IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS; VIRGINIA INTERFAITH POWER & LIGHT; APPALACHIAN VOICES; and FAITH ALLIANCE FOR CLIMATE SOLUTIONS,	)	
Petitioners,	)	
v.	)	**Case No.:** 2023 12061
VIRGINIA STATE AIR POLLUTION CONTROL BOARD; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, Director of Virginia Department of Environmental Quality,	)	
Respondents.	)	

PETITION FOR APPEAL

1. In 2020, the General Assembly passed a law requiring Virginia to join the Regional Greenhouse Gas Initiative ("RGGI," pronounced "Reggie"). RGGI is a proven regional program that reduces carbon dioxide emissions from power plants. Power plant owners in participating states must purchase a carbon "allowance" for every ton of carbon dioxide they emit. RGGI sets a cap on the number of carbon allowances issued by the participating states each year. Because that cap decreases each year, overall emissions from those power plants correspondingly decrease.

2. This law—the "2020 RGGI Act," also known as the Clean Energy and Community Flood Preparedness Act, 2020 Va. Acts ch. 1219—contains numerous mandates to

state agencies and officials. Foremost, the law requires the Department of Environmental Quality ("DEQ") to issue the regulation necessary for Virginia to join RGGI.

3. In 2020, DEQ did exactly what it was required to do by the General Assembly and promulgated the regulation at issue in this case (the "RGGI Regulation"), 9 Va. Admin. Code §§ 5-140-6010 to -6440. Since 2021, the Director of DEQ has sold Virginia's carbon allowances through RGGI auctions as required by the statute, and power plants in the Commonwealth that emit carbon dioxide have been required to comply with the RGGI Regulation. The state treasurer also has distributed the funds generated by the sale of Virginia's carbon allowances, as required by the General Assembly.

4. Virginia has seen significant benefits since joining RGGI. Carbon dioxide emissions from Virginia power plants have declined by 16.8 percent in the first two years of participation. The RGGI auctions have also generated over $650 million for Virginians, which have flowed to important flood resiliency and energy efficiency programs, as required by the 2020 RGGI Act.

5. Despite this resounding success and the legislative mandate of the General Assembly, the Virginia State Air Pollution Control Board ("Air Pollution Control Board") and DEQ and its Director, Michael Rolband (collectively, "Agency Respondents") have decided to repeal the RGGI Regulation and withdraw Virginia from this successful program after December 31, 2023.

6. This action is impermissible under the Virginia Administrative Process Act.

7. First, the Agency Respondents have exceeded their delegated authority by repealing the RGGI Regulation specifically and expressly required by the 2020 RGGI Act. This action also violates the Virginia Constitution because the Agency Respondents have suspended

and ignored the execution of law and invaded the General Assembly's legislative power. The fact is that the General Assembly made a specific legislative decision to require Virginia to participate in RGGI, and only the General Assembly may revisit that choice.

8. Second, the Agency Respondents have further exceeded their delegated authority and violated the Virginia Constitution by basing this repeal on an impermissible rationale—namely the contention that doing so will reduce utility bills. In a separate 2020 law, the Virginia Clean Economy Act, 2020 Va. Acts ch. 1193, enactment cl. 1 ("2020 Utility Act"), the General Assembly authorized monopoly utilities to recover from their customers the costs associated with complying with the new RGGI Regulation and put the State Corporation Commission in charge of reviewing and approving such requests. The Air Pollution Control Board is authorized only to take action to abate, control and prohibit air pollution. It is not authorized to regulate utility costs—and certainly not these specific costs, which the General Assembly expressly determined could be recovered in this way.

9. Third, even if this action were within the Agency Respondents' authority—which it is not—the Agency Respondents have taken this action without conducting any of the required analysis to support their contentions. In fact, the analysis that is available in the limited administrative record directly conflicts with the Agency Respondents' unsupported contentions. Repealing the RGGI Regulation on this insufficient record—devoid of analysis and evidentiary support—also violates the requirements of the Virginia Administrative Process Act.

10. The Association of Energy Conservation Professionals, Virginia Interfaith Power & Light, Appalachian Voices, and Faith Alliance for Climate Solutions (collectively, the "Conservation Organizations") hereby petition this Court to invalidate, vacate, and declare null and void the regulatory action published in the Virginia Register of Regulations on July 31, 2023

under the title “Final Regulation: 9VAC5-140. Regulation for Emissions Trading Programs (adding 9VAC5-140-6445; repealing 9VAC5-140-6010 through 9VAC5-140-6440).” 39 Va. Reg. Regs. 2805, 2813–38 (July 31, 2023) (“Final RGGI Repeal”).

11. In compliance with Rule 2A:2 of the Rules of the Supreme Court of Virginia, the Conservation Organizations timely filed a notice of appeal with the Agency Respondents and their counsel on July 31, 2023, the same day the Final RGGI Repeal was published in the Virginia Register of Regulations. A copy of the notice of appeal is attached with this petition as Attachment A.

12. In compliance with Rule 2A:4 of the Rules of the Supreme Court of Virginia, the Conservation Organizations submit this petition for appeal within 30 days of filing their notice of appeal.

PARTIES

13. The Association of Energy Conservation Professionals is a non-profit trade association based in Floyd, Virginia. The mission of the Association of Energy Conservation Professionals is to provide, promote, and advocate for energy conservation on behalf of its members. The association works closely with the Department of Housing and Community Development in their administration of the Virginia Weatherization Assistance Program and Weatherization Deferral Repair Program, representing the interests of the approximately 15 non-profit weatherization organizations in Virginia that provide services like duct cleaning and insulation, weather sealing, and upgrading appliances to low-income households to increase their household energy efficiency and reduce their utility bills. These weatherization organizations have contracts with the Department of Housing and Community Development to help low-income households reduce their energy bills and climate impact, including under the

Weatherization Deferral Repair Program. The Weatherization Deferral Repair Program is funded solely by Virginia's sale of carbon allowances created by the RGGI Regulation. *See* Attachment B, Decl. of William Weitzenfeld.

14. Appalachian Voices is a non-profit corporation with more than 300 members in Virginia. Appalachian Voices' mission is to reduce reliance on fossil fuels and transition to a clean energy economy in a way that is beneficial and fair to Appalachian communities. Headquartered in Boone, North Carolina, Appalachian Voices has offices in Charlottesville, Virginia and Norton, Virginia. *See* Attachment C, Decl. of Peter Anderson.

15. Virginia Interfaith Power & Light is a not-for-profit corporation comprised of congregations and persons involved in faith communities across Virginia. Virginia Interfaith Power & Light is the state affiliate of Interfaith Power & Light, and its mission is to advocate for solutions to climate change with a key focus on environmental and social justice—ensuring a healthy and stable climate for everyone, including racial minorities and other vulnerable populations that have often been disproportionately impacted by environmental harms. Virginia Interfaith Power & Light advances its missions by advocating for more effective laws and regulations, engaging and educating the public and faith communities, and directly participating in regulatory proceedings and governmental decision-making processes. Virginia Interfaith Power & Light's office is located in Richmond, Virginia. *See* Attachment D, Decl. of Faith B. Harris.

16. Faith Alliance for Climate Solutions is a non-profit corporation comprised of a network of over 200 faith communities and over 2,800 people of faith. Faith Alliance for Climate Solutions mission is to develop local solutions to the climate crisis by sounding an ethical and spiritual call to address climate change, encouraging moral climate polices from a nonpartisan

perspective, enabling congregations to implement projects and initiatives that reduce their carbon footprint or provide other environmental benefits, and empowering congregations to become champions of change. Faith Alliance for Climate Solutions is headquartered in Reston, Virginia. *See* Attachment E, Decl. of Andrea McGimsey.

17. The Air Pollution Control Board is a regulatory board established by Section 10.1-1301 of the State Air Pollution Control Law, Va. Code, Title 10.1, ch. 13. The Air Pollution Control Board has the delegated legislative power to "promulgate regulations, including emergency regulations, abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the [Virginia] Administrative Process Act." Va. Code § 10.1-1308(A). On June 7, 2023, the Air Pollution Control Board voted to approve the Final RGGI Repeal. The Air Pollution Control Board's principal office is located in Richmond, Virginia.

18. DEQ is the state agency operating under authority delegated to it by the General Assembly. Va. Code §§ 10.1-1183, -1186. Pursuant to Governor Youngkin's Executive Order 9, DEQ developed the Final RGGI Repeal and administrative record at issue and presented such materials to the Air Pollution Control Board. DEQ's Central Office is located in Richmond, Virginia.

19. Michael Rolband is named in his official capacity as the Director of DEQ and Agency Secretary of the Air Pollution Control Board. As Director, Mr. Rolband is required to sell the carbon allowances created by the RGGI Regulation. Mr. Rolband also signed the report prepared by DEQ in response to Executive Order 9, which is included in the record. The Director's office is located in Richmond, Virginia.

JURISDICTION AND VENUE

20. This Court has jurisdiction to hear this appeal pursuant to Sections 2.2-4026 and 10.1-1317 of the Virginia Code, in addition to Section 17.1-513. Section 10.1-1317 provides that the validity of any regulation approved by the Air Pollution Control Board may be determined through judicial review in accordance with the provisions of the Virginia Administrative Process Act. Section 2.2-4026 of the Virginia Code, which is part of the Virginia Administrative Process Act, provides a right of appeal to any person affected by and claiming the unlawfulness of any regulation.

21. The Conservation Organizations are affected by the Agency Respondents' unlawful repeal of the RGGI Regulation and thus have standing to challenge the lawfulness of this regulatory action.

22. Venue is proper in this Court under Sections 2.2-4033, 2.2-4026, and 8.01-261(1)(a) of the Virginia Code. This Court is a preferred venue as one or more Petitioners "[r]egularly or systematically conduct[] affairs or business activity" in Fairfax County. Va. Code § 8.01-261(1).

FACTUAL BACKGROUND

23. The following allegations explain how RGGI works, Virginia's path to and participation in RGGI, and the Agency Respondents' repeal process. This information is necessary to understand the requirements of the 2020 RGGI Act, as well as the unlawfulness of the Agency Respondents' actions.

24. The primary issue in this case, however, remains simple: Virginia's participation in RGGI is required by law. The Agency Respondents do not have the authority to contradict

decisions of the General Assembly, and in any event, cannot do so on this record, which lacks evidentiary support for the respondents' changed position.

I. Virginia's Successful Participation in RGGI

a. The Regional Greenhouse Gas Initiative

25. In a cooperative effort known as RGGI, states have taken a proven market-based approach to reducing emissions and applied it to carbon dioxide ("CO_2") emissions from power plants. To participate in RGGI, a state must follow its own state procedures to implement an independent regulation that is consistent with the model rule, which is agreed upon by all participating states. *See* RGGI, Inc., *State Statutes & Regulations*, https://perma.cc/BT49-4BPS (listing each participating state's program regulations and statutory authorities).

26. A not-for-profit corporation, Regional Greenhouse Gas Initiative, Inc. ("RGGI, Inc."), provides administrative and technical support for RGGI, but it is not a regulatory body, nor does it have any regulatory or enforcement authority.

27. The basics of RGGI are simple. If a power plant burns fossil fuel to generate electricity and is large enough (capable of producing at least 25 megawatts), its owner or operator must own a carbon allowance for each ton of CO_2 the power plant emits. *See* RGGI, Inc., *The Regional Greenhouse Gas Initiative: An Initiative of Eastern States of the US* 1 (Jan. 2023), https://perma.cc/8CTZ-6Z53.

28. To drive down CO_2 emissions, participating states reduce the supply of carbon allowances over time. *See, e.g.*, 9 Va. Admin. Code § 5-140-6190. Through this straightforward supply-and-demand mechanism, power plants are not forced to stop burning fossil fuels and specific facilities are not required to reduce emissions by set amounts. Instead, power plant owners and operators have the flexibility to make cost-effective decisions about compliance methods, with the knowledge that the number of available carbon allowances will decrease over

time and that a failure to procure sufficient carbon allowances will result in penalties. *See, e.g.*, *id.* §§ 5-140-6050, -6260.

29. This type of system is not new; the U.S. Environmental Protection Agency ("EPA") used a similar market-based approach to address acid rain in the United States beginning in the 1990s. *See* EPA, *Acid Rain Program Results*, https://perma.cc/Q5W6-GBRF.

30. Each state's RGGI regulation creates a prescribed number of carbon allowances, which the states then distribute to market participants through quarterly auctions administered by RGGI, Inc. *See* RGGI, Inc., *The Regional Greenhouse Gas Initiative: An Initiative of Eastern States of the US*, *supra* ¶ 27, at 1. Power plant owners and other market buyers can purchase allowances at these quarterly auctions or through secondary markets.

31. Following the quarterly auctions, RGGI, Inc. distributes the auction proceeds to each participating state in proportion to that state's quantity of carbon allowances sold. Each state determines how to use the proceeds from the sale of its carbon allowances.

32. RGGI has a long track record of effectively reducing CO_2 emissions. For example, the nine states continually participating in RGGI between 2008 and 2020 saw power plant CO_2 emissions drop by over 50 percent over that period. RGGI, Inc., *The Investment of RGGI Proceeds in 2020* 4 (May 2022), https://perma.cc/CX2X-C9BR. These emissions reductions far outpaced the rest of the country; through the first decade of participation, RGGI states saw their CO_2 emissions drop 90 percent faster than non-RGGI states. Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review* at Executive Summary (2019), https://perma.cc/3MYA-DUR9.

33. Virginia has achieved similar results since it began participating in RGGI in 2021. Since joining RGGI, annual CO_2 emissions from power plants in Virginia have decreased by

about 16.8 percent—from about 32.8 million short tons in 2020 to about 27.3 million short tons in 2022. *See* EPA, *Clean Markets Air Program Data*, https://perma.cc/3HPY-EJV9 (showing yearly emissions for 2020, 2021, and 2022). Those trends have continued into 2023—Virginia power plants emitted approximately 20 percent less CO_2 during the first six months of 2023 than during the first six months of 2020—about 11.8 million short tons versus about 14.7 million short tons. *See* EPA, *Clean Markets Air Program Data*, https://perma.cc/VT49-PDDQ (showing Q1 and Q2 emissions in 2020, 2021, 2022, and 2023).

34. By reducing emissions from power plants, states participating in RGGI have also improved their air quality, resulting in direct health and productivity benefits of over $5.7 billion. RGGI, Inc., *The Investment of RGGI Proceeds in 2020*, *supra* ¶ 32, at Executive Summary.

35. Participating states also saw their economies grow 31 percent faster than the rest of the country. Acadia Ctr., *supra* ¶ 32, at Executive Summary. Utility customers even saw electricity prices fall by 5.7 percent, whereas the rest of the country experienced increases of 8.6 percent on average. *Id.*

36. Residents in participating states also enjoy significant benefits from their state's investment of carbon allowance proceeds. In 2021, for example, participating states invested about 79 percent of auction revenues in (a) energy efficiency programs, (b) clean and renewable energy projects, (c) greenhouse gas abatement projects, and (d) beneficial electrification projects. *See* RGGI, Inc., *The Investment of RGGI Proceeds in 2021* 3 (June 2023), https://perma.cc/8GE3-2MF4.

37. Those 2021 investments in clean energy projects and energy efficiency programs, among other things, will avoid the release of an estimated 4.4 million short tons of CO_2 while returning $1.2 billion in lifetime energy bill savings to customers. *Id.* at 6.

b. Development of Virginia's Original RGGI Regulation

38. Recognizing the threat climate change poses to the Commonwealth, in 2016 Governor McAuliffe issued Executive Order 57 directing the Secretary of Natural Resources to establish a group to study and recommend methods for reducing CO_2 emissions from the electric power sector. Va. Exec. Order No. 57 (June 28, 2016). After almost a year of public engagement, the working group submitted its recommendations to the Governor.

39. In 2017, based on the working group's recommendations, Governor McAuliffe issued an executive directive, instructing DEQ to develop regulations to "abate, control, or limit [CO_2] emissions from electric power facilities" using "market-based mechanisms" that allow for the "trading of [CO_2] allowances through a multi-state trading program." Va. Exec. Directive No. 11 (May 16, 2017).

40. In June 2017, DEQ published a Notice of Intended Regulatory Action ("NOIRA") to develop such regulations and asked for public comment. 33 Va. Reg. Regs. 2421, 2423 (June 26, 2017).

41. In January 2018, DEQ published a proposed regulatory program and made it available for public comment. 34 Va. Reg. Regs. 911, 924–59 (Jan. 8, 2018). Under the regulatory proposal, Virginia would have participated in RGGI but its program would have operated differently than the programs of other states. Prior to 2020, the General Assembly had not authorized the Air Pollution Control Board or DEQ to raise revenue by selling carbon allowances at auction. Thus, consistent with existing regulatory authority at that time, the proposed regulatory program utilized a consignment model designed to drive down emissions without Virginia directly selling allowances.

42. After reviewing comments and performing additional modeling, DEQ revised the proposed regulatory program and republished it in 2019 for another round of public comment. 35

Va. Reg. Regs. 1397, 1404–38 (Feb. 4, 2019). The main revision was to reduce the number of Virginia carbon allowances based on updated modeling, but the program structure, including the consignment model, remained the same.

43. The Air Pollution Control Board approved the program on April 19, 2019, and the final rule was published on May 27, 2019 (the "Original RGGI Regulation"). 35 Va. Reg. Regs. 2307, 2332–62 (May 27, 2019).

44. The Original RGGI Regulation, though approved by the Air Pollution Control Board and duly promulgated, was never implemented. During the 2019 legislative session, the General Assembly passed a budget provision that prevented DEQ from using any state resources to implement the Original RGGI Regulation. 2019 Va. Acts ch. 854 (§ 4-5.11).

c. A New General Assembly Requires Virginia's Participation in RGGI

45. Following the 2019 elections, the 2020 General Assembly reversed its position on RGGI and made two legislative changes to get Virginia back on track.

46. First, the General Assembly removed the budget restriction and restored DEQ's ability to spend general, special, and other funds to implement Virginia's participation in RGGI. 2020 Va. Acts ch. 1283 (striking § 4-5.11 from the 2018-2020 biennium).

47. Second, the General Assembly enacted the 2020 RGGI Act, which added a new article (Article 4—codified at Va. Code §§ 10.1-1329 to -1331) to Virginia's Air Pollution Control Law. This law, specifically Section 10.1-1330, requires Virginia to participate in RGGI.

48. The law mandates that DEQ revise the Original RGGI Regulation and issue the required regulation for Virginia to participate in RGGI: "The provisions of this article shall be incorporated by the Department, without further action by the Board, into the final regulation adopted by the Board on April 19, 2019, and published in the Virginia Register on May 27, 2019." Va. Code § 10.1-1330(A). In other words, the law specifically requires DEQ to update the

Original RGGI Regulation and reissue it in accordance with the new law, affording DEQ no discretion in the matter. DEQ could not have, for example, done nothing and remained in compliance with the statute. Nor could it have let the original consignment model proceed because the law mandates that changes be made to the Original RGGI Regulation.

49. The 2020 RGGI Act also expressly exempts DEQ from following the Virginia Administrative Process Act to make the required changes and publish the revised regulation. *Id.*

50. The law then grants DEQ the authority it lacked previously: to sell carbon allowances directly through the RGGI auctions like every other state participating in RGGI. The statutory language provides: "The Director is hereby authorized to establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program and this article." *Id.* § 10.1-1330(B).

51. But the law does not merely grant such authority in Section 10.1-1330(B). In the next sentence, the law mandates that the Director in fact use such authority by requiring the Director to sell 100 percent of all allowances through the RGGI auctions:

> The Director shall seek to sell 100 percent of all allowances issued each year through the allowance auction, unless the Department finds that doing so will have a negative impact on the value of allowances and result in a net loss of consumer benefit or is otherwise inconsistent with the RGGI program.

Id. With only the limited exceptions prescribed by the statute, the law requires the Director to exercise this new authority and sell Virginia's carbon allowances in the RGGI auctions.

52. In addition to mandating that DEQ revise and issue a new regulation governing Virginia's participation in RGGI, and mandating that the Director sell carbon allowances in the RGGI auctions, the law then sets forth requirements for how the state treasury must use the proceeds from the sale of Virginia's carbon allowances:

> To the extent permitted by Article X, Section 7 of the Constitution of Virginia, the state treasury shall (i) hold the proceeds recovered from the allowance auction in an interest-bearing account with all interest directed to the account to carry out the purposes of this article and (ii) use the proceeds without further appropriation for the following purposes . . . .

Id. § 10.1-1330(C). The 2020 RGGI Act specifies that 45 percent of the proceeds will go to a fund to assist communities dealing with recurrent flooding and sea level rise, 50 percent go to an account administered by the Department of Housing and Community Development to support low-income energy efficiency programs, and the remaining 5 percent go to cover various administrative expenses and carry out statewide climate change planning. *Id.*

53. The law also sets forth an annual reporting requirement for the agencies involved with Virginia's participation in RGGI. *See id.* § 10.1-1330(D). The statute provides that DEQ, the Department of Conservation and Recreation, the Department of Housing and Community Development, and the Department of Energy:

> shall prepare a joint annual written report describing the Commonwealth's participation in RGGI, the annual reduction in greenhouse gas emissions, the revenues collected and deposited in the interest-bearing account maintained by [DEQ] pursuant to this article, and a description of each way in which money was expended during the fiscal year.

Id.

54. A separate piece of legislation passed during the same session reinforces the 2020 RGGI Act's mandate that Virginia participate in RGGI. The 2020 Utility Act amends Section 10.1-1308, which governs the Air Pollution Control Board's regulatory authority, by adding subsection (E). 2020 Va. Acts ch. 1193, enactment cl. 1. This new subsection requires the Air Pollution Control Board to adopt regulations to reduce CO_2 emissions from power plants for the period 2031 to 2050 but prohibits the Board from establishing such regulations before July 1, 2024. Va. Code § 10.1-1308(E).

55. In contrast to the mandates set forth in the 2020 RGGI Act, the 2020 Utility Act's amendments to Section 10.1-1308 expressly afford the Air Pollution Control Board some discretion in how it pursues emissions reductions after 2030. Section 10.1-1308(E) provides that "[t]he Board may establish, implement, and manage an auction program to sell allowances," and "may utilize its existing regulations to reduce [CO_2] emissions" from power plants. The law also provides that under no circumstance shall such regulations provide for carbon allowances in 2050 or beyond. *Id.*

56. Through these complementary 2020 laws, the General Assembly established a thorough regulatory framework for reducing power plant emissions through 2050.

57. The 2020 RGGI Act requires Virginia to participate in RGGI at least through 2030. The Air Pollution Control Board must maintain the RGGI Regulation, the Director must continue selling carbon allowances, the state treasurer must continue distributing the proceeds from such allowance sales into specific accounts, and the responsible state agencies must continue filing annual reports about Virginia's participation in RGGI.

58. From 2031 to 2050, the 2020 Utility Act requires the Air Pollution Control Board to maintain a regulatory program to reduce power plant emissions but affords the Board some discretion in how to do so—including allowing the Board to keep the existing 2021 to 2030 RGGI Regulation in place.

d. The General Assembly Authorizes Monopoly Utilities to Recover RGGI Compliance Costs, Delegating Oversight to the State Corporation Commission

59. Virginia has two large monopoly utilities, Appalachian Power Company ("Appalachian Power," a Phase I Utility) and Virginia Electric and Power Company ("Dominion," a Phase II Utility). As monopoly utilities, Appalachian Power and Dominion are permitted to recover costs and expenses from their customers, plus a fair rate of return, subject to

oversight by the State Corporation Commission. Under this system, costs, such as fossil fuel costs or the costs to comply with environmental requirements, are routinely passed through to customers.

60. Both the 2020 RGGI Act and the 2020 Utility Act provide clarity about how Appalachian Power and Dominion may seek to recover from their customers the costs associated with purchasing carbon allowances.

61. The second enactment clause of the 2020 RGGI Act provides that carbon allowance costs "are deemed to constitute environmental compliance project costs that may be recovered by a Phase I Utility or Phase II Utility . . . pursuant to subdivision A 5 e of § 56-585.1 of the Code of Virginia." 2020 Va. Acts ch. 1219, enactment cl. 2.

62. Consistent with this enactment clause, the 2020 Utility Act simultaneously amends Section 56-585.1(A)(5)(e) to clarify that Appalachian Power and Dominion may seek to recover "the costs of allowances purchased through a market-based trading program for [CO_2] emissions" through this cost recovery procedure, subject to approval by the State Corporation Commission. Va. Code § 56-585.1(A)(5)(e). This same section of code also requires the Commission to find that such costs are "necessary" for compliance before it can approve the utility's request. *Id.* Thus, the 2020 RGGI Act provides that carbon allowance costs are a recoverable environmental compliance project cost, and the 2020 Utility Act puts the State Corporation Commission in charge of reviewing and approving Dominion and Appalachian Power's requests to recover these particular costs.

63. Governor Northam signed both the 2020 RGGI Act and 2020 Utility Act into law in April 2020.

e. DEQ Revises the Original RGGI Regulation as Mandated by the General Assembly

64. In 2020, DEQ revised the Original RGGI Regulation from a consignment model to a direct auction process, as required by the 2020 RGGI Act. *See* Va. Code § 10.1-1330(A).

65. While most of the Original RGGI Regulation remained unchanged, DEQ made necessary revisions—for example, striking definitions and procedures pertaining to the consignment auction process—to comply with the requirements of the 2020 RGGI Act. *See, e.g.*, Certification and Notice of Filing Agency Record, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. Mar. 18, 2021).

66. Without the need to follow the typical Virginia Administrative Process Act requirements, *see* Va. Code § 10.1-1330(A), DEQ made the revisions and issued the RGGI Regulation on July 10, 2020, and it was published in the August 3, 2020 issue of the Virginia Register of Regulations.[1] 36 Va. Reg. Regs. 2593, 2598–618 (Aug. 3, 2020).

67. On January 1, 2021, the carbon allowance requirements of the RGGI Regulation went into effect. Since that date, owners and operators of power plants have been required to track their CO_2 emissions and hold one carbon allowance for every ton of CO_2 their plant emits. 9 Va. Admin. Code § 5-140-6050(C).

68. The compliance requirements apply broadly to fossil-fuel burning power plants that produce at least 25 megawatts of electricity, encompassing approximately 26 different electric generating facilities in Virginia. Some of these facilities are owned by monopoly utilities, like Dominion and Appalachian Power, but many of the facilities are so-called "merchant" power plants. These independent power producers do not have captive customers to

[1] The regulation did not require approval by the Air Pollution Control Board because the statute directed DEQ to issue the revised regulation "without further action by the Board." Va. Code § 10.1-1330(A).

pass through carbon allowance costs to. In 2021, for example, approximately 31 percent of Virginia's CO_2 emissions came from generators other than Dominion and Appalachian Power. Va. Dep't of Plan. & Budget, *Economic Impact Analysis: 9 VAC 5-140 Regulation for Emissions Trading Department of Environmental Quality Town Hall Action/Stage: 6082 / 9879* 4, tbl.3 (Dec. 21, 2022), https://perma.cc/AXS4-X2CV (hereinafter "DPB Analysis").

f. Virginia's Carbon Allowance Sales

69. In compliance with the statutory requirement that the Director sell 100 percent of Virginia's carbon allowances at auction, Virginia has participated in ten quarterly RGGI auctions and has sold 100 percent of its allowances. *See* RGGI, Inc., *Auction 60 State Proceeds and Allowances* (2023), https://perma.cc/59P6-NBWV. Cumulatively, the sale of Virginia's carbon allowances has generated approximately $657 million to support the programs identified in the 2020 RGGI Act. *Id.*

70. The next RGGI auction is scheduled for September 6, 2023, followed by a December auction and then another auction likely in March 2024. RGGI, Inc., *Projected Auction Dates*, https://perma.cc/ZCL2-6N4Q.

g. Carbon Allowance Sales Helping Low-Income Households Reduce Energy Bills

71. As required by Section 10.1-1330(C) of the Virginia Code, 50 percent of the proceeds from the RGGI allowance sales "shall be credited to an account administered by [the Department of Housing and Community Development] to support low-income energy efficiency programs, including programs for eligible housing developments."

72. Based on consultation with various stakeholders, the Department of Housing and Community Development has allocated these RGGI funds to two programs: the Weatherization Deferral Repair Program and the Affordable and Special Needs Housing Program.

73. The Weatherization Deferral Repair Program fills a significant gap in Virginia's Weatherization Assistance Program. The Weatherization Assistance Program is a long-standing federally funded program administered by the Department of Housing and Community Development that "reduces household energy use through the installation of cost-effective energy savings measures, which also improve resident health and safety. Common measures includ[e] sealing air leaks, adding insulation, and repairing heating and cooling systems." Va. Dep't of Hous. & Cmty. Dev., *Weatherization Assistance Program (WAP)*, https://perma.cc/798Q-7CCK.

74. Many low-income households, however, cannot have their homes weatherized through the Weatherization Assistance Program due to underlying issues, such as a leaky roof or unsafe HVAC or electrical systems. *See* Va. Dep't of Hous. & Cmty. Dev., *Virginia Weatherization Deferral Repair Program Guidelines, 2021–2022* 1–3 (July 2021), https://perma.cc/X6JC-P7VJ. Because these households are low-income, they often are unable to afford to fix these issues and the households are "deferred" from weatherization services until such underlying repairs can be completed.

75. The Weatherization Deferral Repair Program, which is funded solely by RGGI auction proceeds, allows weatherization providers to complete the repairs necessary to make deferred homes eligible for the Weatherization Assistance Program. Once these initial repairs are complete, the weatherization provider then must perform the eligible weatherization services, improving the home's efficiency and reducing its energy bills. Va. Dep't of Hous. & Cmty. Dev., *Weatherization Deferral Repair (WDR)*, https://perma.cc/TE8V-BEGP. More than 1,000 single and multi-family homes have had their homes weatherized thanks to the Weatherization Deferral Repair Program and Virginia's participation in RGGI. Damian Pitt et al., *Investing in Virginia*

Through Energy Efficiency: An Analysis of the Impacts of RGGI and the HIEE Program 13 (Jan. 2023), https://perma.cc/BQT8-AQ44.

76. The other RGGI-funded energy efficiency initiative, the Affordable and Special Needs Housing Program, helps promote more highly efficient affordable housing units by funding "energy efficiency upgrades that would not have been feasible otherwise." Va. Dep't of Hous. & Cmty. Dev., *Affordable and Special Needs Housing Competitive Application Program Guidelines FY2023* 6 (rev. Sept. 2022), https://perma.cc/7RZC-H6ZQ.

77. Since 2021, the RGGI-funded Affordable and Special Needs Housing Program has funded at least 36 high-efficiency affordable housing projects throughout the Commonwealth, representing more than 2,300 affordable housing units. Press Release, Va. Dep't of Hous. & Cmty. Dev., *Governor Northam Announces Over $21 Million in Affordable and Special Needs Housing Loans* (July 8, 2021), https://perma.cc/TZK2-YKWR (Round 1 HIEE funded projects); Press Release, Va. Dep't of Hous. & Cmty. Dev., *Governor Northam Announces Over $60 Million in Affordable and Special Needs Housing Loans* (Jan. 13, 2022), https://perma.cc/H5PY-N97H (Round 2 HIEE funded projects); Press Release, Va. Dep't of Hous. & Cmty. Dev., *Governor Youngkin Announces Over $93 Million in Affordable and Special Needs Housing Loans* (Mar. 10, 2023), https://perma.cc/8XQV-2B4D (Round 3 HIEE funded projects); Press Release, Va. Dep't of Hous. & Cmty. Dev., *Governor Youngkin Announces Over $52 Million in Affordable and Special Needs Housing Loans* (Aug. 15, 2023), https://perma.cc/N89K-VPUM (Round 4 HIEE funded projects).

78. By staying in RGGI at least through 2030—as required by law—a recent study estimated that the resulting energy efficiency funding would support upgrades for up to 130,000 homes in Virginia, saving each household an average of $676 annually, creating up to 2,115 new

jobs, and resulting in statewide economic benefits of $2.03 to $2.67 billion. Damian Pitt et al., *supra* ¶ 75, at i.

h. Carbon Allowance Sales Helping Localities Deal with Flooding

79. Section 10.1-1330(C) of the Virginia Code requires that 45 percent of the RGGI auction proceeds be credited to the Virginia Community Flood Preparedness Fund (the "Flood Fund") "for the purpose of assisting localities and their residents affected by recurrent flooding, sea level rise, and flooding from severe weather events."

80. The Department of Conservation and Recreation administers the Flood Fund, which the 2020 RGGI Act requires be used "solely for the purposes of enhancing flood prevention or protection and coastal resilience as required by this article." Va. Code § 10.1-603.25(B). Localities can apply for funding "primarily for the purpose of implementing flood prevention and protection projects and studies in areas that are subject to recurrent flooding as confirmed by a locality-certified floodplain manager." *Id.* § 10.1-603.25(E). In addition, localities can use funds to "mitigate future flood damage and to assist inland and coastal communities across the Commonwealth that are subject to recurrent or repetitive flooding." *Id.*

81. Funding from the Flood Fund is available to eligible recipients across the Commonwealth, whether inland or coastal. The Department of Conservation and Recreation also must ensure that at least 25 percent of the funds disbursed each year are used for "projects in low-income geographic areas." *Id.*

82. Through the three rounds of Flood Fund grants to date, a total of 98 projects across Virginia have received approximately $97.7 million in funding. *See* Va. Dep't of Conservation & Recreation, *Community Flood Preparedness Fund Grants and Loans*, https://perma.cc/M8S8-P5BK.

II. Agency Respondents Successfully Defend "Mandated" RGGI Regulation in Court

83. After DEQ carried out the mandates of the General Assembly and issued the RGGI Regulation in 2020, a trade group called the Virginia Manufacturers Association petitioned the Richmond Circuit Court to vacate the regulation. Petition for Appeal, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 ¶ 1 (Rich. Cir. Ct. Oct. 2, 2020).

84. The Virginia Manufacturers Association argued primarily that DEQ's actions fell outside of the General Assembly's express exemption from the Virginia Administrative Process Act.

85. For example, the Virginia Manufacturers Association argued that DEQ had "the optionality to comply with the [2020 RGGI Act] by joining RGGI, another carbon trading program with an open carbon trading market, or by simply implementing the [Original RGGI Regulation]," *id.* ¶ 38, and therefore those decisions were discretionary and not exempted from administrative process by the General Assembly.

86. In defending the program, the Agency Respondents explained repeatedly that the 2020 RGGI Act does not provide DEQ with discretion to choose whether to run a direct auction program. Throughout the briefing, the Agency Respondents explained that the 2020 RGGI Act requires the RGGI Regulation and mandates the sale of carbon allowances:

- "In 2020, the General Assembly passed legislation that ***mandated*** DEQ to implement a CO_2 direct auction program and then to sell all CO_2 allowances through such auctions." Respondents Brief in Opposition, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 1 (Rich. Cir. Ct. May 7, 2021) (emphasis added) (Attachment F).

- "[S]ection [1330(B)] ***mandates*** that the 'Director shall seek to sell 100 percent of all allowances issued each year through the allowance auction.'" *Id.* at 3 (emphasis added).

- "Thus, Section 1330 is clear. Whereas before, DEQ was not allowed to directly participate in a CO_2 auction and could not directly receive proceeds from auction sales, now:

    - DEQ ***must*** implement and manage a CO_2 auction program;

    - DEQ ***must*** sell 100 [percent] of all CO_2 allowances through an allowance auction; and

    - DEQ ***must*** do these tasks by amending the [Original RGGI Regulation]; however, those amendments are exempt from the [Virginia Administrative Process Act]."

  Id. at 3–4 (emphasis added).

- "[T]his argument fails because DEQ satisfied the Act's ***mandate*** that it establish a CO_2 auction program and then sell all CO_2 allowances through those auctions." *Id.* at 7 (emphasis added).

- "Simply put, the Act ***mandated*** that DEQ take two significant steps: implement and manage a direct auction CO_2 program, and sell 100 [percent] of Virginia's CO_2 allowances in that program. ***Through the [RGGI Regulation], DEQ has done exactly what the General Assembly mandated***. DEQ did not violate the Act, it followed it." *Id.* at 8 (emphasis added).

- "Yet, 'the trading market,' that [Virginia Manufacturers Association] describes was ***explicitly mandated*** by the General Assembly through the [2020 RGGI Act] . . . . Thus, the General Assembly—not DEQ—created 'the trading program' that [Virginia Manufacturers Association] asserts is an illegal tax and the General Assembly ***mandated*** that the DEQ Director sell '100 percent' of all allowances through that program." *Id.* at 24–25 (emphasis added).

- "DEQ followed the General Assembly's ***mandate***: it issued the [RGGI Regulation] that made all necessary changes to the existing [Original RGGI Regulation]. Now, DEQ is directly auctioning CO_2 allowances and the proceeds, which were over $43 million in the first auction, are going to support programs for low-income communities and vulnerable shorelines. This is exactly what the General Assembly legislated." *Id.* at 28 (emphasis added).

87. The Richmond Circuit Court agreed with the Agency Respondents and denied the Virginia Manufacturers Association's petition in its entirety. Opinion Order, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 1 (Rich. Cir. Ct. July 14, 2021).

88. While the court did not decide the precise legal issue present in this case, the court's opinion does characterize the requirements of the 2020 RGGI Act:

> The General Assembly did not direct DEQ to amend the [Original RGGI Regulation] in a manner which would only confuse those required to participate and substantively amend nothing. Rather, it authorized DEQ to convert the trading program to a direct auction trading system and ***directed DEQ to sell, not consign, CO_2 allowances***. The General Assembly not only authorized this change, but it also exempted DEQ from requirements which would otherwise apply in the absence of language to the contrary . . . ***DEQ did what the General Assembly required it to do***.

Id. at 6–7 (emphasis added).

89. The Virginia Manufacturers Association did not appeal the decision.

III. The New Administration's Policy Disagreement with the General Assembly

a. Governor Youngkin's Executive Order 9

90. About a month after winning the gubernatorial election, Governor-elect Youngkin stated at a public meeting that he would "withdraw Virginia" from participating in RGGI through executive action once in office. Laura Vozzella, *Youngkin Says He Will Take Virginia out of the Regional Greenhouse Gas Initiative to Save Ratepayers Money*, Wash. Post (Dec. 8, 2021), https://perma.cc/VQ4Z-G8Q6. When asked about the authority to stop Virginia's participation in RGGI, Youngkin's transition office issued a statement saying, "Virginia's participation is governed by a contract agreement, signed by [DEQ] and other regulations." *Id.*

91. On January 15, 2022, Governor Youngkin was sworn into office. That same day, Governor Youngkin signed Executive Order 9, entitled "Protecting ratepayers from the rising cost of living due to the Regional Greenhouse Gas Initiative." Va. Exec. Order No. 9 (Jan. 15, 2022).

92. While Governor Youngkin claimed a few weeks prior that he would withdraw Virginia from RGGI through direct executive action, Executive Order 9 does not do that.

93. Instead, the Order states that "utilities are allowed to pass on the costs of purchasing allowances to their ratepayers," and that Dominion had increased a typical residential customer bill by $2.39 a month to recover its costs of complying with the RGGI Regulation. *Id.* Of course, utilities are allowed to pass on these costs because the General Assembly expressly authorized them to do so subject to State Corporation Commission approval. *See supra* ¶¶ 60–62.

94. Nonetheless, on the basis of utility costs, Executive Order 9 instructs the Director to (1) provide a full report re-evaluating the costs and benefits of participation in RGGI, (2) develop a proposed emergency regulation for the Air Pollution Control Board to repeal the RGGI Regulation, (3) take all necessary steps to initiate a full rulemaking process with public comment to make any emergency regulation permanent, and (4) notify RGGI, Inc. of the review and the "Governor's intent to withdraw from RGGI, whether by legislative or regulatory action." *Id.*

b. General Assembly Declines to Revisit RGGI Mandate

95. Soon after the Governor announced his intention to repeal the RGGI Regulation through emergency regulatory action under the Virginia Administrative Process Act, there were multiple attempts to repeal the 2020 RGGI Act and end Virginia's participation in RGGI at the 2022 General Assembly. None of these attempts succeeded.

96. Two bills were introduced to repeal Article 4, Chapter 13 of Section 10.1 of the Code. *See* S.B. 532, 2022 Gen. Assemb., Reg. Sess. (Va. 2022); H.B. 1301, 2022 Gen. Assemb., Reg Sess. (Va. 2022). Both bills also contained a clause that directed the Director to "take all steps necessary to suspend the Commonwealth's participation in the auction program to sell allowances into a market-based trading program consistent with [RGGI]." S.B. 532, enactment cl. 3, 2022 Gen. Assemb., Reg. Sess. (Va. 2022); H.B. 1301, enactment cl. 3, 2022 Gen. Assemb., Reg Sess. (Va. 2022).

97. S.B. 532 and H.B. 1301 never made it out committee. The Senate Committee on Agriculture, Conservation and Natural Resources voted to pass by both bills indefinitely and neither reported out.

98. The Governor also proposed amendments to the budget, which would have required Virginia to end its participation in RGGI. Proposed Governor Amendment, S.B. 30, 2022 Gen. Assemb., Reg. Sess. (Va. 2022) (Item 4-5.12#1g); Proposed Governor Amendment, H.B. 30, 2022 Gen. Assemb., Reg. Sess. (Va. 2022) (Item 4-5.12#1g). Neither the House nor the Senate accepted these budget amendments during the regular legislative session.

99. Nor did the House or Senate accept such a measure during negotiations in the special legislative session. Ultimately, the House and Senate approved a 2022 budget that in no way changes the mandates of the 2020 RGGI Act or otherwise interferes with the RGGI Regulation. The only budget provisions that relate to RGGI involve one-time reallocations of a portion of the carbon allowance revenues to different funds. *See* 2022 Va. Acts ch. 1, Special Sess. I (2020–2022 Biennium) (Item 113 L.1); 2022 Va. Acts ch. 2, Special Sess. I (2022–2024 Biennium) (Item 114 K.1, Item 374 R).

100. Efforts to repeal the 2020 RGGI Act continued in 2023 and were once again unsuccessful. S.B. 1001 would have repealed Sections 10.1-1329, 10.1-1330, and 10.1-1331 of the Virginia Code. S.B. 1001, 2023 Gen. Assemb., Reg. Sess. (Va. 2023). The Senate Committee on Agriculture, Conservation and Natural Resources voted to pass by the bill indefinitely, and it failed to report out.

101. The express mandates established by the 2020 RGGI Act remain the law.

IV. The Agency Respondents' Unlawful Regulatory Repeal

a. The Governor Appoints Majority of Members to Air Pollution Control Board

102. While the Governor's Executive Order 9 directed an emergency repeal of the RGGI Regulation—which would have represented an unprecedented exercise of such authority—months passed without any official action.

103. In fact, it was not until after the Governor unexpectedly was able to appoint a majority of Air Pollution Control Board members that the Agency Respondents updated the public about the plans for the regulatory repeal.

104. Typically, governors appoint two board members a year, but political disputes at the General Assembly resulted in four vacant seats for Governor Youngkin to fill in his first year in office. Sarah Vogelsong, *Youngkin Announces Slate of Environmental Board Appointments,* Va. Mercury (May 16, 2022), https://perma.cc/24DJ-Q5GV. Thus, on May 16, 2022, Governor Youngkin announced four appointments to the Air Pollution Control Board. *Id.* Two of the Governor's selections joined the Air Pollution Control Board immediately. The other two members took their seats in July of 2022 after the expiration of two existing board members' terms. *Id.* One of the Governor's appointees served as counsel to the Virginia Manufacturers Association in its unsuccessful challenge to the RGGI Regulation. *See* Pet. for Appeal, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, *supra* ¶ 83, at ¶ 27 (listing John M. Holloway III as counsel).

b. The Agency Respondents Announce New Repeal Approach

105. On August 31, 2022, the Air Pollution Control Board convened a public meeting with all seven Board members present, including the Governor's four recent appointees. Unlike previous meetings that year, RGGI was on the agenda.

106. At the meeting, Acting Secretary of Natural and Historic Resources Travis Voyles announced that the administration had abandoned the emergency regulatory approach originally

set forth in Executive Order 9 and instead would move forward with plans to repeal the RGGI Regulation through the non-emergency Virginia Administrative Process Act process, with the goal of withdrawing Virginia from RGGI by the end of 2023. Charlie Paullin, *Youngkin Administration Outlines Plan to Withdraw Virginia from Carbon Market by Regulation*, Va. Mercury (Sept. 1, 2022), https://perma.cc/BGA4-WQEP.

c. The Agency Respondents Initiate Regulatory Repeal

107. On September 26, 2022, DEQ published a NOIRA in the Virginia Register of Regulations which proposed the development of a regulation to repeal the RGGI Regulation. 39 Va. Reg. Regs 55, 57–58 (Sept. 26, 2022). DEQ also created an Agency Background Document to support the notice ("NOIRA Agency Background Document"). Notice of Intended Regulatory Action Agency Background Document, Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22) (Sept. 6, 2022), https://perma.cc/3W4K-NM23.

108. The NOIRA Agency Background Document advances unsupported claims, provides no analysis, and conflicts with evidence in the record.

109. In the "Mandate and Impetus" section, the NOIRA Agency Background Document copies language from Executive Order 9 and solely discusses impacts of the RGGI Regulation on utility costs. *Id.* at 2–3. There is no discussion of air quality or public health impacts. The document refers to Executive Order 9—which also relies exclusively on the impacts on utility costs as the basis for taking action—as a state "requirement" in the "Legal Basis" section. *Id.* at 4.

110. During the public comment period for the NOIRA stage, the Conservation Organizations submitted comments opposing the decision to leave RGGI and questioning the legality of the effort.

111. Even after DEQ issued the NOIRA, DEQ's website continued to state that "the [2020 RGGI Act] **requires** Virginia to join the Regional Greenhouse Gas Initiative." DEQ, *Greenhouse Gases* (Sept. 27, 2022), *archived at* https://perma.cc/8RRX-7PRB (emphasis added).

d. Despite Opposition, the Agency Respondents Move Forward with Repeal

112. On December 7, 2022, the Air Pollution Control Board convened a public meeting with all seven Board members present.

113. As part of the meeting, the Agency Respondents presented information about the comments received during the NOIRA public comment period. In total, the Agency Respondents received over 1,000 comments on the NOIRA, and more than 90 percent of those comments expressed opposition to the proposal to leave RGGI. *See* Travis A. Voyles, Presentation to Air Board on Proposed Regulation: Repeal CO_2 Budget Trading Program, 9VAC5 Chapter 140 (Rev. A22) at slide 11 (Dec. 7, 2022); Karin Rives, *Virginians Rally for RGGI Carbon Market as Pennsylvania Cools to Idea*, S&P Glob. Mkt. Intel. (Oct. 28, 2022), https://perma.cc/YA7Q-FBCP (concluding that, of the people commenting on the NOIRA, "[m]ore than 95% said the Commonwealth should remain part of the 12-state carbon market").

114. The Agency Respondents also prepared other materials in connection with the meeting, including an Agency Background Document ("Proposed Repeal Agency Background Document"), *see* Proposed Repeal Agency Background Document, Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22) (Dec. 7, 2022), https://perma.cc/JSM7-9QN2, and an Economic Review Form ("Proposed Repeal Economic Review Form"). *See* Off. Of Regul. Mgmt., Economic Review Form for Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22) (Dec. 7, 2022), https://perma.cc/6HEU-NJZW.

115. As discussed *infra* ¶¶ 172–79, the documentation for the December meeting offered only conclusory, unsupported assertions that conflict with the record.

116. The Agency Respondents continued to cite utility costs as the mandate and impetus for this action, as well as Executive Order 9. Proposed Repeal Agency Background Document, *supra* ¶ 114, at 2–4. The Agency Respondents identified only "reduced energy costs" and "greater certainty and transparency in the energy markets" as the advantages of the repeal and identified "no disadvantages to the public or the Commonwealth" that would result from the proposed repeal. *Id.* at 5.

117. At the meeting, Acting Secretary Voyles contended that "RGGI is not working" but provided no analysis about whether the RGGI Regulation was responsible for recent emissions reductions. Travis A. Voyles, *supra* ¶ 113, at slide 16.

118. Despite the overwhelming public opposition to withdrawing from RGGI, DEQ recommended that the Air Pollution Control Board approve the issuance of a proposed regulation to repeal the RGGI Regulation. *See id.* at slide 17.

119. The Air Pollution Control Board voted 4-1, with two abstentions, to approve issuing the proposed regulation to repeal the RGGI Regulation. Charlie Paullin, *Virginia Begins Official Withdrawal from Regional Carbon Market*, Va. Mercury (Dec. 7, 2022), https://perma.cc/2EPG-LJSW. All four of the members in favor of issuing the proposed regulation were appointed by Governor Youngkin. *Id.*

120. Following the vote, the Agency Respondents published a proposed regulation to repeal the RGGI Regulation in the Virginia Register of Regulations. 39 Va. Reg. Regs. 1425, 1436–65 (Jan. 30, 2023).

121. The proposed regulation repeals the entirety of the RGGI Regulation. *See id.* The regulation also adds a temporary section (9 Va. Admin. Code § 5-140-6445) to allow affected power plants to meet their remaining RGGI allowance obligations after December 31, 2023. No later than March 1, 2024, power plants in Virginia must have sufficient allowances in their RGGI accounts to cover their total emissions for the 2021-2023 period. Power plants would not know their total 2023 emissions until early 2024, so this provision allows them to still put allowances into their individual RGGI accounts after December 2023 and thus avoid any penalties. *See* Proposed Repeal Agency Background Document, *supra* ¶ 114, at 96. That section would be repealed once all affected facilities have met those obligations. 39 Va. Reg. Regs. at 1465.

122. During the public comment period for the proposal stage, the Conservation Organizations submitted comments opposing the proposed regulation to repeal the RGGI Regulation and questioning the legality of the action.

e. The Agency Respondents Unlawfully Repeal Virginia's RGGI Regulation

123. On June 7, 2023, the Air Pollution Control Board convened a public meeting with all seven Board members present.

124. As part of the meeting, the Agency Respondents presented information about the public comments received during the proposal stage. In total, the Agency Respondents received thousands of comments on the proposed regulation, with the overwhelming majority opposing the proposed action. *See* Gregory S. Schneider, *Virginia Panel Votes to Exit Carbon Trading Market*, Wash. Post (June 7, 2023), https://perma.cc/X7WK-PAEF.

125. The Agency Respondents also prepared other materials in connection with the meeting, including an Agency Background Document ("Final RGGI Repeal Agency Background Document"), *see* Final Regulation Agency Background Document, Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22) (June 8, 2023),

https://perma.cc/GH4N-J938, and an Economic Review Form ("Final RGGI Repeal Economic Review Form"). *See* Off. of Regul. Mgmt., Economic Review Form for Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22) (June 8, 2023), https://perma.cc/7A7E-K245.

126. As with prior meetings, the documentation for the June meeting offered conclusory, unsupported assertions that conflict with the record. These deficiencies are discussed *infra* ¶¶ 172–79.

127. The Agency Respondents once again described utility costs and Executive Order 9 as the mandate and necessity for the repeal, identified the advantages associated with the repeal as "reduced energy costs" and "greater certainty and transparency in the energy markets," and identified no disadvantages to the public or Commonwealth. Final RGGI Repeal Agency Background Document, *supra* ¶ 125, at 3–5.

128. Secretary of Natural and Historic Resources Voyles made another presentation to the Air Pollution Control Board reiterating prior arguments. Once again, Secretary Voyles asserted that RGGI is "not working" for Virginia but did not support these talking points with any analysis concerning the performance of the RGGI Regulation. Travis A. Voyles, Presentation to State Air Pollution Control Board on Final Regulation: Repeal CO_2 Budget Trading Program, 9VAC5 Chapter 140 (Rev. A22) at slide 15 (June 7, 2023).

129. Despite the continued public opposition to and questionable legality of withdrawing from RGGI, DEQ recommended that the Air Pollution Control Board adopt the proposed final regulation to repeal the RGGI Regulation. *Id.* at slide 16.

130. The Air Pollution Control Board then voted 4-3 to adopt the proposed final regulation ("Final RGGI Repeal"). *See* Charlie Paullin, *Virginia Air Board Approves Withdrawal*

from Regional Carbon Market, Va. Mercury (June 7, 2023), https://perma.cc/EB7C-NDNA. All four of the members in favor of the repeal were appointed by Governor Youngkin. *See id.*

f. The Conservation Organizations Challenge Final Regulation

131. The Final RGGI Repeal was published in the Virginia Register of Regulations on July 31, 2023 with an effective date of August 30, 2023. 39 Va. Reg. Regs. 2805, 2813–38 (July 31, 2023).

132. The final regulation repeals the RGGI Regulation in its entirety and adds the temporary provision to wind down the compliance obligations through the end of 2023. There were no changes made between the proposed regulation and final regulation.

133. The Conservation Organizations served their Notice of Appeal on the Agency Respondents the same day it was published. Attachment A.

V. The Agency Respondents Brush Aside Official Objections and Concerns

134. Throughout this unlawful regulatory action, state officials and legislators have raised serious questions concerning the Agency Respondents' authority to repeal the RGGI Regulation. The Agency Respondents brushed aside these concerns.

a. Attorney General Official Opinion Finds Governor Cannot Repeal RGGI Regulation Through "Executive Order or Other Executive Action"

135. On January 11, 2022, Attorney General Mark Herring issued an official advisory opinion to answer the question of "whether the Governor, solely through an executive order or other executive action, can repeal or eliminate the regulatory requirement that electric utilities and other electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions." 2022 Op. Va. Att'y Gen. 10, 11.

136. The Attorney General answered no: "the Governor may not, solely through an executive order or other executive action, repeal or eliminate the regulatory requirement that

electric utilities and other electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions." *Id.* at 2. As the opinion explains, "in order to lawfully produce electricity in Virginia by combusting fossil fuels, producers must now hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions." *Id.* The RGGI auctions are one of the ways producers can obtain the legally required allowances. *Id.*

137. The Attorney General concluded that the "Governor may not unilaterally direct, by any means, that a validly adopted regulation that has the force of law be suspended or ignored." *Id.*

138. This recent official opinion is one in a long line of Attorney General opinions in Virginia that establish the legal effect of laws and final regulations, and the executive branch's inability to suspend the operation of a law or validly enacted regulation. It cites a 2014 opinion by Attorney General Kenneth Cuccinelli concluding that "a unilateral attempt by the Governor to suspend a validly enacted regulation is as much a violation of the separation of powers as if the Governor sought to suspend the operation of a Virginia statute." 2014 Op. Va. Att'y Gen. 43, 45. Another 2014 opinion concluded that "[i]gnoring or failing to implement a duly adopted regulation or statute has the same practical effect as actively issuing a directive suspending the enforcement of such law." 2014 Op. Va. Att'y Gen. 78, 79. The Attorney General further concluded that "the Governor must enforce duly enacted valid laws, unless the power to delay or suspend enforcement is granted by statute or by the law's enactment clause." *Id.* at 80.

b. Air Pollution Control Board Member Discloses That the Attorney General's Office Advised Her That Virginia's Participation in RGGI Is an Issue for the General Assembly to Decide

139. On April 20, 2022, the Air Pollution Control Board convened a public meeting, with five members present and two seats vacant. This meeting took place prior to the Governor's

appointment of four new members and before the regulatory process to repeal the RGGI Regulation began.

140. Despite the emergency claimed in Executive Order 9, and despite the fact the Governor had the materials prepared by DEQ in response to Executive Order 9 on his desk for over a month, the RGGI Regulation and continued participation in RGGI were not on the initial agenda for this meeting.

141. Air Pollution Control Board Member Hope Cupit requested that the status of Virginia's participation in RGGI be added to the agenda. The Board agreed and added it to the agenda.

142. Board Member Cupit then explained that she had reached out to the Attorney General's Office and received an "opinion from the attorney general's office back in March [2022] saying that it's not the responsibility of the Board, that it's the responsibility of the General Assembly" to modify Virginia's participation in RGGI. Patrick Wilson, *The Mystery of the Secret Virginia Air Board Document*, Rich. Times-Dispatch (May 13, 2022), https://perma.cc/9S3Q-9PEB.

143. This opinion is different than, and subsequent to, the Attorney General's opinion that was publicly released in January 2022, which concludes that the Governor did not have authority to remove Virginia from RGGI via executive action. *See supra* ¶¶ 135–37. Director Rolband asked for a copy of the opinion and Board Member Cupit responded that she would provide it to him. Patrick Wilson, *supra* ¶ 142.

144. The Attorney General's Office has acknowledged that there is such an opinion, but state officials have refused to release the document to the public.

145. On August 4, 2022, Appalachian Voices and Peter Anderson filed suit in Charlottesville Circuit Court seeking a copy of the document after officials refused to release the document pursuant to the Virginia Freedom of Information Act. Pet. For Injunction and Writ of Mandamus, *Appalachian Voices v. State Air Pollution Control Bd.*, Case No. CL22-367 (Charlottesville Cir. Ct. Aug. 4, 2022).

146. On November 30, 2022, Circuit Court Judge Richard E. Moore denied this petition and concluded that the document was protected by attorney client privilege and that the Air Pollution Control Board, as a whole, had not waived that privilege. Order, *Appalachian Voices v. State Air Pollution Control Bd.*, Case No. CL22-367 (Charlottesville Cir. Ct. Dec. 19, 2022). The document remains hidden from the public.

c. Lawmakers Object to the Agency Respondents' Unlawful Repeal

147. In September 2022, a group of over 60 members of the General Assembly, most of whom were members who voted on the 2020 RGGI Act, sent a letter to the Air Pollution Control Board reiterating that Virginia is required by law to participate in RGGI. Charlotte Rene Woods, *61 Dems Say Virginia's Participation in RGGI is up to the Legislature*, Rich. Times-Dispatch (Sept. 8, 2022), https://perma.cc/3LP2-KURA.

148. In December 2022, the Joint Commission on Administrative Rules ("JCAR"), held a meeting on the Agency Respondents' proposed repeal of the RGGI Regulation.

149. JCAR is comprised of members of the General Assembly and is directed to review existing and proposed rules and regulations issued by any state agency and to "make recommendations to the Governor and General Assembly." Va. Code § 30-73.1. It is statutorily empowered to determine whether a proposed rule or regulation "is authorized by statute" or "complies with legislative intent," and to "[f]ile with the Registrar and the agency promulgating the regulation an objection to a proposed or final adopted regulation." *Id.* §§ 30-73.3(A)(1), (3).

150. At its December meeting, JCAR officially objected to the proposed repeal of the RGGI Regulation. Charlie Paullin, *Legislative Commission Objects to Withdrawal from Regional Carbon Market*, Va. Mercury (Dec. 20, 2022), https://perma.cc/7QYD-9TDX.

151. By objecting to this process, JCAR has likewise affirmed that the 2020 RGGI Act mandates RGGI participation. DEQ has never filed an official response to this objection, even though it is statutorily required to do so. Va. Code § 2.2-4014(A).

VI. No Evidentiary Support for the Agency Respondents' Changed Position

152. In addition to brushing aside the serious questions of authority, the Agency Respondents have performed virtually no analysis in this regulatory process, nor have they have provided other evidence, to support their contentions. The documentation that Agency Respondents prepared or relied on consists of:

- 2021 Energy Report, prepared by Department of Energy, *infra* ¶ 157;
- Executive Order 9 Report, prepared by DEQ, *infra* ¶ 160;
- NOIRA Agency Background Document, *supra* ¶ 107;
- 2022 Energy Plan, *infra* ¶ 173;
- Proposed Repeal Agency Background Document and Economic Review Form, *supra* ¶ 114;
- DPB Analysis, *supra* ¶ 68; and
- Final RGGI Repeal Agency Background Document and Economic Review Form, *supra* ¶ 125.

153. As described below, only three of these documents engage in any meaningful, though limited, analysis of RGGI and the RGGI Regulation: the 2021 Energy Report, the EO 9

Report, and the DPB Analysis. The remaining documents simply reiterate conclusory, unsupported assertions.

154. Most importantly, the record contains no evidentiary support for one of the Agency Respondents' primary contentions—that RGGI is not working to drive down CO_2 emissions. The Agency Respondents repeatedly assert that any recent CO_2 emissions reductions are due to other, unnamed federal and state policies but provide no analysis to support this claim. In fact, this unsupported contention is in direct conflict with the analysis that is in the record.

155. There is also no evidence or analysis in the record to support the contention that repealing the RGGI Regulation will in fact reduce costs for monopoly utility customers. While repealing RGGI would eliminate the charge for carbon allowances for monopoly utility customers, it would likely increase fossil fuel charges. The Agency Respondents, however, have not performed an actual bill analysis as part of the regulatory process.

156. Moreover, the Department of Planning and Budget reviewed the proposed repeal as part of its economic impact analysis and identified serious information gaps in the Agency Respondents' proposal. The Department of Planning and Budget explained that there could be substantial negative impacts caused by the repeal but highlighted that they did not have the information needed to assess such impacts. Rather than attempting to address the missing analysis and fill in the gaps, Agency Respondents simply stated they had "no comment" and moved forward with the repeal.

a. 2021 Energy Report Confirms that RGGI is Cost-Effective and Needed to Reduce Emissions

157. In or around December 2021, the Secretary of Natural and Historic Resources and Secretary of Commerce and Trade submitted a report to the General Assembly entitled "Modeling Decarbonization: Report Summary and Policy Brief for Virginia Governor's Office

Administration and Policymakers (Chapter 1194, 2020)" ("2021 Energy Report"). Senate Doc. No. 17 (2021), https://perma.cc/A3DA-E4NT. This report was required by the 2020 Utility Act and incorporated a December 2021 study by the Department of Energy and other stakeholders entitled "Achieving Clean Electricity Generation at Least Cost to Ratepayers by 2045," as well as an introductory memorandum from the Department of Energy summarizing the findings of that study.[2] *See id.*, introductory memorandum at 1; 2020 Va. Acts, ch. 1193, enactment cl. 6.

158. After analyzing various CO_2 emission reduction techniques and performing modeling, the Department of Energy found that flexible programs like RGGI help drive down emissions in more cost-effective ways than alternative types of regulation: "A regional approach to capping emissions is effective in controlling emissions and produces considerable savings for ratepayers." 2021 Energy Report, *supra* ¶ 157, at 28. The Department of Energy also concluded that "[e]conomic theory and a considerable body of empirical evidence shows that market-based emission controls such as RGGI are most likely to achieve the least cost emission reduction pathway." *Id.* at 35. The analysis emphasized the importance of having "multiple policy and technological paths to decarbonization." *Id.*, introductory memorandum at 4.

159. The report concluded that "RGGI should be considered a key mechanism for reducing costs to ratepayers of achieving zero emissions by 2045." *Id.* at 35. "In practice, [RGGI] has lived up to expectations, driving lower compliance costs and ultimately greater ambition in future emission reductions." *Id.* at 34.

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[2] Unless otherwise noted, citations to the "2021 Energy Report" refer to pages in the "Achieving Clean Electricity Generation at Least Cost to Ratepayers by 2045" study.

b. EO 9 Report Further Confirms that Virginia Needs an RGGI Regulation and that Virginia Power Plant Emissions Did Not Decline Without the RGGI Regulation

160. While the attempts to repeal the 2020 RGGI Act were failing at the 2022 General Assembly, Governor Youngkin's office published the materials prepared by DEQ in response to Executive Order 9. *See* Letter from Michael Rolband, Dir. of DEQ, to Andrew Wheeler, Sec'y of Nat. & Historic Res. (Mar. 11, 2022), https://perma.cc/J6M2-AWRG. These materials include a draft report evaluating the costs and benefits of participation in RGGI ("EO 9 Report"). *See id.*

161. While the EO 9 Report contains limited analysis, it contains multiple statements and conclusions in support of the RGGI Regulation.

162. Consistent with the 2021 Energy Report, *see supra* ¶ 159, DEQ concludes in the EO 9 Report that Virginia needs a CO_2 emissions reduction program: "[A]n emission reduction program or combination of programs will be required to meet the Commonwealth's climate goals of the [2020 Utility Act] and the 2045 net-zero carbon emissions goal. In the absence of any such program, emissions may not reduce sufficiently to achieve these goals." EO 9 Report, *supra* ¶ 160, at 14.

163. Consistent with this conclusion, DEQ explains that without the RGGI Regulation, Virginia's power plant CO_2 emissions "have fluctuated over the past 10 years with no discernible trend," and that carbon emissions "have remained fairly constant." *Id.* at 9–10. DEQ further acknowledges that CO_2 emissions from Virginia power plants decreased in the first full year of participation in RGGI, and notes that "[i]t is too early to determine the impact of the program on emissions since 2021 is Virginia's first participation year." *Id.* at 9, 12–13; *see also id.* at 14 ("There is insufficient data to determine the impact of the trading rule and RGGI in reducing CO_2 emissions, since 2021 has been the first year of Virginia's participation in the program.").

164. DEQ also explains that "the RGGI region has a long track record of emission reductions since the beginning of the program." *Id.* at 13. From 2005 to 2020, for example, CO_2 emissions from RGGI participating states decreased by 59 percent. *Id.*

165. Thus, the limited analysis contained in the EO 9 Report establishes that (i) Virginia needs a CO_2 emissions reduction program; (ii) RGGI has a proven record of reducing emissions; (iii) without the RGGI Regulation, Virginia's power plant CO_2 emissions did not decrease; and (iv) with the RGGI Regulation, Virginia's power plant CO_2 emissions did decline significantly but DEQ did not analyze how much the RGGI Regulation was responsible for those reductions.

166. While the body of the report appears to acknowledge the efficacy of the RGGI Regulation, other portions of the report take issue with the General Assembly's policy choice, criticizing its decision to join RGGI in the first place, its decision to permit monopoly utilities to seek recovery of carbon allowance costs from customers, and its allocation of revenues from the RGGI auctions. *See, e.g.*, *id.* at 16.

167. These policy disagreements are, of course, disagreements with the General Assembly. But more importantly, these contentions are unsupported by evidence or analysis and conflict with much of the body of the report.

168. Most glaringly, the EO 9 Report contains no analysis of potential environmental or public health impacts, or impacts to localities, arising from repealing the RGGI Regulation.

169. The EO 9 Report also makes inconsistent statements about recent emissions reductions in Virginia. After mentioning the emissions reductions achieved since joining RGGI, the EO 9 Report states that it is too early to determine the impacts of Virginia's participation in RGGI, *see, e.g.*, *id.* at 9. Then, a few pages later, the EO 9 Report contends that recent emissions

reductions "cannot be directly or solely attributed to RGGI participation," *id.* at 12. If it is too early to determine the impacts of the RGGI Regulation in Virginia, then DEQ has no basis to conclude that recent emissions reduction "cannot be directly" attributed to the RGGI Regulation. DEQ provides no analysis to support this claim. In fact, DEQ performed no forward-looking analysis of its own in the EO 9 Report, nor did it do such analysis in any subsequent document in the administrative record.

170. The analysis of electricity rates in the EO 9 Report is also incomplete. DEQ looks only at Dominion's compliance costs and customer bills in its limited assessment. There is no evidence or analysis concerning other power plant owners, including the merchant power plants in Virginia that do not have ratepayers and accounted for approximately 31 percent of Virginia's 2021 power plant emissions. The EO 9 Report's complaints about the costs of the RGGI Regulation also conflict with the 2021 Energy Report. *See supra* ¶ 158.

171. Even when it comes to Dominion, the analysis in the EO 9 Report is incomplete. While repealing the RGGI Regulation would remove the RGGI-related charge on Dominion customer bills, DEQ provides no evidence or analysis to understand how such action might affect other aspects of customer bills over time. For example, Dominion also passes through fossil fuel costs to its customers, which represents a far larger portion of customer bills than the RGGI-related charge. *See* Va. State Corp. Comm'n, *Status Report: Implementation of the Virginia Electric Utility Regulation Act Pursuant to § 56-596 B of the Code of Virginia* 8 (Sept. 1, 2022), https://perma.cc/WVY7-BTCS. But DEQ did not analyze whether repealing the RGGI Regulation could simultaneously increase this fossil fuel charge, or by how much.

c. Other Agency Documents Devoid of Analysis and Conflict with the Record

172. The remaining agency documents reiterate conclusory, unsupported assertions that conflict with the record.

173. For example, in responding to comments pointing out that emissions have declined significantly since Virginia joined RGGI, the Agency Respondents repeatedly state that emissions have "continue[d]" to decline or have been on a "downward trend"—suggesting that Virginia's emissions were already declining even before the RGGI Regulation went into place. *See* RGGI Final Repeal Agency Background Document, *supra* ¶ 125, at 7 (response #4), 8 (response #5), 20 (response #19); Proposed Repeal Agency Background Document, *supra* ¶ 114, at 9 (response #4); *see also* Va. Dep't of Energy, *The Commonwealth of Virginia's 2022 Energy Plan* (Oct. 3, 2022), https://perma.cc/J7QR-ZXNA ("2022 Energy Plan"). The Agency Respondents provide no analysis to support this contention, which directly conflicts with the EO 9 Report's conclusion that, prior to joining RGGI, Virginia power plant emissions were "fairly constant" and "with no discernible trend." *See supra* ¶ 163.

174. The Agency Respondents also describe Virginia's RGGI Regulation as "redundant and unnecessary," contending that any recent emissions reductions are not attributable to Virginia's participation in RGGI and instead are attributable to other, unnamed federal and state policies. *See* Proposed Repeal Agency Background Document, *supra* ¶ 114, at 9 (response #4); Final RGGI Repeal Agency Background Document, *supra* ¶ 125, at 7–8 (response #5), 7 (response #4), 14 (response #13), 20 (response #19). The record is devoid of support for these contentions, which further conflict with the 2021 Energy Report, *see supra* ¶¶ 158–159, and EO 9 Report. *See supra* ¶ 162.

175. The Agency Respondents assert, without any analysis, that "carbon trading under RGGI is not the most market-friendly means of achieving pollution reduction." Final RGGI Repeal Agency Background Document, *supra* ¶ 125, at 25 (response #24). This too conflicts with the record, including the analysis performed by the Department of Energy in its 2021

Energy Report, which concluded that RGGI is the lowest cost method of reducing power plant emissions. *See supra* ¶¶ 158–59.

176. The Agency Respondents also assert—incorrectly—that all RGGI compliance costs are passed through to utility customers. *See, e.g.*, Proposed Repeal Agency Background Document, *supra* ¶ 114, at 10–11 (response #6); Travis A. Voyles, *supra* ¶ 128, at slide 7; *see also* 2022 Energy Plan, *supra* ¶ 173, at 25. This statement is untrue. A significant portion of power plants in Virginia have no ratepayers, and the law does not "require" monopoly utilities to pass through costs to ratepayers. Instead, the law permits such utilities to seek authorization from the State Corporation Commission to pass through compliance costs, and then empowers the State Corporation Commission to deny any such costs it finds unnecessary to comply with RGGI. *See* Va. Code § 56-585.1(A)(5)(e).

177. This assertion also directly conflicts with the Department of Planning and Budget's economic review analysis, discussed *infra* ¶¶ 180–84, which found that many power plants in Virginia are "likely sell their energy production directly to the PJM market, and do not have ratepayers to whom they can pass on cost increases." DPB Analysis, *supra* ¶ 68, at 5 (footnote omitted). The Department of Planning and Budget concluded that these power plant owners in particular "would have a stronger incentive to cut CO_2 emissions (due to RGGI participation or other factors) because their cost of acquiring allowances may not be readily passed on to other entities." *Id.*

178. Finally, the Agency Respondents repeatedly assert that "[t]here are no disadvantages to the public or the Commonwealth associated with this regulatory change," and that "[n]o locality will be particularly affected by this action." Proposed Repeal Agency Background Document, *supra* ¶ 114, at 5; *see also* Final RGGI Repeal Agency Background

Document, *supra* ¶ 125, at 5; Final RGGI Repeal Economic Review Form, *supra* ¶ 125, at 1–2; Proposed Repeal Economic Review Form, *supra* ¶ 114, at 2 (stating that "No direct costs are being added as a result of this proposed change" and identifying no indirect costs from the repeal). There is no evidence or analysis to support these claims.

179. In fact, and as discussed in the next section, the Department of Planning and Budget expressly found that the proposed repeal action could have significant negative impacts on the environment, public health, localities, small businesses, and other entities. But rather than grapple with these potential negative consequences, the Agency Respondents disregarded them.

d. Department of Planning and Budget Identifies Significant Potential Harms Associated with the Repeal

180. Following the Air Pollution Control Board's approval to advance the repeal of the RGGI Regulation to the proposal stage in December 2022, the Department of Planning and Budget performed its required economic impact analysis under Section 2.2-4007.04 of the Virginia Code and Executive Order 19. It released its analysis on December 21, 2022. *See* DPB Analysis, *supra* ¶ 68.

181. The DPB Analysis identified multiple analytical gaps in the Agency Respondents' proposed repeal of the RGGI Regulation.

182. Most fundamentally, the Department of Planning and Budget highlighted that there is no evidence or analysis to support the Agency Respondents' key assertion: that the RGGI Regulation is not responsible for the lower CO_2 emissions Virginia has experienced since joining RGGI. As the Department of Planning and Budget explained, "[i]t is not clear whether all or part of the decline would have happened without RGGI participation, and [the Department of Planning and Budget] does not have any specific information with which to assess the factors that may have contributed to this reduction." *Id.* at 6.

183. In light of this lack of evidentiary support, the Department of Planning and Budget highlighted numerous potential harms and lost benefits associated with the proposed repeal of the RGGI Regulation that the Agency Respondents failed to consider or acknowledge. For example:

- "To the extent that RGGI participation does in fact reduce CO_2 emissions that would not have otherwise been reduced, the benefits garnered from that reduction would be lost. Those benefits include reduction in the social cost of carbon (SC-CO_2). The SC-CO_2 is a comprehensive estimate of climate change damages and includes, among other things, changes in net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services." *Id.* at 6.

- "To the extent that RGGI participation does in fact reduce CO_2 emissions that would not have otherwise been reduced, all entities and people in Virginia would potentially experience associated environmental and health impacts." *Id.* at 7.

- "To the extent that RGGI participation does in fact reduce CO_2 emissions that would not have otherwise been reduced, the associated benefits from reduction in [sulfur dioxide] and [nitrogen oxides] may also be lost by exiting RGGI." *Id.*

- "[I]f the funding for the flooding and energy efficiency programs is not replaced, firms that provide products and services for those programs and localities and citizens who benefit from those programs would be particularly affected." *Id.*

- "Thus, an adverse impact is indicated since the benefits from those programs including the revenue for businesses supplying products and services for those programs, would be eliminated." *Id.* at 8.

184. In response to this review, DEQ did not perform any additional analysis or provide additional evidentiary support. Instead, DEQ issued a one-sentence response: "The Department has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment." DEQ, *Response to Economic Impact Analysis* (Jan. 11, 2023), https://perma.cc/7JPL-QYN8.

CLAIMS OF ERROR

CLAIM 1

The Agency Respondents exceeded statutory authority, and contravened state law and the Virginia Constitution, by repealing the RGGI Regulation.

185. Allegations 1–184 are incorporated and re-alleged herein.

186. Only the General Assembly may enact laws pursuant to the Separation of Powers provisions of the Virginia Constitution. Va. Const., art. I, § 5; Va. Const., art. III, § 1.

187. The Virginia Constitution prohibits the Agency Respondents from suspending or ignoring the execution of laws by any authority. Va. Const., art. I, § 7.

188. The Air Pollution Control Board has general regulatory power to promulgate regulations "abating, controlling and prohibiting air pollution" subject to the Virginia Administrative Process Act. Va. Code § 10.1-1308.

189. Consistent with the Virginia Constitution, Air Pollution Control Law, and the Virginia Administrative Process Act, the Air Pollution Control Board may only act in accordance with the authority delegated to it by the General Assembly. The Air Pollution Control Board has no authority to ignore or defy the General Assembly.

190. In 2020, the General Assembly passed the 2020 RGGI Act. This law requires Virginia's participation in RGGI. The 2020 RGGI Act requires DEQ to issue the regulation establishing the RGGI Regulation, requires the Director to sell Virginia's carbon allowances (created by the regulation) in the RGGI auctions, and requires the state treasury to use the revenues from the sale of Virginia's carbon allowances for specific purposes. Va. Code § 10.1-1330.

191. In 2020, DEQ issued the RGGI Regulation, as required by law.

192. Since 2021, Virginia has been participating in RGGI. Power plants have been subject to the requirements of the RGGI Regulation, and the Director has sold Virginia's carbon allowances in the RGGI auctions, as required by law.

193. Attempts to repeal this law at the General Assembly have all failed. The law still requires that Virginia participate in RGGI. *See* Va. Code § 10.1-1330.

194. On June 7, 2023, the Air Pollution Control Board approved the Final RGGI Repeal, which repealed the RGGI Regulation in its entirety, based on DEQ's recommendations and an administrative record prepared by DEQ and the Director.

195. In approving and issuing the Final RGGI Repeal, the Agency Respondents exceeded their delegated authority by repealing the RGGI Regulation in contravention of Va. Code § 10.1-1330, *see* Va. Code § 2.2-4027(ii), and violated the Virginia Constitution by suspending and ignoring the execution of law and invading the General Assembly's legislative power, *see* Va. Code § 2.2-4027(i).

CLAIM 2

The Agency Respondents exceeded statutory authority, and contravened state law and the Virginia Constitution, by repealing the RGGI Regulation on the basis of utility cost.

196. Allegations 1–195 are incorporated and re-alleged herein.

197. Only the General Assembly may enact laws pursuant to the Separation of Powers provisions of the Virginia Constitution. Va. Const., art. I, § 5; Va. Const., art. III, § 1.

198. The Virginia Constitution prohibits the Agency Respondents from suspending or ignoring the execution of laws by any authority. Va. Const., art. I, § 7.

199. The State Air Pollution Control Board has general power to promulgate regulations "abating, controlling and prohibiting air pollution" subject to the Virginia Administrative Process Act. Va. Code § 10.1-1308.

200. In 2020, the General Assembly made several statutory changes to the Virginia Code in order to implement a comprehensive statutory framework for Virginia's required participation in RGGI.

201. First, the General Assembly amended the Air Pollution Control Law, adding several new sections that require Virginia's participation in RGGI. *See, e.g.*, Va. Code § 10.1-1330.

202. Second, the General Assembly expressly permitted monopoly utilities to petition the State Corporation Commission for approval to charge utility customers for compliance costs associated with the RGGI Regulation. Va. Code § 56-585.1(A)(5)(e). The General Assembly delegated oversight of these costs to the State Corporation Commission and provided the standard by which the Commission must evaluate these costs. *See id.*

203. Rather than focusing on air pollution and air quality in accordance with their delegated authority, the Agency Respondents have characterized the necessity for this repeal solely in terms of reducing utility costs. NOIRA Agency Background Document, *supra* ¶ 107, at 2–3; Proposed Repeal Agency Background Document, *supra* ¶ 114, at 2–4; Final RGGI Repeal Agency Background Document, *supra* ¶ 125, at 3–4.

204. The Agency Respondents have also repeatedly pointed to Executive Order 9 as a legal requirement for this repeal, which in turn discusses the need for this repeal exclusively in terms of utility costs. *See* Va. Exec. Order No. 9 (Jan. 15, 2022).

205. The General Assembly, however, expressly authorized Dominion and Appalachian Power to seek recovery of costs associated with compliance with the RGGI Regulation and put the State Corporation Commission in charge of regulating these costs and applying the statutory standard.

206. By approving and issuing the Final RGGI Repeal on this basis, the Agency Respondents exceeded delegated authority by usurping the authority granted to the State Corporation Commission pursuant to Va. Code § 56-585.1(A)(5)(e), *see* Va. Code § 2.2-4027(ii), and violated the Virginia Constitution by effectively suspending the General Assembly's decision to permit utilities to seek recovery of compliance costs in this way, *see* Va. Code § 2.2-4027(i).

CLAIM 3

The Agency Respondents violated the Virginia Administrative Process Act by failing to provide evidentiary support for the Final RGGI Repeal and by ignoring the conflicting evidence in the record.

207. Allegations 1–206 are incorporated and re-alleged herein.

208. The Agency Respondents repeatedly assert that the RGGI Regulation is not responsible for recent emissions reductions, and that these reductions are attributable to other federal and state programs.

209. The Agency Respondents never provided any evidence or performed any analysis to assess whether and how much the RGGI Regulation is responsible for recent emissions reductions.

210. The Agency Respondents rely on the contention that the RGGI Regulation is not working to claim that the Program is redundant and unnecessary. The Agency Respondents provided no evidence and performed no analysis to support the claim that RGGI is unnecessary.

211. The Agency Respondents rely on the contention that the RGGI Regulation is not working to claim that there are "no disadvantages to the public or the Commonwealth associated with this regulatory change." Proposed Repeal Agency Background Document, *supra* ¶ 114, at 5. The Agency Respondents provided no evidence and performed no analysis to assess potential disadvantages to the public, including potential negative health effects.

212. The Agency Respondents rely on the contention that the RGGI Regulation is not working to claim that no locality would be particularly affected by this action. The Agency Respondents provided no evidence and performed no analysis to understand potential adverse effects to localities, which could include increased local air pollution, worsened public health, and loss of funding for efficient affordable housing units and flood resilience planning and projects.

213. The Agency Respondents rely on the contention that the RGGI Regulation is not working to claim that repealing the program will save utility customers money. The Agency Respondents provided no evidence and performed no analysis to understand the overall impact repealing the program will have on utility bills, including whether repealing the Program could result in increased fossil fuel charges.

214. Not only are the Agency Respondents' contentions unsupported by evidence in the record they are also in direct conflict with the record, including the EO 9 Report and 2021 Energy Report, both of which the Agency Respondents expressly relied on in taking this action.

215. In December 2022, the Department of Planning and Budget identified the lack of information and analysis underlying the contention that the RGGI Regulation is not responsible for recent emissions reductions. Among many other findings, the Department of Planning and Budget found that, to the extent the RGGI Regulation is helping to reduce emissions, "all entities and people in Virginia would potentially experience associated environmental and health impacts." DPB Analysis, *supra* ¶ 68, at 7.

216. Despite these findings, the Agency Respondents did not perform any additional analysis or provide additional evidentiary support, and instead continued to reiterate the same, unsupported contentions throughout the regulatory process. Before the final vote, for example, the Agency Respondents continued to assert that "there are no disadvantages to the public or the Commonwealth associated with this regulatory change." Final RGGI Repeal Agency Background Document, *supra* ¶ 125, at 5.

217. The Agency Respondents have failed to reasonably justify why they are repealing a policy they previously endorsed. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S. Ct. 1800, 173 L.Ed.2d 738 (2009) (noting that "when, for example, [an agency's] new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate").

218. By failing to analyze the potential impacts of the Final RGGI Repeal and acting in direct conflict with the evidentiary record, the Agency Respondents have acted without sufficient evidentiary support in violation of the Virginia Administrative Process Act. *See* Va. Code § 2.2-4027(iv).

PRAYER FOR RELIEF

WHEREFORE, the Conservation Organizations respectfully request that this Court enter judgment against the Agency Respondents and provide the Conservation Organizations with the following relief:

a. That this Court invalidate, vacate, and declare null and void the Agency Respondents' approval and issuance of the Final RGGI Repeal;

b. That this Court direct the Agency Respondents to take all necessary steps to reinstate the RGGI Regulation and continue participation in RGGI;

c. That this Court, under the authority of Va. Code § 2.2-4030, award the Conservation Organizations their reasonable costs and attorneys' fees; and

d. All other further relief that this Court deems just and proper.

August 21, 2023

Respectfully submitted,

Nathaniel Benforado (VSB #89000)
E. Grayson Holmes (VSB #98516)
Carroll Courtenay (VSB #93449)
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Counsel for Petitioners

ATTACHMENT A

Notice of Appeal

In re: State Air Pollution Control Board, Final Regulation 9 VAC §§ 5-140, Regulation for Emissions Trading Programs (adding 9VAC5-140-6445; repealing 9VAC5-140-6010 through 9VAC5-140-6440) (Jul. 31, 2023)

COMMONWEALTH OF VIRGINIA

BEFORE THE STATE AIR POLLUTION CONTROL BOARD

IN RE: STATE AIR POLLUTION CONTROL BOARD
FINAL REGULATION 9 VAC §§ 5-140
REGULATION FOR EMISSIONS TRADING PROGRAMS
(ADDING 9VAC5-140-6445; REPEALING 9VAC5-140-6010
THROUGH 9VAC5-140-6440)

NOTICE OF APPEAL

Pursuant to Rule 2A:2 of the Rules of the Supreme Court of Virginia, the Association of Energy Conservation Professionals, Virginia Interfaith Power & Light, Appalachian Voices, and Faith Alliance for Climate Solutions (collectively, "Conservation Organizations" or "Appellants") hereby file this Notice of Appeal with the State Air Pollution Control Board, the Virginia Department of Environmental Quality ("DEQ"), and Michael Rolband, the Director of DEQ and Agency Secretary of the State Air Pollution Control Board (collectively, "Appellees") for judicial review of Appellees' Final Regulation 9 VAC §§ 5-140 *et seq.*, Regulation for Emissions Trading Program (adding 9 VAC5-140-6445; repealing 9VAC5-140-6010 through 9VAC5-140-6440), which was published as a final regulation in the Virginia Register of Regulations on July 31, 2023 and is effective on August 30, 2023.

The appeal of this regulation will be taken to the Fairfax Circuit Court, 19th Judicial Circuit of Virginia, located at 4110 Chain Bridge Road, Suite 318, Fairfax, Virginia 22030. Under Rule 2A:3 of the Rules of the Supreme Court of Virginia, the agency record should be forwarded to the Clerk of the Fairfax Circuit Court as soon as possible.

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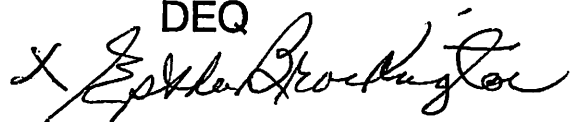


As required by Rule 2A:2(b) of the Rules of the Supreme Court of Virginia, the Appellants provide the following information:

1. The Appellants are:

Association of Energy Conservation Professionals
P.O. Box 152
Floyd, VA 24091

Virginia Interfaith Power & Light
P.O. Box 26059
Richmond, VA 23260

Appalachian Voices
812 East High Street
Charlottesville, VA 22902

Faith Alliance for Climate Solutions
P.O. Box 2012
Reston, VA 20195

2. Counsel for Appellants are:

Nathaniel Benforado (VSB #89000)
E. Grayson Holmes (VSB #98516)
Carroll Courtenay (VSB #93449)
Southern Environmental Law Center
120 Garrett Street, Suite 400
Charlottesville, VA 22902-5613
Tel: (434) 977-4090

3. The identities and addresses of Appellees are:

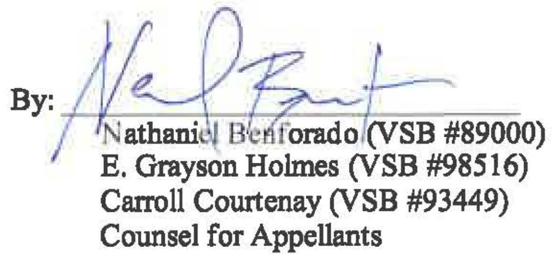
Virginia State Air Pollution Control Board
Virginia Department of Environmental Quality
Michael Rolband, Director of Virginia Department of Environmental Quality
c/o Michael Rolband, Agency Secretary and Director
1111 East Main Street, Suite 1400
Richmond, VA 23219

4. Counsel for Appellees is:

Jason S. Miyares, Attorney General of Virginia
Ross Phillips, Senior Assistant Attorney General
Office of the Attorney General of Virginia
202 North Ninth Street
Richmond, VA 23219

DATED: July 31, 2023

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2023, a complete copy of the foregoing Notice of Appeal was hand-delivered to Appellees and their counsel identified above.

Nathaniel Benforado
Counsel for Appellants

ATTACHMENT B

Declaration of William Weitzenfeld, Association of Energy Conservation Professionals

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

FILED
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2023 AUG 21 P 2:28
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS; VIRGINIA INTERFAITH POWER & LIGHT; APPALACHIAN VOICES; and FAITH ALLIANCE FOR CLIMATE SOLUTIONS,

Petitioners**,**

v.

VIRGINIA STATE AIR POLLUTION CONTROL BOARD; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, Director of Virginia Department of Environmental Quality,

Respondents**.**

Case No.: 2023 12061

DECLARATION OF WILLIAM WEITZENFELD

Pursuant to Va. Code § 8.01-4.3, I, William Weitzenfeld, declare as follows:

1. I am over the age of 18, competent to make this statement, and have personal knowledge of the facts in this Declaration.

2. I am the Executive Director of the Association of Energy Conservation Professionals (the "Association"). The Association was established in 1995 as a Section 501(c)(6) trade association for the nonprofit organizations who implement energy saving measures in low-income households pursuant to the federally funded Weatherization Assistance Program. More recently, the Association has worked on the Weatherization Deferral Repair program, a program that is implemented by our members and funded through the sale of carbon allowances under

Virginia's Regulation for Emissions Trading Program, 9 Va. Admin. Code §§ 5-140-6010 to -6440 ("RGGI Regulation").

3. The Association's mission is to provide, promote, and advocate for energy conservation measures on behalf of our members, all of whom are based in Virginia and provide services to Virginians. We also operate a separate sister organization, the Association of Energy Conservation Professionals/Educational Service, which is organized as a 501(c)(3) and provides a variety of energy education services to the general public. Our office is located in Floyd, Virginia, and our staff and Board of Directors all live and work in Virginia.

4. I was hired as the Association's executive director in 1999 and have served in that role since that time. My professional career has been dedicated to working on and promoting energy conservation through weatherization services.

5. In 1976, Congress established the Weatherization Assistance Program. The U.S. Department of Energy administers the program, which is designed to lower energy costs for low-income households by increasing the efficiency of their homes. By law, each state must offer weatherization services in all its cities, towns, and counties. Common services provided under this program include sealing air leaks, adding insulation, and repairing heating and cooling systems.

6. Although federally funded, Virginia's Weatherization Assistance Program is administered by the Virginia Department of Housing and Community Development. There are approximately 15 nonprofit programs (also known as "weatherizers") that provide coverage across the state. Each weatherizer has a particular service area. Residents contact the weatherizer in their area, who will then go through the steps to assess project eligibility and perform an energy audit to ensure the weatherization services will be cost-effective—*i.e.*, a dollar invested in weatherization measures should result in at least a dollar of energy savings. If a household is

eligible and there are cost-effective weatherization measures available, the weatherizer will then implement the weatherization measures.

7. Weatherization measures result in average energy savings of 20 to 30 percent of consumption for the typical low-income household, which in turn results in lower energy bills for these households. Weatherization measures taken under the Weatherization Assistance Program save households an average of $372 per year. On average, weatherization measures also reduce carbon dioxide emissions by over 2.5 metric tons per year per home.

8. Each weatherizer has a contract with the Virginia Department of Housing and Community Development to provide these services. If the services are provided in accordance with the federal regulations, the Virginia Department of Housing and Community Development will reimburse the weatherizer for the work completed using funds from the Weatherization Assistance Program.

9. The Association works closely with the Virginia Department of Housing and Community Development in their administration of both the Weatherization Assistance Program and the Weatherization Deferral Repair Program, as all our members are customers of the Department.

10. We plan and coordinate two peer exchanges each year, bringing agency employees and our members together for a few days of networking events, trainings, and presentations. This year the Virginia Department of Housing and Community Development sponsored a Weatherization Interchange, which was attended by about 250 people and included a session on Virginia's Weatherization Deferral Repair program that the Association helped to plan and implement.

11. We offer a monthly newsletter and help facilitate information sharing between our members, including through our annual membership meeting. We also provide a forum where people can ask about technical issues. Over the years, we have made educational videos for our members and the general public on energy conservation measures and provided training sessions on specific issues.

12. We also serve as a resource for our members in terms of advocating for legislative and policy changes related to energy conservation and making sure our members are informed about what is happening in Richmond.

13. In 2020, the General Assembly passed a law that, among other requirements, directed the state treasury to dedicate 50 percent of the funds from Virginia's sale of carbon allowances to "support low-income energy efficiency programs." Va. Code § 10.1-1330(C)(2). This new funding stream, which is created by the sale of carbon allowances under the RGGI Regulation, was of keen interest to the Association and our members, whose work is specifically dedicated to providing energy conservation measures to low-income households.

14. After this law was passed, the Association performed a statewide survey of weatherization programs in Virginia that found approximately 1 in 5 homes were being turned down for federally funded weatherization services due to underlying repair issues. Certain issues, like a leaking roof or faulty electrical wiring, render otherwise eligible households ineligible for weatherization services until those underlying issues are repaired. These issues cannot be repaired using federal weatherization funds. Since these households are by definition low-income households, the repairs are almost never completed and the homes are ultimately never weatherized. While these households are in desperate need of the energy bill relief that

weatherization would provide, this paradox often puts such relief out of reach. We refer to these households as "deferrals."

15. Deferrals have been a problem for many years under the federal Weatherization Assistance Program. For this reason, the Association and our members advocated for the Virginia Department of Housing and Community Development to use the funding stream from the RGGI Regulation to create a new program to fund repairs to get these homes off the deferral list and weatherized. In response, the Virginia Department of Housing and Community Development created the Weatherization Deferral Repair program. It is funded entirely by the sale of Virginia's carbon allowances under the RGGI Regulation.

16. The Virginia Department of Housing and Community Development has developed guidelines for the types of repairs that can be made through the Weatherization Deferral Repair program. These include repairing leaky roofs or replacing faulty wiring. If eligible repairs are identified, the weatherizer will perform, or hire a subcontractor to perform, the repairs. Once these repairs are complete, the weatherizer is then required to complete the weatherization measures that are eligible under the federal Weatherization Assistance Program.

17. In this way, Virginia's sale of carbon allowances helps more low-income households conserve energy and lower energy bills. Using the funds to expand weatherization in Virginia also furthers a key goal of the RGGI Regulation—to reduce carbon dioxide emissions—since weatherization reduces the associated emissions impact of a home. Moreover, the Association has a direct interest in protecting funding for the Weatherization Deferral Repair program since the program helps to further our mission of providing and promoting energy conservation measures.

18. Our members are qualified to perform work under the Weatherization Deferral Repair program, helping households that were previously ineligible for participation in the federal Weatherization Assistance Program finally get their homes weatherized.

19. Getting this new program up and running has been a heavy lift for the Association and our members. The Association has done significant work training our members on the requirements of the Weatherization Deferral Repair program, including helping our members get qualified for participation in the program by the Virginia Department of Housing and Community Development, finding contractors to perform repairs, and making sure members understand the new administrative requirements and paperwork.

20. The Association, for example, organized and led a peer exchange on the Weatherization Deferral Repair program for our members with officials from the Virginia Department of Housing and Community Development. The Association and our members have spent—and continue to spend—significant effort as we ramp up the Weatherization Deferral Repair program to help serve more low-income households.

21. For example, when only the federal Weatherization Assistance Program was in place, our members typically did not repair roofs. Now, a roof repair may be necessary through the Weatherization Deferral Repair program in order for a home to qualify for the federal Weatherization Assistance Program. Thus, many of members have spent time and resources establishing contractor agreements with local roofers. Forming these contractor agreements has been a significant administrative burden on many of our members, as many roofing contractors have no experience with government-funded programs and the associated administrative requirements.

22. In addition, the Association has spent significant time working with the Virginia Department of Housing and Community Development to improve the administrative processes associated with the Weatherization Deferral Repair program to ensure the program is serving the most low-income households possible.

23. The Association and our members also spent substantial resources advocating at the General Assembly to defend funding for the Weatherization Deferral Repair program. In 2022, for example, several proposals to repeal the 2020 law were put forward. The Association worked to ensure lawmakers understood how the Weatherization Deferral Repair program—which is made possible only through the sale of Virginia's carbon allowances under the RGGI Regulation—helps low-income households across the Commonwealth.

24. In April 2022, the Association conducted a survey of our members to understand the impact of the Weatherization Deferral Repair program on our membership and Virginians. Fifteen of the 16 nonprofit weatherizers serving Virginia at this time provided survey responses. According to the survey, the Weatherization Deferral Repair program supports 54.5 staff positions within our member weatherizers. Seventeen of these staff positions represent new positions established in response to the Weatherization Deferral Repair program funding.

25. The Weatherization Deferral Repair program has also supported approximately 149 subcontractors across the Commonwealth, with 60 of these being new subcontractor agreements formed in direct response to the Weatherization Deferral Repair program. These subcontractors provide good local jobs that support local communities, including by employing roofers, electricians, and HVAC technicians.

26. The survey also showed that weatherizers believe interest in and demand for the services provided by this program will continue to grow as more low-income households look to

reduce their energy bills in the coming years. In the next few months, our members expect to be able to help hundreds of households if the Weatherization Deferral Repair program remains in place. According to another recent study, continued participation in RGGI through at least 2030 could help upgrade up to 130,000 homes in Virginia, through both the Weatherization Deferral Repair Program and the construction of highly efficient affordable housing units. Damian Pitt et al., *Investing in Virginia Through Energy Efficiency: An Analysis of the Impacts of RGGI and the HIEE Program* i (Jan. 2023), https://perma.cc/BQT8-AQ44.

27. The Weatherization Deferral Repair program is also a critical part of ensuring the more than $65 million of federal funding provided by the bipartisan infrastructure law for the Weatherization Assistance Program is deployed to the maximum extent in Virginia. As I have described above, the Weatherization Deferral Repair program provides a way for deferred low-income households to become eligible for participation in the Weatherization Assistance Program. The number of Virginia households eligible for funding under the federal Weatherization Assistance Program will be significantly limited without the Weatherization Deferral Repair program. Moreover, because this federal funding is only available for five years, this change will limit the number of Virginia households that our members will be able to weatherize and limit the amount of federal funding that is spent to help Virginian families.

28. The Association engaged directly in the regulatory process for the proposed repeal of the RGGI Regulation. We co-signed technical comments during the 2022 notice of intended regulatory action public comment period and the 2023 proposed rulemaking comment period. We also submitted individual comments during these public comment periods and sent out action alerts to our members to encourage them to participate in the regulatory process.

29. I understand that the Virginia State Air Pollution Control Board and the Department of Environmental Quality and its Director (collectively, "Agency Respondents"), recently repealed the RGGI Regulation.

30. The Association and our members have a direct and concrete interest in providing and promoting energy conservation measures and will be immediately and directly harmed by the Agency Respondents' unlawful action. Revenues from the auctioning of carbon allowances under the RGGI Regulation is the exclusive source of funding for the Weatherization Deferral Repair program, which, as I have described above, allows low-income households in Virginia to take advantage of the weatherization measures provided by our members. I am concerned that many deferred households will remain unable to take advantage of weatherization services under the Weatherization Assistance Program if the RGGI Regulation is repealed. Elimination of funding for the Weatherization Deferral Repair program will adversely affect the Association and our members, as we will be forced to look for new policy solutions to deal with the deferred household paradox.

31. The Association has prepared educational materials and conducted—and continues to conduct—extensive work to educate our members about energy conservation measures and the requirements of (and opportunities under) the Weatherization Deferral Repair program. As a result, the Association will have to expend additional resources to update our materials and trainings if the RGGI Regulation is repealed.

32. I am also concerned that the Agency Respondents' unlawful action will immediately disrupt our members' businesses. This disruption will directly affect the Association's interests in providing and promoting energy conservation, as any interruption to

construction timelines associated with weatherization services can be detrimental to providing much needed improvements that lower energy costs for low-income household.

33. Our members will likely have on-going or impending repair jobs in their project queues that cannot be completed without the Weatherization Deferral Repair program, and these projects will therefore not become eligible for the federal Weatherization Assistance Program. At a minimum, there will be significant questions about the funding for repair activities which will substantially impede project timelines.

34. If funding for repairs is unavailable—even temporarily—I am concerned that our members may need to lay off certain staff. As stated previously, the Association's members hired approximately 17 staff members in direct response to the Weatherization Deferral Repair program, and these jobs will be put in serious jeopardy.

35. Our members will also likely have to end relationships formed with the subcontractors who have been performing the repair work funded by the Weatherization Deferral Repair program. If the funding goes away, even temporarily, it will be extremely difficult for our members to reestablish relationships with subcontractors if the Agency Respondents' actions are held to be unlawful.

36. I am also very concerned that our members will be forced to limit the number and types of projects they take on if they do not have a stable source of funding for repairs. Numerous low-income households will not be able to be served by our members if the RGGI Regulation is repealed, and this will directly and adversely affect the Association's mission. With the funding stream for the Weatherization Deferral Repair program eliminated, low-income Virginians whose homes could be repaired and subsequently weatherized by our members will instead be saddled with high energy bills and no way to make the necessary repairs that would make their households

eligible for funding for weatherization measures. Homes that are not weatherized are less efficient and utilize more energy, increasing household energy bill and energy costs for all Virginia ratepayers. Additionally, that increased energy use will mean that these less efficient homes will produce more carbon dioxide emissions than if they had been weatherized.

37. Even if the RGGI Regulation is reinstated following litigation, many of these harms to our members will be irreversible. Certain staff will already have been laid off and new staff will have to be trained. In today's competitive labor market, there is little certainty that these positions could be replaced if funding were to come back online, and our members may suffer reputational damage in the interim. Many of the subcontractors hired specifically for Weatherization Deferral Repair program work will terminate their relationships with our members and pursue other work. Members will have to spend significant time and effort searching for new subcontractors and once again train them on the complex associated with government-funded programs.

38. The Association and our members have direct and concrete interests in providing and promoting energy conservation measures, and these interests will be harmed by the repeal of the RGGI Regulation. Additionally, the Association and our members are directly and adversely affected by any action that eliminates funding for the Weatherization Deferral Repair program. A court order undoing the unlawful repeal of the RGGI Regulation will directly promote the mission and interests of the Association, as well as redress the harm to the individual and professional interests of the Association's members.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 2023

William Weitzenfeld

ATTACHMENT C

Declaration of Peter Anderson, Appalachian Voices

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

FILED
CIVIL INTAKE
2023 AUG 21 P 2:29
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS; VIRGINIA INTERFAITH POWER & LIGHT; APPALACHIAN VOICES; and FAITH ALLIANCE FOR CLIMATE SOLUTIONS,	)	
Petitioners,	)	
v.	)	**Case No.:** 2023 12061
VIRGINIA STATE AIR POLLUTION CONTROL BOARD; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, Director of Virginia Department of Environmental Quality,	)	
Respondents.	)	

DECLARATION OF PETER ANDERSON

Pursuant to Va. Code § 8.01-4.3, I, Peter Anderson, declare as follows:

1. I am over the age of 18, competent to make this statement, and have personal knowledge of the facts in this Declaration.

2. I am the Director of State Energy Policy for Appalachian Voices, where I co-direct Appalachian Voices' tri-state Clean Energy Team. Appalachian Voices is a membership-supported organization with over 300 members in Virginia and is a not-for-profit corporation under Section 501(c)(3) of the United States Internal Revenue Code. We have offices in Charlottesville, Virginia and Norton, Virginia, with 19 staff members living and working in the Commonwealth.

3. Appalachian Voices is dedicated to bringing people together to advance a just transition to a generative and equitable clean energy economy in Appalachia. In furtherance of this

mission, Appalachian Voices works to reduce reliance on fossil fuels and reduce greenhouse gas emissions in order to protect the communities in our region. Fossil fuel activities—including production activities, like mining or fracking, and combustion—threaten communities in Appalachia by degrading the environment, negatively impacting public health, and contributing to climate change.

4. In particular, Appalachian Voices advocates against mountain top removal, surface mining, and increased natural gas development in our region. We advocate for alternatives such as cost-effective investments in energy efficiency programs, conservation, and renewable energy resources that also help reduce customer costs. The clean energy investments that Appalachian Voices supports have positive impacts on local communities and economies.

5. As Director of State Energy Policy, I am responsible for developing, implementing, and managing the organization's programs and activities in Virginia, including advocacy at the General Assembly, public education, and community outreach. My work focuses on utility and clean energy policy development and implementation. I also manage certain litigation matters, including our utility advocacy at the Virginia State Corporation Commission.

6. My work as the Director of State Energy Policy requires that I be familiar with the purpose and activities of Appalachian Voices, as well as the related interests and concerns of our members. I have personal knowledge that members of Appalachian Voices have joined the organization because of their desire to reduce reliance on fossil fuels. Our members believe that by reducing reliance on fossil fuels, we can improve the health, environmental, and economic well-being of communities in Appalachia, while addressing climate change.

7. Appalachian Voices advances our organizational goals through a combination of: (i) advocacy for more effective laws and regulations; (ii) public education and outreach; (iii)

community organizing; and (iv) direct participation in regulatory proceedings, litigation, and governmental decision-making processes.

8. At the Virginia General Assembly, Appalachian Voices advocates for reduced reliance on fossil fuels and increased investment in customer- and environmentally-friendly opportunities such as energy efficiency programs. Energy efficiency measures come in many forms, including weatherizing homes, cleaning ducts, updating inefficient appliances, or replacing outdated light bulbs. Energy efficiency programs are one of the most cost-effective ways to serve customers. Investing in energy efficiency measures reduces energy demand, which helps minimize the need to construct new power plants or burn additional fossil fuel. This in turn helps combat climate change and reduce customer costs. The customers who participate in energy efficiency programs benefit directly in the form of reduced electric bills, and all customers benefit from system-wide cost reductions associated with reduced energy needs.

9. Appalachian Voices educates and engages with citizens through blog posts, earned media, community meetings, webinars, and action alerts to members and supporters. We also work with communities to develop renewable energy programs that promote clean energy and economic development, all of which help further our goal of reducing reliance on fossil fuels and reducing greenhouse gas emissions. For example, Appalachian Voices has been a leading organization in the Solar Workgroup of Southwest Virginia. This coalition works to ensure that policy and administrative barriers to solar development are removed, especially for schools, not-for-profit organizations, and low-income individuals. The Solar Workgroup of Southwest Virginia recently succeeded in attracting private investment in commercial-scale solar projects in the Virginia coalfields.

10. In addition, Appalachian Voices regularly participates in utility proceedings before the Virginia State Corporation Commission. For example, we participate as respondents in utility dockets for the approval of energy efficiency programs. As I have explained, Appalachian Voices strongly supports these programs because they lower fossil fuel needs and greenhouse gas emissions while saving customers money. We also regularly participate in the long-term planning processes for electric utilities, where we seek to advance utility investments in cost-effective clean energy options like energy efficiency programs, solar power, and energy storage projects. Appalachian Voices believes that, compared to costly and often unnecessary fossil fuel generation and infrastructure, these options are not only better for the environment and climate but better for customers.

11. Appalachian Voices also engages in regulatory processes to support these objectives. Appalachian Voices has engaged directly in the regulatory process for Virginia's Regulation for Emissions Trading Program, 9 Va. Admin. Code §§ 5-140-6010 to -6440 ("RGGI Regulation"), both as an organization and through our members.

12. In 2016, for example, when Governor McAuliffe issued Executive Order 57 and created the carbon dioxide emissions reduction work group, Appalachian Voices was one of the organizations that presented to the work group on how to achieve carbon dioxide emissions reductions. Appalachian Voices' presentation pushed for Virginia to reduce its emissions by 30 percent by 2030 and recommended the best ways to achieve this target.

13. As an organization, Appalachian Voices participated throughout the regulatory process for the original RGGI regulation—submitting comments in 2017 on the notice of intended regulatory action, submitting a petition during the 2018 public comment period, and co-signing comments during the 2019 public comment period. Appalachian Voices also engaged our

membership during these public comment periods, sending out multiple action alerts to encourage members to submit their own public comments.

14. Appalachian Voices actively supported the Clean Energy and Community Flood Preparedness Act, 2020 Va. Acts ch. 1219 ("2020 RGGI Act"), during the 2020 General Assembly session. Among other things, we highlighted the 2020 RGGI Act's importance in meetings with legislators, public presentations, and action alerts to our members.

15. The RGGI Regulation, a requirement of the 2020 RGGI Act, advances Appalachian Voices' mission, and the interests of our members, in a number of ways.

16. The RGGI Regulation is proven to drive significant reductions in carbon dioxide emissions, meaning fossil fuel-fired power plants will operate less. This plain fact is demonstrated by the Governor's own report on the Regional Greenhouse Gas Initiative. *See* Letter from Michael Rolband, Dir. of DEQ, to Andrew Wheeler, Sec'y of Nat. & Historic Res., at pdf p.3–18 (Mar. 11, 2022), https://perma.cc/J6M2-AWRG ("EO 9 Report"). Between 2010 and 2020, states participating in the regional effort reduced power plant emissions by approximately 30 percent. *See* EO 9 Report at 13, fig.8. Virginia's power plant emissions during that period, however, remained "fairly constant." *Id.* at 10. Although Virginia only began participating in the regional effort in 2021, Virginia power plant emissions in 2021 were significantly lower than in 2020. *See id.* at 12–13. According to emissions data from the U.S. Environmental Protection Agency ("EPA"), this trend continued in 2022 and 2023 with additional power plant emission reductions. EPA, *Clean Markets Air Program Data*, https://perma.cc/3HPY-EJV9 (2020 v. 2022 annual totals); EPA, *Clean Markets Air Program Data*, https://perma.cc/VT49-PDDQ (Q1 and Q2 emissions in 2020, 2021, 2022, and 2023).

17. By driving reductions in power plant emissions, the RGGI Regulation directly advances Appalachian Voices' efforts to reduce Virginia's reliance on fossil fuels. This reduction in fossil fuel use in Virginia in turn aids our efforts to stop mountain top removal, surface mining, and natural gas development in Appalachia.

18. The RGGI Regulation also directly advances our work to protect and improve the health and environment of communities in Appalachia. In the regions of Virginia where we work, electric power generation largely relies on the combustion of fossil fuels. The RGGI Regulation will result in these plants operating less frequently, and thereby reduce harmful pollutants that detrimentally impact the health of local communities. This will also reduce greenhouse gas emissions from these plants, and these emissions are the primary driver of climate change. However, these benefits are not felt in Appalachia alone. Power plants across the Commonwealth will operate less frequently under the RGGI Regulation, spreading the health and environmental benefits of the program statewide.

19. In addition, proceeds from the sale of carbon allowances under the RGGI Regulation are being used to fund programs that further advance our mission and benefit our members and the communities where we work. Fifty percent of revenues from the sale of carbon allowances under the RGGI Regulation are reinvested into energy efficiency measures. These measures should make the RGGI Regulation even more cost-effective, in part by reducing the need for fossil fuel combustion and bringing down the system-wide costs for all customers. Low-income customers, including many Virginians in Appalachian Voices' region, directly participate in these programs which leads to reduced energy bills. This new and significant funding stream for energy efficiency improvements for low-income families furthers Appalachian Voices' mission by ensuring that the transition away from fossil fuels is done responsibly and equitably.

20. Climate change is also resulting in more frequent and intense rainfall events that have led to significant inland flooding, with many such events occurring in Appalachian Voices' region. Numerous localities in our region have received grants from the Community Flood Preparedness Fund, which is funded by 45 percent of the revenues from the sale of carbon allowances under the RGGI Regulation, including the Lenowisco Planning District Commission in Southwest Virginia, Buchanan County, and the cities of Christiansburg and Roanoke. With no other substantial, dedicated source of funding for projects that address flooding, the RGGI Regulation is helping these communities prepare for the future of climate change.

21. During the 2022 and 2023 General Assembly sessions, several proposals were put forward to repeal the 2020 RGGI Act. Appalachian Voices worked hard to oppose these legislative proposals by meeting with lawmakers, putting out action alerts to our members, and educating the public through our website and blog posts. Ultimately, these legislative repeal attempts failed. The General Assembly maintained the 2020 RGGI Act through both sessions.

22. Appalachian Voices has also participated in three cases at the State Corporation Commission concerning a utility's request to recover costs of complying with the RGGI Regulation from customers. During these proceedings—two for Dominion Energy and one for Appalachian Power—Appalachian Voices analyzed the compliance costs at issue, identified potential unnecessary costs, and urged the Commission to disallow these costs and require the utilities to find ways to lower compliance costs moving forward.

23. Additionally, Appalachian Voices participated in the most recent regulatory process attempting to repeal the RGGI Regulation. In my capacity as Director of State Energy Policy, I provided oral comments at all Virginia State Air Pollution Control Board ("Air Pollution Control Board") meetings where the proposal was considered and comments were accepted.

Appalachian Voices also signed on to detailed comments in October 2022 during the public comment period associated with the notice of intended regulatory action, and in March 2023 during the comment period associated with the proposed rulemaking. Appalachian Voices helped to organize a number of events in support of the RGGI Regulation, including rallies at the Department of Environmental Quality's six regional offices that were attended by approximately 250 people, and letter writing parties that were attended by approximately 40 people.

24. In short, Appalachian Voices has spent significant organizational resources working on and promoting the RGGI Regulation. The program is advancing key objectives of Appalachian Voices' mission and is directly benefitting our members and the communities where we work.

25. I understand that the Air Pollution Control Board and the Department of Environmental Quality and its Director (collectively, "Agency Respondents") have repealed the RGGI Regulation. The Agency Respondents' actions have caused immediate and direct harm to Appalachian Voices and the interests of our members—setting our organizational mission back, impacting our employees and members, and harming the communities where we work.

26. As described herein, the RGGI Regulation is a critical tool to help Appalachian Voices advance our mission, and the organization has spent significant resources to support the program and protect it from repeal at the General Assembly. I am concerned that unlawfully repealing the program will wipe out the significant emissions reductions driven by the program and set Virginia back in its efforts to reduce reliance on fossil fuels. Such a result would be contrary to the interests of Appalachian Voices and our members, as it could encourage continued fossil fuel combustion and associated actions like mountain top removal and fracking. With the RGGI Regulation in place, we have been able to redistribute our organizational resources to focus more

on other initiatives to reduce reliance on fossil fuels and decrease greenhouse gas emissions, like facilitating the development of new renewable energy projects. If the RGGI Regulation is repealed, we will have to reallocate significant organizational resources back to addressing this issue at power plants. This could jeopardize our effectiveness in other areas where we have begun to work after the adoption of the RGGI Regulation.

27. I am also deeply concerned that this unlawful action will mean that fossil fuel-fired power plants—which have been running less and less with the RGGI Regulation in place—would begin running more. The increased pollution from these plants will contribute to climate change and be detrimental to the health of our communities, including communities where our members and employees live and work in Appalachia and beyond. Harmful air emissions from power plants have serious public health impacts, including contributing to asthma, premature births, and learning and behavioral problems. In addition, greenhouse gas emissions are a major driver of climate change. Actions that delay or stop reductions in greenhouse gas and other air pollutants from power plants cannot be adequately compensated given the cumulative and extremely serious nature of climate change and public health impacts.

28. I am also aware that fossil fuel costs have fluctuated dramatically in recent years, and that the analysis used to assess the repeal of the RGGI Regulation does not consider the impact of increased use of fossil fuels on customers' energy bills. The costs of using fossil fuels are highly volatile, and customers' bills have seen sharp increases in recent years because of that volatility. I am concerned that the repeal of the RGGI Regulation and continued reliance on fossil fuels will result in increased costs going forward for utility customers across Virginia. This will have a direct and immediate impact on household budgets of Appalachian communities, as well as the household budgets of our employees.

29. Unlawfully repealing the RGGI Regulation will also eliminate a funding stream for the low-income energy efficiency programs that help to further advance Appalachian Voices' mission and provide direct benefits to low-income families in our region. The Agency Respondents' actions will also deprive localities, including many in our region, of desperately needed funding to perform flood resiliency planning and projects.

30. Appalachian Voices and our members have a direct and concrete interest in reducing reliance on fossil fuels in furtherance of our goal to establish a generative and equitable clean energy economy in Appalachia. The RGGI Regulation directly advances this goal, and these direct interests will be harmed as a result of the unlawful repeal of the RGGI Regulation. A court decision undoing the repeal of the RGGI Regulation will redress these concerns.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 2023 ______________________________

Peter Anderson

ATTACHMENT D

Declaration of Faith B. Harris, Virginia Interfaith Power & Light

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

FILED
CIVIL INTAKE
2023 AUG 21 P 2: 29
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS; VIRGINIA INTERFAITH POWER & LIGHT; APPALACHIAN VOICES; and FAITH ALLIANCE FOR CLIMATE SOLUTIONS, *Petitioners,* v. **VIRGINIA STATE AIR POLLUTION CONTROL BOARD; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, Director of Virginia Department of Environmental Quality,** *Respondents.*	)	**Case No.:** 2023 12061

DECLARATION OF FAITH B. HARRIS

Pursuant to Va. Code § 8.01-4.3, I, Faith B. Harris, declare as follows:

1. I am over the age of 18, competent to make this statement, and have personal knowledge of the facts in this Declaration.

2. I am the Executive Director of Virginia Interfaith Power & Light, a position I have held since July 1, 2022.

3. Virginia Interfaith Power & Light is a state affiliate of a national organization, Interfaith Power & Light. Interfaith Power & Light is dedicated to bringing together all faith communities to mobilize a religious response to climate change through energy conservation, energy efficiency, and renewable energy. Virginia Interfaith Power & Light is a program of the Virginia Interfaith Center for Public Policy and is a not-for-profit corporation under Section

501(c)(3) of the United States Internal Revenue Code. We have an office in Richmond, Virginia with ten employees. All of these employees, and our 12 Board members, live in Virginia.

4. I have worked with Virginia Interfaith Power & Light since 2016. Initially, I served as Chair of Virginia Interfaith Power & Light's Steering Committee. In May 2020, I stepped into the role of Interim Co-Director and then held the role of Co-Director from March 2021 until July 1, 2022. I am also an ordained Baptist minister and was an Assistant Professor at Virginia Union University's Samuel DeWitt Proctor School of Theology until January 2022.

5. As a result of my experiences as Executive Director as well as my previous roles as Co-Director and Steering Committee Chair, I am familiar with the purposes and activities of Virginia Interfaith Power & Light, as well as the related interests of our partners and supporters. I help direct and guide Virginia Interfaith Power & Light's work and ensure that our staff have clear strategic direction. As Executive Director, my work includes: managing staff; fundraising; and developing, implementing, and managing the organization's programs and activities in Virginia. These activities include advocacy at the General Assembly, participation in regulatory processes, public education, and community outreach.

6. Virginia Interfaith Power & Light's goals focus on addressing climate change and climate justice. Our mission is to grow healthy and sustainable communities in the Commonwealth by advancing climate and environmental justice through education, advocacy, and worship in faith communities. In pursuit of this mission and goals, Virginia Interfaith Power & Light advocates for climate solutions that are just for everyone, and promotes the fundamental right to drink clean water, breathe clean air, and live in a safe and stable environment.

7. Virginia Interfaith Power & Light has approximately 17,000 active supporters across the Commonwealth. These supporters follow the activities of the organization, respond to action alerts, register for the organization's educational programs, and sometimes contribute funds.

8. Virginia Interfaith Power & Light also engages with more than 250 faith communities and congregations. Ten of these congregations are partner congregations that have committed to support our work and receive training from Virginia Interfaith Power & Light. Our partner congregations participate in regularly scheduled calls, workshops, events, and otherwise support the mission and vision of Virginia Interfaith Power & Light.

9. Promoting environmental justice is a key focus for Virginia Interfaith Power & Light. In fact, we played an important role during the McAuliffe Administration lobbying to establish the Virginia Environmental Justice Council. Virginia Interfaith Power & Light's Board Chair and I are currently members of the Virginia Environmental Justice Council. Virginia Interfaith Power & Light's environmental justice work seeks to ensure that racial minorities, low-income people, and other vulnerable populations are not disproportionately impacted by climate change and other environmental harms. Research has shown that air pollution—including air pollution from power plants—disproportionately impacts historically marginalized communities, including African Americans, in part because industries like power plants are typically located where minorities live. Additionally, the "energy burden," or the percentage of gross household income that is spent on energy costs, for low-income households is three times higher than for non-low-income households, making energy costs an equity issue.

10. Climate change directly impacts Virginia Interfaith Power & Light, its mission, and its supporters. Many faith communities and congregations we work with already experience the detrimental effects of climate change. Greenhouse gas emissions from burning fossil fuels at power

plants are a major cause of climate change. As such, much of Virginia Interfaith Power & Light's work is focused on advocating for reduced reliance on fossil fuels in the Commonwealth to reduce greenhouse gas emissions and promoting solutions to help mitigate the impacts of climate change.

11. For example, Virginia Interfaith Power & Light furthers its mission and goals by providing congregations and faith communities with tools and resources to act on and speak out in favor of climate solutions. We conduct community dialogues and workshops on various climate-related topics, including creation care theology (which teaches the theology of caring for God's creation), solar energy and energy-efficiency programs, citizen training for civic engagement, and environmental justice.

12. One important aspect of this work is helping communities understand how climate change affects and threatens traditional missions of faith communities. For example, faith communities have long emphasized caring for the sick and vulnerable. In Virginia, climate change results in more extreme heat waves and poor air quality days, leading to health problems like heat exhaustion and heat stroke and exacerbating allergies and respiratory illnesses such as asthma. Burning fossil fuels at power plants can also impact community health by releasing harmful pollution, like particulate matter, sulfur dioxide, and other criteria pollutants. Exposure to criteria pollutants has been linked to respiratory and cardiovascular problems. Many of these health problems are particularly pronounced in some of the environmental justice communities where we focus our outreach and organizing. Helping vulnerable communities understand and cope with these climate and emissions-related health problems is an important part of our mission.

13. Climate change is also causing sea level rise and increased flooding throughout Virginia. We work with faith communities and congregations that are already experiencing the impacts of increased flooding. One congregation we work with in Virginia Beach was forced to

move out of Norfolk due to recurring flooding at its church buildings. Other congregations have faced problems with stormwater runoff. One partner congregation in the City of Richmond faced high fees for stormwater runoff from its large parking lot and flat roof. Virginia Interfaith Power & Light helped the congregation put in a rain garden to mitigate the runoff problem.

14. Virginia Interfaith Power & Light has worked to promote climate solutions at the state level to reduce greenhouse gas emissions. When Governor McAuliffe issued Executive Order 57 and established a work group to advise the administration on carbon dioxide reduction opportunities, Virginia Interfaith Power & Light gave a presentation to that work group about the need to reduce dependence on fossil fuels and the impacts of air pollution and climate change on environmental justice communities in the Commonwealth.

15. Virginia Interfaith Power & Light also advocated throughout the process for the original RGGI regulation adopted in 2019. Virginia Interfaith Power & Light participated in the comment periods on the proposed and re-proposed draft regulation by co-signing technical comments and by encouraging grassroots comments from congregations and people of faith across Virginia. We also participated directly, and encouraged our supporters and partner congregations to participate, in the public hearings held by the Department of Environmental Quality on the regulation in or around 2018.

16. In addition to participating in regulatory processes, Virginia Interfaith Power & Light also advocates for legislative solutions to advance its mission. During the 2020 General Assembly session, one of our key priorities was helping to pass the Clean Energy and Community Flood Preparedness Act, 2020 Va. Acts ch. 1219 ("2020 RGGI Act"), which required DEQ to issue the RGGI Regulation at issue in this case (9 Va. Admin. Code §§ 5-140-6010 to -6440) and start participating in RGGI. Among other provisions, this law directs the Commonwealth to use

the annual revenues from the auction of carbon allowances under the RGGI Regulation to support low-income energy efficiency measures and to assist communities with addressing recurrent flooding and sea level rise.

17. Thanks to the 2020 RGGI Act, the sale of carbon allowances under the RGGI Regulation has resulted in hundreds of millions of dollars flowing into programs that help to advance Virginia Interfaith Power & Light's work. Fifty percent of funds from the sale of carbon allowances go towards energy efficiency measures—a climate solution Virginia Interfaith Power & Light has supported in Virginia for years—and, critically, all of these funds go towards projects in low-income communities. Because these funds focus on vulnerable families and communities, the RGGI Regulation directly advances our organization's work on environmental justice. Virginia Interfaith Power & Light has already expended resources working with partner organizations to consider the best uses of the energy efficiency revenues stemming from the RGGI Regulation. We plan to continue this work. Forty-five percent of the funds from the sale of carbon allowances go to communities dealing with the effects of climate change in the form of recurrent flooding and sea level rise under the 2020 RGGI Act. These funds, too, advance our work of helping communities grapple with the effects of climate change.

18. The RGGI Regulation also requires the Department of Environmental Quality to review the impacts of the program on vulnerable and environmental justice communities and increase participation of environmental justice communities during the review process. 9 Va. Admin. Code § 5-140-6440. As explained above, environmental justice is a key aspect of Virginia Interfaith Power & Light's mission, and these provisions directly advance that organizational goal.

19. Since so much of our work focuses on climate change and reducing Virginia's reliance on fossil fuels, the RGGI Regulation should have allowed Virginia Interfaith Power &

Light to spend more time and resources on implementing educational programs and diversifying our climate justice and clean energy advocacy in Virginia. However, during the 2022 and 2023 General Assembly sessions, we spent 50 to 60 percent of our time defending the 2020 RGGI Act and the RGGI Regulation against repeal efforts. At least two full-time staff members devoted their schedules to appealing to legislators and sending related action alerts to supporters. In addition to direct advocacy with legislators, we also participated in rallies in support of the RGGI Regulation. We worked to keep our supporters and partners engaged through twice-weekly briefings.

20. Virginia Interfaith Power & Light has also opposed the regulatory process attempting to repeal the RGGI Regulation. We signed on to technical comments on the notice of intended regulatory action and on the proposed repeal and sent action alerts encouraging grassroots participation in these public comment opportunities. We also testified at every Virginia State Air Pollution Control Board ("Air Pollution Control Board") meeting where the repeal of the RGGI Regulation was considered. Furthermore, Virginia Interfaith Power & Light has held trainings with faith communities to explain and discuss the impact of the RGGI Regulation to help these communities better understand how the program affects them and Virginia. This type of education allows more people to participate in the regulatory process.

21. Over the course of the past two years, 25 to 30 percent of the organization's time has been devoted to defending the RGGI Regulation. As a result, Virginia Interfaith Power & Light has been unable to be proactive on other priority issues, including promoting solar energy for houses of worship and advocating for Virginia to recognize the human right to water.

22. I understand that the Air Pollution Control Board, and the Department of Environmental Quality and its Director, have repealed the RGGI Regulation. This repeal threatens to undo important gains that have been made in reducing greenhouse gas and other harmful

emissions from power plants in Virginia. The repeal of the RGGI Regulation will directly and adversely harm Virginia Interfaith Power & Light, our employees, and our supporters and partners in numerous ways, both in the short- and long-term.

23. As I have described, Virginia Interfaith Power & Light has worked for years to develop and support the RGGI Regulation. We have spent significant organizational resources to secure the regulatory program and the public benefit programs funded by the regulatory program. By targeting one of the largest contributors of climate change pollution in Virginia, the RGGI Regulation has directly aided Virginia Interfaith Power & Light's goal of addressing climate change. I am concerned that climate change pollution from power plants will continue unabated if the RGGI Regulation is repealed. The repeal would immediately eliminate an extremely important tool for reducing greenhouse gas emissions from power plants in Virginia, and it will be impossible to undo any emissions that are released if the illegal repeal of the RGGI Regulation goes into effect.

24. The RGGI Regulation has also resulted in immediate health benefits to communities by reducing criteria pollutants in the air, and this beneficial effect supports and furthers our work to help faith communities deal with health problems associated with the burning fossil fuels. If the RGGI Regulation is repealed, I am concerned about the negative impact that increased air emissions from fossil fuel-burning power plants will have on communities around the Commonwealth, especially environmental justice communities that will continue to be disproportionately impacted by emissions from these plants. Our employees and Board, all of whom live in Virginia, will also feel these impacts. If the RGGI Regulation is repealed and fossil fuel-burning power plants begin running more, these types of detrimental public health impacts

will be felt immediately, and their cumulative nature means the impacts of any emissions that are released cannot be reversed.

25. The repeal of the RGGI Regulation may also result in increased energy costs due to volatility of fossil fuel prices. I am concerned about the impact the repeal of the RGGI Regulation may have on the relative energy burden for low-income communities around the Commonwealth. I understand that this potential impact was not considered in any analysis as part of the regulatory repeal process. Increases in the energy burden for low-income households are concerning, especially since Virginia Interfaith Power & Light is dedicated to eradicating environmental and social injustices to work towards a just, thriving, and equitable world.

26. I am also deeply concerned about the loss of tens of millions of dollars that should be invested in low-income families and communities struggling with climate change if the RGGI Regulation is repealed. Climate change is significantly impacting the communities where we work, and the 2020 RGGI Act provides an important source of funding that helps Virginia Interfaith Power & Light advance its goal of providing equitable climate solutions to congregations and communities throughout the Commonwealth. Without funding provided by the RGGI Regulation, the programs specifically tailored for low-income energy efficiency improvements and projects that deal with recurrent flooding and sea level rise will likely cease to exist.

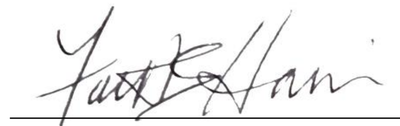
27. If the RGGI Regulation is repealed, the time and resources that Virginia Interfaith Power & Light expended in reliance on the RGGI Regulation will also be wasted. For example, Virginia Interfaith Power & Light works with a Bristol, Virginia community located near a quarry landfill that emits noxious gases. While the City's landfill has ceased accepting waste, we continue to support residents' efforts to see it permanently closed as recommended by the expert panel convened by the Department of Environmental Quality. Emissions from the landfill are expected

to continue for several more years, making mitigating efforts for residents necessary into the foreseeable future. We have spent significant time and resources trying to mitigate the problem for area residents, including by trying to get funding for air purifiers for homes in the community. We have been working as part of a coalition to increase public participation on this issue. Energy efficiency funds from allowance sales under the RGGI Regulation could provide a key source of funding to help this community improve their homes' insulation to keep out fumes from the landfill. These funds can also spur a much-needed increase in providers able to do the work. Currently, there is only one provider in the Bristol area with capacity. If the funding for energy efficiency work from the RGGI Regulation disappears, our related advocacy will have been wasted, and Bristol residents will continue to breathe noxious gases inside their homes.

28. In sum, Virginia Interfaith Power & Light has a direct and concrete interest in advancing climate and environmental justice solutions, and the repeal of the RGGI Regulation will directly and significantly harm these interests. A court decision declaring the repeal of the RGGI Regulation as unlawful and null and void, will protect and redress these interests.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 2023



Faith B. Harris

ATTACHMENT E

Declaration of Andrea McGimsey, Faith Alliance for Climate Solutions

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

FILED
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2023 AUG 21 P 2:29
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS; VIRGINIA INTERFAITH POWER & LIGHT; APPALACHIAN VOICES; and FAITH ALLIANCE FOR CLIMATE SOLUTIONS,	)	
Petitioners,	)	
v.	)	**Case No.:** 2023 12061
VIRGINIA STATE AIR POLLUTION CONTROL BOARD; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; and MICHAEL ROLBAND, Director of Virginia Department of Environmental Quality,	)	
Respondents.	)	

DECLARATION OF ANDREA McGIMSEY

Pursuant to Va. Code § 8.01-4.3, I, Andrea McGimsey, declare as follows:

1. I am over the age of 18, competent to make this statement, and have personal knowledge of the facts in this Declaration.

2. I am the Executive Director of Faith Alliance for Climate Solutions. Faith Alliance for Climate Solutions is a not-for-profit corporation under Section 501(c)(3) of the United States Internal Revenue Code. Our principal office is in Reston, Virginia, in Fairfax County, and we regularly conduct affairs and business activities in Fairfax County. All of our employees and Board members, and many of our volunteers, live in Virginia.

3. Faith Alliance for Climate Solutions is designed to mobilize and connect diverse faith communities to develop local solutions to the climate crisis. Our network includes over 200

faith communities and over 2,800 people of faith in Virginia, with a primary policy focus on Fairfax County.

4. I have been the Executive Director since August 2021. A largely volunteer-run organization, I was the first full-time employee of Faith Alliance for Climate Solutions. As Executive Director, I develop, implement, and manage the organization's activities, manage staff, support volunteers, and fundraise. This role means that I am responsible for furthering Faith Alliance for Climate Solutions' mission and that I am familiar with the interests for our network and supporters.

5. Prior to serving as Executive Director of Faith Alliance for Climate Solutions, I was the Senior Director of Global Warming Solutions at Environment America for four years. In this role, I led campaigns to reduce greenhouse gas emissions and worked on issues related to the Regional Greenhouse Gas Initiative in multiple states.

6. Faith Alliance for Climate Solutions' work is organized around four goals: (i) to sound an ethical and spiritual call to address climate change; (ii) to encourage moral climate policies from a nonpartisan perspective; (iii) to enable faith communities to do good works that protect our planet and its people; and (iv) to empower faith communities to become champions of change.

7. In pursuit of these goals, Faith Alliance for Climate Solutions advocates for the implementation of laws, regulations, and policies that will address climate change, including actions that will reduce greenhouse gas emissions and measures that will mitigate the impacts of climate change on communities. As part of this work, Faith Alliance for Climate Solutions amplifies the voices of faith leaders and members, sends action alerts to our network, drafts comment letters and media content, hosts events, and organizes teams of volunteers around key

climate issues. We also work at the local and faith community level to promote climate education activities, like workshops or movie screenings, and directly implement climate solutions, like the use of solar panels or transitioning to reusable dishware, at faith campuses around Virginia.

8. In addition to work undertaken by employees, Faith Alliance for Climate Solutions has six volunteer-run "hubs" in Fairfax County, Loudoun County, Arlington County, the City of Alexandria, the northern Shenandoah Valley, and the central Shenandoah Valley. These hubs prioritize local organizing for climate justice and solutions and lead our outreach work with local officials. We also have organization-wide Advocacy Teams—including one focused on energy and justice—that provide resources to our network about specific climate topics through webinars, events, and meetings with elected officials. One of our key campaigns is focused on promoting local policies that will reduce localities' greenhouse gas emissions in order to reach carbon neutrality by 2050.

9. Reducing greenhouse gas emissions in Virginia is critical to furthering our mission, and it is a main focus of Faith Alliance for Climate Solutions' advocacy work. Greenhouse gas emissions are the primary driver of climate change, and carbon dioxide is the most prevalent greenhouse gas. Fossil fuel-burning power plants are a major source of greenhouse gas emissions. Virginians, including our faith communities, are already facing the effects of climate change like impacts from more extreme storms and flooding, sea level rise, and heat waves. Climate change is the moral and urgent challenge of our time, and Faith Alliance for Climate Solutions believes we, as people of faith, have a responsibility to protect people and nature by addressing it.

10. Additionally, fossil fuel power plants also emit other dangerous pollutants that harm communities, like nitrogen oxides, particulate matter, and sulfur dioxide. These types of air pollutants can have significant public health impacts. They have been linked to cardiovascular and

respiratory issues and have been shown to disproportionately impact communities of color and low-income communities. Reducing emissions from power plants not only helps to address climate change, but it also helps to address environmental injustice.

11. Virginia's Regulation for Emissions Trading Program, 9 Va. Admin. Code §§ 5-140-6010 to -6440 ("RGGI Regulation"), which requires Virginia to sell carbon dioxide allowances as part of the Regional Greenhouse Gas Initiative, has put Virginia on a strong path toward addressing its contribution to climate change by reducing emissions from power plants. Even though the RGGI Regulation has only been in place since 2021, power plant emissions in Virginia have substantially declined during the first two years of participation. *See* EPA, *Clean Markets Air Program Data*, https://perma.cc/3HPY-EJV9 (2020 v. 2022 annual totals). These reductions have continued in 2023. EPA, *Clean Markets Air Program Data*, https://perma.cc/VT49-PDDQ (2020 v. 2023 Q1 and Q2 totals).

12. Faith Alliance for Climate Solutions has supported the RGGI Regulation from the beginning, including through direct advocacy with local legislators in 2019 to oppose a budget provision that would have prevented Virginia from implementing a carbon allowance trading program.

13. Faith Alliance for Climate Solutions also advocated for legislation that puts funds generated by the RGGI Regulation toward energy efficiency and flood resilience measures. We actively supported the Clean Energy and Community Flood Preparedness Act, 2020 Va. Acts ch. 1219, which directs 45 percent of revenues from the auction of carbon allowances to the Community Flood Preparedness Fund (the "Flood Fund") and 50 percent of revenues to energy efficiency projects in low-income communities.

14. These funds support important measures that help communities to mitigate and adapt to the impacts of climate change. For example, the Virginia Coastal Resilience Master Plan has found that annualized flood damages in the Commonwealth's coastal region are expected to increase from $400 million to $5.1 billion over the next 60 years. Funding from the Flood Fund can help communities prepare for this future.

15. Energy efficiency measures funded by the RGGI Regulation can also help to reduce greenhouse gas emissions even more by reducing energy demand and the need for fossil fuel power generation. Importantly, this funding is directed specifically to low-income families, and these types of projects help households save money—energy efficiency repairs have cut Virginians' energy bills by an average of 20 percent. Faith Alliance for Climate Solutions has advocated at the local level, including in Fairfax County, to urge localities to engage in stakeholder processes related to the development energy efficiency programs funded by the RGGI Regulation, and to apply for funding to improve energy efficiency in government-owned and/or -operated affordable housing.

16. Faith Alliance for Climate Solutions has worked to raise public awareness about the benefits of the RGGI Regulation and associated funding. For example, we organized and led a rally outside the Governor's housing conference to highlight energy efficiency issues and the benefits of the funding provided by the RGGI Regulation. Two of the pastors in our network also spoke at a rally we co-sponsored in support of the RGGI Regulation outside of the Virginia Department of Environmental Quality's Woodbridge office. We also have held forums with panelists to discuss the RGGI Regulation.

17. Because the RGGI Regulation is an important tool for addressing both the cause and the impacts of climate change in Virginia, we have spent significant resources defending the

RGGI Regulation in the General Assembly. During the 2022 and 2023 General Assembly sessions, we engaged in direct advocacy with legislators from our region, submitted letters to the editors to news outlets around our region, participated in interviews about the RGGI Regulation, and issued action alerts to our network about the legislative process.

18. In addition, Faith Alliance for Climate Solutions has been involved in defending the RGGI Regulation against illegal regulatory repeal. We submitted organizational letters in opposition to repeal of the program during the public comment periods associated with the notice of intended regulatory action and proposed rulemaking. We also encouraged our network to submit individual comments through action alerts and spearheaded a letter to the Virginia State Air Pollution Control Board ("Air Pollution Control Board") signed by 24 clergy members associated with our organization.

19. In my capacity as Executive Director, I also submitted several letters to the editor and op-eds to news outlets to explain the benefits of retaining the RGGI Regulation and to oppose the proposed repeal of the Program. At the March 2023 Air Pollution Control Board meeting, I and several Faith Alliance for Climate Solutions faith community members testified in support of the RGGI Regulation. At the June 2023 Air Pollution Control Board meeting, Scott Peterson, Faith Alliance for Climate Solutions' Vice Chair and Advocacy Committee Chair, provided oral testimony asking the Air Pollution Control Board to vote against repealing the RGGI Regulation.

20. I understand that the Air Pollution Control Board and the Department of Environmental Quality and its Director, have repealed Virginia's RGGI Regulation. This repeal would directly and concretely harm Faith Alliance for Climate Solutions, its network, and its supporters in many ways.

21. As I have described above, Faith Alliance for Climate Solutions is working towards solving the climate crisis, and one of our main initiatives involves promoting policies that will move localities towards carbon neutrality by 2050. The RGGI Regulation is one of the best and most efficient ways to cut greenhouse gas emissions because it addresses this pollution at one of its main sources—fossil fuel power plants. I am concerned that if the RGGI Regulation is repealed, greenhouse gases will continue to be emitted from these plants uncontrolled and one of the most important tools available to help eliminate climate changing pollution sources in Virginia will be gone. And since this type of pollution is controlled at the state level, the localities where we and our faith communities live and work will be unable to reduce these emissions through local policies. A repeal of the RGGI Regulation therefore directly affects our efforts to reduce greenhouse gas emissions to address the climate crisis.

22. The RGGI Regulation also helps to reduce other harmful air emissions from these plants, which improves public health in our communities. I am very concerned about opening the door to more emissions from power plants. Faith Alliance for Climate Solutions works with faith communities near plants subject to the RGGI Regulation. For example, the Unitarian Universalist Church of Loudoun is located approximately five miles from the Potomac Energy Center, a natural gas power plant that releases about 2 million tons of carbon dioxide annually. *See* EPA, *GHG Facility Details – Potomac Energy Center*, https://perma.cc/G3QT-3Z28. Additionally, as I have said, all of our employees and Board members, and many of our volunteers, live in Virginia. I am concerned that the illegal repeal of the RGGI Regulation will result in increased greenhouse gas and other emissions from these plants, which will directly, and negatively, impact the air quality in our communities. These impacts will be immediate and irreparable, given the cumulative nature of emissions that lead to climate change and result in public health impacts. Emissions released by

fossil fuel power plants cannot be undone, and our communities will suffer from the impacts of increased air pollution.

23. This unlawful action would also eliminate the source of funding for low-income energy efficiency programs and the Flood Fund—two programs that are incredibly important in providing communities with resources to prepare for and adapt to climate change and decreasing overall energy demand, which will lead to even greater reduction in greenhouse gas emissions. This loss would be detrimental to our mission to address climate change and its impacts at the local level, and it would harm communities around the Commonwealth.

24. Since reducing emissions from fossil fuel power plants is such an important part of eliminating pollution that drives climate change and results in detrimental impacts to communities and the environment, Faith Alliance for Climate Solutions has put substantial time and resources towards advocating for and defending the RGGI Regulation. As a largely volunteer-run organization, this has meant that Faith Alliance for Climate Solutions has had limited bandwidth to dedicate to other important areas of advocacy and education central to our mission. If the unlawful repeal of the RGGI Regulation is allowed to stand, all these efforts will have been for naught.

25. Faith Alliance for Climate Solutions has a direct and concrete interest in addressing the climate crisis, and this interest will be harmed as a result of the repeal of the RGGI Regulation. It will be harder for Faith Alliance for Climate Solutions to advance its goals, as we will have to shift to advocating for policies that are less effective and efficient in reducing greenhouse gas emissions because they tackle this pollution further from its source. A court decision undoing the repeal of the RGGI Regulation will redress these concerns.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 21, 2023

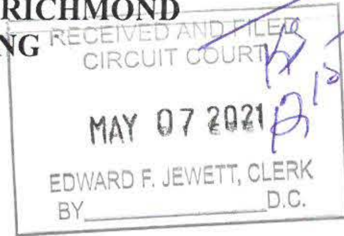
Andrea McGimsey

ATTACHMENT F

Respondents' Brief in Opposition, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918
(Rich. Cir. Ct. May 7, 2021)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING



VIRGINIA MANUFACTURERS ASSOCIATION, Petitioner, v. VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, ET AL., Respondents.	:	Case No.: CL20-4918 Hon. Judge Beverly W. Snukals

<u>Respondents' Brief in Opposition</u>

Respondents, the Virginia Department of Environmental Quality ("DEQ"), the State Air Pollution Control Board, and Director David Paylor, the Director of DEQ, by counsel, respectfully submit this brief in Opposition to the Petitioner's appeal.

This case is important, but not complex. The General Assembly passed legislation mandating that DEQ amend regulations for the CO_2 Budget Trading Program. The legislation expressly exempted the amended regulations from the Virginia Administrative Process Act ("APA"). DEQ followed the General Assembly's mandate and promulgated amended regulations.

Petitioner, Virginia Manufacturers Association ("VMA") has appealed the amended regulations but not challenged the legislation that required them. As discussed below, VMA's arguments are incorrect: the amended regulations follow the General Assembly's mandate, indeed at times, incorporating *verbatim* the language from the legislation; the amended regulations are exempt from the APA; they are not vague; and there is no illegal tax on electricity ratepayers. VMA is asking this Court to set aside a program that controls CO_2 pollution and provides millions of dollars to help low-income households and vulnerable shoreline communities. This Court should not be persuaded to undermine these efforts in contravention of the law.

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Relevant Factual History

The relevant facts in this case are not in dispute.[1] As discussed below, before 2020, DEQ had a CO_2 budget trading program that was limited to utilizing a conditional allowance / consignment model. In 2020, the General Assembly passed legislation that mandated DEQ to implement a CO_2 direct auction program and then to sell all CO_2 allowances through such auctions. The General Assembly further required that DEQ implement these changes by amending its existing regulations and then expressly exempted those amendments from the APA. It is those Amended Regulations that VMA challenges in this case.

I. The Act mandated that DEQ establish a CO_2 auction trading program and then sell 100% of Virginia's CO_2 allowances through that program.

A. Before the Act, Virginia could only participate in CO_2 auctions on a limited, "consignment" basis.

The State Air Pollution Control Board, with the support of DEQ, adopted regulations establishing a CO_2 Budget Trading Program on April 19, 2019 and published those regulations on May 27, 2019 (hereafter referred to as the "Original Regulations"). VMA Pet. at ¶ 35.[2]

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[1] VMA filed over 450 pages of attachments to its Brief in Support; most of these documents were not included in the Certified Agency Record. VMA never objected to the Certified Agency Record nor moved to supplement the record. Thus, this Court need not consider any of these documents as they are not part of the record in this case. *See* Va. Sup. Ct. R. 2A:3(c) (2020). Moreover, most of these documents are irrelevant to the issue in this case, which is whether DEQ's Amended Regulations are *lawful.* VMA's attachments address whether it is a good *policy* to establish a CO_2 trading program. *See, e.g.*, VMA Attachment E (2017 article on RGGI); Attachment J (cost study of Virginia's CO_2 trading program). The General Assembly answered that policy question in 2020. Thus, these attachments are largely irrelevant to this case.

[2] The dates of adoption and publication for the Original Regulations are significant because, as discussed below, it is by those dates that the General Assembly refers to the Original Regulations in the Clean Energy and Community Flood Preparedness Act.

Prior to adoption, the Original Regulations went through a full notice and comment process pursuant to the APA. *Id.* at ¶ 33. VMA participated in that process and submitted "extensive written comments." *Id.*

The Original Regulations were limited because DEQ lacked legislative authority to either directly sell CO_2 allowances in an auction or spend or receive proceeds from an auction. *Id.* at ¶ 31. The Original Regulations worked around these limitations by utilizing a consignment model. Under the Original Regulations, DEQ granted "conditional allowances" to power plants and other CO_2 sources, those sources then "consigned" those allowances over to the CO_2 auction program where they were sold at a consignment auction. *Id.* At the same time, CO_2 sources were required to obtain CO_2 allowances that equaled their CO_2 emissions. *Id.* In this way, DEQ neither participated directly in the auctions nor spent or received revenue from the auction. *Id.*

B. The General Assembly mandated that DEQ establish a CO_2 direct auction and "sell 100 percent" of all annual CO_2 allowances in the auction.

In the 2020 legislative session, the General Assembly passed two historic pieces of environmental legislation. The first was the Virginia Clean Economy Act, which is not subject to this lawsuit. The second was the Virginia Clean Energy and Community Flood Preparedness Act (hereafter referred to as the "Act.").[3]

[3] Both the media and trade publications immediately recognized the significance of both pieces of legislation. As one commenter described the importance of the Act:

> The Act directs DEQ to revise the Rule without notice and comment through the Virginia Administrative Process Act by incorporating the statute into the existing Rule. Now, Virginia will be sprinting toward RGGI membership by the end of this year. Direct RGGI membership is a significant shift from the prior consignment membership….

Liz Williamson, *Virginia Regional Carbon Trading: Ready, Set, Join RGGI!*, JD Supra, July 15, 2020) (available at https://www.jdsupra.com/legalnews/virginia-regional-carbon-trading-ready-77904/ (last visited Apr. 14, 2021). *See also Virginia Enacts Aggressive Clean Energy Laws*, The National Law Review (Apr. 17, 2020) (available at

The Act created a new Virginia Code provision: Section 10.1-1330, which requires DEQ to take two actions. First, Section 1330.B. authorizes the Director of DEQ to "establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program and this article." Va. Code § 10.1-1330.B (2020). Second, the section mandates that the "Director shall seek to sell 100 percent of all allowances issued each year through the allowance auction." *Id.*[4]

C. The Act explicitly exempted the Amended Regulations from the APA.

Subsection A of Section 1330 of the Act requires DEQ to incorporate the provisions of the Act "into the final regulation adopted by the Board on April 19, 2019, and published in the Virginia Register on May 27, 2019." Va. Code § 10.1-1330.A. The dates referenced in this provision refer to the dates of adoption and publication of the Original Regulations; *i.e.*, the regulations that developed the conditional allowance / consignment model described above.

Section 1330.A. then states: "Such incorporation by the Department shall be exempt from the provisions of the Virginia Administrative Process Act (§ 2.2-4000 *et seq*.)." *Id.*

Thus, Section 1330 is clear. Whereas before, DEQ was not allowed to directly participate in a CO_2 auction and could not directly receive proceeds from auction sales, now:

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https://www.natlawreview.com/article/virginia-enacts-aggressive-clean-energy-laws (last visited Apr. 14, 2021); *Virginia Gov. Ralph Northam signs clean energy legislation*, WJHL News (Apr. 12, 2020) (available at https://www.wjhl.com/news/regional/virginia/virginia-gov-ralph-northam-signs-clean-energy-legislation/ (last visited Apr. 14, 2021).

[4] The legislation also contains several provisions that are not directly relevant to this case, but which demonstrate the General Assembly's purpose and intent. For example, the General Assembly revised Virginia Code 10.1-603.25 by converting the Virginia Shoreline Resiliency Fund into the Virginia Community Flood Preparedness Fund. Pursuant to the revisions, the fund "shall be used solely for the purpose of enhancing flood prevention or protection and coastal resilience as required by this article." Va. Code § 10.1-603.25.B. The General Assembly also required that "[n]o less than 25 percent of the moneys disbursed from the Fund each year shall be used for projects in low-income geographic areas." Va. Code § 10.1-603.25.E.

- DEQ must implement and manage a CO_2 auction program;
- DEQ must sell 100% of all CO_2 allowances through an allowance auction; and
- DEQ must do these tasks by amending the Original Regulations; however, those amendments are exempt from the APA.

II. DEQ followed the Act's mandate by revising its CO_2 Trading Regulations so that Virginia could directly participate in CO_2 auctions.

Consistent with the Act, on July 10, 2020, DEQ issued amendments to the Original Regulations (hereafter referred to as the "Amended Regulations"). VMA Pet. at ¶ 43. These Amended Regulations comprise the majority of the Certified Agency Record that DEQ filed in this case. Specifically, the Amended Regulations begin on the third page of the Certified Agency Record and consist of 57 pages of regulations that are now codified as 9 VAC5-140-6010 through 9 VAC5-140-6440. The Amended Regulations, as filed as part of the Certified Agency Record in this case, are paginated 1 through 57, with the page number appearing on the top right corner of each page. For ease of reference, this Opposition Brief will refer to this pagination system when citing to the Amended Regulations.

The Amended Regulations, as filed in this case, show both the Original Regulations and the amendments. The Original Regulations appear as regular typeface. Where DEQ deleted words, those words appear with a line through them. Where DEQ added words, those words are underlined. *See, e.g.*, Amended Regulations at 2 ("Allocate" or "allocation" means the determination by the department of the number of ~~conditional~~ CO_2 allowances recorded in the ~~conditional~~ allowance account of a CO_2 budget unit…"). In other words, the Amended Regulations DEQ has filed with this Court are a blackline, edited version of the Original Regulations that show both the Original Regulations and the Amended Regulations.

As the Amended Regulations demonstrate, most of the Original Regulations remain unchanged. For example, two of the regulations that VMA challenge as impermissibly vague, 9 VAC5-140-6050.C and 9 VAC5-140-6260 (*see* VMA Brief at 22), are unchanged and only contain minor edits that update dates and remove obsolete terminology. *See* Amended Regulations at 16 (showing the only amendments to 9 VAC5-140-6050.C are to remove the phrase "initial control period" and to update dates); at 39 – 43 (showing minimal changes to 9 VAC5-140-6260).

Most of the changes in the Amended Regulations, as required by the Act, change the CO_2 trading program from a conditional allowance / consignment model to a direct auction model. For example, the Amended Regulations add language stating that CO_2 allowances would now be sold "by the Department or its agent" through an auction. *Id.* at 5. The Amended Regulation also delete references to conditional allowances and consignment auctions. *Id.* at 6-7; 28; 32-33; 56-57.[5]

III. Virginia received $43 million in net revenue from its first auction.

On March 5, 2021, Virginia participated in its first quarterly auction of CO_2 allowances. As reported, Virginia earned more than $43 million in net proceeds from the auction.[6] Pursuant to the Act, 45% of this revenue will assist localities affected by flooding and sea level rise. Va. Code § 10.1-1330.C. 50% of this revenue will be spent on low-income energy efficiency programs. *Id.* The next RGGI auction is scheduled for June 2, 2021.[7]

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[5] The Amended Regulations also add to the definition of the term "life-of-the-unit contractual arrangement" and then have a new regulation specifying the parties' obligations for CO_2 allowances under such an arrangement. *Id.* at 9-10; 45. These new regulations were explicitly required by Section 1331 of the Act. *See* Va. Code § 10.1-1331.

[6] *See* Sarah Vogelsong, *Virginia Nets More than $43 Million in First Carbon Allowance Auction*, The Virginia Mercury (Mar. 9, 2021) (available at https://www.virginiamercury.com/blog-va/virginia-nets-more-than-43-million-in-first-carbon-allowance-auction/) (last visited Apr. 13, 2021).

[7] https://www.rggi.org/auctions/upcoming-auctions.

Standard of Review and Burden of Proof

I. Standard of review when comparing regulations to enabling legislation.

At its core, VMA's Brief argues that the Amended Regulations are inconsistent with the Act. As the Virginia Court of Appeals has explained: "[w]hen [a] [c]ourt reviews whether a regulation is inconsistent with its enabling legislation, it must take into account the text as well as the context in the underlying statute, viewing it as a symmetrical and coherent regulatory scheme." *Karr v. Dep't of Envtl. Quality*, 66 Va. App. 507, 526 (2016) (internal citations and quotation marks omitted). Further, a court "is duty bound to interpret the several parts of a statute as a consistent and harmonious whole so as to effectuate the legislative goal." *Id.* at 527 (citing *Virginia Elec. & Power Co. v. Citizens for Safe Power*, 222 Va. 866, 869 (1981)).

Finally, although "pure questions of statutory interpretation" are subject to *de novo* review, if the statute in question "falls within the agency's specialized competence, the agency decision is entitled to special weight and will be overturned only if it constitutes a clear abuse of the delegated discretion." *Dorman v. Commonwealth*, 2019 Va. App. LEXIS 209, *6 (2019) (unpublished) (internal citations omitted); *see also Thormac, LLC v. Dep't of Alcoholic Bev. Control*, 68 Va. App. 216, 223 (Va. Ct. App. 2017) ("where the question involves an interpretation which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's decision is entitled to special weight in the court.").

II. Burden of proof

The APA places the burden upon VMA to demonstrate an error of law. Va. Code § 2.2-4027. "[T]he agency action is presumed valid on review and the burden rests upon the party complaining to overcome this presumption." *Strawbridge v. Cnty. of Chesterfield*, 23 Va. App. 493, 503 (1996).

Argument

VMA's Brief asserts four arguments for why the Amended Regulations should be declared void. These four arguments relate to VMA's six assignments of error that it has listed in its Petition for Appeal. For ease of reference, this Opposition Brief will address each of VMA's arguments in the order they were presented.

I. The Amended Regulations satisfy the Act's mandate of implementing a "market-based trading program consistent with the RGGI program" and of selling "100 percent of all allowances each year through the allowance auction."

VMA's first argument is that DEQ violated the Act when it issued the Amended Regulations. VMA Brief at 17. As discussed below, this argument fails because DEQ satisfied the Act's mandate that it establish a CO_2 auction program and then sell all CO_2 allowances through those auctions. Furthermore, VMA's assertion that DEQ "failed to incorporate" certain portions of the Act fails because those portions of the Act either had no relevance to the CO_2 auction program or were implemented in the Amended Regulations *verbatim*.

A. DEQ's Amended Regulations follow the General Assembly's Mandate.

Section 1330.B of the Act (codified at Virginia Code Section 10.1-1330.B) contains two sentences, each of which directs DEQ to take certain action. First, the Act authorizes DEQ to "establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program and this article." Va. Code § 10.1330.B. Second, the Director of DEQ "shall seek to sell 100 percent of all allowances issued each year through the allowance auction." *Id.*

DEQ did exactly as the General Assembly instructed. Through the Amended Regulations, DEQ struck all language referencing the former consignment model and replaced it with the direct auction model the Act requires. For example, the Amended Regulations:

- Added language stating that CO_2 allowances would now be sold "by the Department or its agent" through a direct auction (Amended Regulations at 5);
- Deleted reference to conditional allowances and consignment auctions (*id.* at 6 – 7);
- Deleted "conditional allowances" and replaced them with "CO_2 allowances" (*id.* at 28);
- Repealed the methodology for conditional allocations (*id.* at 32 – 33); and
- Repealed the consignment auctions (*id.* at 56 – 57).

VMA does not, and cannot, dispute that the Amended Regulations repealed consignment auctions, removed references to conditional allowances, and removed other transitional provisions that are not compatible with a direct auction program. *See* VMA Brief at 17 (alleging that the Amended Regulations "*implement*" the Act but still violate it) (emphasis in original). Simply put, the Act mandated that DEQ take two significant steps: implement and manage a direct auction CO_2 program, and sell 100% of Virginia's CO_2 allowances in that program. Through the Amended Regulations, DEQ has done exactly what the General Assembly mandated. DEQ did not violate the Act, it followed it.

B. VMA's argument that DEQ "failed to incorporate" certain provisions of the Act fails because those provisions are either unrelated to DEQ's mandate or explicitly incorporated in the Amended Regulations.

Rather than argue that the Amended Regulations fail to satisfy the Act's mandate, VMA argues that DEQ did not go far enough and that, allegedly, DEQ "failed to incorporate" certain provisions of the Act. VMA Brief at 17. As discussed below, VMA is incorrect.

1. VMA's allegation that DEQ failed to incorporate the definitions section of the Act is both illogical, because that section did not require DEQ to do anything, and undermined by the 13 pages of definitions in the Amended Regulations.

First, VMA alleges that DEQ "failed to incorporate" Section 10.1-1329 of the Act. VMA Brief at 17. Section 1329 is titled "Definitions" and is a list of nine defined terms that are used in

the Act, including "DMME," "Energy efficiency program, and "Fund." Va. Code § 10.1-1329. ("As used in this article, unless the context requires a different meaning: [followed by nine defined terms]").

VMA's argument seems to be that DEQ was required to define terms such as "DMME" or "Fund" in the Amended Regulations. There are two problems with this argument. First, definitions prescribed by the General Assembly are already incorporated into the Board's regulations. The very first section in the Board's Regulations, 9 VAC5-10-10, provides that "[u]nless specifically defined in the Virginia Air Pollution Control Law . . . terms used [in the Air Board's regulations] shall have the meanings given them by 9VAC5-170-20, or commonly ascribed to them by recognized authorities." 9 VAC5-10-10(B). Thus, the regulations, by operation of 9 VAC5-10-10(B), defer to and adopt definitions provided by the General Assembly. *Id.* DEQ has already incorporated the definitions contained in the Act by virtue of existing regulations. Repeating this incorporation in the Amended Regulations would be redundant.

Second, the fact that the General Assembly included a list of defined terms in the Act does not require DEQ to do anything in its Amended Regulations. Indeed, those Amended Regulations contain 13 pages of definitions, many of which were unchanged by the amendments. *See* Amended Regulations at 1-13. DEQ did not "fail to incorporate" Section 10.1-1329 because there was nothing in that section for DEQ to incorporate. And, VMA has not shown a single instance where the definitions in the Amended Regulations contradict or undermine the Act's defined terms. Thus, VMA is incorrect: DEQ did not violate the Act by "failing to incorporate" the definitions listed in the Act. The Board's existing regulations already incorporate by reference definitions passed by the General Assembly, the Original Regulations already had a lengthy definitions section, and DEQ amended those definitions where necessary to comply with the Act. *Id.*

2. VMA's allegation that DEQ failed to incorporate Section 1331 is incorrect: The Amended Regulations contain a nearly *verbatim* inclusion of that section.

Second, VMA alleges that DEQ "failed to incorporate" Section 10.1-1331. *See* VMA Brief at 17 (listing Section 10.1-1331 as one of the provisions DEQ "failed to incorporate") and at 18 (alleging that the Amended Regulations "also has not incorporated . . . Section 1331.").

This argument is demonstrably false: not only do the Amended Regulations incorporate this section, they do so nearly *verbatim*. Section 1331 of the Act (codified at Virginia Code Section 10.1-1331) is titled "Energy conversion or energy tolling agreements." The section states that if Virginia becomes a "full participant in RGGI," then two items must be included in DEQ's Amended Regulations. Va. Code § 10.1-1331. First, the Amended Regulations must include within its definition of the phrase "life-of-the-unit contractual arrangement" the following phrase: "any energy conversion or energy tolling agreement that has a primary term of 20 years or more and pursuant to which the purchaser is required to deliver fuel to the CO2 budget source or CO2 budget unit and is entitled to receive all of the nameplate capacity" from that source. *Id.* Second, the Act requires the Amended Regulations include a provision stating that under such an agreement, the purchaser is responsible for acquiring the associated CO_2 allowances. *Id.*[8]

The Amended Regulations include both requirements. The Original Regulations already contained a definition of "life-of-the-unit contractual arrangement." *See* Amended Regulations at 9-10 (showing the original definition in subsection "a"). Thus, the Amended Regulations added

[8] A "life-of-the-unit contractual arrangement" in the electricity utility industry is essentially a dedicated power plant: a situation where a power plant commits, by long-term contract, to provide all or most of its produced electricity to a single purchaser. *See, e.g.* 42 U.S.C. § 7651a(27) (2020) (defining the term under federal law). Section 1331 of the Act clarifies that under such a contractual arrangement, it is the power purchaser who must obtain the CO_2 allowances. *See* Va. Code § 10.1-1331 ("any purchaser under an energy conversion or energy tolling agreement shall be responsible for acquiring any CO2 allowances"); Amended Regulations at 45 (adding a new section, 9 VAC5-140-6325, that includes this same clarification).

the word “either” to the definition, made the original definition subsection “a.” and then added a new “b.” *Id.* Subsection b of that definition is, *verbatim*, the definition from Section 1331. *Id.*

Then, the Amended Regulations added a new provision, 9 VAC 5-140-6325, that clarifies that the purchaser under such an arrangement is responsible for obtaining the necessary CO_2 allowances. *Id.* at 45.

So that there is no doubt as to whether the Amended Regulations incorporate Section 1331, here is the exact language from both the Act and the Amended Regulations:

Section 1331 of the Act	**Relevant Amended Regulations**
If the Governor seeks to include the Commonwealth as a full participant in RGGI or another carbon trading program… then	
(i) the definition of the term “life-of-the-unit contractual arrangement” under the Final Regulation shall include any energy conversion or energy tolling agreement that has a primary term of 20 years or more and pursuant to which the purchaser is required to deliver fuel to the CO2 budget source or CO2 budget unit and is entitled to receive all of the nameplate capacity and associated energy generated by such source or unit for the entire contractual period and	“Life-of-the-unit contractual arrangement” means either… (b) For any energy conversion or energy tolling agreement that has a primary term of 20 years or more and pursuant to which the purchaser is required to deliver fuel to the CO_2 budget source or CO_2 budget unit and is entitled to receive all of the nameplate capacity and associated energy generated by such source or unit for the entire contractual period. (Amended Regulations at pp. 9-10.)
(ii) any purchaser under an energy conversion or energy tolling agreement shall be responsible for acquiring any CO2 allowances required under the Final Regulation in relation to a CO2 budget source or CO2 budget agreement that is subject to such agreement.	A power purchaser entered into a life-of-the-unit contractual arrangement… shall be responsible for acquiring and transferring all allowances to the CO_2 budget source or unit that are necessary for demonstrating compliance with the CO_2 budget trading program. (Amended Regulations at p. 45.)

VMA never mentions the Amended Regulations’ new definition of “life-of-the-unit contractual arrangement.” VMA Brief at 17-18. Nor does VMA ever mention the new

requirement, codified in 9 VAC5-140-6325, that the purchaser under such an arrangement acquire the requisite CO_2 allowances. *Id.* Instead, VMA ignores these provisions and claims that the Amended Regulations "fail to incorporate" Section 1331. *Id.* This is simply false: the Amended Regulations incorporate, on a nearly *verbatim* basis, Section 1331.[9]

3. VMA's allegation that the Amended Regulations "fail to incorporate" Section 10.1-1330(C) is a red herring: that provision addresses how the *proceeds* from direct auctions will be spent; there is nothing in that provision for DEQ to include in its regulations implementing and managing a direct auction program.

Third, VMA alleges in its Petition for Appeal that DEQ failed to incorporate Section 10.1-1330.C, which VMA describes as "the most substantive and impactful part" of the Act. VMA Pet. at ¶ 51. Curiously, VMA never makes this argument in its Brief in Support. *See* VMA Brief at 17-18 (listing the three provisions of the Act it alleges that DEQ "failed to incorporate" but not including Section 10.1-1330.C). Nonetheless, because VMA made this assertion in its Petition for Appeal, the Respondents will address it here.

Section 1330.C of the Act (codified at Virginia Code Section 10.1-1330.C) specifically provides for how the proceeds from the CO_2 direct auctions shall be allocated:

1. 45% of the revenue shall go to the Virginia Community Flood Preparedness Fund;

[9] In support of its argument that DEQ failed to incorporate Section 1331, VMA cites *Jackson v. Marshall*, 454 S.E.2d 23 (Va. Ct. App. 1995). VMA Brief at 18. VMA cites *Jackson* for the proposition that "no deference can be given to an agency when compliance with a statute is at issue." *Id.* The word "deference" is only used once in in the *Jackson* opinion: "On review, the interpretation which an administrative agency gives its law must be accorded great deference." *Jackson*, 454 S.E.2d at 26. Not only is VMA's characterization of *Jackson* incorrect, it is also irrelevant. *Jackson* involved a Department of Social Services administrative hearing over allegations of sexual abuse where the hearing officer issued a ruling finding "Reason to Suspect Sexual Abuse," yet the statute at issue only allowed for findings of either "Founded" or "Unfounded." *Id.* at 24-25. The *Jackson* court then reasoned that, even though agency interpretation of its law "must be accorded great deference," where a statute "is clear and unambiguous, a court will give the statute its plain meaning." *Id.* at 26. Here, Section 1331 is clear and DEQ inserted its provisions directly into the Amended Regulations. Thus, *Jackson* is inapplicable.

2. 50% of the revenue shall go to the Department of Housing and Community Development to support low-income energy efficiency programs;
3. 3% of the revenue shall go to DEQ to cover administrative expenses of managing the auction and related activities; and
4. 2% of the revenue shall go to the Department of Housing and Community Development, in partnership with the Department of Mines, Minerals, and Energy, to administer and implement the low-income efficiency programs funded above.

Va. Code § 10.1-1330.C.

There is nothing in this provision related to how DEQ shall "establish, implement, and manage" the CO_2 direct auction program. Va. Code § 10.1-1330.B. Nor is there anything in this provision related to how the Director of DEQ shall "seek to sell 100 percent of all allowances issued each year." *Id.* Thus, there was nothing for DEQ to incorporate from Section 1330.C into the Amended Regulations. Indeed, it would be nonsensical for DEQ, through regulations that implement the auction program, to prescribe rules for how other state agencies, such as the Department of Housing and Community Development, are to administer separate programs. DEQ did not "fail to incorporate" Section 1330.C as VMA alleges; rather, there is nothing in that provision for DEQ to incorporate in the Amended Regulations.[10]

[10] VMA included a fourth "failure to incorporate" allegation in its brief. In two separate places, VMA alleges that DEQ failed to incorporate "Section 10.1-1300." *See* VMA Brief at 17 (listing among the sections DEQ allegedly "failed to incorporate" "Section 10.1-1300"); at 18 ("Revision A20 also has not incorporated Section 10.1-1300 . . . ."). This could be a typographical error as Virginia Code Section 10.1-1300 is not part of the Act, is unrelated to the CO_2 trading program, and is not mentioned in VMA's Petition for Appeal.

Since VMA makes this assertion twice in its brief; however, the Respondents will briefly address it here. This allegation should be rejected for three reasons. First, VMA did not identify this provision as an assignment of error in its Petition for Appeal; and therefore, has waived its right to raise this new issue now. *See* Va. Sup. Ct. R. 2A:4(a) (requiring a petition for appeal to "specify the errors assigned") (2020). Second, this code provision was not changed by the Act.

II. VMA's APA-based assignments of error fail because: (A) the Act exempted the Amended Regulations from the APA; and (B) the Act authorized each of the changes VMA identifies in its brief.

VMA's first three assignments of error (Claims I, II, and III) in its Petition for Appeal allege that DEQ violated the APA by issuing the Amended Regulations without going through APA's notice-and-comment process. VMA Pet. at ¶¶ 58-78. VMA supports these claims through the second argument in its brief. *See* VMA Brief at 18-21. As discussed below, VMA's argument is incorrect because the Act expressly exempts the Amended Regulations from the APA and because the Act authorizes each of the changes VMA complains of.

A. The Act expressly exempts the Amended Regulations from the APA.

Section 1330.A of the Act (codified at Virginia Code Section 10.1-1330.A) states:

> The provisions of this article shall be incorporated by the Department, without further action by the Board, into the final regulation adopted by the Board on April 19, 2019, and published in the Virginia Register on May 27, 2019. Such incorporation by the Department *shall be exempt from the provisions of the Virginia Administrative Process Act (§ 2.2-4000 et. seq.*).

Va. Code § 10.1-1330.A (emphasis added). Thus, the Act expressly exempts DEQ's Amended Regulations from the requirements of the APA. This Court's analysis need go no further.

VMA incorrectly alleges that DEQ claims that the Amended Regulations qualify for one of the exemptions listed in the APA. VMA Brief at 19 (asserting that DEQ was invoking Virginia Code 2.2-4006(A)(4)(a) to justify avoiding the APA). In support of this assertion, VMA cites "Attachment A (Agency Record) at 3." *Id.* But nowhere on that page, nor anywhere else in the

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Virginia Code Section 10.1-1300 is the definitions section for the chapter of the Virginia Code that establishes the State Air Pollution Control Board. It was last amended in 2015, well before the Original Regulations or the Act. *See* Va. Code § 10.1-1300 (legislative history section showing the last amendment in 2015). Thus, VMA's argument that DEQ somehow violated "the Act" by failing to incorporate this section is internally inconsistent: this section is not part of the Act so failing to incorporate it cannot be a violation of the Act. Finally, VMA has not identified any definition or provision in the Amended Regulations that is inconsistent with Section 10.1-1300. Thus, VMA's contention that DEQ "failed to incorporate" this code provision is without merit.

record, does DEQ ever claim this APA exemption. There is no reason to claim such an exemption: the Act exempts the Amended Regulations from the APA. [11]

VMA relies upon a strawman fallacy: after misrepresenting DEQ's justification for not going through the APA process, VMA spends the remainder of its second argument refuting DEQ's supposed position. *See* VMA Brief at 19-22. There was no reason for DEQ to resort to one of the APA's exemptions when the Act exempted the Amended Regulations from the APA.[12]

B. The Act authorized each of the changes VMA identifies in its brief.

VMA concedes that the Act exempts the Amended Regulations from the APA. VMA Brief at 19. But according to VMA, DEQ went "far beyond the scope of the exemption" and included

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[11] Recently, VMA made the same APA argument in a case before the Honorable Judge W. Reilly Marchant. In *VMA v. Northam*, Case No. CL20-4521, VMA asserted that emergency temporary standards for workplace safety, passed in response to the COVID-19 pandemic, were illegal because they did not go through the APA process. VMA also asserted that Governor Northam's emergency executive orders, also passed in response to the COVID-19 pandemic, had to go through the APA process. This Court dismissed VMA's APA claim reasoning:

> Count I is an allegation that there are violations to the Administrative Process Act. The Court finds that the VAPA doesn't apply to executive orders. In regard to the Emergency Temporary Standards, the Court also agrees with the Defense that 40.1 exempts the ETS, the Emergency Temporary Standards, from the VAPA. They exempt it. So the Court grants the Defense motion to dismiss Count I for those reasons.

VMA v. Northam, Case No. CL20-4521, Hearing Transcript at 60:6-15 (Feb. 16, 2021). *See also* Order Granting Motion to Dismiss at ¶ 1 ("Count I… is **HEREBY DISMISSED** for the reasons stated on the record at the February 16, 2021 hearing and because the VAPA does not apply to Emergency Executive Orders and because Virginia Code Section 40.1-22(6a) expressly exempts the Emergency Temporary Standard from the VAPA."). VMA has now filed a notice of appeal. *See* Notice of Appeal (Mar. 31, 2021).

While VMA may prefer to have the Amended Regulations go through the APA, just like they wanted the Emergency Temporary Standards at issue before the Honorable Judge Marchant to go through the APA, in both instances the General Assembly expressly exempted the regulations from the APA. In both instances, VMA's reliance on the APA is mistaken.

[12] VMA also asserts, without explanation, that the Act's APA exemption "is very narrow." VMA Brief at 20. Yet VMA does not point to any limiting language in the exemption.

"abundant substantive changes" in the Amended Regulations. *Id.* VMA then lists, in bullet-point format, six such changes.

Yet each of these changes are amendments that move Virginia from the previous consignment model (where DEQ granted "conditional allowances" to the regulated community who then consigned them over to the RGGI market) to the current direct auction model that the Act requires. Specifically, the first and third of VMA's examples are provisions where DEQ removed the concept of conditional allowances. *Compare* VMA Brief at 20 *with* Amended Regulations at 2 (replacing "conditional allowances" with "CO_2 allowances"). Similarly, the fourth, fifth, and sixth examples are provisions where DEQ removed the concept of a consignment auction and replaced it with a direct auction. *Compare* VMA Brief at 20 *with* Amended Regulations at 32-33 (repealing conditional allocation methodology regulations and removing reference to consignment auctions); at 56-57 (repealing consignment auction regulations).

These changes are expressly required by Section 1330.B of the Act, which requires DEQ to "establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program," and which requires the Director to "sell 100 percent of all allowances issued each year." Va. Code § 10.1-1330.B. Put differently, because the General Assembly mandated that DEQ move from the consignment/conditional allowance model to a direct auction model, DEQ amended its regulations to remove all references to consignment auctions and conditional allowances.

VMA characterizes its second example as an amendment that "strikes language in the definition for 'adjustment for banked allowances.'" VMA Brief at 20. This change, found on page 1 of the Amended Regulations, simply deletes the last phrase from the definition of the term "Adjustment for banked allowances." Specifically:

> "Adjustment for banked allowances" means an adjustment applied to the Virginia CO_2 Budget Trading Program base budget for allocation years 2021 through 2025 to address allowances held in general and compliance accounts, including compliance accounts established pursuant to the CO_2 Budget Trading Program, but not including accounts opened by participating states~~, that are in addition to the aggregate quantity of emissions from all CO_2 budget sources in all of the participating states at the end of the initial control period in 2020 and as reflected in the CO_2 Allowance Tracking System on March 15, 2021~~.

Amended Regulations at 1. DEQ made this change because, by moving from the consignment model to being a "full participant in RGGI" (Act at Section 1331), DEQ was now in sync with RGGI's time schedule—not its own—and it no longer needed an "initial control period in 2020." *See* Amended Regulations at 9 (deleting the term "Initial Control Period.") In other words, the Original Regulations included both an "Initial Control Period" and an "Interim Control Period." *Id.* (including both terms in the Original Regulations). After the Act, DEQ no longer needed both concepts so it deleted the term "Initial Control Period" from the Amended Regulations. *Id.* For consistency, it then deleted the last phrase in the definition of "adjustment for banked allowances" that referenced this now obsolete term. *Id.* at 1. VMA incorrectly characterizes this change as more than it is by describing it as changing "how the adjustment shall be aggregated with other participating states." VMA Brief at 20. This is incorrect. The only revision, as shown on the record, is removing reference to an obsolete term, *i.e.*, allowances from the "Initial Control Period."[13]

[13] After listing six examples of "abundant substantive changes" that VMA contends are illegal, VMA includes another example. VMA claims that "DEQ opted to further exceed its authority" by imposing a new provision requiring manufacturing facilities that generate some of their own electricity to apply for a permit exemption. VMA Brief at 20. According to VMA, this requirement is not in the Act; and is therefore, not exempt from the APA. *Id.* This is another red herring. The manufacturing facility exemption already existed in the Original Regulations; thus, it already went through the APA process. *See* Amended Regulations at 14 (showing the Original Regulations and showing that the exemption found in 9 VAC5-140-6040 is not one of the new amendments). Thus, this exemption already went through the APA process and VMA's opportunity to appeal these regulations has passed.

III. Contrary to VMA's assertion, the Amended Regulations are not vague.

The third argument in VMA's Brief (and its sixth assignment of error in its Petition for Appeal) is that the Amended Regulations are "void as a vague regulation." VMA Brief at 21. As discussed below, VMA's argument is incorrect. First, to establish that a regulation is unlawfully void, VMA faces an incredibly high burden, yet VMA points to no language in the Amended Regulations that comes anywhere close to meeting that burden Second, each of the specific arguments VMA advances in support of its vagueness theory is flawed.

A. The Amended Regulations are not void under Virginia law.

VMA cites two Virginia Supreme Court cases in support of its unlawfully void argument: *Tanner v. City of Va. Beach*, 277 Va. 432 (2009), and *Volkswagon of Am., Inc. v. Smit*, 279 Va. 327 (2010). *See* VMA Brief at 22. In each opinion, the court begins its analysis by stating that setting aside a statute or regulation on voidness grounds, which is rooted in due process concerns, is an extreme remedy that should be avoided if possible. In *Tanner*, the court stated:

> We are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity. Thus, if a statute or ordinance can be construed reasonably in a manner that will render its terms definite and sufficient, *such an interpretation is required*.

Moreover, these facilities were already required to apply for a permit. *See generally* 9 VAC5 Chapter 85 (permits for stationary sources of pollutants subject to regulation). Thus, the permit requirement is not new either. The only new revision DEQ made to this exemption is to provide a new application deadline of January 1, 2022. *See* Amended Regulations at 14. There are other updated deadlines throughout the Amended Regulations. *See, e.g. id.* at 5 (updating calendar year trigger price definitions); at 10 (similar update for the definition of "minimum reserve price"); at 25 (new deadline for submission of CO_2 budget permit applications); at 27 (revising Virginia's base budget to begin in 2021 rather than 2020); at 46 (replacing certain 2020 deadlines with new 2021 deadlines). According to VMA's argument, anytime the General Assembly mandates that a state agency make changes to an existing regulatory regime, the General Assembly must also explicitly empower the agency to make necessary deadline changes that go with those revisions.

Tanner, 277 Va. at 438-39 (emphasis added) (citations omitted). In *Volkswagon*, the court began its analysis by citing *Tanner*, and adding, "a court should not declare a statute to be wholly unconstitutional unless such a determination *is absolutely necessary* to decide the merits of the case. *Volkswagon*, 279 Va. at 337 (emphasis added) (citations and internal quotations omitted).

Thus, VMA as the moving party, has the burden to demonstrate that there is no "reasonable doubt" that the Amended Regulations are so vague that they are incapable of being "construed reasonably in a manner that will render [them] definite and sufficient." *Tanner*, 277 Va. at 439.

VMA cannot meet this burden. The key obligation that the Amended Regulations place on owners and operators of fossil-fuel burning power plants is to acquire CO_2 allowances that are equal or greater than the amount of the plant's CO_2 emissions. This obligation is codified in 9 VAC5-140-6050.C. *See* Amended Regulations at 16. That provision states:

> 1. The owners and operators of each CO_2 budget source and each CO_2 budget unit at the source *shall hold CO_2 allowances* available for compliance deductions under 9 VAC5-140-6260, as of the CO_2 allowance transfer deadline, in the source's compliance account *in an amount not less than the total CO_2 emissions* that have been generated as a result of combusting fossil fuel for an interim control period or control period from all CO_2 budget units at the source….

Id. There is nothing vague about this obligation. Indeed, each of the key terms in this regulation is specifically defined in the Amended Regulations. *See, e.g.,* Amended Regulations at 4 (defining "CO_2 budget source" and "CO_2 budget unit"); at 6 (defining "compliance account"); at 12 (defining "source" and "unit"). VMA fails to explain how any of this is vague; much less, incapable of being "construed reasonably in a manner that will render its terms definite and sufficient," which is the legal standard articulated in *Tanner*. 277 Va. at 438-39.

The Amended Regulations stand in stark contrast to the ordinance at issue in *Tanner*. There, Virginia Beach imposed a city ordinance that made it unlawful "for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city." *Id.* at

435. The ordinance failed to define "unreasonably loud" and the trial court heard testimony from police officers that they interpreted the ordinance using a "reasonable person standard" that "depends on an individual officer's assessment." *Id.* at 437. The Virginia Supreme Court ruled that the ordinance was unlawfully vague because persons subject to the ordinance could not determine in advance whether activity was unlawful. *Id.* at 439-40.

Here, there is no reasonable person test. Indeed, the phrase "reasonable person" does not appear anywhere in the Amended Regulations. VMA fails to demonstrate how any CO_2 unit or budget source, subject to these Amended Regulations, is unable to determine whether activity is unlawful. The Amended Regulations are clear: such a regulated entity must acquire CO_2 allowances that are "not less than" its CO_2 emissions.[14]

There is one final point worth noting about VMA's vagueness claim. Challenges to statutes or regulations on vagueness grounds are due process claims. *See Volkswagon*, 279 Va. at 337. Yet most of the obligations the Amended Regulations place on power plants, such as the obligation to acquire CO_2 allowances, are not new: they are obligations that existed in the Original Regulations. *See, e.g.*, Amended Regulations at 16 (showing only one minor change to 9VAC-140-6050.C). The Original Regulations went through a full APA notice and comment process that VMA participated in. VMA elected not to appeal the Original Regulations. Thus, even if the obligations were somehow vague, VMA has had due process and waived its right to now challenge the specificity of these obligations.

B. Each of VMA's voidness arguments is flawed.

In support of its "unlawfully void" argument, VMA makes three arguments; each is flawed.

[14] Also, *Tanner* involved a city ordinance that applied to the general population. The Amended Regulations, by contrast, apply to fossil-fuel burning electric utilities and other large, sophisticated entities who already comply with a myriad of federal, state, and local regulations.

1. VMA's argument that the Amended Regulations "do not even mention" RGGI ignores the Act's mandate and how the Amended Regulations work.

First, VMA argues that "[w]ithout RGGI, the [Amended Regulations] cannot operate; however, the RGGI program is not even mentioned." VMA Brief at 22. There are two flaws in this argument. First, the Act does not require DEQ to join RGGI or mention RGGI in its amendments; rather, it very specifically mandates that DEQ "establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program." Va. Code § 10.1-1330.B. In other words, the General Assembly gave DEQ flexibility: it could join RGGI, create its own auction "consistent with the RGGI program," or should a new auction be created in the future, join it. *See also* Va. Code § 10.1-1331 ("If the Governor seeks to include the Commonwealth as a full participant in RGGI…."). DEQ followed the Act's mandate by fashioning Amended Regulations that are "consistent with RGGI" but would also be consistent with one of these other options. Thus, rather than being an unlawful ambiguity, the lack of the word "RGGI" in the Amended Regulations is intentional and consistent with the Act.

The second flaw with this argument is that other states' regulations do not mention RGGI either; yet there is no evidence that their auctions, which have been occurring for years, impose vague or uncertain obligations on participants.[15] If VMA's argument that regulations that fail to mention RGGI are so vague that they cannot be complied with, then one would not expect over a

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[15] For example, Massachusetts' CO2 Budget Trading Program regulations are nearly identical to Virginia's Amended Regulations, yet Massachusetts has been successfully participating in RGGI auctions for years. *See* 310 Code of Mass. Regulations 7.70 (creating the "Massachusetts CO2 Budget Trading Program," requiring utilities to purchase allowances through that trading program, and only using the word "RGGI" when discussing the "RGGI CO_2 Allowance Tracking System"). *See also* 26 Code of Maryland Regulations Subtitle 9 (establishing the "Maryland CO2 Budget Trading Program" without using the word "RGGI"); 6 New York Code of Rules and Regulations Subpart 242-1 (establishing the New York CO2 Budget Trading Program but not using the word "RGGI"); Code of Vermont Regulations 12-031-002 (establishing the Vermont CO 2 Budget Trading Program but not using the word "RGGI").

decade of successful auctions by other states that have regulations that do not mention RGGI. *See, e.g.,* RGGI Auction Results (showing cumulative auction proceeds since RGGI's inception of $3,953,834,280.29) (available at https://www.rggi.org/auctions/auction-results) (last visited Apr. 14, 2021); RGGI Fourth Compliance Report (Apr. 2, 2021) (finding that "99.1% of covered power section emissions were in compliance" with auction requirements) (available at https://www.rggi.org/sites/default/files/Uploads/PressReleases/2021_04_02_FoCP_Compliance.pdf) (last visited Apr. 14, 2021).

2. VMA's argument that RGGI requirements are de facto rules is internally inconsistent, misapplies caselaw, and is a challenge to the Original Regulations, not the Amended Regulations.

VMA's second argument is that "RGGI requirements are de facto rules neatly eluding public notice or engagement in Virginia." VMA Brief at 24. There are three flaws with this argument. First, it is inconsistent with VMA's prior argument that the regulations are vague for failing to mention RGGI. Both statements cannot be true: regulations cannot be simultaneously vague for not using the word "RGGI" and vague for imposing RGGI.

The second flaw is that it misconstrues the concept of "de facto rules." VMA cites a single case regarding "de facto rules" — *Virginia Bd. Of Med. v. Virginia Physical Therapy Ass'n.*, 413 S.E.2d 59 (Va. Ct. App. 1991). *Id.* That case involved a determination of whether an informal "rule" adopted by the Board of Medicine constituted a "rule or regulation" under the APA. *Virginia Bd. of Medicine*, 413 S.E.2d at 64-65. In that context, the Court of Appeals discussed the concept of a "de facto rule," meaning, an agency action that the agency characterizes as something short of a final rule or regulation, but nonetheless, may constitute a rule or regulation under the APA. *Id.* That concept has no application here. The Amended Regulations are regulations. There

is no dispute. The Amended Regulations did not go through the APA process because the General Assembly expressly exempted them. Va. Code § 10.1-1330.A.

The third flaw in this argument, mentioned in Section A above, is that the *Original Regulations* imposed the requirements VMA now complains of. For example, VMA complains that the Amended Regulations require participants to comply with the requirements for RGGI COATS accounts. VMA Brief at 22. Yet the regulation VMA cites to make this argument, 9VAC5-140-6260, is substantially unchanged by the Amended Regulations. *See* Amended Regulations at 39-41 (showing the only change the Amended Regulations made to this provision is to remove reference to an "initial control period"). In other words, the Original Regulations imposed the same requirements VMA now claims to be unlawfully vague. Yet, the Original Regulations went through a full notice and comment process that VMA participated in and VMA chose not to pursue an APA appeal. Thus, VMA cannot now claim some sort of due process violation for a requirement that is not new. Moreover, the Original Regulations are not before the Court; thus, any alleged ambiguity is not at issue here.

3. VMA offers no evidence to support its claim that a "person of ordinary intelligence" could not comply with the Amended Regulations and the results of Virginia's first CO_2 auction demonstrate that VMA's claim is false.

VMA's third argument is that a "person of ordinary intelligence, in the Revision A20 program could not decipher the program requirements in general." VMA Brief at 23-24. This argument is flawed for two reasons. First, VMA has the burden of proof and, as discussed above, it is a very high burden for a vagueness claim. VMA points to no evidence in the record to substantiate this claim.

Second, this Court can take judicial notice[16] of media accounts of Virginia's first CO_2 auction which occurred earlier this year. As reported, Virginia generated over $43 million in revenue from the first auction and there were no reports of widespread confusion by participants.[17]

IV. VMA's tax claims fail because: (A) they are challenges to the Act, not the Amended Regulations; and (B) the revenue collected is not an illegal tax.

The fourth argument in VMA's Brief (and its fourth and fifth assignments of error in its Petition for Appeal) is that "requiring utilities to buy CO2 allowances to offset 100% of their annual tons of CO2 emissions" is an "illegal carbon tax on Virginia electricity ratepayers." VMA Brief at 25. There are two flaws with this argument. First, it is a challenge to the Act (and other statutes), not a challenge to the Amended Regulations. Second, utilities charging their customers for CO_2 allowances is not an illegal tax under Virginia law.

A. VMA's tax arguments are challenges to the Act, not the Amended Regulations; yet, VMA did not challenge the Act in this case.

According to VMA, "[t]he trading market, as structured under Revision A20, creates a carbon tax outside of the required taxation process." *Id.* Yet, "the trading market," that VMA describes was explicitly mandated by the General Assembly through the Act:

> The Director is hereby authorized to establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program and this article. The Director shall seek to sell 100 percent of all allowances issued each year through the allowance auction. . . .

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[16] Pursuant to Virginia Supreme Court Rule 2:201, this Court may take judicial notice of "a factual matter not subject to reasonable dispute in that it is either (1) common knowledge or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Va. Sup. R. 2:201(a) (2020).

[17] *See* Sarah Vogelsong, *Virginia Nets More than $43 Million in First Carbon Allowance Auction*, The Virginia Mercury (Mar. 9, 2021) (available at https://www.virginiamercury.com/blog-va/virginia-nets-more-than-43-million-in-first-carbon-allowance-auction/) (last visited Apr. 13, 2021). VMA has provided no evidence of widespread confusion in any of the other RGGI states since their adoption of similar regulations.

Va. Code § 10.1-1330.B. Thus, the General Assembly — not DEQ — created "the trading program" that VMA asserts is an illegal tax and the General Assembly mandated that the DEQ Director sell "100 percent" of all allowances through that program. Yet VMA did not challenge the Act.

VMA similarly argues that "the CECFPA directs the state treasury to hold the proceeds recovered from the allowance auction in an interest-bearing account," and by doing so, "the CECFPA specifically evades the general treasury." VMA Brief at 26. According to VMA, this evasion of the general treasury is unconstitutional. *Id.* But as VMA's own brief demonstrates, this is an argument against the Act, not the Amended Regulations. *Id.* ("the CECFPA specifically evades the general treasury…").

VMA did not challenge the constitutionality of the Act. Instead, VMA is asking this Court to set aside the Amended Regulations. But even if this Court did so, the Act would remain in place; thus, the "illegal tax" VMA claims exists would remain.

B. Even if the Act was before this Court, the General Assembly's authorization for utilities to include the costs of allowances in their rates is not an illegal tax.

VMA argues that "Revision A20 effectively *imposes a tax on electricity ratepayers* because the CECFPA provides for recovery of these costs through rates as environmental compliance project costs." VMA Brief at 25 (emphasis added). Not only is this argument, as discussed above, a challenge to the Act rather than to the Amended Regulations, this argument suffers from two additional defects: this provision is neither a tax nor illegal.

First, the Act mandates the creation of a CO_2 direct auction program. Va. Code § 10.1-1330.B. The potential added costs of electricity that ratepayers may pay utilities to comply with that program is not a tax under Virginia law. As the United States Court of Appeals for the Fourth Circuit reasoned in *Corr v. Metro. Wash. Airports Auth.*, 740 F.3d 295, 300 (4th Cir. 2013), in

assessing an illegal tax claim, "Virginia courts ask whether a given exaction is a bona fide fee-for-service or an invalid revenue-generating device." For example, tolls "are user fees and not taxes when they are nothing more than an authorized charge for the use of a special facility." *Id.* (quoting *Elizabeth River Crossings OpCo., LLC v. Meeks*, 749 S.E.2d 176, 183 (Va. 2013) (internal quotation marks omitted)). The rate that electricity customers pay an electricity utility is the "authorized charge" the customer pays in exchange for receiving the electricity. *Id.* The fact that the General Assembly, through the Act, has allowed utilities to include within that fee the costs of purchasing CO_2 allowances necessary to produce that electricity does not transform a customer's electricity bill into a tax.[18]

The second defect with VMA's argument is that even if passing on the costs of purchasing CO_2 allowances to ratepayers did constitute a tax, the General Assembly has the legal authority to levy taxes. *See* Va. Cont. Art. VII, § 7. *See also Wise Cty Bd. of Supervisors v. Wilson*, 250 Va. 482, 484 (1995) ("no entity other than an elected governing body may levy taxes"). The constitutional limitation on the General Assembly's taxing power is found in Article X, Section 7 of the Virginia Constitution, which states that "[n]o money shall be paid out of the State treasury except in pursuance of appropriations made by law." Va. Const. Art X, § 7. The Virginia Supreme Court has interpreted the term "appropriation" to mean "payment out of the state treasury." *Button v. Day*, 203 Va. 687, 695 (1962). Thus, taxes collected in Virginia can only be paid out of the state

[18] If VMA's argument were correct, every "environmental compliance project cost" that a utility includes in its costs of service would constitute an illegal tax on rate payers. For example, the General Assembly allows a utility to charge all its customers for the costs of projects that replace existing overhead powerlines with underground power lines. *See* Va. Code § 56-585.1.A.6. According to VMA, this cost sharing would be an illegal tax because it is a project cost that is paid for by all customers for a public need. Similarly, the General Assembly allows utilities to include the "cost of compliance" with renewable energy portfolio standards as part of its cost of service. Va. Code § 56-585.1.A.5.d. These costs, according to VMA's logic, would also constitute illegal taxes on electricity customers.

treasury if authorized by the General Assembly through the passage of a law. Here, the General Assembly did just that: it passed the Act. Specifically, Section 10.1-1330.C of the Act, begins with, "[t]o the extent permitted by Article X, Section 7 of the Constitution of Virginia," and then articulates exactly how proceeds from direct auctions are to be distributed. Thus, even if the Act were challenged in this case (which it is not), and even if requiring electricity customers to pay through electricity rates for the purchase of CO_2 allowances necessary to produce their electricity constituted a tax (which it does not), it is not an unconstitutional or illegal tax because the General Assembly explicitly directed how the proceeds should be distributed through a law.

V. VMA is not entitled to attorneys' fees under the APA or otherwise.

In its petition, VMA requests that this Court award it attorneys' fees that VMA incurred in bringing this action. VMA Pet. at 26. Pursuant to Virginia Code Section 2.2-4030, a party is only entitled to attorneys' fees in an APA appeal if "(i) the agency's position is not substantially justified, (ii) the agency action was in violation of law, or (iii) the agency action was for an improper purpose." Va. Code § 2.2-4030.A.

Here, none of these elements have been satisfied. As discussed above, DEQ's issuance of the Amended Regulations was mandated by the General Assembly through the Act and the Act expressly exempted the Amended Regulations from the APA. Thus, DEQ neither violated the law nor acted "for an improper purpose." *Id.* For all the reasons stated above, DEQ respectfully requests that this Court deny VMA's request for attorneys' fees.

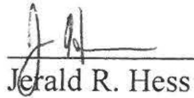
Conclusion

This case is important. In 2020, the Virginia General Assembly passed historic environmental legislation that addresses both the causes of climate change and its impact on vulnerable communities in Virginia. Part of that legislation required that DEQ amend the existing CO_2 budget trading program by moving to a direct auction model and then selling 100% of Virginia's CO_2 allowances in those auctions. The General Assembly expressly exempted these amendments from the APA. DEQ followed the General Assembly's mandate: it issued the Amended Regulations that made all necessary changes to the existing CO_2 Budget Trading Program. Now, DEQ is directly auctioning CO_2 allowances and the proceeds, which were over $43 million in the first auction, are going to support programs for low-income communities and vulnerable shorelines. This is exactly what the General Assembly legislated.

Yet this case is not complicated. VMA has challenged the Amended Regulations, but not the Act. Contrary to VMA's assertions, the Amended Regulations expressly follow the Act, they do not violate it. There can be no APA violation because the Act exempts the Amended Regulations from the APA. The Amended Regulations are not unlawfully vague. Finally, allowing utilities to charge their customers for the costs of CO_2 allowances is not an issue before this Court (because it is an issue that goes to the Act, not the Amended Regulations), and even if it was, doing so is not an illegal tax.

The Virginia General Assembly acted to address climate change and vulnerable communities in Virginia are receiving the benefit of these actions. This Court should not be persuaded to undermine this progress.

Respectfully submitted,



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I hereby certify that a copy of the above Brief in Opposition was served via certified mail and by electronic mail on May 7, 2021, on the following:

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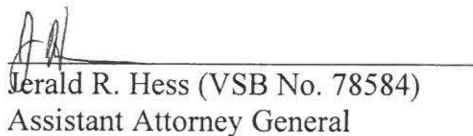

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