Polluters Pay Climate Superfund (SB684 / AB1243)

The polluter pays principle is a longstanding legal doctrine

California's Polluters Pay Climate Superfund Act is modeled on existing state and federal laws: the California Childhood Lead Poisoning Prevention Act and the federal Comprehensive Environmental Response, Compensation, & Liability Act (CERCLA).

It satisfies constitutional due process. If a product caused harm, there is liability to remedy that harm even where a product was or is legal, and even where a product might be seen to provide a benefit.

Since the 1990s, California has implemented a law assessing compensatory fees against lead paint and leaded gas producers to fund programs to screen and treat lead poisoning in children. The Department of Public Health assesses and collects the fee annually, based on the polluter's market share responsibility for environmental lead contamination.[1] In a challenge by a petroleum company to its allocation, the California court of appeals found "there was a reasonable basis for the department to allocate the lead program fee in the manner it did, based on the gasoline industry's responsibility for contaminating the environment with lead."[2] It also found that allocating fees only to the paint and petroleum industries—even though other industries also contributed some lead contamination—was warranted because the paint and petroleum industries were "overwhelmingly the largest historical consumers of lead in the stream of commerce resulting in environmental lead contamination, and subsequently resulting in ongoing and chronic exposure to children."[3]

CERCLA also imposes retroactive liability on multiple parties, including the generators of waste, for the cleanup of contaminated sites. Retroactive liability laws, including CERCLA, have withstood constitutional challenges under the Due Process Clause.[4] Courts evaluate whether the government has shown the application has a "legitimate legislative purpose furthered by rational means," and give significant deference to the legislative and executive branches in making this determination.[5] **Federal courts have unanimously found that pollution remediation is a legitimate government purpose, and that it is rational to impose liability for these costs upon parties that created and profited from activities that caused the pollution.**[6]

Companies that have sufficient minimum contacts with the state—including those that avail themselves of the privilege of doing business here, such as through the marketing, sale, or distribution of fossil fuels to in-state purchasers—are properly subject to the jurisdiction of the state, and to the Climate Superfund Program because of the demonstrable relationship between fossil fuels and climate change harms felt in California.

The Federal Clean Air Act (CAA) does not preempt the Polluters Pay Climate Superfund Act.

While the CAA is intended to reduce emissions, it does not address damages from pollution. Courts are reluctant to find that federal environmental pollution statutes preempt state laws—especially where, as here, the statute expressly contemplates state regulation.[7] Further, liability under California's Climate Superfund Act only deals with *in-state* damages—it poses no obstacle to any federal EPA permitting process for greenhouse gas emissions nor does it improperly seek to control emissions from out-of-state sources.

The Polluters Pay Climate Superfund Act does not violate the Commerce Clause.

California's Climate Superfund does not distinguish between in-state and out-of-state responsible parties and thus does not run afoul of the Commerce Clause.[8] And while the law would impose economic costs on entities that may exist beyond state borders, the legislation seeks to remedy extensive harm *within* the state, and has considerable, meaningful local benefits.[9]

The Polluters Pay Climate Superfund Act is not a taking.

Courts have repeatedly upheld environmental laws and regulations that impose financial costs on polluters for environmental harm.[10] The responsible parties under California's Climate Superfund take in exorbitant private profits from their activities—***more than $2 trillion since 1990***[11]—while the public bears the health and environmental costs. Their profits dwarf the potential financial liabilities under the bill. It's patently unreasonable for companies to have expected limited or no government regulation of fossil fuels, especially since they have known their products would cause harm and operated in a highly regulated environment, for decades.

The Polluters Pay Climate Superfund Act does not interfere with ongoing public nuisance cases seeking accountability for fossil fuel companies' decades of deception about the harmful impacts of their products.

Climate Superfund legislation and public nuisance lawsuits are fundamentally distinct, but complementary, approaches. The lawsuits center on disinformation—not pollution—and seek to stop companies from lying to consumers, abate ongoing public nuisance, and provide equitable relief. In contrast, California's Climate Superfund, like the Childhood Lead Poisoning Prevention Act, seeks to remedy damage caused by polluters' past fossil fuel emissions. The Climate Superfund bill doesn't prevent companies from continuing business as usual; it's about remedying harm. California has never been made whole for the damage these companies caused. **Under the Climate Superfund framework, it doesn't matter if the product was or is legal, or if the product provided a benefit—if the product caused harm, the company must pay to remedy the damage.** Similarly, the California Legislature sought remedies through legislation (the California Childhood Lead Poisoning Prevention Act) and California local governments through the courts (public nuisance lawsuits) related to harms caused by lead paint and gas products. California courts upheld the government's ability to pursue both avenues for damages.[12]

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[1] Health & Saf. Code § 105310.

[2] *Equilon Enterprises LLC v. Bd. of Equalization* (2010) 189 Cal. App. 4th 865, 870; *see also Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 877-878 (Cal. 1997) ("**the police power is broad enough to include mandatory remedial measures to mitigate the *past, present, or future* adverse impact of the fee payer's operations**, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects").

[3] *Equilon Enterprises*, *supra*, 189 Cal.App.4th at 876-77.

[4] *See, e.g.*, *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988) ("Many courts have concluded that Congress intended CERCLA's liability provisions to apply retroactively to pre-enactment disposal activities of off-site waste generators. They **have held uniformly that retroactive operation survives the Supreme Court's tests for due process validity**.").

[5] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (**judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches**).

[6] *See, e.g.*, *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986); *O'Neil v. Picillo*, 883 F.2d 176, 183 n.12 (1st Cir. 1989).

[7] 42 U.S.C. § 7416 (stating that, aside from vehicle emission limits, **nothing in the CAA "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution**").

[8] See, e.g., *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 947 (9th Cir. 2013) (A statute that "'treat[s] all private companies exactly the same' does not discriminate against interstate commerce.").

[9] *See generally, Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008); *National Pork Producers Council v. Ross* 598 U.S. 356 (2023).

[10] *See, e.g.*, *United States v. Alcan Aluminum Corp*., 315 F.3d 179, 190 (2d Cir. 2003); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986) ("Appellants also summarily argue retroactive application of CERCLA constitutes an unconstitutional taking of property. We disagree.").

[11] Padding Big Oil's Profits: Companies Bank Trillions, Taxpayers Get the Bill, Taxpayers for Common Sense (2020).

[12] *People v. ConAgra Grocery Products Co.* (2017) 17 Cal. App. 5th 51.