



May 5, 2025

Environment and Natural Resources Committee
100 State House Station
Cross Building Room 216
Augusta, ME 04333

IN RE: Recommendation Ought Not to Pass **LD 1808** “An Act to Enact the Maine Climate Superfund Act”
Recommendation Ought Not to Pass **LD 1870** “An Act to Establish a Climate Superfund Cost Recovery
Program to Impose Penalties on Climate Polluters”

Dear Senator Denise Tepler, Co-Chair; Representative Victoria Doudera, Co-Chair; and Members of the Committee:

Thank you for this opportunity to provide comments related to the above-referenced legislation. The American Petroleum Institute (API)¹ **opposes LD 1808 and LD 1870.**² While API appreciates the goal of funding environmental programs, this legislation is not the way to effectuate this objective. API believes it is bad public policy and may be unconstitutional.

API is extremely concerned that these **bills retroactively impose costs and liability on prior activities that were legal, violate equal protection and due process rights** by holding companies responsible for the actions of society at large, and are **preempted by federal law**. In fact, API and the U.S. Chamber of Commerce recently filed a complaint in federal court challenging the legality of similar legislation passed in Vermont and New York.³

API strongly encourages Maine lawmakers to exercise prudence and refrain from passing these “Climate Superfund” bills given there is pending litigation on this issue which is rife with uncertainty and legal questions. **API respectfully suggests and recommends lawmakers refrain from committing resources into bills that are effectively already being litigated in another state.**

For the reasons articulated below, API requests that the committee determines the bills **ought not to pass** (ONTP).

Retroactive Law Making

Generally speaking, legislation should apply prospectively to ensure notice to the regulated community and protect due process rights and interests. These bills impose strict liability on actions that occurred over thirty-five years ago. While

¹ The American Petroleum Institute represents all segments of America’s natural gas and oil industry, which supports more than 11 million U.S. jobs. Our nearly 600 members produce, process, and distribute the majority of the nation’s energy. API members participate in API Energy Excellence, through which they commit to a systematic approach to safeguard our employees, environment and the communities in which they operate. Formed in 1919 as a standards-setting organization, API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

² LD 1808 and LD 1870 are similar bill with subtle differences, namely the covered period in LD 1870 is an additional five years. Most notable in its distinction is the fact that LD 1870 also includes language noting that the legislation “may not be construed to relieve any person from liability at common law or under any state law. This Act may not be construed to preempt, displace, restrict or limit in any way any other claim or remedy available to a person.” Additionally, LD 1870 includes language that requires money collect be used to replenish monies allocated from the general fund with a fixed amount of proceeds applied to low- and moderate-income individuals and families.

³ These complaints are available through the U.S. Chamber of Commerce website:

New York: <https://www.uschamber.com/assets/documents/Complaint-Chamber-v.-James-S.D.N.Y.pdf>; and

Vermont: <https://www.uschamber.com/assets/documents/Complaint-Chamber-v.-Moore-D.-Vt.pdf>.



retroactive *ex post facto* laws may be justifiable under certain circumstances, there is reason to believe that a court would view this legislation as unconstitutional given the potentially harsh and oppressive nature of the bill.⁴ Stated another way, there is a persuasive argument that the bill's extreme retroactivity (reaching back to activities starting in 1990 is inappropriate, and furthermore, the yet to be determined amount of potential liability could make the law "harsh and oppressive" considering that the targeted companies' actions were lawful during the relevant period and the emissions were actually produced by others farther down the supply chain.

Law May Be Contrary to Excessive Fines and Takings Clauses

The legislation at issue may effectively result in a taking, as it will impose a considerable financial burden for conduct that legally occurred decades earlier in a way that singles out the refining industry for others' use of fossil fuels. Singling out energy production for potentially exorbitant and disproportionate penalties while ignoring the economy-sustaining use of that energy is misguided.

Arbitrary Penalties and Estimated Fines Create Due Process and Fairness Issues

These bills incorrectly suggest that emissions by companies over an extended number of years can be determined with great accuracy. That is simply not true. At best the state can only estimate emissions; and these estimates are imprecise and not accurate enough to base a prorated share of what could be billions upon billions of dollars in penalties.

State Played a Role in Products Being Demanded and Delivered

It is patently unfair to retroactively punish companies with punitive fees for producing fuels that were and remain legal. These fuels were used to heat and cool our homes and get us to work for the last thirty-five years and will continue to be relied upon in the coming decades. Not only were these fuels a necessity for individuals and businesses, but for federal, state and local governments as well.

If LD 1808 or LD 1870 were to pass, a fee would be imposed on the very goods the state deemed critical and necessary. About every other Maine household use petroleum products as a primary source for home heating, the largest share for any state.⁵ Transportation and home heating fuel consumption together contribute to making Maine's per capita petroleum use the highest among the New England states.⁶ In fact, Maine residents consumed more than 37 billion gallons of petroleum products, 1.5 trillion cubic feet of natural gas, and 3.66 million tons of coal from 2000 to 2022.⁷

Moreover, the state has approved the siting and operation of some 13 petroleum storage facilities, one liquefied natural gas facility,⁸ seven natural gas fired power plants, five petroleum-fired power plants,⁹ approximately 1,800 miles of natural gas pipeline,¹⁰ almost 700 retail gasoline stations fueling over fourteen and a half million vehicle miles traveled in 2022,¹¹ and state and local governments paving and repairing 46,800 lane miles of public roads using tens of

⁴ *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 41 n.23 (1990) (internal quotation marks omitted); see, e.g., *E. Enters. v. Apfel*, 524 U.S. 498, 549-550 (Kennedy, J., concurring in the judgment) (opining that a law that "create[ed] liability for events which occurred 35 years ago" violated due process); *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233, 249 (N.Y. 2013) (holding that a tax 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").

⁵ See U.S. Census Bureau, All states, Table B25040, House Heating Fuel, 2023 American Community Survey 1-Year Estimates.

⁶ See U.S. EIA, State Energy Data System, Table C15, Petroleum Consumption Estimates, Total and per Capita, Ranked by State, 2022.

⁷ See https://www.eia.gov/state/seds/data.php?incfile=/state/seds/sep_use/total/use_tot_MEa.html&sid=ME.

⁸ See https://www.energy.gov/sites/default/files/2021-09/Maine_Energy_Sector_Risk_Profile.pdf.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See <https://www.eia.gov/state/data.php?sid=ME>.



thousands of tons of asphalt made from processed crude oil.¹²

This Bill Runs Contrary to Prior Positions Taken By Other Legislatures

LD 1808 and LD 1870 contradict and run afoul to previous laws and policies supported by prior legislatures. Maine lawmakers are being asked to support these bills despite previously declaring by statute that “the distribution and retail sale of motor fuels at reasonable prices and in adequate supply throughout the State vitally affects the public health, welfare and safety”¹³ and that “the business of transporting natural gas within the State by interstate or intrastate natural gas pipeline utilities affects the public interest,”¹⁴ while designating oil, and natural gas resources and assets as critical infrastructure.¹⁵ Not to mention the state and federal government approved (through 2024) the operation of the one-million-barrel federal Northeast Gasoline Supply Reserve¹⁶ and the Northeast Home Heating Oil Reserve (NEHHOR) to protect consumers in the northeastern states, including Maine, from supply disruptions. In fact, some 200,000 barrels of NEHHOR was located in South Portland.¹⁷

Through the years the state has continually identified and valued oil and gas related facilities, unfortunately, the state is now seeking to retroactively impose fees on fuels and related infrastructure the state has valued and relied on for transportation, industrial processes, farming and agriculture, and heating.

No Nexus Between Fine and Actual Responsibility

These bills impose liability without regard to the extent of a particular business’s actual responsibility. Given the potential magnitude of the fines at play, API believes that the state must offer more than an asserted causal connection between a company’s greenhouse gas emissions and negative impacts or injuries to the environment or public health and welfare. Liability should not attach simply because a company extracted or refined fossil fuels that were placed into commerce and used by a third party.

Improper Use of Strict Liability Standard

The goal of the bills is to effectively impose strict liability for purported damages caused by alleged past emissions from extracted or refined fuels no matter where in the world those emissions were released, or who released them. It is patently unfair to charge a group of large companies that did not combust fossil fuels but simply extracted or refined them in order to meet the needs and demands of the people. Furthermore, these bills are arguably discriminatory because they single out certain companies. The legislation also neglects to even consider that companies responded with a supply of products to meet the demand for them in the marketplace. Through their use of the strict liability standard, proponents of this legislation concluded that only one segment of the economy should pay the state for excessive costs.

Disproportionate Penalties

LD 1808 and LD 1970 potentially place an unfair burden on domestic companies. These bills envision liability being proportionately divided by so-called “responsible parties.” As written, “responsible party” excludes “any person that lacks sufficient connection with the state to satisfy the nexus requirement of the United States Constitution.” There will be situations where certain companies, including foreign companies, may suggest they have an insufficient connection

¹² See https://explore.dot.gov/views/StateStatisticalAbstracts_16699101653250/DashboardALT?%3Aembed=y&%3Aiid=1&%3AisGuestRedirectFromVizportal=y, and <https://highways.dot.gov/public-roads/september-2017/whats-your-asphalt#:~:text=Asphalt%20is%20the%20sticky%20black,refiners%20would%20give%20it%20away>.

¹³ Maine Rev. Stat. Ann., 10, § 1452

¹⁴ Maine Rev. Stat. Ann., 35-A, § 4501.

¹⁵ See <https://www.maine.gov/mema/homeland-security/critical-infrastructure-protection#:~:text=A%20significant%20objective%20of%20Maine's,officials%20and%20private%20sector%20representatives>.

¹⁶ U.S. Department of Energy, Office of Fossil Energy, Northeast Gasoline Supply Reserve, accessed October 11, 2024.

¹⁷ See <https://www.energy.gov/ceser/northeast-home-heating-oil-reserve>.



with Maine, which would mean that domestic companies may shoulder even greater financial responsibility.

Preemption

The payments required by these bills may be preempted by federal law. Greenhouse gas emissions are global in nature and subject to numerous federal statutory regimes, including the Clean Air Act. They are also a matter of federal and international law, not state law. The U.S. Court of Appeals for the Second Circuit recently noted this fact in *City of New York v. Chevron Corp.*¹⁸ where the court rejected state-law nuisance claims based on global emissions because “a federal rule of decision is necessary to protect uniquely federal interests.” As this bill seeks compensation for alleged harms to the environment based on global emissions, it is preempted by federal law.

Conclusion

For all the reasons articulated above, API strongly opposes this legislation and respectfully recommends the committee determine the bills **ONTP**.

Thank you for your time, effort and consideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael S. Giaimo', with a stylized flourish at the end.

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¹⁸ See 993 F.3d 81, 90 (2d Cir. 2021).