quoting Todd Stern, Special Envoy for Climate Change, Special Briefing (Oct. 28, 2015), https://perma.cc/W9YX-ARPR)); *see also* Oliver Slow, US Refuses Climate Reparations for Developing Nations, BBC (July 13, 2023), https://perma.cc/WF3U-HQ9J; Nathan Layne, Trump Says He Would Renege on $3 Billion US Pledge for Green Climate Fund, Reuters (Dec. 14, 2023), https://perma.cc/33SW-5ZVQ (suggesting incoming administration will continue this policy and has already signaled that it may pull other climate-related funding). Yet, Vermont's Act attempts to do exactly that—establish a punitive liability and compensation scheme based on the (speculatively calculated) impact to Vermont from global greenhouse gas emissions, contrary to the policy goals of the federal government as reflected in international climate negotiations. Therefore, the Act presents a "clear conflict" with an "express federal policy," which is "alone enough to require state law to yield" to federal law. *Garamendi*, 539 U.S. at 425. In holding that New York City could not impose its law on international greenhouse gas emissions through a nuisance action, the Second Circuit explained that "condoning an extraterritorial nuisance action here would not only risk jeopardizing our nation's foreign policy goals but would also seem to circumvent Congress's own expectations and carefully balanced scheme of international cooperation on a topic of global concern" under the Clean Air Act. *City of New York*, 993 F.3d at 103. The same concerns apply here—allowing Vermont to attempt to impose liability based on foreign emissions could upset foreign policy goals, interfere with international climate change discussions, and upset trade with foreign countries. "Because it therefore 'implicat[es] the conflicting rights of [s]tates [and] our relations with foreign nations,'" the Act and its penalties for global greenhouse gas emissions

"pose[] the quintessential example of when" federal law "is most needed." *Id.* at 92 (quoting *Tex. Indus.*, 451 U.S. at 641).

96. A single State like Vermont cannot dictate greenhouse gas emissions liability rules for the entire United States or other countries across the world. But that is the purpose and effect of the Act—to attempt to "regulate," via significant penalties, energy producers' "behavior far beyond [Vermont's] borders." *Id*. Although the Act imposes a retroactive penalty for past emissions, much like the tort liability for past actions at issue in *City of New York,* there is no limiting principle to what Vermont has done. If the Act is permitted to stand, then Vermont (or other States) could hold current and future energy producers strictly liable and penalize them for hundreds of millions or billions of dollars going forward. And if energy producers attempt to "mitigate" such future liability, whatever actions they would take "must undoubtedly take effect across every state (and country)." *Id.* Indeed, because the Act's penalties are tied to responsible parties' "shares" of global greenhouse gas emissions, § 598(b), a covered energy producer could only avoid or limit liability for future conduct from similar legislative penalties by ceasing operations globally. In this way, Vermont is single-handedly dictating nationwide and global emissions policy, contrary to the principles and structure of the United States Constitution and federal system.

97. Therefore, Vermont's "sprawling" scheme that targets greenhouse gas emissions emitted in all 50 States and in countries around the globe "is simply beyond the limits of state law." *Id.*

98. It does not matter that the Act imposes a penalty as opposed to "a standard of care or emission restrictions." *Id.* That is because its "cost recovery demand" scheme is "even more ambitious: to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released." *Id.* at 93. Thus, even if the Act tries to

"regulate cross-border emissions in an indirect and roundabout manner, it . . . regulate[s] them nonetheless." *Id.*

99. At bottom, Vermont's imposition of penalties against energy producers will "upset[] the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.*; *see also AEP*, 564 U.S. at 427.

100. The Act also invades the equal sovereignty of other States and thus transgresses the structural constitutional and due process limits on States' abilities to extend their laws beyond their borders by unconstitutionally imposing liability and penalties on energy companies outside of Vermont for global greenhouse gas emissions produced by lawful activities outside of Vermont's borders.

101. The greenhouse gas emissions for which Vermont seeks to penalize energy producers have no direct connection to Vermont, and indeed have no more connection to Vermont than to any other State in the United States or to any other country in the entire world. Thus, Vermont is attempting to "directly regulate[] transactions which take place . . . wholly outside the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 641 (1982) (plurality op.). In doing so, Vermont is imposing liability on wholly *extraterritorial* activity and impermissibly "project[ing]" its "regulatory regime into the jurisdiction" of other States. *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 337 (1989); *see Gore*, 517 U.S. at 571-72 ("[A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States.").

102. Other States and their citizens are directly affected by Vermont's Act. By penalizing energy producers with massive fines, Vermont is essentially dictating greenhouse gas emission

liability rules and energy policy for the other 49 States. Its Act will likely negatively affect energy production and could increase energy costs that could be borne by citizens of all States, not just Vermont. Although Vermont would reap the benefits of millions of dollars to fund its preferred climate change adaptation projects, citizens of other States would receive no benefits, only costs.

103. Moreover, Vermont's Act attempts to impose liability upon refining and extracting operations that have no presence within its borders but are a critical industry for other States. As explained above, no traditional energy producers are headquartered in Vermont or otherwise conduct extraction or refining activities in the State. *See supra* ¶ 41. Because a "responsible party" must be in the business of extracting or refining fossil fuels, the Act applies *only* to companies engaged in extracting and refining *in other States*. *See* Oil and Gas, Vt. Agency of Nat. Resources Dep't of Env'l Conservation (2024), https://perma.cc/NS27-LWTV; Vermont State Profile, , https://perma.cc/4T95-DW4B. For example, States like Louisiana and Texas are home to large energy producers who not only provide energy for their citizens but also support those States' economies with jobs, revenue, and other benefits. *See supra* ¶¶ 43-44. Those benefits enjoyed by other sovereigns like Louisiana and Texas will be negatively affected by Vermont's Act, despite the fact that Vermont lacks any such relationship with the energy production industry.

104. Indeed, the Solicitor General of the United States recently acknowledged the limits on States' abilities to regulate greenhouse gas emissions outside their borders. In the United States' amicus brief in *Sunoco LP v. City & County of Honolulu*, the Solicitor General noted that the energy-producer defendants in that case had raised arguments that the plaintiffs' tort claims involving greenhouse gas emissions "are barred by the Interstate and Foreign Commerce Clauses, the Due Process Clause, and federal primacy in foreign affairs," and acknowledged that "[t]hose constitutional arguments may ultimately be held to foreclose [plaintiffs'] state-law claims to the

extent they are based *on emissions or other conduct outside Hawaii*." Brief for the United States as Amicus Curiae at 7, *Sunoco LP v. City & County of Honolulu*, Nos. 23-947 (U.S. Dec. 10, 2024) (emphasis added); *see id.* at 12 (recognizing that defendants "may ultimately prevail on their contention that respondents' claims are barred by the Constitution . . . to the extent the claims rely on conduct occurring outside Hawaii."); *id.* at 13-14 (noting that "courts could conclude that the Constitution bars the state-law claims to the extent they rely on conduct occurring outside Hawaii"). In short, Vermont "has attempted, in essence, to unilaterally impose its moral and policy preferences for" energy production "on the rest of the Nation," demanding money from energy producers to fund its own preferred climate projects while the rest of the Nation foots the bill. *Nat'l Pork Producers Council*, 598 U.S. at 407 (Kavanaugh, J., concurring in part and dissenting in part). "[Vermont's] approach undermines federalism and the authority of individual States by forcing individuals and businesses in one State" to bear costs and changes to energy products due to the "law[] of a *different* State." *Id.*

* * *

105. The Act unconstitutionally extends state law into an area that is governed exclusively by federal law and invades the equal sovereignty of the other States in the Union through its unconstitutionally extraterritorial reach. Therefore, under the structure of the U.S. Constitution and controlling precedent, the Act is precluded by federal law, and it may not be enforced against the Chamber's and API's covered members.

106. If the Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT II
FEDERAL PREEMPTION UNDER THE CLEAN AIR ACT
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

107. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

108. "[T]he Supremacy Clause 'invalidates state laws that interfere with, or are contrary to, federal law.'" *Clean Air Mkts. Grp.*, 338 F.3d at 86-87.

109. The federal Clean Air Act preempts Vermont's Act because the Vermont Act's imposition of penalties for global greenhouse gas emissions falls outside the "slim reservoir" of remaining state authority to independently regulate greenhouse gas emissions outside the parameters of the Clean Air Act.

110. In *Massachusetts v. EPA*, the Supreme Court held that greenhouse gas emissions are "pollutants" covered by the Clean Air Act and thus subject to regulation by the EPA. 549 U.S. at 528-29. Therefore, under the Clean Air Act, EPA decides on "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" through an "informed assessment of competing interests." *AEP*, 564 U.S. at 427. "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* In the first instance, "[t]he Clean Air Act entrusts such complex balancing to EPA." *Id.*

111. Pursuant to its authority under the Clean Air Act, for example, EPA has promulgated New Source Performance Standards that address greenhouse gas emissions from oil and gas operations, among other sources. *See* 40 C.F.R. §§ 60.5360a-60.5439a. Moreover, EPA imposes mandatory greenhouse gas reporting requirements on various entities. *See* 40 C.F.R. §§ 98.1, *et seq.* And EPA imposes procedures for new or substantially modified facilities to use the best available control technology for greenhouse gas emissions. *See* 40 C.F.R § 51.166(j).

112. As explained above, by virtue of the overarching constitutional principle that state law is not competent to govern out-of-state or international emissions, federal law—initially federal common law—has always governed interstate disputes involving emissions of air pollutants.

See supra ¶¶ 76-78. But the Supreme Court has held that the Clean Air Act displaces any claim grounded in federal common law involving interstate greenhouse gas emissions. *AEP*, 564 U.S. at 425-26. In other words, the Clean Air Act is now the federal standard governing any claims involving interstate greenhouse gas emissions. Thus, because the Clean Air Act "provides a means to seek limits on emissions" there is no other "room for a parallel track" of regulation. *Id.* at 425. Now that the Clean Air Act governs regulations of greenhouse gas emissions in the United States, States like Vermont may regulate emissions only as permitted by the Clean Air Act. This is because "'resort[ing] to state law' on a question previously governed by federal common law is permissible only to the extent 'authorize[d]' by federal statute." *City of New York*, 993 F.3d at 96 (alterations in original) (quoting *Milwaukee III*, 731 F.2d at 411).

113. Here, "the Clean Air Act does not authorize the state-law" penalties Vermont's Act "seeks to" impose on energy producers. *Id.*

114. The Clean Air Act "anoints the EPA as the 'primary regulator of [domestic] greenhouse gas emissions.'" *Id.* (alteration in original) (quoting *AEP*, 564 U.S. at 428). Although the Clean Air Act includes savings clauses that allow "states to create and enforce their own emissions standards applicable to in-state polluters," *id.* at 99 (citing 42 U.S.C. §§ 7416, 7604(e)), that "authorization is narrowly circumscribed," *id.* at 100.

115. In *International Paper Co. v. Ouellette*, the Supreme Court held that the Clean Water Act "pre-empts state law to the extent that the state law is applied to an out-of-state point source." 479 U.S. at 509. The Court explained that "the only state suits that remain available are those specifically preserved by the Act," and that "[a]n interpretation of the saving[s] clause that preserved actions brought under an affected State's law would disrupt th[e] balance of interests" under the Clean Water Act. *Id.* at 492, 495. Specifically, an interpretation of the statute that would

permit one state to apply its laws to regulate out-of-state emissions of pollutants would "upset[] the balance of public and private interests so carefully addressed by the Act." *Id.* at 494. "The application of affected-state laws would be incompatible with the Act's delegation of authority and its comprehensive regulation of water pollution." *Id.* at 500. The same statutory features are present in the Clean Air Act, and the same preemption analysis governs.

116. Under the Clean Air Act, only a "slim reservoir" of state authority remains to independently regulate emissions outside the Clean Air Act's regulatory scheme. *Id.*[10] Specifically, consistent with *Ouellette*, the Clean Air Act "has been interpreted to permit only state lawsuits brought under 'the law of the [pollution's] *source* [s]tate.'" *City of New York*, 993 F.3d at 100 (alterations in original) (quoting *Ouellette*, 479 U.S. at 497); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 (3d Cir. 2013) ("[T]he Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located."); *Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015) (noting that "claims based on the common law of the source State" are "not preempted by the Clean Air Act," whereas "claims based on the common law of a non-source State . . . are preempted by the Clean Air Act").

117. State laws that seek to impose monetary consequences—whether through common law tort damages or statutory monetary penalties—on "emissions emanating simultaneously from all 50 states and the nations of the world" do not fit within the "slim reservoir" of state authority under the Clean Air Act. *City of New York*, 993 F.3d at 100. To permit such state action "would

[10] Although States play a critical role in implementing the Clean Air Act's regulation of air pollution, *see generally* EPA, Government Partnerships to Reduce Air Pollution (Aug. 6, 2024), https://perma.cc/Z93U-G2BZ (providing examples of how local, state, federal, and tribal governments are working together to reduce pollution), they have no authority to regulate emissions beyond their borders outside of that national regulatory scheme, *see City of New York*, 993 F.3d at 100.

undermine this carefully drawn statute through a general savings clause" and would "serious[ly] interfere[ ] with the achievement of the full purposes and objectives of Congress." *Id.* (alterations in original) (quoting *Ouellette*, 479 U.S. at 493-94).

118. Here, the Clean Air Act preempts Vermont's Act because it imposes liability on energy producers for greenhouse gas emissions emitted *outside* of Vermont. It imposes cost recovery demands for *global* greenhouse gas emissions. § 596(7) (defining "[c]overed greenhouse gas emissions" as "the total quantity of greenhouse gases released into the atmosphere during the covered period"). It does not purport to impose liability only for emissions released in Vermont.

119. Indeed, the theory behind Vermont's Act is that once greenhouse gas emissions have been released into the atmosphere, those emissions collectively contribute to changes in the Earth's climate, and those changes to climate result in the purported harms to the State of Vermont. The Act does not seek to impose liability for only those emissions released in Vermont: any such emissions would be miniscule compared to emissions around the rest of the globe. Yet, Vermont seeks to impose liability for all such greenhouse gas emissions. The Clean Air Act preempts its attempt to do so.

120. Permitting States like Vermont to penalize energy producers for out-of-state emissions would "undermine [the] regulatory structure" provided by the Clean Air Act and would "lead to chaotic confrontation between sovereign states." *Ouellette*, 479 U.S. at 496-97.

121. Because the Clean Air Act preempts Vermont's Act, it may not be enforced against the Chamber's and API's covered members.

122. If Vermont's Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT III
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

123. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

124. The Act's imposition of significant retroactive penalties based on an arbitrary and irrational method of attributing to specific energy producers the purported costs of climate change to Vermont from three decades of global greenhouse gas emissions (emitted primarily by other people and entities) violates the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV.

125. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also E. Enters.*, 524 U.S. at 537 (plurality opinion) (holding that to succeed on due-process claim, moving party must "establish that its liability under the Act is 'arbitrary and irrational'" (quoting *Usery*, 428 U.S. at 15)). Moreover, due process protects individuals from overly "harsh and oppressive" "economic legislation." *Pension Benefit Guar. Corp.*, 467 U.S. at 733; *see also Canisius Coll.*, 799 F.2d at 25 (The "'harsh and oppressive' test does not differ from the test of constitutionality applicable to economic legislation generally, namely, that such legislation is constitutional unless Congress has acted in an arbitrary and irrational way.").

126. That protection includes prohibiting governments from "retroactive[ly]" imposing financial penalties that are arbitrary and irrational or "so harsh and oppressive as to transgress the constitutional limitation" of due process. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regul. of Fla.*, 496 U.S. 18, 41 & n.43 (1990) (citation omitted); *E. Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part) ("[D]ue process requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary

and irrational way."). The Supreme Court has recognized that "retroactive lawmaking is a particular concern for the courts because of the legislative 'tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals.'" *E. Enters.*, 524 U.S. at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (alteration in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994)); *Opati v. Republic of Sudan*, 590 U.S. 418, 425 (2020) ("The principle that legislation usually applies only prospectively . . . protects vital due process interests, ensuring that 'individuals . . . have an opportunity to know what the law is' before they act, and may rest assured after they act that their lawful conduct cannot be second-guessed later." (citation omitted)). Therefore, "[t]he retrospective aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *E. Enters.*, 524 U.S. at 547-48 (Kennedy, J., concurring in the judgment and dissenting in part) (alteration in original) (citation omitted).

127. Here, the Act transgresses due process in several ways.

128. *First*, it imposes a harsh and oppressive retroactive penalty on energy producers for global greenhouse gas emissions emitted over the past *30 years*.[11] Nothing about that period of liability is "modest," "short," or "limited." *See, e.g.*, *id.* at 528. On the contrary, it imposes liability on energy companies for actions taken as long as *three decades ago*. *See id.* at 549-50 (Kennedy, J., concurring in the judgment and dissenting in part) (concluding that a law that "create[ed]

[11] Although CERCLA also imposes retroactive, strict liability, it is different from Vermont's Act. CERCLA permits retroactive liability related to the costs of cleaning up specific pollutants at sites that meet specific criteria. That liability may be imposed only upon potentially responsible parties who have specific connections to—such as one who "disposed" of hazardous waste at—a specific site at issue. The Vermont Act, on the other hand, penalizes only a handful of energy producers for three decades of greenhouse gas emissions resulting from the collective conduct of billions of people, and uses the proceeds from the penalties imposed to fund unknown future climate-related projects. *See supra* note 4.

liability for events which occurred 35 years ago" violated due process); *James Square Assocs. LP v. Mullen*, 993 N.E.2d 374, 383 (N.Y. 2013) (holding that state law with a 16-month retroactivity period was unconstitutional because the sole state purpose offered—"raising money for the state budget"—was "insufficient to warrant [such] retroactivity"). Vermont's law punishes energy companies for lawful actions taken long ago, with no opportunity to know what the law is before they acted and subjecting them to Vermont's second-guessing of their actions many years after the fact. *See Opati*, 590 U.S. at 418. Such a significant and far-reaching retroactive law is dissimilar to the types of laws the Court has previously upheld.

129. *Second*, the Act imposes an arbitrary and irrational punishment on energy producers. To start, the Act's punishment is arbitrary because the coverage period defining producers' liability provides no basis for selecting the date range of January 1, 1995, to December 31, 2024, as opposed to a shorter time period. The Act's coverage period is particularly arbitrary given that carbon dioxide emissions, for example, remain in the atmosphere for centuries. MIT Climate Portal Writing Team, How Do We Know How Long Carbon Dioxide Remains in the Atmosphere?, MIT Climate Portal (Jan. 17, 2023), https://perma.cc/D3NV-AMSM. Moreover, carbon dioxide molecules, "once they enter the air, follow different paths and can last for radically different amounts of time." *Id.* Thus, Vermont has no sound basis for choosing thirty years as its coverage period, and even within that coverage period, Vermont cannot fairly and accurately attribute specific impacts in Vermont to specific greenhouse gas emissions (out of all global greenhouse gas emissions).

130. The Act's coverage period also fails to reflect changes in research regarding climate change and industry changes in response to scientific developments, such as ways to burn fuel more efficiently and cleanly.

131. Furthermore, the Act uses an irrational and arbitrary method to calculate energy producers' punishment for global greenhouse gases. The Act provides that responsible parties will be liable for cost recovery demands based on an amount "that bears the same ratio to the cost to the State of Vermont . . . from the emission of covered greenhouse gases during the covered period as the responsible party's applicable share of covered greenhouse gas emissions bears to the aggregate applicable shares of covered greenhouse gas emissions resulting from the use of fossil fuels extracted or refined during the covered period." § 598(b). But calculating the purported impact of global greenhouse gas emissions on Vermont and attributing global greenhouse gas emissions that caused that impact to each responsible party is impossible. "Greenhouse gases once emitted 'become well mixed in the atmosphere,'" *AEP*, 564 U.S. at 422 (citation omitted)), and after that point, "[g]reenhouse gas molecules cannot be traced to their source," *City of New York*, 993 F.3d at 92 (internal record citation omitted). Thus, as the Supreme Court has recognized, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." *AEP*, 564 U.S. at 422.

132. Indeed, Vermont's attempt to pin blame on specific energy producers for the purported impacts to the State from climate change caused by global greenhouse gas emissions is vastly different from attributing pollution in a river to an upstream facility or leaching from a particular waste site. The theory behind Vermont's Act is that global greenhouse gas emissions collectively have caused changes to the climate, such as warming the atmosphere, and those changes have harmed Vermont. But there is no fair and accurate way to attribute to specific energy producers the purported impacts to Vermont caused by climate change due to 30 years of global greenhouse gas emissions in the atmosphere resulting from the collective conduct of billions of people all around the world. Likewise, Vermont also cannot accurately and fairly determine what

purported impacts and costs to the State were caused by greenhouse gas emissions during the 30-year coverage period versus those caused before that period or by environmental factors unrelated to greenhouse gas emissions, such as acid rain.

133. For these reasons, the Act cannot with any accuracy or fairness calculate the purported impact to Vermont from global greenhouse gas emissions, nor can it accurately or fairly attribute such impact from global greenhouse gas emissions to specific energy producers.

134. The Act will also impose a punishment that unfairly and arbitrarily overestimates energy producers' purported impacts on climate change. Through its definition of "responsible parties" and its calculation method, §§ 596(22), 598(b), the Act targets a small handful of large energy producers and singles them out as the sole contributors to climate change by attributing all the purported impacts in Vermont to greenhouse gas emissions solely to fossil fuels (and solely to that small handful of energy producers). But it ignores greenhouse gas emissions from many other sources across the globe, including fossil fuel activities conducted by the United States and foreign governments, national owned fossil fuel companies, wood-fuel burning,[12] forest fires and deforestation, methane from farm animals, agriculture, other land-use activities, transportation, and many others.

135. For example, the World Economic Forum has stated that almost a quarter of "global greenhouse gas emissions in 2007-2016 came from agriculture and land-use change,

[12] Indeed, "[m]ore than one in eight Vermont households use wood for their primary heating source, more than 10 times the national average and the largest share of any state." Vermont State Profile, https://perma.cc/4T95-DW4B. And according to one scholar, "some smokestack emission tests show burning wood results in carbon emissions 2.5 times higher than natural gas and 30 percent higher than coal." Jim Finley, Burning Wood? Caring for the Earth?, PennState Coll. of Agric. Scis. (Feb. 15, 2021), https://perma.cc/EBC5-9YZ9. Yet the Act omits any liability for Vermont's own contribution to greenhouse gas emissions in the atmosphere.

approximately half of which is due to deforestation." To Tackle Deforestation We Need to Focus on Land Use. Here's Why., World Econ. Forum (Sept. 13, 2022), https://tinyurl.com/2s3dm6kp.

136. Yet, those responsible for such agricultural and land-use activities are not covered by Vermont's Act. Worse, covered energy producers will bear the punishment for the greenhouse gas emissions emitted by those non-fossil fuel sources. Although the Act defines "[c]overed greenhouse gas emissions" to mean the total emissions in the atmosphere "resulting from the use of fossil fuels extracted or refined by an entity," § 596(7) Vermont cannot determine which greenhouse gas molecules were emitted by fuels extracted by energy producers or establish that those molecules (as opposed to emissions from other non-fossil fuel sources) caused specific climate change impacts on the State of Vermont.

137. The Act also targets mainly energy producers operating in the United States even though many other companies and consumers across the globe have contributed to global greenhouse gas emissions. For one, energy producers from countries around the world extract and refine fossil fuels and then consumers across the globe use those fuels in a wide variety of ways in everyday life. *See* Report: China Emissions Exceed All Developed Nations Combined, BBC (May 7, 2021), https://perma.cc/CV5J-XUF6.

138. Moreover, in the context of fossil fuels, it is the end users, not energy producers, who emit the majority of greenhouse gas emissions. *See supra* ¶ 31. Companies from a host of different industries beyond energy production emit greenhouse gases when they independently combine fossil fuels with their machines, equipment, and operations. Likewise, consumers emit greenhouse gases from the transportation and utilities they choose to use. Thus, there is no way to accurately or fairly pin liability on a handful of domestic energy producers for the purported impact of greenhouse gas emissions released when fuel is extracted or refined versus those released by

other companies and individuals across the globe, especially when it is other entities who emit the vast majority of greenhouse gases.

139. The Act also arbitrarily and unlawfully imposes joint and several liability on entities in a "controlled group," requiring that such entities "be treated by the Agency as a single entity for the purposes of identifying responsible parties" and making them "jointly and severally liable for payment of any cost recovery demand owed by any entity in the controlled group." § 598(a)(2). Lumping separate corporate entities together and making them jointly and severally liable for payment of the Act's severe penalties is arbitrary because it does not distinguish between worldwide emissions purportedly attributable to one entity over another, and in failing to do so, it disregards corporate separateness principles and protections—not to mention the jurisdictional limitations of the State.

140. *Third*, the Act's imposition of a penalty on energy producers is unconstitutionally vague as it provides seemingly unfettered discretion to Vermont agencies to determine how much energy producers' penalties should be. Due Process "requires the invalidation of laws that are impermissibly vague," meaning that they "fail[] to provide a person of ordinary intelligence fair notice of what is prohibited, or [are] so standardless that [they] authorize[] or encourage[] seriously discriminatory enforcement." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (citation omitted). Thus, the Due Process Clause ensures "that regulated parties should know what is required of them so they may act accordingly" and requires "precision and guidance . . . so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* Moreover, when civil penalties are "prohibitory" and have a "stigmatizing effect," courts apply a "strict" vagueness test. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

141. Here, the Act is subject to a "strict" vagueness test because "the prohibitory and stigmatizing effects of the [law] are clear," *id.* at 499 n.16—it punishes energy producers for their products and labels them as the culprits for climate change. Under that test, the Act is unconstitutionally vague because it fails to give adequate notice to energy producers of what they will have to pay under the Act. The Act leaves that decision to Vermont agencies, who must determine the purported cost to the State from greenhouse gas emissions and each energy producers' purported share of global emissions. §§ 598(b), 599c. Thus, Vermont agencies have seemingly "unfettered discretion" to subject energy producers to penalties in the hundreds of millions or billions of dollars. *Hayes v. N.Y. Att'y Grievance Comm. of the Eight Jud. Dist.*, 672 F.3d 158, 169 (2d Cir. 2012) (citation omitted). That discretion "encourages seriously discriminatory enforcement." *Fox Television Stations, Inc.*, 567 U.S. at 253.

142. *Fourth*, the Act imposes significant penalties on energy producers without sufficient procedural safeguards, which will lead to arbitrary and excessive penalties in violation of the Due Process Clause. "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416; *see also Gore*, 517 U.S. at 562 (similar). Just as the Due Process Clause places both "procedural and substantive constitutional limitations" on the amount of punitive damages that can be awarded against a defendant, *State Farm*, 538 U.S. at 416, it places the same limits on the amount for which a State may penalize individuals or businesses for other forms of liability. In *State Farm*, for example, the Supreme Court was concerned about the lack of "protections" to defendants in civil cases from the "imprecise manner" in which punitive damages were calculated and the "wide discretion" juries had in calculating them. 538 U.S. at 417 (citation omitted). To address that lack of

protections, the Court imposed specific "guideposts" to ensure that punitive damage awards did not run afoul of due process protections.

143. Vermont's Act contains no such guideposts. Rather, energy producers have no notice of "the severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574, as nothing in the Act limits or constrains how far Vermont may go. The lack of procedural safeguards ensuring that the Act's penalties comply with due process are made worse by the fact that the Act imposes liability for global emissions that cannot be accurately attributed to energy producers or purported impacts to Vermont and that the Act covers a period of 30 years. Just as punitive damages "[i]mposed indiscriminately" and without proper procedural "protections" "pose an acute danger of arbitrary deprivation of property," *State Farm*, 538 U.S. at 417, the Act's imposition of undefined penalties based on global emissions, calculated in Vermont agencies' discretion, poses an acute risk of substantial harm to energy producers and the individuals and businesses who rely on them.

144. Because the Act violates the Constitution's due process protections, it cannot be enforced against the Chamber's and API's covered members.

145. If the Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT IV
VIOLATION OF THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

146. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

147. The Constitution vests Congress with the power to "regulate Commerce with foreign Nations, and among the several States." U.S. Const., Art. I, § 8, cl. 3.

148. Within the Constitution's Commerce Clause, the Supreme Court has recognized a "dormant Commerce Clause," under which "state laws offend the Commerce Clause when they seek to 'build up . . . domestic commerce' through 'burdens upon the industry and business of other States,' regardless of whether Congress has spoken." *Nat'l Pork Producers Council*, 598 U.S. at 369 (alteration in original) (quoting *Guy v. Baltimore*, 100 U.S. 434, 443 (1880)). Thus, "[g]enerally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337.

149. A State violates the dormant Commerce Clause when it "discriminat[es] against interstate commerce." *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 373 n. 18 (1994); *Nat'l Pork Producers Council*, 598 U.S. at 369 ("[The] antidiscrimination principle lies at the 'very core' of our dormant Commerce Clause jurisprudence." (citation omitted)).

150. The foreign Commerce Clause also restricts states from enacting laws that burden or discriminate against foreign commerce. U.S. Const. art. I, § 8, cl. 3. This doctrine safeguards the federal government's exclusive authority to regulate international trade and ensures that the United States presents a unified and coherent voice in its dealings with foreign nations. *See Japan Line, Ltd.*, 441 U.S. at 448 ("Foreign commerce is pre-eminently a matter of national concern."); *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 66 (1st Cir. 1999) ("[T]he Foreign Commerce Clause . . . restrains the states from excessive interference in foreign affairs."), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). Such a unified approach is essential to maintain diplomatic consistency and avoid fragmented or conflicting state-level policies that could undermine national interests. *See id.* For these reasons, the Supreme Court considers "the

scope of the foreign commerce power" of the federal government to be "greater" than the interstate commerce power. *Japan Line, Ltd.*, 441 U.S. at 448.

151. The Vermont Act violates the dormant Commerce Clause because it discriminates against the important economic interests of other States by specifically targeting energy producers headquartered in other States with excessive penalties. *See Nat'l Pork Producers Council*, 598 U.S. at 364 ("[N]o State may use its laws to discriminate purposefully against out-of-state economic interests."). *First*, Vermont discriminates against the economic interests of every other State by unilaterally impacting energy production and cost throughout the country. By penalizing energy producers located outside of Vermont with massive fines, Vermont will encumber domestic energy production with significant costs that could harm the entire nation, but only Vermont will reap financial benefits from this statutory scheme (through payment for its future climate projects). *Second*, by discriminating against out-of-state energy producers, Vermont harms other States that depend largely on energy production like Louisiana and Texas, penalizing those means of energy production but not others that Vermont may prefer like wind or solar or other renewable energy sources. Indeed, there are no energy producers that conduct extracting or refining of fossil fuels in Vermont, and no company targeted by Vermont's law is based in Vermont. *See supra* ¶ 41. In either case, Vermont exceeds the bounds of its authority and trespasses upon "the principles of 'sovereignty and comity'" with other States. *Nat'l Pork Producers Council*, 598 U.S. at 376.

152. Vermont's law also violates the foreign Commerce Clause because it interferes with and discriminates against a vital area of foreign commerce—energy production and trade. The United States imports "about 8.51 million barrels per day (b/d) of petroleum from 86 countries" and exports "about 10.15 million b/d of petroleum to 173 countries and 3 U.S. territories." How Much Petroleum Does the United States Import and Export?, U.S. Energy Info. Admin. (Mar. 29,

2024), https://perma.cc/ANE8-L7SD. Likewise, "the United States is . . . one of the top exporters of liquefied natural gas (LNG) in the world." Natural Gas Explained, U.S. Energy Info. Admin. (June 30, 2023), https://perma.cc/U9E7-3RRS.

153. Vermont's law interferes with international trade in such resources by imposing penalties on domestic energy producers who export energy products internationally and on foreign energy producers who import energy products into the United States for those companies' share of global greenhouse gas emissions. In doing so, it discriminates against the economic interests of the United States' key trade partners, potentially increasing costs for them and their citizens while Vermont reaps the financial benefits from this statutory scheme (through payment for its future climate projects). It also discriminates against foreign energy producers and domestic energy producers that operate overseas by penalizing them for global greenhouse gas emissions, thereby harming those companies and countries that rely on their international business. *See Nat'l Foreign Trade Council*, 181 F.3d at 68 ("When the Constitution speaks of foreign commerce, it is not referring only to attempts to regulate the conduct of foreign companies; it is *also* referring to attempts to restrict the actions of American companies overseas."). Indeed, the Act penalizes foreign entities, including foreign affiliates of domestic entities, that are in a "controlled group" as defined by the Act, irrespective of whether Vermont has jurisdiction over any such affiliated entities within the group.

154. Thus, the Act risks disrupting international trade in the energy industry by potentially increasing costs for both domestic and international consumers and interferes with the federal government's exclusive authority over international trade by potentially negatively affecting energy policy with foreign trade partners, preventing the federal government from speaking with one voice in this area of international commerce. Indeed, the U.S. Solicitor General recently

acknowledged the limits on States' abilities to regulate greenhouse gas emissions outside their borders under the Commerce Clause. Brief for the United States as Amicus Curiae at 6-7, *Sunoco LP v. City & County of Honolulu*, Nos. 23-947 (U.S. Dec. 10, 2024) (emphasis added); *see supra* ¶ 104.

155. Because the Act violates the Constitution's dormant Commerce Clause and foreign Commerce Clause, it cannot be enforced against the Chamber's and API's covered members.

156. If the Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT V
VIOLATION OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT TO THE U.S. CONSTITUTION
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

157. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

158. The Act imposes an excessive fine in violation of the Eighth Amendment to the U.S. Constitution. U.S. Const. amend. VIII.

159. The Eighth Amendment provides, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

160. This protection "traces its venerable lineage back to at least 1215," to the Magna Carta. *Timbs v. Indiana*, 586 U.S. 146, 151 (2019). The "Magna Carta required that economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" *Id.* (alteration in original) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)).

161. Following from this ancient tradition, the Eighth Amendment prohibits the government from imposing excessive fines as a form of punishment. *See Austin*, 509 U.S. at 609-10; *see also United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998). This prohibition applies in criminal

proceedings and civil proceedings that "advance punitive as well as remedial goals." *Austin*, 509 U.S. at 610, 621-22.

162. "The Excessive Fines Clause limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *Id.* at 609-10 (cleaned up). Punishment "cuts across the division between the civil and the criminal law." *Id.* at 610 (cleaned up).

163. The Act imposes a penalty that constitutes an excessive fine in violation of the Eighth Amendment. That penalty punishes energy producers for greenhouse gas emissions related to the use of all fossil fuels and the purported impacts on climate change. The Act's punishment targets only a select number of largely domestic energy producers, pinning the blame for climate change impacts on those select producers who were lawfully operating while ignoring the myriad end users across the world who emit the majority of greenhouse gas emissions (and many of whom fail to mitigate their own emissions). This selective targeting of a handful of energy producers, while ignoring a host of other producers, businesses, and consumers, demonstrates a mismatch between the Act's provisions and its purported goal of mitigating the impacts of climate change, suggesting that the true purpose of the Act is to punish those energy producers disfavored by Vermont.

164. The punishment is also in the form of legislatively determined "strict[] liability," § 598(a)(1)—punishing energy producers for simply operating their lawful businesses. That is, it does not hold energy producers liable for violating some standard of care in their operations; it punishes them for producing energy.

165. Likewise, the severe nature of the penalty imposed by the Act on energy producers—hundreds of millions or billions of dollars—suggests that the Act is punitive in nature.

166. The fine imposed by the Act is unconstitutionally excessive. A fine is unconstitutionally excessive if it is grossly disproportional to the gravity of the offense. *Bajakajian*, 524 U.S. at 334.

167. Courts evaluate four factors to determine whether a fine is constitutionally excessive: "(1) the essence of the [offense] of the [purported wrong-doer] and its relation to other [bad acts], (2) whether the [purported wrong-doer] fits into the class of persons for whom the statute was principally designed, (3) the maximum . . . fine that could have been imposed, and (4) the nature of the harm caused by the [purported wrong-doer's] conduct." *United States v. George*, 779 F.3d 113, 122 (2d Cir. 2015) (cleaned up). But these factors are not exhaustive. *See United States v. Viloski*, 814 F.3d 104, 110-11 (2d Cir. 2016).

168. Here, the Act is retroactively punishing lawful business activities—the production of energy, whether to support domestic energy needs or energy around the globe. *See Bajakajian*, 524 U.S. at 337-38. To make it worse, that retroactive punishment stretches back three decades.

169. The penalty is also based on global greenhouse gas emissions, and for the reasons explained above, *see supra* ¶¶ 34-40, 131-33, attributing specific impacts in Vermont to climate change and tracing those impacts back to specific greenhouse gas emissions from a particular source will be impossible. Thus, there is significant risk that the Act will impose penalties that overestimate and arbitrarily attribute greenhouse gas emissions to covered energy producers, and that overestimation of liability makes the penalty excessive. *See New York v. United Parcel Serv., Inc.*, 942 F.3d 554, 600 (2d Cir. 2019) (fine was excessive when it "double count[ed]" the party's liability). Even worse, the Act does not differentiate between the impacts of climate change purportedly caused by greenhouse gas emissions from fossil fuels versus emissions from other sources

or other causes of climate change; in failing to do so, it imposes all the purported costs of climate change onto a select group of energy producers.

170. The maximum possible fine here is significant and seemingly unlimited. The Act puts no limit on the State Treasurer's calculation of the total cost to the State, §§ 598(b), 599c, and therefore no limit on the Agency's calculation of each "responsible party's" cost recovery demand, § 598(b). Vermont thus intends to fine energy producers for millions or billions of dollars under the Act's scheme.

171. For these reasons, the Act violates the Eighth Amendment to the U.S. Constitution by creating a scheme for the imposition of fines that will be grossly disproportional to the gravity of any purported offense committed.

172. Because the Act violates the Constitution's protections against excessive fines, it cannot be enforced against the Chamber's and API's covered members.

173. If the Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT VI
VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION
42 U.S.C. § 1983 AND *EX PARTE YOUNG* EQUITABLE CAUSE OF ACTION

174. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

175. The Act constitutes an unconstitutional taking in violation of the Fifth Amendment to the U.S. Constitution. U.S. Const. amend. V.

176. The federal Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Fourteenth Amendment incorporates the Takings Clause against the States. *Sheetz v. County of El Dorado*, 601 U.S. 267, 276 (2024).

177. Plaintiffs may bring a claim for prospective injunctive relief against state officials in their official capacity for violations of the Takings Clause. *See, e.g.*, *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 420-21 (S.D.N.Y. 2022) (citing *Hutto v. Finney*, 437 U.S. 678, 690 (1978)); *Ex parte Young*, 209 U.S. at 123.

178. The Act imposes "cost recovery demands" that require energy producers to hand over funds—their property—to Vermont. § 598(b), (f). Vermont then uses those funds for its preferred "climate change adaptation projects" within the State without providing just compensation to energy producers. § 598(a).

179. The Act effects a regulatory taking, requiring the imposition of penalties on covered energy producers that go "too far" in regulating those companies so as to amount to an unconstitutional taking. *Cedar Point Nursery*, 594 U.S. at 149 (2021). The magnitude of these penalties, coupled with their retroactive application, effectively confiscates a portion of covered energy producers' past and present assets. *See E. Enters.*, 524 U.S. at 528-29 (plurality opinion) (holding that legislation can be "unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.").[13]

180. In considering whether a regulatory taking has occurred, courts consider "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has

[13] The Second Circuit has held that "no 'common denominator' can be said to exist among the Court's opinions" in *Eastern Enterprises*, and therefore, "[t]he only binding aspect of such a splintered decision is its specific result, and so the authority of *Eastern Enterprises* is confined to its holding that the Coal Act is unconstitutional as applied to Eastern Enterprises." *United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003). Nevertheless, the plurality's Takings Clause analysis in *Eastern Enterprises* is persuasive authority that should be applied to the Vermont Act here.

interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr v. Wisconsin*, 582 U.S. 383, 393 (2017).

181. The Act has a substantial economic impact on covered energy producers. It imposes a substantial and disproportionate penalty—potentially in the hundreds of millions or billions of dollars—on a select group of covered energy producers, requiring them to pay for climate change adaptation projects. *E. Enters.*, 524 U.S. at 529 (plurality opinion) (holding that there was "no doubt that the Coal Act has forced a considerable financial burden upon" the plaintiff where it had to make retroactive payments "on the order of $50 to $100 million"). Those penalties will have a severe economic impact not only on energy producers, but also potentially on consumers and businesses throughout the United States.

182. The Act also upsets the reasonable, investment-backed expectations of covered energy producers by imposing severe retroactive penalties on previously (and currently) lawful conduct. The Takings Clause "provides a . . . safeguard against retrospective legislation concerning property rights." *Id.* at 533-34. Here, the Act holds energy producers strictly liable for 30 years of lawful energy producing operations. *See id.* at 532 (plurality opinion) (holding that Coal Act "substantially interfere[d]" with party's reasonable investment-backed expectations where the "Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability"). Those retrospective penalties punish energy producers for actions taken decades before Vermont ever considered imposing such liability, all while energy producers were subject to and complying with the federal and state laws in force at the time. Such "retroactive liability is substantial and particularly far reaching," *id.* at 534, upsetting energy producers' reasonable investment-backed expectations. In short, the Act turns the investment-backed expectations of covered energy producers on their heads, wrongly punishing them for legally operating their businesses for 30 years.

183. The Act essentially imposes strict tort liability via statute on covered energy producers to pay for Vermont's desired climate change adaptation projects. In other words, it places a targeted and specific group of covered energy producers on the hook for global greenhouse gas emissions and the impacts of climate change stretching back 30 years, imposing penalties on those companies while ignoring others that also contributed to such emissions. *See id.* at 537 (plurality opinion) (holding that "the nature of the governmental action" was "quite unusual" where the government's "solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused," and therefore, such "governmental action implicates fundamental principles of fairness underlying the Takings Clause"). In doing so, the Act runs afoul of the Takings Clause, which "prevent[s] the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 522 (citation omitted).

184. For these reasons, the Act unconstitutionally effects a regulatory taking without providing just compensation.

185. Because the Act violates the Fifth Amendment's Takings Clause, it cannot be enforced against the Chamber's and API's covered members.

186. If the Act is not declared invalid and enjoined, the Act's significant penalties will cause irreparable harm to the Chamber's and API's covered members.

COUNT VII
EQUITABLE RELIEF

187. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

188. The Act—both as a whole and its individual challenged provisions—violates federal law and deprives Plaintiffs' covered members of enforceable federal rights. Federal courts

have the power to enjoin unlawful actions by state officials. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015).

189. This Court can and should exercise its equitable power to enter an injunction prohibiting Defendants from enforcing the Act and all the challenged provisions of the Act against Plaintiffs and their covered members.

190. Injunctive relief is proper where a plaintiff demonstrates "actual success on the merits," *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011), and establishes the standard factors for obtaining equitable relief—"(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *U.S.S.E.C. v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 296 (2d Cir. 2014) (citation omitted).

191. *First*, on the merits, Plaintiffs will succeed in proving that the Act is barred under the U.S. Constitution and under federal statutes like the Clean Air Act and that the Act violates the constitutional rights of Plaintiffs' covered members.

192. *Second*, Plaintiffs' covered members face irreparable injury absent an injunction and remedies available at law are inadequate to compensate for that injury. Here, energy producers will either be forced to pay hundreds of millions or even billions of dollars in penalties to Vermont under the Act or be forced to expend time and resources proving that they are not covered by the Act because they do not have a substantial nexus to the State.

193. Although "[m]onetary loss alone will generally not amount to irreparable harm," where "the movant provides evidence of damage that cannot be rectified by financial compensation," there is irreparable harm. *Borey v. Nat'l Union Fire Ins. Co.*, 934 F.2d 30, 34 (2d Cir. 1991)

(citation omitted). Further, where a plaintiff cannot recover damages due to sovereign immunity, irreparable harm may be presumed. *See United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (affirming the district court's finding that the plaintiffs "injury was irreparable even though [its] losses were only pecuniary because a suit in federal court against [the defendant,] New York[,] to recover the damages sustained by [the plaintiff] would be barred by the Eleventh Amendment"); *Regeneron Pharms., Inc. v. U.S. Dep't of Health & Hum. Servs.*, 510 F. Supp. 3d 29, 39 (S.D.N.Y. 2020); *John E. Andrus Mem'l, Inc. v. Dainers*, 600 F. Supp. 2d 563, 572 n.6 (S.D.N.Y. 2009).

194. Here, any monetary relief Plaintiffs seek would be barred by sovereign immunity. Without a preliminary injunction, Vermont can impose penalties through what the Act refers to as "cost recovery demands." Responsible parties who receive notices of cost recovery demands are then "strictly liable" for their purported share of greenhouse gas emissions, and Vermont may demand payment to the State as punishment for that purported liability. § 598(a)(1), (f).

195. *Third*, the equities favor an injunction. When the government is the opposing party, the third and fourth factors, "harm to the opposing party and weighing the public interest," merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). "[T]he Government does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (citation omitted); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d 2020) ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal."). Enjoining Defendants from unlawfully regulating greenhouse gas emissions beyond Vermont's borders and burdening energy producers is in the public interest.

196. For the foregoing reasons, the Court should exercise its equitable power to enter an injunction prohibiting Defendants from enforcing the Act and all the challenged provisions of the Act against Plaintiffs' covered members.

COUNT VIII
42 U.S.C. § 1983 AND 28 U.S.C. § 2201
DECLARATORY RELIEF

197. Plaintiffs incorporate all prior paragraphs as though fully set forth herein.

198. Vermont's Act is precluded by the federal Constitution and preempted by the Clean Air Act and violates the Due Process Clause of the Fourteenth Amendment to the Constitution, as well as other constitutional provisions incorporated against the States under the Due Process Clause. Vermont's Act therefore deprives Plaintiffs and their covered members of enforceable federal rights.

199. The precluded, preempted, unconstitutional, and unlawful portions of the Act are not severable from the rest of the Act. The entire Act is therefore unlawful and unenforceable against Plaintiffs' covered members.

200. With exceptions not relevant here, in any "case of actual controversy within [their] jurisdiction," federal courts have the power to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

201. This Court can and should exercise its equitable power to enter a declaration that the entire Act is precluded, preempted, unconstitutional, and otherwise unlawful as applied to Plaintiffs' covered members.

PRAYER FOR RELIEF

Plaintiffs request an order and judgment:

a. declaring that the Act, S.259, is unlawful;
b. declaring that the Act, S.259, is precluded by the United States Constitution;

c. declaring that the Act, S.259, is preempted by the Clean Air Act;

d. declaring that the Act, S.259, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

e. declaring that the Act, S.259, violates the Commerce Clause of the United States Constitution;

f. declaring that the Act, S.259, violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution as incorporated against the States;

g. declaring that the Act, S.259, violates the Takings Clause of the Fifth Amendment to the United States Constitution as incorporated against the States;

h. enjoining Defendants and their agents, employees, and all persons acting under their direction or control from taking any action to enforce the Act or the challenged portions of the Act against Plaintiffs' covered members;

i. entering judgment in favor of Plaintiffs;

j. awarding Plaintiffs their attorneys' fees and costs incurred in bringing this action, including attorneys' fees and costs under 42 U.S.C. § 1988(b) for successful 42 U.S.C. § 1983 claims against state officials; and

k. awarding Plaintiffs all other such relief as the Court deems proper and just.

Dated: December 30, 2024

Respectfully submitted,

/s/ Matthew B. Byrne

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**pro hac vice forthcoming*

Office of Public Affairs
U.S. Department of Justice

PRESS RELEASE

Justice Department Files Complaints Against Hawaii, Michigan, New York and Vermont Over Unconstitutional State Climate Actions

Thursday, May 1, 2025

For Immediate Release

Office of Public Affairs

WASHINGTON — The Justice Department today filed complaints against the states of New York and Vermont over their "climate superfund laws." In separate actions, the Justice Department yesterday filed lawsuits against the states of Hawaii and Michigan to prevent each state from suing fossil fuel companies in state court to seek damages for alleged climate change harms.

President Trump recently directed Attorney General Pamela Bondi to take action to stop the enforcement of state laws that unreasonably burden domestic energy development so that energy will once again be reliable and affordable for all Americans. These lawsuits advance President Trump's directive in Executive Order 14260, *Protecting American Energy from State Overreach*.

"These burdensome and ideologically motivated laws and lawsuits threaten American energy independence and our country's economic and national security," said Attorney General Pamela Bondi. "The Department of Justice is working to 'Unleash American Energy' by stopping these illegitimate impediments to the production of affordable, reliable energy that Americans deserve."

"When states seek to regulate energy beyond their constitutional or statutory authority, they harm the country's ability to produce energy and they aid our adversaries," said Acting Assistant Attorney General Adam Gustafson of the Justice Department's Environment and Natural Resources Division. "The Department's filings seek to protect Americans from unlawful state overreach that would threaten energy independence critical to the wellbeing and security of all Americans."

According to the complaints filed yesterday in the U.S. District Courts for the District of Hawaii and the Western District of Michigan, Hawaii and Michigan intend to sue fossil fuel companies to seek damages for alleged climate change harms. The government alleges that these anticipated actions are preempted by the Clean Air Act and violate the Constitution. Such lawsuits burden energy production, force the American people to pay more for energy, and make the United States less able to defend itself from hostile foreign actors.

Complaints filed today in U.S. District Courts for the Southern District of New York and for the District of Vermont challenge expropriative laws passed by New York and Vermont. These "climate superfund" laws would impose strict liability on energy companies for their worldwide activities extracting or refining fossil fuels. The laws assess penalties for those businesses' purported contributions to harms that those states allegedly are experiencing from climate change. The New York law seeks $75 billion from energy companies, while the Vermont law seeks an unspecified amount.

Today's complaints allege that the New York Climate Change Superfund Act and the Vermont Climate Superfund Act are preempted by the federal Clean Air Act and by the federal foreign affairs power, and that they violate the U.S. Constitution. The Justice Department seeks a declaration that these state laws are unconstitutional and an injunction against their enforcement.

Complaints:

- Hawaii
- Michigan
- New York
- Vermont

Updated May 12, 2025

Topic

ENVIRONMENT

Components

Office of the Attorney General | ENRD - Environmental Enforcement Section

Press Release Number: 25-458

Office of Public Affairs
U.S. Department of Justice

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By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. My Administration is committed to unleashing American energy, especially through the removal of all illegitimate impediments to the identification, development, siting, production, investment in, or use of domestic energy resources — particularly oil, natural gas, coal, hydropower, geothermal, biofuel, critical mineral, and nuclear energy resources. An affordable and reliable domestic energy supply is essential to the national and economic security of the United States, as well as our foreign policy. Simply put, Americans are better off when the United States is energy dominant.

American energy dominance is threatened when State and local governments seek to regulate energy beyond their constitutional or statutory authorities. For example, when States target or discriminate against out-of-State energy producers by imposing significant barriers to interstate and international trade, American energy suffers, and the equality of each State enshrined by the Constitution is undermined. Similarly, when States subject energy producers to arbitrary or excessive fines through retroactive penalties or seek to control energy development, siting, or production activities on Federal land, American energy suffers.

Many States have enacted, or are in the process of enacting, burdensome and ideologically motivated "climate change" or energy policies that threaten American energy dominance and our economic and national security. New York, for example, enacted a "climate change" extortion law that seeks to retroactively impose billions in fines (erroneously labelled "compensatory payments") on traditional energy producers for their purported past contributions to greenhouse gas emissions not only in New York but also anywhere in the United States and the world. Vermont similarly extorts energy producers for alleged past contributions to greenhouse gas emissions anywhere in the United States or the globe.

Other States have taken different approaches in an effort to dictate national energy policy. California, for example, punishes carbon use by adopting impossible caps on the amount of carbon businesses may use, all but forcing businesses to pay large sums to "trade" carbon credits to meet California's radical requirements. Some States delay review of permit applications to produce energy, creating de facto barriers to entry in the energy market. States have also sued energy companies for supposed "climate change" harm under nuisance or other tort regimes that could result in crippling damages.

These State laws and policies weaken our national security and devastate Americans by driving up energy costs for families coast-to-coast, despite some of these families not living or voting in States with these crippling policies. These laws and policies also undermine Federalism by projecting the regulatory preferences of a few States into all States. Americans must be permitted to heat their homes, fuel their cars, and have peace of mind — free from policies that make energy more expensive and inevitably degrade quality of life.

These State laws and policies try to dictate interstate and international disputes over air, water, and natural resources; unduly discriminate against out-of-State businesses; contravene the equality of States; and retroactively impose arbitrary and excessive fines without legitimate justification.

These State laws and policies are fundamentally irreconcilable with my Administration's objective to unleash American energy. They should not stand.

Sec. 2. State Laws and Causes of Action. (a) The Attorney General, in consultation with the heads of appropriate executive departments and agencies, shall identify all State and local laws, regulations, causes of action, policies, and practices (collectively, State laws) burdening the identification, development, siting, production, or use of domestic energy resources that are or may be unconstitutional, preempted by Federal law, or otherwise unenforceable. The Attorney General shall prioritize the identification of any such State laws purporting to address "climate change" or involving "environmental, social, and governance" initiatives, "environmental justice," carbon or "greenhouse gas" emissions, and funds to collect carbon penalties or carbon taxes.

(b) The Attorney General shall expeditiously take all appropriate action to stop the enforcement of State laws and continuation of civil actions identified in subsection (a) of this section that the Attorney General determines to be illegal.

(c) Within 60 days of the date of this order, the Attorney General shall submit a report to the President, through the Counsel to the President, regarding actions taken under subsection (b) of this section. The Attorney General shall also recommend any additional Presidential or legislative action necessary to stop the enforcement of State laws identified in subsection (a) of this section that the Attorney General determines to be illegal or otherwise fulfill the purpose of this order.

Sec. 3. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
April 8, 2025.

S02129 Summary:

BILL NO S02129B

SAME AS SAME AS

SPONSOR KRUEGER

COSPNSR ADDABBO, BRESLIN, BRISPORT, BROUK, CLEARE, FERNANDEZ, GIANARIS, GONZALEZ, GOUNARDES, HARCKHAM, HINCHEY, HOYLMAN-SIGAL, JACKSON, KAVANAGH, KENNEDY, LIU, MAY, MAYER, MYRIE, PARKER, RAMOS, RIVERA, SALAZAR, SANDERS, SEPULVEDA, SERRANO, STAVISKY, WEBB

MLTSPNSR

Add Art 76 76-0101 - 76-0105, En Con L; add 97-m, St Fin L

Establishes the climate change adaptation cost recovery program to require companies that have contributed significantly the buildup of climate-warming greenhouse gases in the atmosphere to bear a share of the costs of needed infrastructure investments to adapt to climate change; mandates that projects funded by the program require compliance with prevailing wage requirements; requires that contracts for funded projects contain a provision that the structural iron and structura steel used or supplied in the performance of the contract or any subcontract thereto shall be produced or made in whole o substantial part in the United States, its territories or possessions; makes additional provisions; establishes the clima change adaptation fund.

S02129 Actions:

BILL NO S02129B

01/18/2023 REFERRED TO ENVIRONMENTAL CONSERVATION
04/17/2023 REPORTED AND COMMITTED TO FINANCE
05/15/2023 AMEND AND RECOMMIT TO FINANCE
05/15/2023 PRINT NUMBER 2129A
06/07/2023 COMMITTEE DISCHARGED AND COMMITTED TO RULES
06/07/2023 ORDERED TO THIRD READING CAL.1664
06/07/2023 PASSED SENATE
06/07/2023 DELIVERED TO ASSEMBLY
06/07/2023 referred to environmental conservation
01/03/2024 died in assembly
01/03/2024 returned to senate
01/03/2024 REFERRED TO ENVIRONMENTAL CONSERVATION
03/12/2024 REPORTED AND COMMITTED TO FINANCE
04/26/2024 AMEND AND RECOMMIT TO FINANCE
04/26/2024 PRINT NUMBER 2129B
05/06/2024 REPORTED AND COMMITTED TO RULES
05/06/2024 ORDERED TO THIRD READING CAL.851
05/07/2024 PASSED SENATE
05/07/2024 DELIVERED TO ASSEMBLY
05/08/2024 referred to environmental conservation
06/07/2024 substituted for a3351b
06/07/2024 ordered to third reading rules cal.591
06/07/2024 passed assembly
06/07/2024 returned to senate

246

12/26/2024 DELIVERED TO GOVERNOR

12/26/2024 SIGNED CHAP.679

12/26/2024 APPROVAL MEMO.101

S02129 Floor Votes:

DATE: 06/08/2024 Assembly Vote YEA/NAY: 92/49

Yes	Alvarez	No	Byrnes	Yes	Fall
Yes	Anderson	Yes	Carroll	No	Fitzpatrick
No	Angelino	Yes	Chandler-Waterm	No	Flood
Yes	Ardila	No	Chang	Yes	Forrest
Yes	Aubry	Yes	Clark	No	Friend
No	Barclay	Yes	Colton	Yes	Gallagher
Yes	Barrett	Yes	Conrad	No	Gallahan
No	Beephan	Yes	Cook	No	Gandolfo
No	Bendett	Yes	Cruz	Yes	Gibbs
Yes	Benedetto	Yes	Cunningham	No	Giglio JA
ER	Berger	No	Curran	No	Giglio JM
Yes	Bichotte Hermel	Yes	Dais	Yes	Glick
No	Blankenbush	ER	Darling	Yes	Gonzalez-Rojas
No	Blumencranz	Yes	Davila	No	Goodell
Yes	Bores	Yes	De Los Santos	No	Gray
No	Brabenec	No	DeStefano	Yes	Gunther
Yes	Braunstein	ER	Dickens	No	Hawley
Yes	Bronson	Yes	Dilan	Yes	Hevesi
No	Brook-Krasny	Yes	Dinowitz	Yes	Hunter
No	Brown EA	No	DiPietro	Yes	Hyndman
Yes	Brown K	No	Durso	ER	Jackson
Yes	Burdick	Yes	Eachus	Yes	Jacobson
Yes	Burgos	ER	Eichenstein	Yes	Jean-Pierre
Yes	Burke	Yes ‡	Epstein	No	Jensen
No	Buttenschon	Yes	Fahy	Yes	Jones

‡ Indicates voting via videoconference

S02129 Text:

STATE OF NEW YORK

2129--B

2023-2024 Regular Sessions

IN SENATE

January 18, 2023

Introduced by Sens. KRUEGER, ADDABBO, BRESLIN, BRISPORT, BROUK, CLEARE, FERNANDEZ, GIANARIS, GONZALEZ, GOUNARDES, HARCKHAM, HINCHEY, HOYLMAN-SIGAL, JACKSON, KAVANAGH, KENNEDY, LIU, MAY, MYRIE, PARKER, RAMOS, RIVERA, SALAZAR, SANDERS, SEPULVEDA, SERRANO, STAVISKY, WEBB -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- recommitted to the Committee on Environmental Conservation in accordance with Senate Rule 6, sec. 8 -- reported favorably from said committee and committed to the Committee on Finance -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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

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

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

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

1. Climate change, resulting primarily from the combustion of fossil fuels, is an immediate, grave threat to the state's communities, environment, and economy. In addition to mitigating the further buildup of greenhouse gases, the state must take action to adapt to certain consequences of climate change that are irreversible, including rising sea levels, increasing temperatures, extreme weather events, flooding, heat waves, toxic algal blooms and other climate-change-driven threats. Maintaining New York's quality of life into the future, particularly for

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

LBD02710-12-4

young people, who will experience greater impacts from climate change over their lifetimes, will be one of the state's greatest challenges over the next three decades. Meeting that challenge will require a shared commitment of purpose, huge investments in new or upgraded infrastructure, and new revenue sources to pay for those investments.

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

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

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

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

6. a. Payments by historical polluters into the climate change adaptation cost recovery program would be used for new or upgraded infrastructure needs such as coastal wetlands restoration, storm water drainage system upgrades, energy efficient cooling systems in public and private buildings, including schools and public housing, support for programs addressing climate-driven public health challenges, and responses to extreme weather events, all of which are necessary to protect the public safety and welfare in the face of the growing impacts of climate change.

b. 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.

c. The total assessment rate of $3 billion dollars per year represents a small percentage of the extraordinary cost to New York State for repairing from and preparing for climate change-driven extreme events over the next 25 years, and is designed to have a meaningful impact on the burden borne by New York State taxpayers for climate adaptation while being sufficiently limited so as to not impose a punitive negative impact on an industry in which just the three largest domestic oil and gas producers made a combined $85.6 billion in profits in 2023. Recent science has determined that the largest one hundred fossil fuel producing companies are responsible for more than 70% of global greenhouse gas emissions since 1988, and therefore bear a much higher share of responsibility for climate damage to New York State than is represented by the $75 billion being assessed them.

d. At least 35 percent, with a goal of 40 percent or more of the overall benefits of program spending would go to climate change adaptive infrastructure projects that directly benefit disadvantaged communities.

7. A covered period of 2000-2018 has been selected. Over 70 percent of the total increase in greenhouse gas concentrations since the Industrial Revolution has occurred since 1950, with a marked increase in the rate of emissions after the year 2000. By 2000 the science of climate change was well established, and no reasonable corporate actor could have failed to anticipate regulatory action to address its impacts. In addition, the data necessary to attribute proportional responsibility is very robust in the covered period.

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

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

ARTICLE 76

CLIMATE CHANGE ADAPTATION COST RECOVERY PROGRAM

§ 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 weather-

ization 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, as defined in section 75-0101 of this chapter, including but not limited to releases of greenhouse gases resulting from the extraction, storage, production, refinement, transport, manufacture, distribution, sale, and use of fossil fuels or petroleum products extracted, produced, refined, or sold by such entity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d. To accept and collect payment from responsible parties;

e. To identify climate change adaptive infrastructure projects;

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

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

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

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

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

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

holds a minority interest, multiplied by the percentage of the minority interest held.

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

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

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

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

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

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

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

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

iii. issuing notices of cost recovery demand to responsible parties informing them of the cost recovery demand amount; how and where cost recovery demands can be paid; the potential consequences of nonpayment

and late payment; and information regarding their rights to contest an assessment;

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

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

b. The department shall hold at least two public hearings, one in-person and one virtual, on proposed regulations, with a minimum of thirty days' public notice in compliance with the provisions of article seven of the public officers law.

5. Within two years of the effective date of this article, the department shall complete a statewide climate change adaptation master plan for the purpose of guiding the dispersal of funds in a timely, efficient, and equitable manner to all regions of the state in accordance with the provisions of this chapter. In completing such plan, the department shall:

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

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

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

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

e. consult with stakeholders, including local governments, businesses, environmental advocates, relevant subject area experts, and representatives of disadvantaged communities; and

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

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

7. The department or the department of taxation and finance shall

[First Reprint]

SENATE, No. 3545

STATE OF NEW JERSEY

221st LEGISLATURE

INTRODUCED SEPTEMBER 12, 2024

Sponsored by:
Senator JOHN F. MCKEON
District 27 (Essex and Passaic)
Senator BOB SMITH
District 17 (Middlesex and Somerset)

Co-Sponsored by:
Senators Timberlake, McKnight, Greenstein, Cryan, Burgess, Mukherji, Cruz-Perez, Johnson, Diegnan, Zwicker, Gopal and Vitale

SYNOPSIS

"Climate Superfund Act"; imposes liability on certain fossil fuel companies for certain damages caused by climate change and establishes program in DEP to collect and distribute compensatory payments.

CURRENT VERSION OF TEXT

As reported by the Senate Environment and Energy Committee on December 12, 2024, with amendments.

(Sponsorship Updated As Of: 5/12/2025)

AN ACT concerning damages caused by climate change and supplementing Title 26 of the Revised Statues.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Climate Superfund Act."

2. As used in this act:

"Climate change adaptation project" means a project designed to respond to, avoid, moderate, repair, or adapt to negative impacts caused by climate change and to assist human and natural communities, households, and businesses to prepare for future climate-change-driven disruptions. "Climate change adaptation projects" include, but are not limited to: flood protection projects; home buyouts; upgrades of stormwater drainage systems; defensive upgrades to roads, bridges, railroads, and transit systems; preparation for, and recovery from, extreme weather events; preventive health care programs and providing medical care to treat illness or injury caused by the effects of climate change; relocation, elevation, or retrofits of sewage treatment plants and other infrastructure vulnerable to flooding; installation of energy efficient cooling systems and other weatherization and energy efficiency upgrades and retrofits in public and private buildings, including schools and public housing, designed to reduce the public health effects of more frequent heat waves and forest fire smoke; upgrades to the electrical grid to increase stability and resilience, including the creation of self-sufficient microgrids; and response to toxic algae blooms, loss of agricultural topsoil, crop loss, and other climate-driven ecosystem threats to forests, farms, fisheries, and food systems.

"Coal" means bituminous coal, anthracite coal, and lignite.

"Commissioner" means the Commissioner of Environmental Protection.

"Controlled group" means two or more entities treated as a single employer pursuant to:

(1) 26 U.S.C. s.52(a) or (b), without regard to 26 U.S.C. s.1563(b)(2)(C); or

(2) 26 U.S.C. s.414(m) or (o).

"Cost recovery demand" means a charge imposed upon a responsible party for cost recovery payments under the Climate Superfund Cost Recovery Program established pursuant to section 5 of this act for payment into the Climate Superfund Cost Recovery Program Fund established pursuant to section 6 of this act.

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
[1]Senate SEN committee amendments adopted December 12, 2024.

"Covered greenhouse gas emissions" means 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 extracted or refined by an entity.

"Covered period" means the time period beginning on January 1, 1995 and ending on the last day of the calendar year during which this act takes effect.

"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.

"Department" means the Department of Environmental Protection.

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

"Fossil fuel" means coal, petroleum products, and fuel gases.

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

"Fuel gas" means methane, natural gas, liquefied natural gas, and any manufactured fuel gas.

"Greenhouse gas" means the same as the term is defined in section 3 of P.L.2007, c.112 (C.26:2C-39).

"Notice of cost recovery demand" means the written communication from the department informing a responsible party of the amount of the cost recovery demand payable into the Climate Superfund Cost Recovery Program Fund established pursuant to section 6 of this act.

"Overburdened community" means the same as the term is defined in section 2 of P.L.2020, c.92 (C.13:1D-158).

"Petroleum product" means any product refined or re-refined from: (1) synthetic or crude oil; or (2) crude oil extracted from natural gas liquids or other sources.

"Qualifying expenditure" means an authorized payment from the Climate Superfund Cost Recovery Program Fund established pursuant to section 6 of this act to pay for: (1) a climate change adaptation project, including its operation, monitoring, and maintenance; or (2) reasonable expenses associated with the administration of the Climate Superfund Cost Recovery Program established pursuant to section 5 of this act.

"Responsible party" means an 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 department to be responsible more than one billion metric tons of covered greenhouse gas emissions, except

that "responsible party" does not include any entity that is not required to pay New Jersey sales tax.

3. a. No later than two years after the effective date of this act, the State Treasurer, in consultation with the department, and with any other person or entity whom the State Treasurer decides to consult for the purpose of obtaining and utilizing credible data or methodologies that the State Treasurer determines may aid the State Treasurer in making the assessments and estimates required by this section, shall submit to the Senate Environment and Energy Committee and the Assembly Environment, Natural Resources and Solid Waste Committee, or their successor committees, an assessment of the damages to the State and its residents that have resulted from covered greenhouse gas emissions.

b. The assessment shall include:

(1) a summary of the various cost-driving effects of covered greenhouse gas emissions on the State, including effects on public health, natural resources, biodiversity, agriculture, economic development, flood preparedness and safety, housing, and any other effect that the State Treasurer determines is relevant;

(2) a categorized calculation of the costs that have been incurred within the State of each of the effects identified in paragraph (1) of this subsection; and

(3) a categorized calculation of the costs that have been incurred to abate the effects of covered greenhouse gas emissions on the State and its residents.

4. a. Each responsible party shall be strictly liable to the State for damages that resulted from covered greenhouse gas emissions, as determined by the State Treasurer pursuant to section 3 of this act. Each responsible party shall make compensatory payments to the State according to its proportional liability, as determined by the department pursuant to section 5 of this act.

b. Responsible parties that are entities in a controlled group shall be treated as a single entity for identification purposes, but shall be jointly and severally liable for the payment of any cost recovery demand owed by any entity in the controlled group.

5. a. There is established the Climate Superfund Cost Recovery Program in the Department of Environmental Protection. The purposes of the program shall be to:

(1) secure compensatory payments from responsible parties based on a standard of strict liability;

(2) determine the proportional liability of responsible parties;

(3) impose cost recovery demands on responsible parties and issue
notices of cost recovery demands;

(4) accept and collect payment from responsible parties; and

(5) disperse funds to implement climate change adaptation projects.

b. With respect to each responsible party, the cost recovery demand shall be equal to an amount that bears the same ratio to the cost to the State and its residents, as calculated by the State Treasurer pursuant to section 3 of this act, from the emission of covered greenhouse gases as the responsible party's applicable share of covered greenhouse gas emissions bears to the aggregate applicable shares of covered greenhouse gas emissions resulting from the use of fossil fuels extracted or refined during the covered period.

c. If a responsible party owns a minority interest of 10 percent or more in another entity, the responsible party's applicable share of covered greenhouse gas emissions shall be increased by the applicable share of covered greenhouse gas emissions for the entity in which the responsible party holds a minority interest multiplied by the percentage of the minority interest held by the responsible party.

d. The department shall use the United States Environmental Protection Agency's Emissions Factors for Greenhouse Gas Inventories, as applied to the best publicly available fossil fuel volume data for the purpose of determining the amount of covered greenhouse gas emissions attributable to any entity from the fossil fuels attributable to the entity.

e. The department may adjust the cost recovery demand amount of a responsible party who refined petroleum products or who is a successor in interest to an entity that refines petroleum products if the responsible party establishes to the satisfaction of the department that:

(1) a portion of the cost recovery demand amount was attributable to the refining of crude oil extracted by another responsible party; and

(2) the crude oil extracted by the other entity was accounted for when the department determined the cost recovery demand amount for the other responsible party or a successor in interest of the other responsible party.

f. The department shall issue the cost recovery demands required under this section no later than six months following the adoption of the rules and regulations required under section 8 of this act.

g. (1) Except as provided in paragraph (2) of this subsection, a responsible party shall pay the cost recovery demand amount in full no later than six months following the department's issuance of the cost recovery demand.

(2) A responsible party may elect to pay the cost recovery demand amount in nine annual installments, provided that:

(a) the first installment shall be paid no later than six months following the department's issuance of the cost recovery demand

and shall be equal to 20 percent of the total cost recovery demand amount;

(b) each subsequent installment shall be paid one year from the initial payment each subsequent year and shall be equal to 10 percent of the total cost recovery demand amount. The commissioner, at the commissioner's discretion, may adjust the amount of a subsequent installment payment to reflect increases or decreases in the Consumer Price Index;

(c) the unpaid balance of all remaining installments shall become due immediately if the responsible party fails to pay any installment in a timely manner, if there is a liquidation or sale of all, or substantially all, the assets of the responsible party, or if the responsible party ceases to do business; and

(d) in the case of a sale of all, or substantially all, the assets of a responsible party, the remaining installments shall not become due immediately if the buyer enters into an agreement with the department under which the buyer assumes liability for the remaining installments due under this section in the same manner as if the buyer were the responsible party.

h. The department shall deposit cost recovery payments into the Climate Superfund Cost Recovery Program Fund established by section 6 of this act.

i. A responsible party aggrieved by the issuance of a notice of cost recovery demand shall exhaust administrative remedies by filing a request for reconsideration with the department within 15 days following issuance of the notice of cost recovery demand. A request for reconsideration shall state the grounds for the request and include supporting documentation. The department shall issue a subsequent notice of cost recovery demand or a retraction, which shall be considered final agency action on the matter for the purposes of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and shall be subject only to review by a court of competent jurisdiction.

j. Nothing in this section shall be construed to supersede or diminish in any way existing remedies available to a person or the State at common law or under statute.

6. a. There is established in the Department of Environmental Protection a special, nonlapsing fund to be known as the "Climate Superfund Cost Recovery Program Fund." Monies in the fund shall be held separately and be dedicated solely for the purpose of making qualifying expenditures.

b. The fund shall be credited with:

(1) cost recovery payments distributed to the fund pursuant to section 1 of this act;

(2) any other moneys appropriated by the Legislature or otherwise made available to the fund for the purposes of this act;

(3) other gifts, donations, or other monies received from any source, public or private, dedicated for deposit into the fund and approved by the State Treasurer; and

(4) any interest earnings or other investment income earned or received on the moneys in the fund.

c. All moneys appropriated or otherwise made available to the fund shall be dedicated for the purposes of the fund. Pending use, moneys in the fund may be invested and reinvested in the same manner as other moneys of the department in the manner provided by law. All earnings received from the investment or deposit of such moneys shall be paid into and become a part of the fund and be available for use pursuant to this act.

d. The department shall establish a grant program to disperse funds from the Climate Superfund Cost Recovery Program Fund to project sponsors of climate change adaptation and resilience projects. In order to effectuate the grant program, the department shall:

(1) establish eligibility criteria for a program grant award;

(2) adopt guidelines and procedures for the submission of grant applications, including, but not limited to, guidelines and procedures addressing the form and manner in which such applications are to be submitted;

(3) establish criteria[1] [, in consultation with the Department of Environmental Protection,] [1] for the evaluation and prioritization of program grant applications;

(4) identify the project costs that are eligible for financing through the use of program grant funding, and identify the specific factors that will be considered, by the department, in determining the appropriate dollar amount of each grant award issued under the program; and

(5) identify the terms and conditions for the awarding of a program grant, and for the use of program grant funds awarded, pursuant to this section, including, at a minimum, conditions requiring the recipient of a grant award to report relevant information, to the department, regarding the recipient's expenditure of grant funds awarded thereto under the program.

7. No later than five years after the effective date of this act, and annually thereafter, the commissioner shall issue a written report to the Legislature, pursuant to section 2 of P.L.1991, c.164 (C.52:14-19.1), summarizing the activities of the Climate Superfund Cost Recovery Program.

8. No later than two years after the State Treasurer completes the report required by section 3 of this act, the Department of Environmental Protection shall, in accordance with the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.). adopt rules and regulations to implement this act.

9. This act shall take effect immediately.

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Let's Make Things Even More Complicated

Overview of the CSRR Rule Proposal

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Panelists

- **Gail Conenello, Esq.**
  K&L Gates
- **Patrick Mottola, Esq.**
  CSG Law
- **Andrew Robins, Esq.**
  Sills Cummis & Gross
- **Mark Fisher, LSRP**
  Hailey & Aldrich
- **Kathi Stetser, LSRP**
  GEI Consultants

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GWQS Changes - 2025

Published February 3, 2025

- 7 COCs decreased by more than an OOM
  - Vinyl chloride
  - Cobalt
  - 1,1-biphenyl
  - Cyanide (free)
  - 1,3-dichlorobenzene (meta)
  - Heptachlor epoxide
  - Methoxychlor
- Other COCs decreased by less than an OOM

- GenX Rule Proposal – March 18, 2025

Order of Magnitude and Phase-In

6-Month Phase-in timeframe - August 3, 2025

- No OOM Change
  - Submit a Remedial Action Workplan or Remedial Action Report by 8/3/2025 to lock in old standards; or
  - Submit an Unrestricted Use Response Action Outcome by 8/3/2025.

- OOM Change
  - Submit Unrestricted Use Response Action Outcome prior to 8/3/2025 or
  - Use the new standards.

Other Standards

The Same 6-month phase-in applies for all new standards starting with the date published in the NJ Register:

- Vapor Intrusion – Compare to prior screening levels for OOM evaluation.
- Migration to Ground Water Soil – Coming soon, expect OOM changes.
- Surface Water – Proposed standards for PFAS are extremely low. Consider implications for your Sites.

Initial RAP Applications

- Submitted prior to August 3, 2025
  - If approved the permit will say that an OOM evaluation must be completed prior to the first biennial certification.
  - You can opt to send them your OOM evaluation prior to permit approval or wait till first biennial certification.
  - If the RAP application is required to be withdrawn for any reason, the new standards will apply.
  - If you know you are going to need more work for delineation – don't delay.


Site Remediation Rule Proposal
NJDEP PROPOSED AMENDMENTS/NEW RULES/REPEALS TO THE SITE REMEDIATION REFORM ACT REGULATIONS ("SRRA 2.0")

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Rules Included in the Proposal

- NJDEP Docket No. 12-24-09, Proposal No. PRN 2024-124
- Rule Proposed October 21, 2024; Public Hearing on November 21, 2024; extended comment period ended January 31, 2025
- Known as the "SRRA 2.0" Rule Proposal
- Proposal Amends many Rules, including:
  - Administrative Rules for Remediation of Contaminated Sites (ARRCS) N.J.A.C. 7:26
  - Industrial Site Recovery Act (ISRA) N.J.A.C. 7:26B
  - Technical Requirements for Site Remediation (Tech Regs) N.J.A.C. 7:26E
  - Heating Oil Tank System Remediation (UHOT) N.J.A.C. 7:26F

SRRA 2.0 Proposal Overview

- Amendments Related to the 2019 SRRA Legislation
  - Definitions
    - Retain (Clarifies limited circumstances when an LSRP is not required for remediation)
    - Remediation
  - Public Notification
    - Timing
    - Responding to public inquiries
  - All Appropriate Inquiry and Discharge Reporting (*to be discussed later*)
  - IEC Requirements for unoccupied buildings
  - Direct Oversight

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SRRA 2.0 (continued)

- RAP Paradigms (*to be discussed later in presentation*)
- Amendments to 2021 Remediation Standards
  - Indoor Air and Building Interiors
  - RAOs
- Clarifying IEC requirements in unoccupied structures
- Remediation Funding Sources and Financial Assurances
- Clarifications of Direct Oversight requirements

Other Proposed Changes

- Notice in lieu of deed notice for institutional controls (as found in RAP Guidance)
- RAO Notices and "annulment"
- Requirements for Alternative Fill
- When "Extrapolation" delineation is appropriate
- Receptor evaluation requirements
- Reminder to consider threatened and endangered species
- Administrative corrections

The Remedial Action Permit "Paradigm"

- Permits required for exceedances of indoor air standards
  - Indoor Air Notification Area and Fact Sheet (like a CEA for indoor air)
  - As-built drawing and operations manual for vapor intrusion systems
  - Long term monitoring, "change-in-use" evaluation and protectiveness evaluations
- Focused Remedial Action Permits
  - Limited restricted use remedies
  - Presumptive remedies
  - Pre-approved alternative remedies
  - Soil permit for historic fill
  - Monitored Natural Attenuation

The Remedial Action Permit "Paradigm" (continued)

- Clarification and codification of biennial certification requirements
- Procedures for administrative changes to permits
- Permissive "One Permit" Paradigm
- Need to coordinate new approach with existing permit process

All Appropriate Inquiry

- All Appropriate Inquiry and Discharge Reporting
  - All appropriate inquiry (AAI) is "remediation"
  - Clarifies liability (or non-liability) of party performing AAI
  - Reporting of knowledge of a discharge by "any person"

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Let's Make Things Even More Complicated

Overview of the CSRR Rule Proposal

Getting Grants in the Garden State: New Jersey Site Remediation Funding Programs

"MONEY, MONEY, MONEY"

Joanne Vos, Esq.
Sonya Ward, LSRP
Melissa Clarke, Esq.
Anita Locke, LSRP

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Hazardous Discharge Site Remediation Fund

The Law:

N.J.S.A. 58:10B-4 through N.J.S.A. 58:10B-10

The Rules

- N.J.A.C. 7:26C-11.1, et seq. (Requirements for a Person to Apply for HDSRF)
- N.J.A.C. 19:31-8, et seq. (Implementation of HDSRF by NJEDA)

HAZARDOUS DISCHARGE SITE REMEDIATION FUND LOANS & GRANTS AVAILABLE

PUBLIC SECTOR ASSISTANCE

APPLICANT	FUNDS	PHASE	AMOUNT	SPECIAL CONDITIONS
Municipalities, Counties & Redevelopment Entities	Grants NJSA 58:10B-6(a)(2)(a(iii)	PA/SI/RI	100 % of PA/SI/RI (capped at $2 million per applicant per year)	Must have 1) tax sale certificate; 2) voluntarily acquired through foreclosure or similar means; 3) own site. • Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed.
Municipalities, Counties & Redevelopment Entities	Grants NJSA 58:10B-6(a)(2)(a(ii)	Remedial Action Affordable housing; Recreation/ Conservation purposes; Renewable Energy	75% of RA for recreation or conservation 50% of RA for affordable housing 75% of RA for Renewable Energy Program cap of $2.5M per year	• Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed. • Rec./Cons. Grants-property must be preserved for conservation or recreation through a development easement or conservation easement or other restriction/easement restricting development. The HDSRF can provide a template for the draft easement.
Municipalities, Counties & Redevelopment Entities	Grants BDA sites NJSA 58:10B-6(a)(2)(a(i)	Remediation (PA/SI/RI/RA)	100 % PA/SI/RI 75 % RA (capped at $2M per applicant per year) Additional $1M	• Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed. • Lien (for the amount expended for remedial action costs) placed on property if municipality, county or redevelopment entity does not acquire site.

HAZARDOUS DISCHARGE SITE REMEDIATION FUND LOANS & GRANTS AVAILABLE

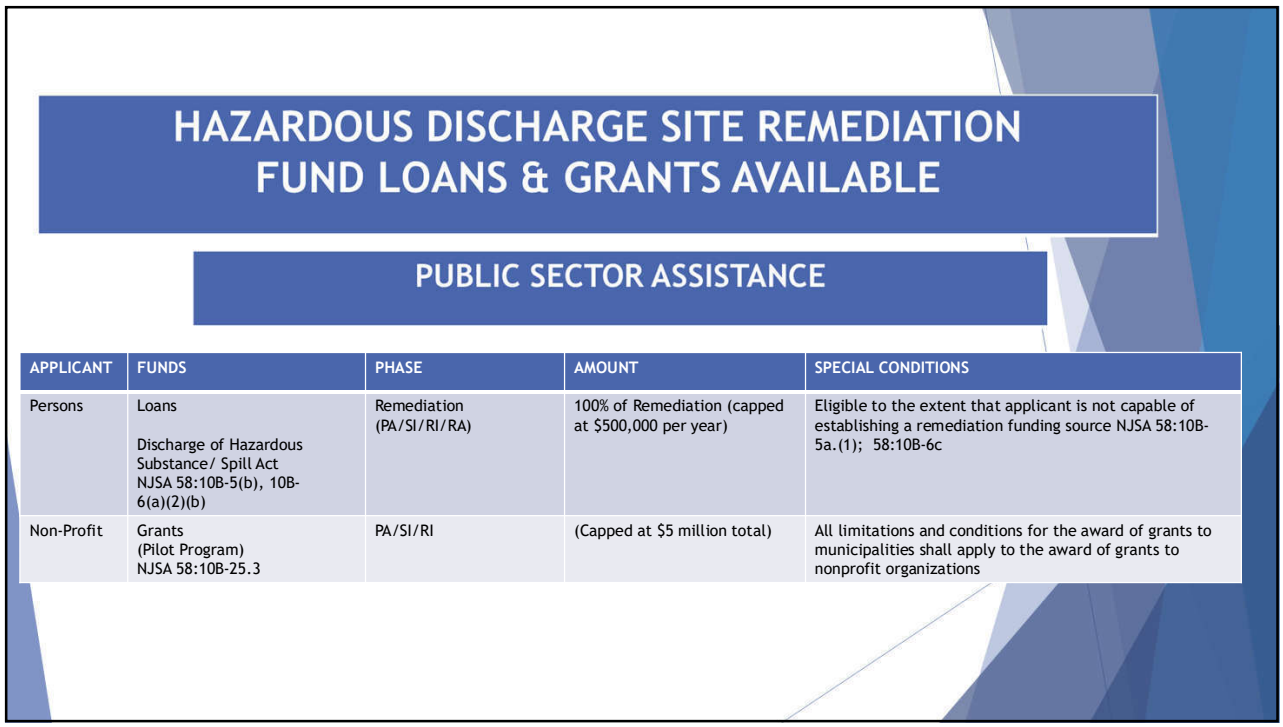
PUBLIC SECTOR ASSISTANCE

APPLICANT	FUNDS	PHASE	AMOUNT	SPECIAL CONDITIONS
Municipalities, Counties & Redevelopment Entities	Grants Unrestricted Use Remedy (soil only) NJSA 58:10B-6(a)(5)(b)	Remediation (RA)	25% "project" costs of the remediation for an unrestricted use remedial action $250,000 cap	Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed
Municipalities, Counties and Redevelopment Entities	Loans Imminent & significant threat NJSA 58:10B-6(a)(2)(a)(v)	Remediation (PA/SI/RI/RA)	100% of Remediation Activities (capped at $1 million per year)	Must own site Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed
Municipalities, Counties and Redevelopment Entities	Loans PA/SI/RI is completed NJSA 58:10B-6(a)(2)(a)(iv)	Remedial Action	100% of Remedial Action (capped at $2 million per year)	Must own site Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed

HAZARDOUS DISCHARGE SITE REMEDIATION FUND LOANS & GRANTS AVAILABLE

PUBLIC SECTOR ASSISTANCE

APPLICANT	FUNDS	PHASE	AMOUNT	SPECIAL CONDITIONS
Persons Qualifying Persons	Grants Unrestricted Use Remedy NJSA 58:10B-6(a)(5)(b)	Remedial Action	25% of the "project costs" for the RA that is specifically for an unrestricted use $250,000 cap	• "Qualifying person" means any person who has a net worth of not more than $2M • "Project costs" means that portion of the total costs of a remediation to implement an unrestricted use remedial action
Persons	Loans for sites with imminent & significant threat) NJSA 58:10B-6(a)(2)(b)		100% Remediation (capped at $500,000 per year)	Eligible to the extent that applicant is not capable of establishing a remediation funding source (NJSA 58:10B-6c)
Persons	Loans for sites in qualifying municipality NJSA 58:10B-6a(1)	Remediation (PA/SI/RI/RA)	100% Remediation (capped at $500,000 per year)	Eligible to the extent that applicant is not capable of establishing a remediation funding source (NJSA 58:10B-6c)
Persons	Loans EOZ NJSA 58:10B-6(a)(5	Remediation (PA/SI/RI/RA)	100% of Remediation (capped at $500,000 per year	Exempt from demonstrating the ability to establish remediation funding source NJSA 58:10B-5a.(1); 58:10B-6c
Persons	Loans ISRA NJSA 58:10B-5(b)	Remediation (PA/SI/RI/RA)	100% of Remediation (capped at $500,000 per year)	Eligible to the extent that applicant is not capable of establishing a remediation funding source NJSA 58:10B-5a.(1); 58:10B-6c



APPLICANT	FUNDS	PHASE	AMOUNT	SPECIAL CONDITIONS
Persons	Loans Discharge of Hazardous Substance/ Spill Act NJSA 58:10B-5(b), 10B-6(a)(2)(b)	Remediation (PA/SI/RI/RA)	100% of Remediation (capped at $500,000 per year)	Eligible to the extent that applicant is not capable of establishing a remediation funding source NJSA 58:10B-5a.(1); 58:10B-6c
Non-Profit	Grants (Pilot Program) NJSA 58:10B-25.3	PA/SI/RI	(Capped at $5 million total)	All limitations and conditions for the award of grants to municipalities shall apply to the award of grants to nonprofit organizations

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Brownfields Redevelopment Incentive Program Act (BRIP)

- The Law: N.J.S.A. 34:1B-277, et seq. (Eff. 2021)
- Tax Credit Program
- Developers and municipalities are eligible;
- Can be stacked with Aspire Program (https://www.njeda.gov/aspire/) or Historic Property Reinvestment Program (https://www.njeda.gov/historic-property-reinvestment-program/)
- BRIP program legislation recently signed into law removed the eligibility restriction that the applicant not be in any way liable or responsible for the discharge
- The new legislation narrowed the eligibility restrictions to applicants who "did not discharge a hazardous substance at the brownfield site" and are not a corporate successor to a discharger

Legislative Changes expected 2025!

- NJEDA is drafting new rules
- No applications are being accepted until new rules are adopted

Presented by:

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SUBCHAPTER 11. HAZARDOUS DISCHARGE SITE REMEDIATION FUND

7:26C-11.1 Scope and requirements

This subchapter provides the requirements for a person to apply for a loan or a grant from the Hazardous Discharge Site Remediation Fund.

7:26C-11.2 Application for loans and grants

An applicant, as defined at N.J.A.C. 19:31-8.2, New Jersey Economic Development Authority, Authority Assistance Programs, may apply for a loan or grant from the Hazardous Discharge Site Remediation Fund by submitting to the Department a completed form and following the instructions, both of which are found on the Department's website at www.nj.gov/dep/srp/srra/forms.

7:26C-11.3 Grants for reimbursement of prior remediation costs

(a) A person responsible for conducting remediation may apply for a grant for reimbursement of remediation costs that were incurred prior to an application pursuant to this subchapter provided that:

1. The remediation costs were incurred after June 16, 1993;

2. If a person other than a licensed site remediation professional conducted the remediation, the Department has approved the remediation associated with the remediation costs; and

3. If a licensed site remediation professional conducted a phase of remediation and submitted the document to the Department pursuant to this chapter.

7:26C-11.4 Disbursements of grants and loans

(a) A person responsible for conducting remediation using a loan or a grant as part of the remediation funding source requirement shall comply with N.J.A.C. 7:26C-5.12 for the disbursement of funds.

(b) A person responsible for conducting remediation using a loan or grant, other than as part of a remediation funding source, shall comply with N.J.A.C. 7:26C-5.12(b) for a site where the remediation is subject to direct oversight.

(c) All other persons responsible for conducting remediation shall request disbursement of loan or grant funds by submitting to the Department a completed form available on the Department's website at www.nj.gov/dep/srp/srra/forms. Instructions for completing the form are also available on the website.

SUBCHAPTER 12. PETROLEUM UNDERGROUND STORAGE TANK REMEDIATION UPGRADE AND CLOSURE FUND FOR A REGULATED UNDERGROUND STORAGE TANK

7:26C-12.1 Scope

This subchapter sets forth the requirements for any person to apply for a loan and/or grant from the Petroleum Underground Storage Tank Remediation, Upgrade, and Closure Fund, to fund projects pursuant to the Underground Storage Tank Finance Act, N.J.S.A. 58:10A-37.1 et seq., except that this subchapter does not apply to applications for a loan or grant for remediation costs associated with an unregulated heating oil tank. For such requirements, see N.J.A.C. 7:26F-7, Petroleum Underground Storage Tank Remediation, Upgrade, and Closure Fund.

7:26C-12.2 Application for loans and grants

An applicant, as defined at N.J.S.A. 58:10A-37.2, may apply for a loan and/or a grant from the Petroleum Underground Storage Tank Remediation, Upgrade, and Closure Fund by submitting to the Department a completed form and following the form's instructions, both of which are found on the Department's website at www.nj.gov/dep/srp/srra/forms.

HAZARDOUS DISCHARGE SITE REMEDIATION FUND
LOANS & GRANTS AVAILABLE

PUBLIC SECTOR ASSISTANCE				
APPLICANT	**FUNDS**	**PHASE**	**AMOUNT**	**SPECIAL CONDIITIONS**
Municipalities, Counties & Redevelopment Entities	**Grants** NJSA 58:10B-6(a)(2)(a(iii)	**PA/SI/RI**	**100 % of PA/SI/RI (capped at $2 million per applicant per year)**	• **Must have 1) tax sale certificate; 2) voluntarily acquired through foreclosure or similar means; 3) own site.** • **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed.**
Municipalities, Counties & Redevelopment Entities	**Grants** NJSA 58:10B-6(a)(2)(a(ii)	**Remedial Action** Affordable housing; Recreation/ Conservation purposes; Renewable Energy	**75% of RA for recreation or conservation** **50% of RA for affordable housing** **75% of RA for Renewable Energy** **Program cap of $2.5M per year**	• **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed.** • **Rec./Cons. Grants-property must be preserved for conservation or recreation through a development easement or conservation easement or other restriction/easement restricting development. The HDSRF can provide a template for the draft easement.**
Municipalities, Counties & Redevelopment Entities	**Grants** BDA sites NJSA 58:10B-6(a)(2)(a(i)	**Remediation (PA/SI/RI/RA)**	**100 % PA/SI/RI** **75 % RA** **(capped at $2M per applicant per year)** **Additional $1M**	• **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed.** • **Lien (for the amount expended for remedial action costs) placed on property if municipality, county or redevelopment entity does not acquire site.**

HAZARDOUS DISCHARGE SITE REMEDIATION FUND
LOANS & GRANTS AVAILABLE

PUBLIC SECTOR ASSISTANCE				
APPLICANT	**FUNDS**	**PHASE**	**AMOUNT**	**SPECIAL CONDIITIONS**
Municipalities, Counties & Redevelopment Entities	**Grants** Unrestricted Use Remedy (soil only) NJSA 58:10B-6(a)(5)(b)	**Remediation (RA)**	**25% "project" costs of the remediation for an unrestricted use remedial action** **$250,000 cap**	• **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed**
Municipalities, Counties and Redevelopment Entities	**Loans** Imminent & significant threat NJSA 58:10B-6(a)(2)(a)(v)	**Remediation (PA/SI/RI/RA)**	**100% of Remediation Activities (capped at $1 million per year)**	• **Must own site** • **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed**
Municipalities, Counties and Redevelopment Entities	**Loans** PA/SI/RI is completed NJSA 58:10B-6(a)(2)(a)(iv)	**Remedial Action**	**100% of Remedial Action (capped at $2 million per year)**	• **Must own site** • **Adopt a comprehensive redevelopment plan specifically for contaminated sites, or a demonstrate a commitment the site will be redeveloped within 3 years after the remediation is completed**

HAZARDOUS DISCHARGE SITE REMEDIATION FUND
LOANS & GRANTS AVAILABLE

PRIVATE SECTOR ASSISTANCE				
APPLICANT	**FUNDS**	**PHASE**	**AMOUNT**	**SPECIAL CONDIITIONS**
Persons Qualifying Persons	**Grants** Unrestricted Use Remedy NJSA 58:10B-6(a)(5)(b)	**Remedial Action**	**25% of the "project costs" for the RA that is specifically for an unrestricted use** **$250,000 cap**	• **"Qualifying person" means any person who has a net worth of not more than $2M** • **"Project costs" means that portion of the total costs of a remediation to implement an unrestricted use remedial action**
Persons	**Loans** for sites with imminent & significant threat) NJSA 58:10B-6(a)(2)(b)		**100% Remediation (capped at $500,000 per year)**	• **Eligible to the extent that applicant is not capable of establishing a remediation funding source** (NJSA 58:10B-6c)
Persons	**Loans** for sites in qualifying municipality NJSA 58:10B-6a(1)	**Remediation (PA/SI/RI/RA)**	**100% Remediation (capped at $500,000 per year)**	• **Eligible to the extent that applicant is not capable of establishing a remediation funding source** (NJSA 58:10B-6c)
Persons	**Loans** EOZ NJSA 58:10B-6(a)(5)	**Remediation (PA/SI/RI/RA)**	**100% of Remediation (capped at $500,000 per year)**	**Exempt from demonstrating the ability to establish remediation funding source** NJSA 58:10B-5a.(1); 58:10B-6c
Persons	**Loans** ISRA NJSA 58:10B-5(b)	**Remediation (PA/SI/RI/RA)**	**100% of Remediation (capped at $500,000 per year)**	**Eligible to the extent that applicant is not capable of establishing a remediation funding source** NJSA 58:10B-5a.(1); 58:10B-6c

HAZARDOUS DISCHARGE SITE REMEDIATION FUND
LOANS & GRANTS AVAILABLE

PRIVATE SECTOR ASSISTANCE				
APPLICANT	**FUNDS**	**PHASE**	**AMOUNT**	**SPECIAL CONDITIONS**
Persons	**Loans** Discharge of Hazardous Substance/ Spill Act NJSA 58:10B-5(b), 10B-6(a)(2)(b)	**Remediation (PA/SI/RI/RA)**	**100% of Remediation (capped at $500,000 per year)**	**Eligible to the extent that applicant is not capable of establishing a remediation funding source** NJSA 58:10B-5a.(1); 58:10B-6c
Non Profits	**Grants** (Pilot Program) NJSA 58:10B-25.3	**PA/SI/RI**	**(Capped at $5 million total)**	**All limitations and conditions for the award of grants to municipalities shall apply to the award of grants to nonprofit organizations**

New Jersey Statutes Annotated
Title 34. Labor and Workmen's Compensation
Chapter 1B. Promotion of Business and Industry
XVI. New Jersey Economic Recovery Act of 2020 (Refs & Annos)

N.J.S.A. 34:1B-277

34:1B-277. Short title; Brownfields Redevelopment Incentive Program Act

Effective: January 7, 2021
Currentness

Sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287) shall be known and may be cited as the "Brownfields Redevelopment Incentive Program Act."

Credits
L.2020, c. 156, § 9, eff. Jan. 7, 2021.

N. J. S. A. 34:1B-277, NJ ST 34:1B-277
Current with laws through L.2024, c. 62 and J.R. No. 1.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

New Jersey Statutes Annotated
Title 34. Labor and Workmen's Compensation
Chapter 1B. Promotion of Business and Industry
XVI. New Jersey Economic Recovery Act of 2020 (Refs & Annos)

N.J.S.A. 34:1B-278

34:1B-278. Definitions relating to Brownfields Redevelopment Incentive Program

Currentness

As used in sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287):

"Authority" means the New Jersey Economic Development Authority established by section 4 of P.L.1974, c. 80 (C.34:1B-4).

"Board" means the Board of the New Jersey Economic Development Authority, established pursuant to section 4 of P.L.1974, c. 80 (C.34:1B-4).

"Brownfield site" means any real property in this State that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant or on which there is contaminated building material.

"Building services" means any cleaning or routine building maintenance work, including, but not limited to, sweeping, vacuuming, floor cleaning, cleaning of rest rooms, collecting refuse or trash, window cleaning, securing, patrolling, or other work in connection with the care or securing of an existing building, including services typically provided by a door-attendant or concierge. "Building services" shall not include any skilled maintenance work, professional services, or other public work for which a contractor is required to pay the "prevailing wage" as defined in section 2 of P.L.1963, c. 150 (C.34:11-56.26).

"Contaminated building material" means components of a structure where abatement or removal of asbestos, or remediation of materials containing hazardous substances defined pursuant to section 3 of P.L.1976, c. 141 (C.58:10-23.11b), is required by applicable federal, state, or local rules or regulations.

"Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L.1976, c. 141 (C.58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L.1976, c. 99 (C.13:1E-38), pollutant as defined pursuant to section 3 of P.L.1977, c. 74 (C.58:10A-3), or contaminated building material.

"Department" means the Department of Environmental Protection.

"Developer" means any person that enters or proposes to enter into a redevelopment agreement with the authority pursuant to the provisions of section 13 of P.L.2020, c. 156 (C.34:1B-281).

"Director" means the Director of the Division of Taxation in the Department of the Treasury.

"Equity" means developer-contributed capital that may consist of cash, costs for project feasibility incurred within the 12 months prior to application, property value less any mortgages when the developer owns the project site, and any other investment by

the developer in the project that the authority deems acceptable. Property value shall be an amount equal to the lesser of: (1) the purchase price, provided the property was purchased pursuant to an arm's length transaction within 12 months of application; or (2) the value as determined by a current appraisal acceptable to the authority. "Equity" includes federal or local grants and proceeds from the sale of federal or local tax credits, including, but not limited to, any federal tax credits that the redevelopment receives pursuant to section 42 of the federal Internal Revenue Code of 1986 (26 U.S.C. s.42) and section 45D of the federal Internal Revenue Code of 1986 (26 U.S.C. s.45D). "Equity" shall not include State grants or tax credits or proceeds from redevelopment area bonds. For a residential project utilizing low income tax credits awarded by the New Jersey Housing and Mortgage Financing Agency pursuant to section 19 of P.L.2008, c. 46 (C.52:27D-321.1), "equity" includes the portion of the developer's fee that is deferred for a minimum of five years.

"Government-restricted municipality" means a municipality in this State with a municipal revitalization index distress score of at least 75, that met the criteria for designation as an urban aid municipality in the 2019 State fiscal year, and that, on the effective date of P.L.2020, c. 156 (C.34:1B-269 et al.), is subject to financial restrictions imposed pursuant to the "Municipal Stabilization and Recovery Act," P.L.2016, c. 4 (C.52:27BBBB-1 et seq.), or is restricted in its ability to levy property taxes on property in that municipality as a result of the State of New Jersey owning or controlling property representing at least 25 percent of the total land area of the municipality or as a result of the federal government of the United States owning or controlling at least 50 acres of the total land area of the municipality, which is dedicated as a national natural landmark.

"Labor harmony agreement" means an agreement between a business that serves as the owner or operator of a retail establishment or distribution center and one or more labor organizations, which requires, for the duration of the agreement: that any participating labor organization and its members agree to refrain from picketing, work stoppages, boycotts, or other economic interference against the business and that the business agrees to maintain a neutral posture with respect to efforts of any participating labor organization to represent employees at an establishment or other unit in the retail establishment or distribution center, agrees to permit the labor organization to have access to the employees, and agrees to guarantee to the labor organization the right to obtain recognition as the exclusive collective bargaining representatives of the employees in an establishment or unit at the retail establishment or distribution center by demonstrating to the New Jersey State Board of Mediation, Division of Private Employment Dispute Settlement, or a mutually agreed-upon, neutral third party, that a majority of workers in the unit have shown their preference for the labor organization to be their representative by signing authorization cards indicating that preference. The labor organization or organizations shall be from a list of labor organizations that have requested to be on the list and that the Commissioner of Labor and Workforce Development has determined represent substantial numbers of retail or distribution center employees in the State.

"Licensed site remediation professional" means an individual who is licensed by the Site Remediation Professional Licensing Board pursuant to section 7 of P.L.2009, c. 60 (C.58:10C-7) or the department pursuant to section 12 of P.L.2009, c. 60 (C.58:10C-12).

"Program" means the Brownfields Redevelopment Incentive Program established by section 11 of P.L.2020, c. 156 (C.34:1B-279).

"Project financing gap" means the part of the total remediation cost, including reasonable and appropriate return on investment, that remains to be financed after all other sources of capital have been accounted for, including, but not limited to, developer contributed capital, which shall not be less than 20 percent of the total remediation cost, and investor or financial entity capital or loans for which the developer, after making all good faith efforts to raise additional capital, certifies that additional capital cannot be raised from other sources; provided, however, that for a redevelopment project located in a government-restricted municipality, the developer contributed capital shall not be less than 10 percent of the cost of rehabilitation. When an applicant is proposing a new project, the project financing gap shall consider the cost of the full project, but the award size shall be based on remediation costs. Developer contributed capital may consist of cash, deferred development fees, costs for project feasibility incurred within the 12 months prior to application, property value less any mortgages when the developer owns the project site, and any other investment by the developer in the project deemed acceptable by the authority, as provided by regulations

promulgated by the authority. Property value shall be valued at the lesser of either: a. the purchase price, provided the property was purchased pursuant to an arm's length transaction within 12 months of application; or b. the value as determined by a current appraisal.

"Qualified incentive tract" means: a. a population census tract having a poverty rate of 20 percent or more; or b. a census tract in which the median family income for the census tract does not exceed 80 percent of the greater of the Statewide median family income or the median family income of the metropolitan statistical area in which the census tract is situated.

"Redevelopment agreement" means an agreement between the authority and a developer under which the developer agrees to perform any work or undertaking necessary for the remediation of a brownfield site located at the site of the redevelopment project.

"Redevelopment project" means a specific remediation project undertaken, pursuant to the terms of a redevelopment agreement, by a developer within an area of land whereon a brownfield site is located.

"Remediation" or "remediate" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action, or any portion thereof, as those terms are defined in section 23 of P.L.1993, c. 139 (C.58:10B-1); and hazardous materials abatement; hazardous materials or waste disposal; building and structural remedial activities, including, but not limited to, demolition, asbestos abatement, polychlorinated biphenyl removal, improvement and capping of landfills, contaminated wood or paint removal, or other infrastructure remedial activities, provided, however, "remediation" or "remediate" shall not include the payment of compensation for damage to, or loss of, natural resources.

"Remediation costs" means all reasonable costs associated with the remediation of a contaminated site, except any costs incurred in financing the remediation.

Credits

L.2020, c. 156, § 10, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 5, eff. July 2, 2021; L.2024, c. 61, § 5, (contingent effective date).

N. J. S. A. 34:1B-278, NJ ST 34:1B-278
Current with laws through L.2024, c. 62 and J.R. No. 1.

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N.J.S.A. 34:1B-279

34:1B-279. Brownfields Redevelopment Incentive Program; establishment and purpose; tax credits

Effective: January 7, 2021
Currentness

The Brownfields Redevelopment Incentive Program is established as a program under the jurisdiction of the New Jersey Economic Development Authority. The purpose of the program is to compensate developers of redevelopment projects located on brownfield sites for remediation costs. To implement this purpose, the authority shall issue tax credits. The total value of tax credits approved by the authority shall not exceed the limitations set forth in section 98 of P.L.2020, c. 156 (C.34:1B-362). For the purpose of determining the aggregate value of tax credits approved in a fiscal year, a tax credit shall be deemed to have been approved at the time the authority approves an application for an award of a tax credit. If the authority approves less than the total amount of tax credits authorized pursuant to this section in a fiscal year, the remaining amount, plus any amounts remaining from previous fiscal years, shall be added to the limit of subsequent fiscal years until that amount of tax credits are claimed or allowed. Any unapproved, uncertified, or recaptured portion of tax credits during any fiscal year may be carried over and reallocated in succeeding years.

Credits
L.2020, c. 156, § 11, eff. Jan. 7, 2021.

N. J. S. A. 34:1B-279, NJ ST 34:1B-279
Current with laws through L.2024, c. 62 and J.R. No. 1.

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N.J.S.A. 34:1B-280

34:1B-280. Application for a redevelopment project tax credit; eligibility criteria; review of application; award of tax credits; forfeit of tax credits for material misrepresentation; amended application

Currentness

a. A developer seeking a tax credit for a redevelopment project shall submit an application to the authority and the department in a form and manner prescribed in regulations adopted by the authority, in consultation with the department, pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.).

b. A redevelopment project shall be eligible for a tax credit only if the developer demonstrates to the authority and the department at the time of application that:

(1) except as ordered by a government official with jurisdiction over the brownfield site or certified by a licensed site remediation professional to correct or prevent the spread of a health, safety, or other hazard, and as provided in subsection j. of this section, the developer has not commenced any remediation or clean up at the site of the redevelopment project, except for preliminary assessments and investigations, prior to applying for a tax credit pursuant to this section, but intends to remediate the site immediately upon approval of the tax credit;

(2) the redevelopment project is located on a brownfield site;

(3) without the tax credit, the redevelopment project is not economically feasible;

(4) a project financing gap exists for projects located outside of a government-restricted municipality that have a total remediation cost of $5,000,000 or greater;

(5) the developer shall obtain and submit to the authority, before approval by the board, a letter evidencing support for the redevelopment project from the governing body of the municipality in which the redevelopment project is located; and

(6) each worker employed to perform remediation, construction, or building services work at the redevelopment project shall be paid not less than the prevailing wage rate for the worker's craft or trade, as determined by the Commissioner of Labor and Workforce Development pursuant to P.L.1963, c. 150 (C.34:11-56.25 et seq.). The prevailing wage requirements shall apply for remediation or construction work through the completion of the redevelopment project, and the prevailing wage

requirements shall apply for building services work at the site of the redevelopment project for 10 years following completion of the redevelopment project. In the event a redevelopment project, or the aggregate of all redevelopment projects approved for an award under the program, constitute a lease of more than 35 percent of a facility, the prevailing wage requirements shall apply to the entire facility.

c. A redevelopment project that received a reimbursement pursuant to sections 34 through 39 of P.L.1997, c. 278 (C.58:10B-26 through 58:10B-31) shall not be eligible to apply for a tax credit under the program. If the authority receives an application and supporting documentation for approval of a reimbursement pursuant to sections 34 through 39 of P.L.1997, c. 278 (C.58:10B-26 through 58:10B-31) prior to the effective date of sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287), then the authority may consider the application and award a tax credit to a developer, provided that the authority shall take final action on all applications for approval of a reimbursement pursuant to sections 34 through 39 of P.L.1997, c. 278 (C.58:10B-26 through 58:10B-31) no later than July 1, 2019. No applications shall be submitted pursuant to sections 34 through 39 of P.L.1997, c. 278 (C.58:10B-26 through 58:10B-31) after the effective date of sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287).

d. (1) Prior to approval of an application, the authority shall confirm with the Department of Labor and Workforce Development, the Department of Environmental Protection, and the Department of the Treasury whether the developer is in substantial good standing with the respective department, or has entered into an agreement with the respective department that includes a practical corrective action plan for the developer. The authority may also contract with an independent third party to perform a background check on the developer. The developer shall certify that any contractors or subcontractors that perform work at the redevelopment project: (a) are registered as required by "The Public Works Contractor Registration Act," P.L.1999, c. 238 (C.34:11-56.48 et seq.); (b) have not been debarred by the Department of Labor and Workforce Development from engaging in or bidding on Public Works Contracts in New Jersey, and (c) possess a tax clearance certificate issued by the Division of Taxation in the Department of the Treasury. Provided that the developer is in substantial good standing with the Department of Labor and Workforce Development, the Department of Environmental Protection, and the Department of the Treasury, or has entered into such an agreement, and following approval of an application by the board, the authority shall enter into a redevelopment agreement with the developer, as provided for in section 13 of P.L.2020, c. 156 (C.34:1B-281).

(2) The authority, in consultation with the department, may impose additional requirements upon an applicant through rule or regulation adopted pursuant to the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), if the authority or the department determines the additional requirements to be necessary and appropriate to effectuate the purposes of sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287).

e. The authority, in consultation with the department, shall conduct a review of the applications on a rolling basis, unless the authority determines that demand is likely to exceed available tax credits, and then through a competitive application process whereby the authority and the department shall evaluate all applications submitted by a date certain, as if all received applications were submitted on that date. To receive a tax credit award, a developer's application shall meet a minimum score, as determined by the authority. In addition to the eligibility criteria set forth in subsection b. of this section, the authority, in consultation with the department, may consider additional factors that may include, but shall not be limited to: the economic feasibility of the redevelopment project; the benefit of the redevelopment project to the community in which the remediation project is located; the degree to which the redevelopment project enhances and promotes economic development and reduces environmental or public health stressors in an overburdened community, as those terms are defined by section 2 of P.L.2020, c. 92 (C.13:1D-158), and attendant department regulations; and, if the developer has a board of directors, the extent to which that board of directors is diverse and representative of the community in which the redevelopment project is located. The authority, in consultation with the department, shall submit applications that comply with the eligibility criteria set forth in this section, fulfill the additional

factors considered by the authority pursuant to this subsection, satisfy the submission requirements, and provide adequate information for the subject application, to the board for final approval.

f. The authority shall award tax credits to redevelopment projects until either the available tax credits are exhausted or all redevelopment projects that are eligible for a tax credit pursuant to the provisions of sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287) receive a tax credit, whichever occurs first. If insufficient funding exists to allow a tax credit to a developer in accordance with the provisions of subsection a. of section 16 of P.L.2020, c. 156 (C.34:1B-284), the authority may offer the developer a value of the tax credit below the amount provided for in subsection a. of section 16 of P.L.2020, c. 156 (C.34:1B-284).

g. A developer shall pay to the authority or to the department, as appropriate, the full amount of the direct costs of an analysis concerning the developer's application for a tax credit, which a third party retained by the authority or department performs, if the authority or department deems such retention to be necessary.

h. If the authority determines that a developer made a material misrepresentation on the developer's application, the developer shall forfeit all tax credits awarded under the program.

i. If circumstances require a developer to amend its application to the authority, then the developer, or an authorized agent of the developer, shall certify to the authority that the information provided in its amended application is true, under the penalty of perjury.

j. A developer who has commenced remediation or clean up at the site and who could not reasonably have known the full extent of the site contamination prior to commencing the remediation may still apply for a tax credit under the program, if the developer certifies to the authority, under the penalty of perjury, that the developer cannot reasonably finish the remediation and commence the redevelopment project absent the tax credit.

Credits

L.2020, c. 156, § 12, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 6, eff. July 2, 2021; L.2024, c. 61, § 6, (contingent effective date).

N. J. S. A. 34:1B-280, NJ ST 34:1B-280
Current with laws through L.2024, c. 62 and J.R. No. 1.

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N.J.S.A. 34:1B-281

34:1B-281. Redevelopment agreement; terms and conditions; revision of agreement; certification of information submitted to authority; maintenance of good standing with certain departments

Currentness

a. Following approval of an application by the board, but prior to the start of any remediation or clean up at the site of the redevelopment project, except activities disclosed at the time of approval or those in accordance with section 12 of P.L.2020, c. 156 (C.34:1B-280), the authority shall enter into a redevelopment agreement with the developer. The chief executive officer of the authority shall negotiate the terms and conditions of the redevelopment agreement on behalf of the State.

b. The redevelopment agreement shall specify the amount of the tax credit to be awarded to the developer, the date on which the developer shall complete the remediation, and the projected project remediation cost. The redevelopment agreement shall require the developer to submit progress reports to the authority and to the department every six months pursuant to section 15 of P.L.2020, c. 156 (C.34:1B-283).

c. The authority shall not enter into a redevelopment agreement with a developer unless:

(1) the redevelopment project complies with standards established by the authority in accordance with the green building manual prepared by the Commissioner of Community Affairs pursuant to section 1 of P.L.2007, c. 132 (C.52:27D-130.6), regarding the use of renewable energy, energy-efficient technology, and non-renewable resources to reduce environmental degradation and encourage long-term cost reduction;

(2) the redevelopment project complies with the authority's affirmative action requirements, adopted pursuant to section 4 of P.L.1979, c. 303 (C.34:1B-5.4); and

(3) the developer pays each worker employed to perform remediation work, construction work, or building services work at the redevelopment project not less than the prevailing wage rate in accordance with the requirements of paragraph (6) of subsection b. of section 12 of P.L.2020, c. 156 (C.34:1B-280) for the worker's craft or trade, as determined by the Commissioner of Labor and Workforce Development pursuant to P.L.1963, c. 150 (C.34:11-56.25 et seq.).

d. The authority shall not enter into a redevelopment agreement unless the developer demonstrates, to the satisfaction of the Department of Environmental Protection, that the developer did not discharge a hazardous substance at the brownfield site proposed to be in the redevelopment agreement and is not a corporate successor to the discharger, to any person in any way

responsible for the hazardous substance or to anyone liable for cleanup and removal costs pursuant to section 8 of P.L.1976, c. 141 (C.58:10-23.11g).

e. (1) Except as provided in paragraph (2) of this subsection, the authority shall not enter into a redevelopment agreement for a redevelopment project that includes at least one retail establishment that will have more than 10 employees or at least one distribution center that will have more than 20 employees, unless the redevelopment agreement includes a precondition that any business that serves as the owner or operator of the retail establishment or distribution center enters into a labor harmony agreement with a labor organization or cooperating labor organizations which represent retail or distribution center employees in the State.

(2) A labor harmony agreement shall be required only if the State has a proprietary interest in the redevelopment project and shall remain in effect for as long as the State acts as a market participant in the redevelopment project. The authority may enter into a redevelopment agreement with a developer without the labor harmony agreement required under paragraph (1) of this subsection only if the authority determines that the redevelopment project would not be feasible if a labor harmony agreement is required. The authority shall support the determination by a written finding, which provides the specific basis for the determination.

(3) (Deleted by amendment, P.L.2024, c. 61)

f. The redevelopment agreement shall provide that issuance of a tax credit under the program shall be conditioned upon the subrogation to the department of all rights of the developer to recover remediation costs from any other person who discharges a hazardous substance or is in any way responsible, pursuant to section 8 of P.L.1976, c. 141 (C.58:10-23.11g), for a hazardous substance that was discharged at the brownfield site.

g. A developer may seek a revision to the redevelopment agreement if the developer cannot complete the remediation on or before the date set forth in the redevelopment agreement. A developer's ability to change the date on which the developer shall complete the remediation shall be subject to the availability of tax credits in the year of the revised date of completion.

h. A developer shall submit to the authority satisfactory evidence of the actual remediation costs, as certified by a certified public accountant, and a licensed site remediation professional for costs under the jurisdiction of the "Site Remediation Reform Act," sections 1 through 29 of P.L.2009, c. 60 (C.58:10C-1 et seq.), and as applicable, other appropriate licensed or certified professional for costs that are not under the jurisdiction of the "Site Remediation Reform Act," evidence of completion of the remediation as demonstrated by a Response Action Outcome where the remediation is subject to the "Site Remediation Reform Act," a certification from the appropriate licensed or certified professional for other remedial activities, and a certification that all information provided by the developer to the authority is true, including information contained in the application, the redevelopment agreement, any amendment to the redevelopment agreement, and any other information submitted by the developer to the authority pursuant to sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287). The developer, or an authorized agent of the developer, shall certify under the penalty of perjury that the information provided pursuant to this subsection is true.

i. The redevelopment agreement shall include a provision allowing the authority to recapture the tax credits for any year in which the Department of Environmental Protection, the Department of Labor and Workforce Development, or the Department of the Treasury that advises the authority that the developer is not in substantial good standing with the respective department, nor has the developer entered into an agreement with the respective department that includes a practical corrective action plan for the developer. The redevelopment agreement shall also include a provision allowing the authority to recapture the tax credits

for any year in which the developer fails to confirm that each contractor or subcontractor performing work at the redevelopment project: (1) is registered as required by "The Public Works Contractor Registration Act," P.L.1999, c. 238 (C.34:11-56.48 et seq.); (2) has not been debarred by the Department of Labor and Workforce Development from engaging in or bidding on Public Works Contracts in New Jersey; and (3) possesses a tax clearance certificate issued by the Division of Taxation in the Department of the Treasury.

Credits

L.2020, c. 156, § 13, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 7, eff. July 2, 2021; L.2024, c. 61, § 7, (contingent effective date).

N. J. S. A. 34:1B-281, NJ ST 34:1B-281
Current with laws through L.2024, c. 62 and J.R. No. 1.

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N.J.S.A. 34:1B-282

34:1B-282. Qualification for tax credit; requirements

Currentness

In addition to the submission of any additional evidence that the authority may request to verify that activities comply with local, state, and federal regulations, to qualify for a tax credit under the program, a developer shall, as applicable:

a. enter into an administrative consent order or other oversight document with the Commissioner of Environmental Protection in accordance with the provisions of section 37 of P.L.1997, c. 278 (C.58:10B-29);

b. comply with the requirements set forth in subsection b. of section 30 of P.L.2009, c. 60 (C.58:10B-1.3) for the remediation of the site of the redevelopment project; or

c. comply with the rules, regulations, and guidelines by the federal government, the New Jersey Department of Labor and Workforce Development, the New Jersey Department of Health, and the New Jersey Department of Community Affairs regarding requirements for remediation of asbestos, contaminated paint, polychlorinated biphenyls, and other environmental hazards.

Credits
L.2020, c. 156, § 14, eff. Jan. 7, 2021. Amended by L.2024, c. 61, § 8, (contingent effective date).

N. J. S. A. 34:1B-282, NJ ST 34:1B-282
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N.J.S.A. 34:1B-283

34:1B-283. Reporting requirements; loss of tax credit for failure to submit timely updates or for breach of redevelopment agreement

Effective: January 7, 2021
Currentness

Commencing with the date six months following the date the authority and a developer execute a redevelopment agreement and every six months thereafter until completion of the project, the developer shall submit an update of the status of the redevelopment project to the authority and to the department, including the remediation costs incurred by the developer for the remediation of the contaminated property located at the site of the redevelopment project. Unless the authority determines that extenuating circumstances exist, the authority's approval of a tax credit shall expire if the authority, the department, or both, do not timely receive the status update required under this section. The authority may rescind an award of tax credits under the program if a redevelopment project fails to advance in accordance with the redevelopment agreement.

Credits
L.2020, c. 156, § 15, eff. Jan. 7, 2021.

N. J. S. A. 34:1B-283, NJ ST 34:1B-283
Current with laws through L.2024, c. 62 and J.R. No. 1.

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N.J.S.A. 34:1B-284

34:1B-284. Certification by department upon completion of remediation; contents; award of tax credit; information submitted to department; application of tax credit

Effective: September 4, 2024
Currentness

a. Upon completion of the remediation, the developer shall seek certification from the authority, in consultation with the department, that:

(1) the remediation is complete;

(2) the developer complied with the requirements of section 14 of P.L.2020, c. 156 (C.34:1B-282), as applicable, and section 15 of P.L.2020, c. 156 (C.34:1B-283); and

(3) the remediation costs were actually and reasonably incurred.

Upon receipt of certification, and confirmation by the authority that the developer's obligations under the redevelopment agreement have been met, a developer shall be awarded a credit against the tax imposed pursuant to section 5 of P.L.1945, c. 162 (C.54:10A-5), sections 2 and 3 of P.L.1945, c. 132 (C.54:18A-2 and C.54:18A-3), section 1 of P.L.1950, c. 231 (C.17:32-15), or N.J.S.17B:23-5 as follows: (a) for project located in a qualified incentive tract or government-restricted municipality, in an amount not to exceed 80 percent of the actual remediation costs, or 80 percent of the projected remediation costs as set forth in the redevelopment agreement, or $12,000,000, whichever is least; (b) for a project erecting a solar panel array on the site of a closed sanitary landfill, in an amount not to exceed 100 percent of the costs of remediation and capping of the landfill, or $12,000,000 if the project is located in a qualified incentive tract or government-restricted municipality, or $8,000,000 if the project is located anywhere else in the State, whichever is least; and (c) for all other projects, in an amount not to exceed 60 percent of the actual remediation costs, or 60 percent of the projected remediation costs as set forth in the redevelopment agreement, or $8,000,000, whichever is least. The developer, or an authorized agent of the developer, shall certify that the information provided to the department and the authority pursuant to this subsection is true under the penalty of perjury.

b. When filing an application for certification pursuant to subsection a. of this section, the developer shall submit to the department and the authority: (1) the total remediation costs incurred by the developer for the remediation of the subject property located at the site of the redevelopment project, as provided in the redevelopment agreement and certified by a certified public accountant, and a licensed site remediation professional for costs under the jurisdiction of the "Site Remediation Reform Act," sections 1 through 29 of P.L.2009, c. 60 (C.58:10C-1 et seq.), and, as applicable, other appropriate licensed or certified

professional for costs that are not under the jurisdiction of the "Site Remediation Reform Act"; (2) evidence of completion of the remediation, as demonstrated by a Response Action Outcome where the remediation is subject to the "Site Remediation Reform Act"; (3) a certification from the appropriate licensed or certified professional for other remedial activities; (4) as applicable, information concerning the occupancy rate of any buildings or other work areas located on the property subject to the redevelopment agreement; and (5) such other information as the department deems necessary in order to make the certifications and findings pursuant to this section.

c. A developer shall apply the credit awarded against the developer's liability for the tax imposed pursuant to section 5 of P.L.1945, c. 162 (C.54:10A-5), sections 2 and 3 of P.L.1945, c. 132 (C.54:18A-2 and C.54:18A-3), section 1 of P.L.1950, c. 231 (C.17:32-15), or N.J.S.17B:23-5 for the privilege period during which the director awards the developer a tax credit pursuant to subsection a. of this section. A developer shall not carry forward any unused credit.

d. The director shall prescribe the order of priority of the application of the credit awarded under this section and any other credits allowed by law against the tax imposed under section 5 of P.L.1945, c. 162 (C.54:10A-5). The amount of the credit applied under this section against the tax imposed pursuant to section 5 of P.L.1945, c. 162 (C.54:10A-5) for a privilege period, together with any other credits allowed by law, shall not reduce the tax liability to an amount less than the statutory minimum provided in subsection (e) of section 5 of P.L.1945, c. 162 (C.54:10A-5).

Credits

L.2020, c. 156, § 16, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 8, eff. July 2, 2021; L.2024, c. 61, § 9, (contingent effective date).

N. J. S. A. 34:1B-284, NJ ST 34:1B-284
Current with laws through L.2024, c. 62 and J.R. No. 1.

End of Document

New Jersey Statutes Annotated
Title 34. Labor and Workmen's Compensation
Chapter 1B. Promotion of Business and Industry
XVI. New Jersey Economic Recovery Act of 2020 (Refs & Annos)

N.J.S.A. 34:1B-285

34:1B-285. Application for tax credit transfer certificate; assignment or sale during privilege period; restrictions

Effective: July 2, 2021
Currentness

a. A developer may apply to the director and the chief executive officer of the authority for a tax credit transfer certificate, during the privilege period in which the director awards the developer a tax credit pursuant to section 16 of P.L.2020, c. 156 (C.34:1B-284), in lieu of the developer being allowed to apply any amount of the tax credit against the developer's State tax liability. The tax credit transfer certificate, upon receipt thereof by the developer from the director and the chief executive officer of the authority, may be sold or assigned, in the privilege period during which the developer receives the tax credit transfer certificate from the director, to another person, who may apply the credit against a tax liability pursuant to section 5 of P.L.1945, c. 162 (C.54:10A-5), sections 2 and 3 of P.L.1945, c. 132 (C.54:18A-2 and C.54:18A-3), section 1 of P.L.1950, c. 231 (C.17:32-15), or N.J.S.17B:23-5. The tax credit transfer certificate provided to the developer shall include a statement waiving the developer's right to claim the credit that the developer has elected to sell or assign.

b. The developer shall not sell or assign a tax credit transfer certificate allowed under this section for consideration received by the developer of less than 85 percent of the transferred credit amount before considering any further discounting to present value which shall be permitted, except a developer of a residential project consisting of newly-constructed residential units that has received federal low income housing tax credits under 26 U.S.C. s.42(b)(1)(B)(i) may assign a tax credit transfer certificate for consideration of no less than 75 percent subject to the submission of a plan to the authority and the New Jersey Housing and Mortgage Finance Agency to use the proceeds derived from the assignment of tax credits to complete the residential project. The tax credit transfer certificate issued to a developer by the director shall be subject to any limitations and conditions imposed on the application of State tax credits pursuant to section 16 of P.L.2020, c. 156 (C.34:1B-284) and any other terms and conditions that the director may prescribe.

c. A purchaser or assignee of a tax credit transfer certificate pursuant to this section shall not make any subsequent transfers, assignments, or sales of the tax credit transfer certificate.

d. The authority shall publish on its Internet website the following information concerning each tax credit transfer certificate approved by the authority and the director pursuant to this section:

(1) the name of the transferor;

(2) the name of the transferee;

(3) the value of the tax credit transfer certificate;

(4) the State tax against which the transferee may apply the tax credit; and

(5) the consideration received by the transferor.

Credits

L.2020, c. 156, § 17, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 9, eff. July 2, 2021.

N. J. S. A. 34:1B-285, NJ ST 34:1B-285
Current with laws through L.2024, c. 62 and J.R. No. 1.

End of Document

N.J.S.A. 34:1B-286

34:1B-286. Biennial reports to Governor and Legislature by State colleges and universities regarding implementation of program; contents

Effective: January 7, 2021
Currentness

Beginning the year next following the year in which sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287) take effect [1] and every two years thereafter, a State college or university established pursuant to chapter 64 of Title 18A of the New Jersey Statutes shall, pursuant to an agreement executed between the State college or university and the authority, prepare a report on the implementation of the program, and submit the report to the authority, the Governor, and, pursuant to section 2 of P.L.1991, c. 164 (C.52:14-19.1), to the Legislature. Each biennial report required under this section shall include a description of each redevelopment project receiving a tax credit under the program, a detailed analysis of the consideration given in each project to the factors set forth in sections 12 and 13 of P.L.2020, c. 156 (C.34:1B-280 and C.34:1B-281), the return on investment for incentives awarded, the redevelopment project's impact on the State's economy, and any other metrics the State college or university determines are relevant based upon national best practices. The authority shall prepare a written response to the report, which the authority shall submit to the Governor and, pursuant to section 2 of P.L.1991, c. 164 (C.52:14-19.1), to the Legislature.

Credits
L.2020, c. 156, § 18, eff. Jan. 7, 2021.

Footnotes

1 L.2020, c. 156, eff. Jan. 7, 2021.

N. J. S. A. 34:1B-286, NJ ST 34:1B-286
Current with laws through L.2024, c. 62 and J.R. No. 1.

End of Document

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

New Jersey Statutes Annotated
Title 34. Labor and Workmen's Compensation
Chapter 1B. Promotion of Business and Industry
XVI. New Jersey Economic Recovery Act of 2020 (Refs & Annos)

N.J.S.A. 34:1B-287

34:1B-287. Rules and regulations

Effective: September 4, 2024
Currentness

a. Notwithstanding the provisions of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), to the contrary, the chief executive officer of the authority, in consultation with the Commissioner of Environmental Protection, may adopt, immediately upon filing with the Office of Administrative Law, regulations that the chief executive officer and commissioner deem necessary to implement the provisions of sections 9 through 19 of P.L.2020, c. 156 (C.34:1B-277 through C.34:1B-287), which regulations shall be effective for a period not to exceed 360 days from the date of the filing. The chief executive officer, in consultation with the Commissioner of Environmental Protection, shall thereafter amend, adopt, or readopt the regulations in accordance with the requirements of P.L.1968, c. 410 (C.52:14B-1 et seq.). The rules shall require annual reporting by developers that receive tax credits pursuant to the program, in addition to the regular progress updates. As part of the authority's review of the annual reports required from a developer, the authority shall confirm with the Department of Labor and Workforce Development, the Department of Environmental Protection, and the Department of the Treasury that the developer is in substantial good standing with the respective department, or has entered into an agreement with the respective department that includes a practical corrective action plan, and the developer shall certify that any contractors or subcontractors performing work at the redevelopment project:(1) are registered as required by "The Public Works Contractor Registration Act," P.L.1999, c. 238 (C.34:11-56.48 et seq.); (2) have not been debarred by the Department of Labor and Workforce Development from engaging in or bidding on Public Works Contracts in New Jersey; and (3) possess a tax clearance certificate issued by the Division of Taxation in the Department of the Treasury. The rules and regulations adopted pursuant to this section shall also include a provision to require that, in any year in which the developer is not in substantial good standing with the Department of Labor and Workforce Development, the Department of Environmental Protection, or the Department of the Treasury, the developer may forfeit all tax credits awarded in that year, and to allow the authority to extend, in individual cases, the deadline for any annual reporting requirement established pursuant to this section.

b. Notwithstanding any provision of the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), to the contrary, the chief executive officer of the authority may adopt, immediately upon filing with the Office of Administrative Law, rules and regulations necessary to implement the provisions of P.L.2024, c. 61. The rules and regulations adopted pursuant to this section shall be effective for a period not to exceed 365 days following the date of filing and may thereafter be amended, adopted, or readopted by the director in accordance with the requirements of P.L.1968, c. 410 (C.52:14B-1 et seq.).

Credits
L.2020, c. 156, § 19, eff. Jan. 7, 2021. Amended by L.2021, c. 160, § 10, eff. July 2, 2021; L.2024, c. 61, § 10, eff. Sept. 4, 2024.

N. J. S. A. 34:1B-287, NJ ST 34:1B-287
Current with laws through L.2024, c. 62 and J.R. No. 1.

End of Document

PFAS STANDARDS AND REGULATIONS:

How the Responsibility May Shift from the Federal Government to the States

Tod Delaney, PhD, PE, BCEE
President
First Environment, Inc.

Jon Jacobs, Esq.
Manager in Litigation Support
First Environment, Inc.

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Meet The Presenters

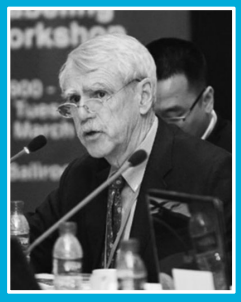
Jon Jacobs, Esq.

PFAS Regulations at the Federal Level (EPA Focus)

- Former senior attorney-advisor and manager at U.S. EPA for nearly 30 years
- Specialized in civil/criminal enforcement of chemical and pesticide regulations
- Served as Special Assistant U.S. Attorney prosecuting environmental crimes
- Deputy Director in the Office of Civil Enforcement—oversaw enforcement for key industrial sectors
- Recognized with numerous EPA

Tod Delaney, PhD, PE, BCEE

PFAS Regulations at the State Level



- President and founder of First Environment; U.S. Army veteran
- Nationally recognized expert in environmental engineering and litigation support
- Testified in over 30 cases involving PFAS and other hazardous substances under CERCLA, RCRA, and state laws
- Oversees major federal and state environmental compliance and remediation projects
- Chair of ISO's Climate Change Coordinating Committee (2014–2018)

"PFAS"

- Per- and polyfluoroalkyl substances (PFAS) are a group of synthetic chemicals that contain multiple fluorine atoms attached to a carbon atom
- Comprise a large group of synthetic chemicals, including over 15,000 identified compounds with diverse structures and properties
- PFOA and PFOS are among the most widely used PFAS's

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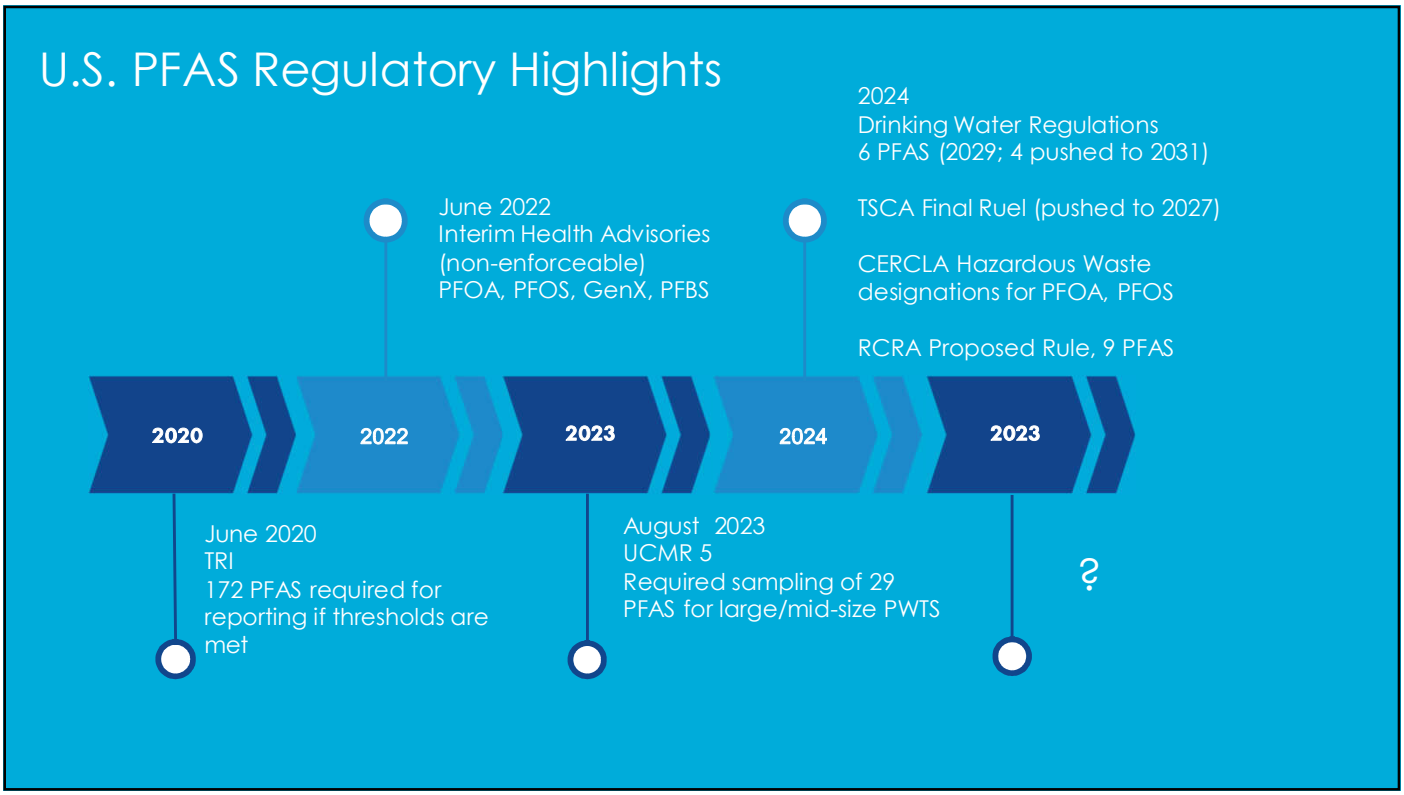
In 2021 EPA Developed the PFAS Strategic Roadmap

- Took a cross program, agency-wide approach
- Outlined proposed three prong strategy of research, restrict, and remediate PFAS across environmental media
- Set goals for PFAS management from 2021–2024
- Set aggressive deadlines for actions
- Took a lifecycle approach
- Included state authorization

EPA PFAS Strategic Roadmap (2021–2024)

Regulations	Key Actions/Commitments	Key Achievements by Fall 2024
TSCA	Use TSCA provisions to: • develop testing strategy for PFAS evaluation, • ensure robust review of new PFAS compounds, • review previous PFAS decisions, • stop grandfathering of abandoned PFAS, • close holes in TRI reporting, • collect data for PFAS manufactured after 2011.	• Issued rule to require up-front safety review prior to resuming manufacturing or processing of inactive PFAS • Proposed regulation to eliminate existing exemptions of premarket reviews • Added PFAS to TRI reporting • Elimination of PFAS from the Safer Choice program • Future options – EPA funded studies on plant uptake to bioremediate combined with thermal destruction of PFAS plant material under the Office of Research and Development
SDWA	Use SDWA provisions to: • undertake nationwide monitoring of PFAS • regulate PFOA and PFOS • evaluate additional PFAS for regulation • publish toxicity assessment for GenX and health advisory for GenX and PFBS • Update analytical methods for drinking water	• Finalized enforceable MCLs for 6 PFAS compounds • Monitored for 29 PFAS's in 10,000 water systems • Used the infrastructure bill to fund water infrastructure in communities impacted by PFAS


U.S. PFAS Regulatory Highlights
2024
Drinking Water Regulations
6 PFAS (2029; 4 pushed to 2031)
June 2022
Interim Health Advisories
(non-enforceable)
PFOA, PFOS, GenX, PFBS
TSCA Final Ruel (pushed to 2027)
CERCLA Hazardous Waste
designations for PFOA, PFOS
RCRA Proposed Rule, 9 PFAS
2020
2022
2023
2024
2023
June 2020
TRI
172 PFAS required for
reporting if thresholds are
met
August 2023
UCMR 5
Required sampling of 29
PFAS for large/mid-size PWTS
?

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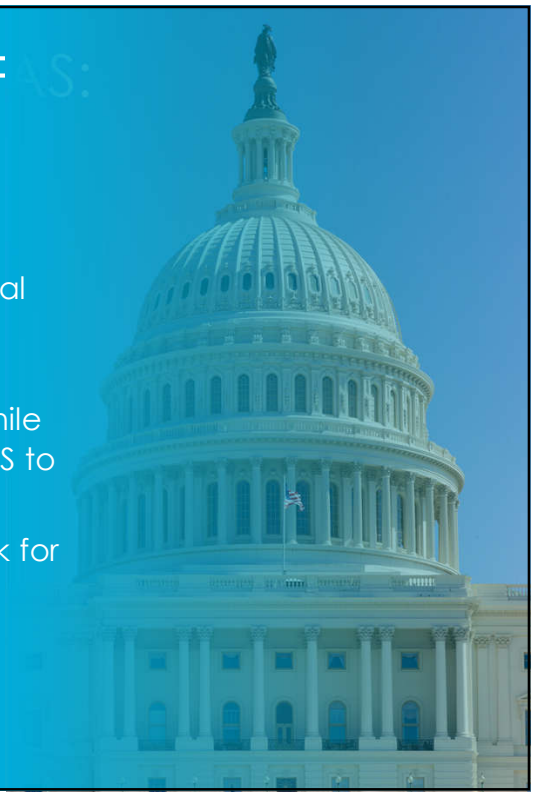
EPA PFAS Strategic Roadmap (2021–2024)

Regulations	Key Actions/Commitments	Key Achievements by Fall 2024
CWA	Use Clean Water Act provisions to: • Study, evaluate and establish technology base ELG's • Leverage federal NPDES permits to include elimination/substitution, bmps, notifications and pretreatment, as appropriate • Issue guidance to authorized states on monitoring and conforming to the federal permitting approach for PFAS • Publish analytical methodology and recommend ambient water quality criteria • Monitor fish tissues • Finalize PFOA and PFOS risk assessment for biosolids	• Finalized two methodologies for measuring PFAS • Issued preliminary technology based ELQs for PFAS manufacturers • Finalized recommended water quality criteria for aquatic life
CERCLA	Use CERCLA provisions to: • Use rulemaking to designate PFOA and PFOS hazardous substances • Initiate rulemaking process to evaluate other PFAS compounds	• Finalized designation of PFOA & PFOS as hazardous substances • Issued new PFAS enforcement policy • Issued enforcement discretion policy focused on major contributors
RCRA	• Update guidance on destruction and disposal of PFAS	• Proposed adding 9 PFAS as hazardous constituents to Appendix VIII • Updated guidance for destruction and disposal • Reached agreement with Chemours to monitor PFAS at Washington Works
CAA	• Identify sources • Develop monitoring approaches • Develop information on mitigation • Assess fate and transport	

EPA's Current Approach to PF

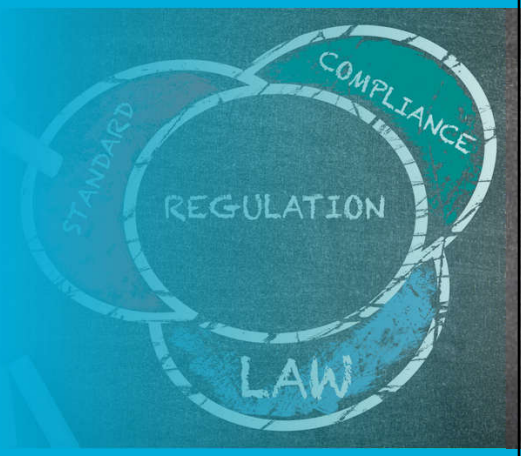
- Put roadmap on hold and committed to releasing a comprehensive review and approach in the fall.
- Withdrew the proposed effluent standard for industrial wastewater
- Considering removing DWS for 4 of 6 regulated compounds – leaving only PFOA and PFOS in place while extended deadline for compliance for PFOA and PFOS to 2031
- Considering establish a federal exemption framework for smaller rural drinking water systems



EPA Press Release, April 18, 2025

EPA Committed to:

- Continue developing ELGs for PFAS manufacturers and metal finishers;
- Expanding air monitoring and measurement techniques for PFAS emissions
- Increasing update frequency of PFAS Destruction and Disposal Guidance from every three years to annually
- Evaluating use of RCRA authorities to address PFAS releases from manufacturing operations
- Enforcing Clean Water Act limitations on PFAS use and release
- Completing public comment period on biosolids risk assessment and determining path forward



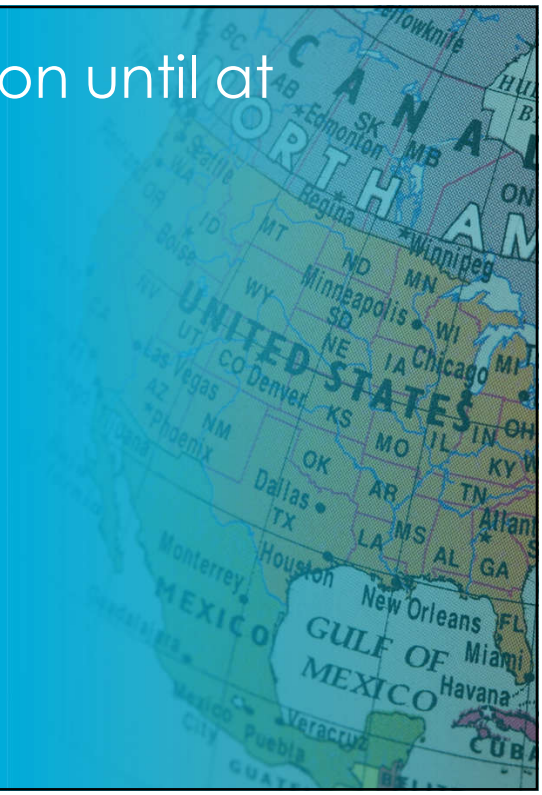
Complicating the issue are the future EPAs Office of Research and Development.

- ORD has always been a shared resource that supported basic science at EPA
- Currently they are facing
  - Funding Freeze and layoffs
  - Proposed Budget Cuts
  - Grant Cancellations
- Moving forward, EPA is being reorganized, and the reorganization may or may not include a role for ORD
- It is unclear how of if this void will be addressed.

States without Federal Direction until at Least the Fall

With the EPAs direction unclear states may be forced or choose to take the lead on critical PFAS issues. This will potentially:

- Result in a patchwork of inconsistent policies
- Increase compliance challenges for industry
- Create variability in public health protections
- Accelerate need for state-specific risk assessments to support state standards



Current Situation on PFAS regulation

- NJ
- NY
- CT
- PA

New Jersey

Drinking Water:

- MCLs set by NJDEP:
  - PFOA: 0.014 µg/L (ppb)
  - PFOS & PFNA: 0.013 µg/L (ppb)

Groundwater:

- Ground Water Quality Standards (GWQS):
  - PFOA: 0.014 µg/L (ppb)
  - PFOS & PFNA: 0.013 µg/L (ppb)
- Interim GWQS for ClPFPECAs set at 0.002 µg/L

Soil:

- The LSRP must go through a complex comparative process to determine the appropriate PFAS cleanup standard at each AOC or site
- Interim soil and soil leachate remediation standards must be considered for both the ingestion-dermal and migration to groundwater exposure pathways, for the following PFAS compounds: PFNA, PFOA, PFOS, and GenX

Biosolids:

- NJPDES entities with LLAMA approval must monitor PFAS in groundwater at land application sites

DGW Permit:

- Have require DGW permittees to monitor for PFOA, PFOS, and PFNA and, if the contaminants are detected above the applicable ground water quality standard(s), the permittee will be required to remove the pollutant(s) from its waste stream or provide treatment to meet the ground water quality standard(s)

DSW Permit:

- The Division of Water Quality is targeting PFAS in industrial wastewater through surveys, data collection, and focused monitoring of dischargers

Air:

- Filed a petition along with 2 other states to EPA to add four PFAS substances (PFOA, PFOS, PFNA, and HFPO-DA) as HAPs under Section 112(b)(3) of the Clean Air Act

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New York

Drinking Water:

- MCL for PFOA and PFOS set at 10 ppt* each

Groundwater:

- No enforceable PFAS groundwater standards currently in place
- Ambient Water Quality Guidance Values used for permitting & remediation
  - PFOA: 6.7 ppt
  - PFOS: 2.7 ppt

Air:

- Proposed bill related to the regulation of PFAS as a toxic air pollutant (Currently in the Assembly Environmental Conservation Committee)

Biosolids:

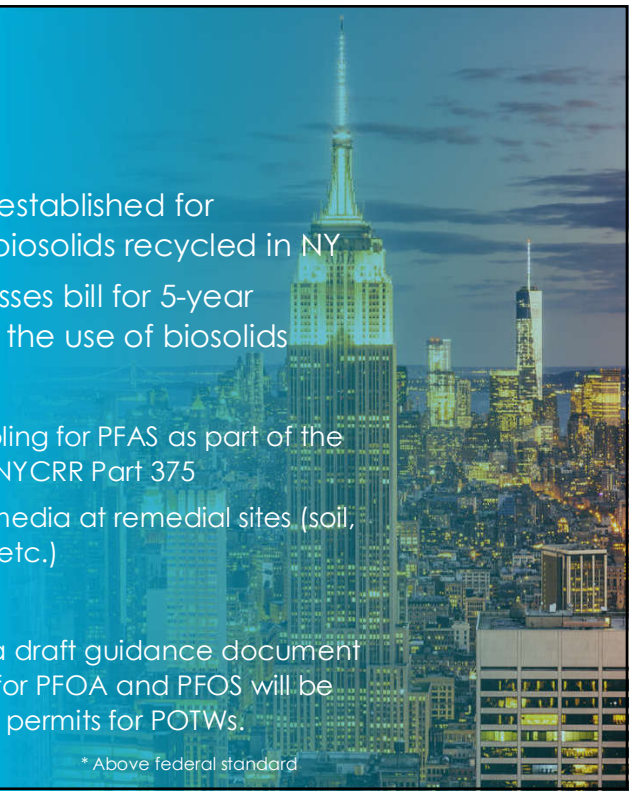
- Interim criteria established for PFOA/PFOS in biosolids recycled in NY
- NYS Senate passes bill for 5-year moratorium on the use of biosolids

Soil:

- Mandatory sampling for PFAS as part of the TAL/TCL under 6 NYCRR Part 375
  - Applies to all media at remedial sites (soil, groundwater, etc.)

Discharge Permit:

- Have published a draft guidance document on how the GVs for PFOA and PFOS will be applied to SPDES permits for POTWs.

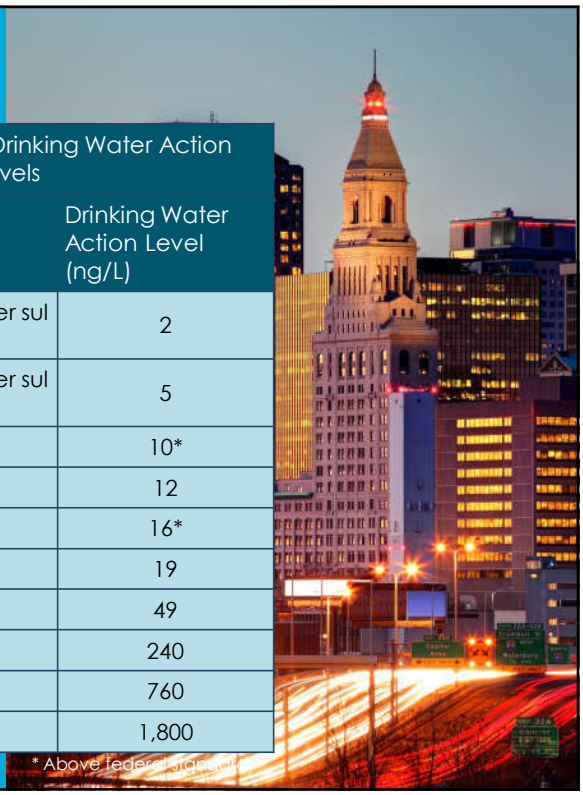


* Above federal standard

Connecticut

- Has the most PFAS included with drinking water action levels in states surrounding NJ
- Other PFAS Rules & Regulations:
  - Biosolids: biosolids that contain PFAS cannot be bought or sold in CT, nor can they be used/bought from other states
  - New proposed rule for drinking water: all PFAS cannot exceed 20 ng/L
  - Discharges- CT implemented a clean water act program where known sources of PFAS will have additional sampling/compliance plans
  - No regulations for air emissions presently
  - CT has started a pilot program in which farmers can send it soil samples to be evaluated for PFAS for free

Connecticut PFAS Drinking Water Action Levels	
Compound	Drinking Water Action Level (ng/L)
6:2 chloropolyfluoroether sulfonic acid	2
8:2 chloropolyfluoroether sulfonic acid	5
PFOS	10*
PFNA	12
PFOA	16*
GenX	19
PFHxS	49
PFHxA	240
PFBS	760
PFBA	1,800



* Above federal standard

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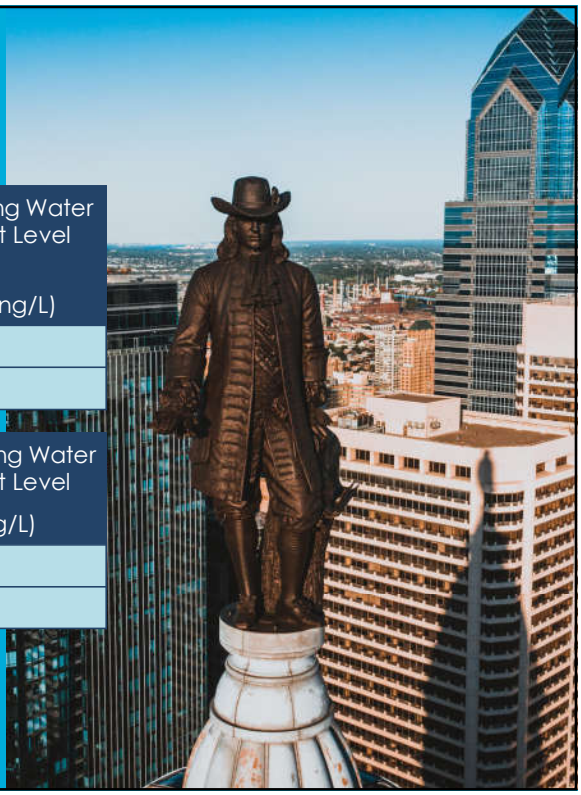
Pennsylvania

- Has both MCLs and MCLGs for PFOA and PFOS in drinking water
- Other PFAS Rules & Regulations:
  - Discharges are monitored, but not limited, for PFAS (Industrial Wastewater)
  - Statewide PFAS sampling effort from May 2019 to March 2021(Note: Resulted in new MCLGs)
  - No specific regulations for air, biosolids, soil, groundwater

Pennsylvania PFAS Drinking Water Maximum Contaminant Level Goals	
Compound	MCLG (ng/L)
PFOA	8*
PFOS	14*

Pennsylvania PFAS Drinking Water Maximum Contaminant Level	
Compound	MCL (ng/L)
PFOA	14*
PFOS	18*



Acronym List

- EPA- Environmental Protection Agency
- NJDEP-New Jersey Department of Environmental Protection
- PFAS-per- and polyfluoroalkyl substances
- CWA-Clean Water Act
- SDWA-Safe Drinking Water Act
- CERCLA-Comprehensive Environmental Response, Compensation, and Liability Act
- TSCA- Toxic Substances Control Act
- ELG-Effluent Limitations Guidelines
- RCRA-Resource Conservation and Recovery Act
- PFOA-Perfluorooctanoic acid
- PFOS- perfluorooctanesulfonic acid
- GWQS-Ground Water Quality Standards
- ClPFPECAs- Chloroperfluoropolyether Carboxylates
- MCLs –Maximum Contaminant Level
- LLAMA - Landfill Leachate and Methane Management Approval

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About the Panelists…

Andrew T. Alessandro is an associate with Gibbons, P.C. in Newark, New Jersey, and handles a wide variety of cases in the firm's Environmental Group in both state and federal courts throughout New Jersey. He represents clients in litigation under the *Spill Act* and CERCLA, and also advises clients on regulatory compliance with lead-paint regulations in New York.

Admitted to practice in New Jersey and New York, Mr. Alessandro is a Director of the New Jersey State Bar Association Environmental Law Section. He is a member of the Stewart G. Pollock Environmental American Inn of Court and the co-author of "High Court Clean Air Fight May Transform Administrative Law," (*Law360*, 3/4/22).

Mr. Alessandro received his B.A. from Rutgers University and his J.D. from Rutgers School of Law-Newark, where he served as Business Editor of the *Rutgers University Law Review* and worked as a clinical student for the Criminal and Youth Justice Clinic. He served as a judicial law clerk to the Honorable Joseph L. Yannotti, P.J.A.D., New Jersey Superior Court, Appellate Division, where he conducted research and wrote memoranda on civil, administrative, criminal and family matters, and edited judicial opinions.

Robert S. Baranowski, Jr. is a Partner in Hyland Levin Shapiro LLP in Marlton, New Jersey, and concentrates his practice in environmental and land use matters. He represents clients in connection with development applications, zoning and land use litigation, appellate matters, redevelopment, eminent domain and inverse condemnation actions, and also handles title insurance claims and general commercial litigation.

Admitted to practice in New Jersey and Pennsylvania, and before the United States District Court for the District of New Jersey, Mr. Baranowski is Past Chair of the New Jersey State Bar Association's Land Use Section Board of Directors and has been a member of the Burlington County Bar Association and the Chamber of Commerce of Southern New Jersey. He has also been a member of the Builders League of South Jersey, the Urban Land Institute and the Environmental Law Institute. Mr. Baranowski formerly served as Deputy Attorney General with the State of New Jersey, Division of Law, where he represented the Department of Environmental Protection. A lecturer at a number of ICLE seminars, he has also lectured on land use and environmental topics for ALI-ABA, DRI, the National Business Institute and the Camden County Bar Association.

Mr. Baranowski received his B.A. from Rutgers University and his J.D. from Seton Hall Law School.

Scott Bisbort is Senior Project Manager at Langan Engineering and Environmental Services in Princeton, New Jersey.

Michael Bock, Ph.D. is a Senior Principal at Verdantas in Portland, Maine, and has more than 25 years of experience in environmental science and consulting. He specializes in the assessment of contamination, including statistical analysis, forensic analysis and source

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Mr. Chimchirian received his B.S. from Marist College and his M.S. in Environmental Engineering and Water Resources from Villanova University.

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Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Ms. Conenello is Past Chair of the New Jersey State Bar Association Environmental Law Section and the Morris County Bar Association Environmental Law Committee, and a former member of the District V-A Ethics Committee. She has lectured for professional and trade associations including ICLE, the New Jersey State Bar Association, the Chemistry Council of New Jersey and the New York State Business Council. The author of "NY, NJ Lease Auctions Highlight US Push for Offshore Wind" (*Law360*, 2/10/22), she is the recipient of several honors.

Ms. Conenello received her B.A., with Honors, from Rutgers University and her J.D. from New York University School of Law, where she was Editor of the *Annual Survey of American Law Journal*. She was a judicial clerk to the Honorable Douglas K. Wolfson and the Honorable Yolanda Ciccone, New Jersey Superior Court, Law Division.

Tod Delaney, Ph.D., PE, BCEE has been President of First Environment in Boonton, New Jersey, since 1987. He has testified in more than 30 litigations involving the management, disposal and handling of petroleum and chemicals, including chlorinated solvents (TCE, PCE, TCA), gasoline, fuel oils, diesel, BTEX and PAH compounds and refinery wastes; MGP wastes; PCBs; lighter-end volatile organics; PFAS (per-and polyfluoroalkyl substances); and elemental materials including chromium, lead and mercury; in the context of CERCLA, RCRA, state law cleanup statutes and toxic tort lawsuits. He has prepared expert opinions for clients in a number of states and has testified in federal and state courts.

Dr. Delaney is a Professional Engineer in New Jersey, New York, Pennsylvania, Connecticut and 12 other states. He is a Board Certified Environmental Engineer, American Academy of Environmental Engineers and Scientists; a Lead Verifier through the California Air Resource Board; and holds the Principal Environmental Auditor designation from the Institute of Environmental Management and Assessment (IEMA). Chair of the ISO Climate Change Coordinating Committee, he is WG Chair of the International Standards Organization (ISO) and a member of the American Chemical Society and the California Green Ribbon Science Panel.

Dr. Delaney received his B.S. and M.S. in Chemical Engineering from the University of New Mexico, his M.B.A. from Pepperdine University and his Ph.D. in Environmental/Environmental Health Engineering from the University of Texas at Austin.

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Prior to joining the firm, Ms. Dema was an Attorney-Advisory in the Office of General Counsel at the National Oceanic and Atmospheric Administration ("NOAA"). She was part of a team that received the U.S. Department of Commerce Gold Medal for exceptional professional achievement in science, law and policy.

Ms. Dema received her B.A., *cum laude*, from Columbia College; her MSc (with Distinction) from Imperial College London; and her J.D. from Columbia University School of Law, where she was a James Kent Scholar, a Harlan Fiske Stone Scholar, a member of the Environmental Law Clinic and Editor-in-Chief of the *Columbia Journal of Environmental Law*.

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Admitted to practice in New Jersey and Pennsylvania, Ms. Demirjian is a member of the Board of Directors of the New Jersey State Bar Association Environmental Law Section. She has served as an Adjunct Professor at Rutgers University School of Law-Camden, where she taught a course on environmental litigation. A former member of the Delaware Valley Environmental American Inn of Court, she has authored articles on environmental and energy-related issues and has given presentations to clients and peers on environmental laws and issues.

Ms. Demirjian received her B.A. from Rutgers University and her J.D. from Rutgers University School of Law-Camden. During law school, she interned for the Environmental Enforcement Section of the United States Department of Justice in Washington, D.C., and for the United States Environmental Protection Agency in Philadelphia, Pennsylvania, where she worked on *Clean Water Act* and CERCLA-related issues. She clerked for the Honorable Carol E. Higbee, Presiding Judge, Civil Division, Superior Court, Atlantic County.

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A Licensed Site Remediation Professional, Mr. Fisher is a Trustee and President of the New Jersey LSRP Association and serves on several of the Association's regulatory and technical guidance committees which work directly with the NJDEP and other stakeholders. He formerly spent ten years as a project and team manager with the NJDEP's Site Remediation Program.

Mr. Fisher received his B.S. from Richard Stockton State College.

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Jacqueline Fusco is a Technical Director at Roux in the firm's Somerset, New Jersey, office, and has more than 24 years of experience in the environmental consulting field.

Having served major utility companies across the country, Ms. Fusco has knowledge of federal and state programs, and has managed land use permitting for major generating facilities as well as renewable energy power development including solar, storage and offshore wind. She has also provided permitting services for private industrial, commercial and multi-family residential developers and public entities.

Ms. Fusco received her B.S. from The George Washington University Columbian School of Arts & Sciences.

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Michele Julie Glass is a Director in the Environmental Practice at Gibbons, P.C. in Newark, New Jersey. She has represented parties in a broad range of matters including brownfields redevelopment and site remediation, transactional matters and due diligence, permitting, insurance and environmental compliance. She has negotiated redevelopment agreements on behalf of developers and assisted clients through all phases of the remediation process from initial investigation through no further action and/or response action outcome.

Ms. Glass is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey. She is Past Chair of the New Jersey State Bar Association's Environmental Law Section and a founding member of the NJSBA Renewable Energy, Cleantech & Climate Change Sub-Committee. Ms. Glass has also served in several capacities for the American Bar Association Section of Environment, Energy & Resources (SEER). She is the recipient of several honors.

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John D.S. Gilmour is a Partner in Kelley Drye in the firm's Houston, Texas, office, where he is Co-Chair of the Environmental Litigation Section. He represents public and private sector clients in matters addressing remediation and restoration, including natural resource damages in state, territorial and federal courts.

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Mr. Gilmour received his B.A. from McGill University and his J.D. Tulane University Law School, where he was a member of the Order of the Barristers. He clerked for the Honorable David Hittner, United States District Court for the Southern District of Texas.

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As Bureau Chief, Mr. Hackman oversees many recently passed legislations including Dirty Dirt, Single-use Plastic Reduction, Food Waste Recycling, Minimum Recycled Content, and Electric and Hybrid Vehicle Battery Management laws. He also manages solid waste licensing, landfill escrow and district solid waste management programs as well as the issuance of grant money to counties, municipalities and institutions of higher education pursuant to New Jersey's *Recycling Enhancement Act*.

Mr. Hackman received his undergraduate degree and M.B.A. from Rutgers University.

Michael R. Hastry is Director of Waste & UST Compliance and Enforcement, New Jersey Department of Environmental Protection in Trenton, New Jersey. He oversees the enforcement program for solid waste, RCRA/hazardous waste, regulated medical waste, recycling, hazardous material transport and underground storage tanks.

Mr. Hastry has served with the New Jersey Department of Environmental Protection for 39 years. He is a member of the Board of Directors of the Northeast Waste Management Official's Association.

Jon Jacobs, with First Environment, Inc. in Butler, New Jersey, served nearly three decades as a senior manager and attorney-advisor in the United States Environmental Protection Agency's Washington, D.C. Office of Enforcement and Compliance Assurance and the Office of Administrative Law Judges. There he focused in civil and criminal litigation involving chemicals and pesticides violations as well as regulatory and policy development matters. Since entering private practice in 2014 he has focused on advocacy and enforcement defense, as well as climate change, carbon sequestration and life cycle assessment issues.

During his career Mr. Jacobs received numerous EPA medal awards for exceptional and outstanding service. He also served as an instructor and judge at the Federal Law Enforcement Training Center and EPA's National Enforcement Training Institute.

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Mr. Klein received his B.A., *cum laude*, from The George Washington University and his J.D. from Boston College Law School.

Anita Locke, LSRP, a Licensed Site Remediation Professional (LSRP) and Senior Professional with Geosyntec Consultants, Inc. in Pennington, New Jersey, has 24 years of experience in environmental consulting including planning, developing and implementing a range of environmental investigations, assessments and remediation in New Jersey.

A Licensed Site Remediation Professional (LSRP) in New Jersery, Ms. Locke has served as the LSRP for 23 sites since 2015, has submitted more than 20 milestone documents to the NJDEP and has closed seven cases with Response Action Outcomes (RAOs). She is a Trustee and Chair of the Finance Committee for the Licensed Site Remediation Professionals Association (LSRPA) and is Co-Chair of the Golf Committee for the New Jersey Society of Women Environmental Professionals (NJSWEP).

Ms. Locke received her B.A from the University of Delaware.

Judd Mahan, PG is a Project Director at Tetra Tech in Charlotte, North Carolina, and has been working in the environmental consulting industry for 25 years. A licensed geologist in Georgia, North Carolina and South Carolina, he serves on the Interstate Technology and Regulatory Council (ITRC) Microplastics and Emerging Contaminants Teams. His projects include soil and groundwater assessments in the Carolinas; air emissions permit support for shipping terminals in Savannah, Georgia; environmental permitting for Coast Guard construction projects; and support for microplastics studies in the Chesapeake Bay area.

Mr. Mahan serves as a trainer for ITRC Microplastics webinars. The ITRC *Microplastics Outreach Toolkit* was published in June 2024 and the *Contaminants of Emerging Concern Framework* was published in December 2024.

Mr. Mahan received his B.A. and B.Sc. from Auburn University and his M.B.A. from the University of North Carolina at Pembroke.

Daniel T. McKillop is counsel to Scarinci Hollenbeck in Little Falls, New Jersey, where he practices primarily in environmental law. He has represented corporate and individual clients in complex environmental litigations and regulatory proceedings before administrative, federal and state courts, and environmental agencies, arising under state and federal statutes including ISRA, the *Spill Act*, RCRA, CERCLA/Superfund, the *Clean Air Act* and the *Clean Water Act*. He has also counseled corporate and private clients regarding federal, state and local environmental law, including the environmental aspects of commercial real estate sales and acquisitions, compliance with industrial discharge standards and environmental permitting requirements.

Admitted to practice in New Jersey, New York and the District of Columbia, and before the United States District Court for the District of New Jersey, Mr. McKillop is Past Chair of the New Jersey State Bar Association Environmental Law Section and has served on the New Jersey Commerce and Industry Association's Environmental Business Council Steering Committee and the *New Jersey Law Journal* Young Lawyer's Advisory Board. He has also been a member of the New Jersey CannaBusiness Association.

An editor of the *Cannabis Law Journal*, Mr. McKillop was selected by the *National Law Journal* as a 2018 Cannabis Law Trailblazer. His articles have appeared in professional publications and he has lectured for ICLE. He is the recipient of several honors.

Mr. McKillop received his B.A. from the University of Notre Dame and his J.D., *cum laude*, from Pace University School of Law, where he received certificates in both Environmental and International Law and was a member of the law school's *Environmental Law Review*. During law school, he worked in the Office of the Staff Judge Advocate General at the United States Military Academy at West Point and also practiced law as a student attorney in the Pace Law School Environmental Litigation Clinic.

David J. Miller is a Shareholder in Giordano, Halleran & Ciesla, P.C. in Red Bank, New Jersey. An environmental attorney with experience in the private and public sectors, he focuses his practice in environmental regulatory, real estate and corporate transactional matters. Mr. Miller counsels clients on site remediation, the *Industrial Site Recovery Act* (ISRA), the *Site Remediation Reform Act* (SRRA), the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA), due diligence, participation in potentially responsible party groups and interaction with the Environmental Protection Agency on Superfund matters. He also advises on the procurement of environmental permits from state and federal agencies for major commercial and industrial development, transaction-triggered environmental laws and voluntary brownfields remediation programs.

Admitted to practice in New Jersey, Pennsylvania and New York, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, Mr. Miller is Secretary of the New Jersey State Bar Association Environmental Law Section, a former member of the Association's *Amicus* Committee and has been a member of the Pennsylvania Bar Association. He formerly served as senior counsel in the Office of Governor Philip D. Murphy, overseeing environmental and energy issues and initiatives. Prior to attending law school, Mr. Miller worked in the Commissioner's Office of the New Jersey Department of Environmental Protection. He is a former member of the Justice Stewart G. Pollack Environmental American Inn of Court and the author of articles which have appeared in the *NJ Environmental Law Blog*.

Mr. Miller received his B.A. from The College of New Jersey and his J.D., *cum laude*, from Rutgers University School of Law. He was a law clerk for the United States Environmental Protection Agency.

Dan Millemann is a research scientist and the New Jersey Department of Environmental Protection in Trenton, New Jersey, where he is working on the development of aquatic life criteria, bioaccumulation and biomagnification of contaminants, applied and field ecotoxicology, and managing associate projects for the state of New Jersey. His primary focus as a

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Mr. Millemann received his B.S. from Elon University and his M.S. and Ph.D. in Environmental Sciences from Rutgers University.

Sean Moriarty is Regulatory Director of The State Energy & Environmental Impact Center at NYU School of Law in New York City. He formerly served as Deputy Commissioner, New Jersey Department of Environmental Protection, in Trenton, New Jersey, where he led DEP's internal legal team on all matters of regulatory compliance and rule-making, and oversaw the Office of Enforcement Policy. Mr. Moriarty was also a member of the Commissioner's executive team and provided input on priority initiatives that included climate change and environmental justice. He formerly served as Chief Advisor for Regulatory and Legislative Affairs.

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Nicole R. Moshang heads the Litigation Practice Group at Manko Gold Katcher & Fox LLP, an environmental, energy, litigation, safety and land use practice in Philadelphia, Pennsylvania. With more than 28 years of legal experience representing a broad range of clients, she represents clients in litigation matters for cost recovery, contribution, natural resource damages, toxic tort, breach of contract, insurance coverage, and enforcement and penalty actions under state and federal statutes. She has served as the firm's Hiring Partner, Mentoring Program Coordinator and member of the DEI Committee.

Ms. Moshang is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey and the Eastern District of Pennsylvania, and the Third Circuit Court of Appeals. She is a member and former Co-Chair of the Society of Women Environmental Professionals of Greater Philadelphia and a Board Member of Habitat for Humanity Philadelphia. A member of the Villanova Law School American Inn of Court, she has lectured for the Society of Women Environmental Professionals of Greater Philadelphia, DRI and other organizations, and is the recipient of several honors.

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Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Mr. Mottola is a Trustee and Co-Chair of the Legal and Legislative Committee of the Licensed Site Remediation Professional Organization (LSRPA). He is a member of the Brownfield Coalition of the Northeast (BCONE) and Environmental Business Council of the Commerce & Industry Association of New Jersey (CIANJ).

Mr. Mottola is a founding member and three-term Executive Committee Administrator of the Justice Stewart G. Pollack Environmental American Inn of Court. Co-Moderator of an annual Environmental Law Review program sponsored by Rutgers University and BCONE, he also served as an Adjunct Professor at Charter Oak State College, where he designed and taught a course in environmental law.

Mr. Mottola received his A.B. from Hamilton College and his J.D., cum laude, from Seton Hall University School of Law.

Raymond S. Papperman is counsel to Sills Cummis & Gross, P.C. in Newark, New Jersey, where he concentrates his practice in environmental law pertaining to ongoing operations at commercial and industrial facilities, and the remediation and development of sites throughout New Jersey. Prior to joining Sills Cummis, he was Deputy Advisor to the Commissioner of the New Jersey Department of Environmental Protection (DEP) in Trenton, New Jersey. With more than 30 years of legal experience, he was also the Director of the Office of Dispute Resolution, DEP's Ethics Liaison Officer and acted as DEP's liaison with the Division of Law on several matters.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, the Third Circuit Court of Appeals and the United States Supreme Court, Mr. Papperman is a member of the Board of Directors and Past Chair of the New Jersey State Bar Association Environmental Law Section and Past Vice Chair of the Toxic Tort and Environmental Law Committee of the American Bar Association. He has extensive experience in dispute resolution, particularly in the environmental and construction areas, and has been named to the New Jersey Judiciary's roster of mediators for the statewide mediation program.

Mr. Papperman is a Master of the Stewart G. Pollock New Jersey Environmental American Inn of Court, where he serves on the Executive Committee. He has been a frequent lecturer and author on environmental and real estate development topics and is the recipient of several honors.

Mr. Papperman attended Cornell University and is a graduate of Hobart College. He received his J.D. from Tulane University Law School.

Jonathan ("Joe") Perse, LSRP, PG is a Client Manager at Cornerstone Environmental Group, LLC, a Tetra Tech company, in Philadelphia, Pennsylvania, and has 25 years of experience in the environmental consulting and engineering field, with regulatory experience primarily in New Jersey and Pennsylvania. His primary work focuses on the investigation and remediation of complex environmentally impacted projects.

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Mr. Perse received his undergraduate degree from St. Lawrence University and his Master of Geological Sciences from The Ohio State University.

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Mr. Pietrucha is New Jersey Licensed Site Remediation Professional (LSRP), a Professional Engineer in New Jersey and also holds the Subsurface Evaluator designation from the New Jersey Department of Environmental Protection. He is a member, Past President and a former Trustee of the New Jersey Site Remediation Professionals Association.

David M. Reap is Special Counsel to Kelley Drye in the firm's New York City office, where he represents government entities in high-impact litigation to protect public health, safety and the environment, as well as public and private sector clients in environmental litigation.

Mr. Reap is admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the Southern and Eastern Districts of New York. He is a former New Jersey Deputy Attorney General primarily assigned to the Consumer Fraud Prosecution Section.

Mr. Reap received his B.A. from the University of Michigan's Gerald R. Ford School of Public Policy and his J.D. from the Benjamin N. Cardozo School of Law, where he was Editor-in-Chief of the *Cardozo Jurist*, a staff writer for the *Cardozo Journal of Conflict Resolution* and the recipient of the Jacob Burns Medal. He clerked for the Honorable Harriet F. Klein, New Jersey Superior Court, Chancery Division, General Equity Part.

Andrew B. Robins is Of Counsel to Sills Cummis & Gross P.C. in the firm's Newark, New Jersey, office. He uses his wide range of environmental law experience to counsel clients in regulatory compliance, cost recovery litigation, redevelopment, brownfields, transaction negotiation and risk analysis. He has been involved in the crafting and implementation of new NJDEP programs and initiatives, including the Site Remediation, Land Use, Solid and Hazardous Waste and Enforcement Programs, as well as the LSRP Program and SRRA legislation.

Admitted to practice in New Jersey and before the United States District Court for the District of New Jersey, Mr. Robins is a Trustee of the New Jersey Licensed Site Remediation Professionals Association (LSRPA), Past Co-Chair of NAIOP-NJ's Regulatory Affairs Committee, and a member of the Environmental Committee of the National Association of Home Builders and the Environmental and Land Use Sections of the New Jersey State Bar Association. He is also a member of the National Brownfield Association, the Brownfield Coalition of the Northeast, the New Jersey Builders Association, the Shore Builders Association of Central New Jersey and several NJDEP groups.

Mr. Robins has lectured for ICLE, the New Jersey Builders Association, NAIOP-NJ and other organizations, and his articles have appeared in the *New Jersey Law Journal* and other publications. He is the recipient of the Regulatory Committee President's Award from NAIOP-

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Mr. Robins received his B.A. from the University of Pennsylvania and his J.D. from Rutgers Law School.

Debra S. Rosen is a Shareholder in Archer & Greiner, P.C. in Voorhees, New Jersey, a member of the firm's Board of Directors and the Equity and Inclusion Committee, Co-Chair of the Personnel Committee and Chair of the Women Lawyers Network. She concentrates her practice in complex environmental litigation, with an emphasis on the defense of groundwater contamination cases involving claims of property damage and serious personal injury.

Ms. Rosen is a member of the New Jersey State, Pennsylvania and Camden County Bar Associations, and a Board Member of the Alice Paul Center. Past Chair of the New Jersey Society of Women Environmental Professionals, she has lectured on environmental laws and diversity and inclusion issues facing the legal profession.

Ms. Rosen received her undergraduate degree, with honors, from Dickinson College and her law degree, with honors, from Rutgers School of Law-Camden.

David J. Singer is a Principal of Porzio, Bromberg & Newman, P.C. in Morristown, New Jersey, and a member of the firm's Environmental Practice Group. He concentrates his practice in environmental transactions, litigation and compliance matters, the sale and purchase of commercial real estate, land use and general civil litigation.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey, Mr. Singer is President of the Bridgewater Professional Group and a member of the American, New Jersey State and Middlesex County Bar Associations. He is a Master of the Stewart G. Pollock Environmental American Inn of Court and his articles have appeared in the *New Jersey Law Journal* and other publications. He is the recipient of several honors.

Mr. Singer received his B.S. from Cook College, Rutgers University, and his J.D. from Vermont Law School.

Michael G. Sinkevich, a Shareholder in Lieberman Blecher & Sinkevich, P.C. in Princeton, New Jersey, has practiced extensively in environmental and land use matters, with a focus in environmental litigation, since 2007.

Mr. Sinkevich assists business, individual, municipal and non-profit clients in matters concerning New Jersey's *Spill Compensation and Control Act*, *Site Remediation Reform Act*, *Solid Waste Management Act*, *Environmental Rights Act* and *Municipal Land Use Law*; and represents clients before New Jersey and New York state and federal courts as well as planning and zoning boards throughout New Jersey. He also guides clients through environmental regulatory compliance and has a particular focus in securing insurance coverage for remediation efforts. He is Chair of the New Jersey State Bar Association's Environmental Law Section and has lectured frequently for ICLE.

Mr. Sinkevich received his B.S. and M.S. in Environmental Engineering, with a focus on hydrogeology, from Cornell University and is a *cum laude* graduate of Albany Law School, where he was an articles editor for the *Albany Law Environmental Outlook Journal* and the recipient of the Gary M. Peck Memorial Prize for Excellence in Environmental Law. During law school he also interned with the Office of Hearings and Mediation Services at the New York State Department of Environmental Conservation.

Paul Stephan is Counsel to Sher Edling LLP in San Francisco, California, where he helps hold polluters accountable and ensures justice for communities suffering from pollution's effects. Prior to joining Sher Edling he was an associate at the class action law firm of Cohen Milstein Sellers & Toll PLLC, where he litigated class actions on behalf of consumers.

Mr. Stephan received his B.A., *summa cum laude*, from the State University of New York at Buffalo and his J.D., *magna cum laude*, from the University of Pennsylvania, where he was a Comments Editor of the *University of Pennsylvania Law Review* and Co-President of the Penn Law chapter of the American Constitution Society. He clerked for the Honorable Anne E. Thompson, United States District Court for the District of New Jersey.

Kathleen ("Kathi") Stetser, P.G., LSRP is Vice President and Industrial Practice Leader at GEI Consultants in Mount Laurel, New Jersey. She has 25 years of consulting experience and specializes in environmental program management and New Jersey site remediation services for clients within the chemical, pharmaceutical, utility, petroleum and manufacturing business sectors. She is a New Jersey regulatory specialist and is expert in matters relating to the *Industrial Site Recovery Act* (ISRA), the *Site Remediation Reforms Act* (SRRA) and the Technical Requirements for Site Remediation.

Ms. Stetser is a licensed Professional Geologist in Pennsylvania, Florida and Georgia, and a New Jersey Licensed Site Remediation Professional (LSRP). A member of the New Jersey Site Remediation Professionals Licensing Board, she is active on numerous NJDEP Stakeholder Committees involving new regulations and technical guidance and has served on the NJDEP Ground Water Quality Standards Classification working group. Ms. Stetser is co-author, with Joshua Gradwohl of the NJDEP, of the *Preliminary Assessment Technical Guidance*, and one of the primary authors of the *Site Investigation/Remediation Investigation/Remedial Action for Soils Technical Guidance* as well as the *Historic Fill Technical Guidance* and the *Historic Pesticide Technical Guidance*. She participated in the stakeholder group that redrafted the *Technical Requirements for Site Remediation* and serves on the New Jersey Site Remediation Professional Licensing Board.

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Ms. Zolezi is a distinguished professional with more than 30 years of experience in environmental consulting, site remediation, construction and development, material and waste management, and regulatory compliance. In 2022 she was appointed to U.S. EPA Local Government – Small Communities Subcommittee, which promotes access to clean air, safe drinking water, waste management services and federal funding programs. She is also a locally-elected official in Ocean County, New Jersey, and the recipient of multiple honors.

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