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October 26, 2022

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**RE: Comments on Notice of Intended Regulatory Action (NOIRA) to Repeal Virginia's Participation in the Regional Greenhouse Gas Initiative**

Dear Ms. Sabasteanski:

On behalf of the Association of Energy Conservation Professionals, Wetlands Watch, Appalachian Voices, and Virginia Interfaith Power & Light (collectively, "Conservation Organizations"), the Southern Environmental Law Center ("SELC") is pleased to submit the following comments on the Notice of Intended Regulatory Action ("NOIRA") from the Department of Environmental Quality ("DEQ") entitled "Repeal $CO_2$ Budget Trading Program as required by Executive Order 9 (Revision A22)." This NOIRA "begins the process of developing a regulation to repeal" Part VII of 9 Va. Admin. Code § 5-140, also known as Virginia's Emissions Reduction Program or the $CO_2$ Budget Trading Program.

As discussed below, Conservation Organizations strongly oppose this proposal. Neither the Air Pollution Control Board ("Air Board") nor DEQ has the authority to repeal the Emissions Reduction Program. The General Assembly has mandated that DEQ issue the Emissions Reduction Program and that Virginia participate in the Regional Greenhouse Gas Initiative ("RGGI"). The Air Board and DEQ cannot override those legislative mandates.

While DEQ and the Air Board lack the authority to take this action, there is also no good reason for them do so. Virginia's continued participation in RGGI is already bringing numerous benefits to the Commonwealth. States participating in RGGI have historically reduced their emissions at a much more rapid rate than non-participants, and those trends should continue in the future, resulting in better health outcomes and a cleaner environment for Virginians. DEQ itself has acknowledged that Virginia needs to remain in RGGI to fulfill the Commonwealth's climate goals, as set forth in the Virginia Clean Economy Act and other laws. The funds gained from sales of allowances are also being used to protect Virginians against the worst impacts of climate change, including sea level rise, and to improve the lives of low-income households across the state by increasing their energy efficiency and reducing their utility bills. Leaving RGGI would mean those benefits would cease.

These comments briefly summarize the background of RGGI, including the deliberate, well-reasoned decision by the General Assembly to have Virginia participate in RGGI and the development of the Emissions Reduction Program. We then discuss recent efforts by the

Youngkin administration to pull Virginia out of RGGI and explain why any non-legislative effort to withdraw the Commonwealth from RGGI is improper and unconstitutional. Lastly, we respond to the administration's misplaced critiques of RGGI and explain the significant benefits to the Commonwealth of continuing participation in RGGI. Remaining in RGGI will undoubtedly benefit the public health, safety, and welfare of Virginians.

Given the lack of legal authority for this action, and the very real benefits RGGI is already providing to Virginians, Conservation Organizations respectfully ask that DEQ and the Air Board take no action on the proposed repeal and continue Virginia's participation in RGGI.

### A. Virginia's Participation in RGGI Was the Result of Careful Consideration, Culminating with a Clear Legislative Mandate.

Virginia began participating in the Regional Greenhouse Gas Initiative in 2021. The decision to participate in RGGI took years of public process and careful development. Ultimately, in 2020, the General Assembly passed the Clean Energy and Community Flood Preparedness Act, a bipartisan law requiring Virginia's participation in RGGI and implementation of an emissions reduction program.

#### 1. How RGGI Works

When a state wants to start participating in RGGI, it must follow its own state procedures to implement a regulation consistent with RGGI's model rule.[1] Virginia did so by adopting the Emissions Reduction Program.[2]

The program relies on a basic supply-and-demand mechanism to drive down carbon emissions over time. Power plants may still combust fossil fuels to generate electricity, but for every ton of carbon dioxide that a plant emits, its owner or operator must hold a carbon allowance. At the end of every compliance period, each power plant owner or operator must hold enough allowances to account for its carbon dioxide pollution or face steep penalties.[3]

The allowances themselves are generated by each state's individual regulatory program. Each state generates a set budget of allowances each year, the supply of which is reduced by 3 percent annually. By reducing the supply each year, the RGGI states will drive down their overall emissions by 30 percent from 2020 to 2030.[4]

Along with the other participating RGGI states, Virginia sells the allowances created by its regulatory program in quarterly auctions run by RGGI, Inc. Power plant owners and operators purchase their desired quantity of allowances, and, following the auction, RGGI, Inc. distributes

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[1] *See* Attachment 1, RGGI, Inc., Model Rule Part XX $CO_2$ Budget Trading Program (rev. 2018), *available at* https://www.rggi.org/sites/default/files/Uploads/Design-Archive/Model-Rule/2017-Program-Review-Update/2017_Model_Rule_revised.pdf.

[2] 9 Va. Admin. Code § 5-140-6010 *et seq*.

[3] *See* Attachment 2, RGGI, Inc., RGGI 101 Factsheet (Sept. 2021), *available at* https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf.

[4] *See* RGGI, Inc., Summary of RGGI Model Rule Updates (Dec. 19, 2017), *available at* https://www.rggi.org/sites/default/files/Uploads/Program-Review/12-19-2017/Summary_Model_Rule_Updates.pdf.

the proceeds to the states. The states then invest the proceeds in worthwhile programs of their choosing—often energy efficiency and bill savings programs, along with clean and renewable energy investments. RGGI, Inc. is a non-profit organization, whose board of directors is composed of agency heads from each participating state. RGGI, Inc. has no enforcement or regulatory power over a state or a power plant, and no control over a state's emissions program; its role is to administer the quarterly allowance auctions and provide other technical services to participating states.[5]

RGGI has a long track record of success. The first RGGI auction took place in 2008. In the first decade RGGI was in place, RGGI states saw their emissions drop 90 percent faster than the rest of the country.[6] Not only does the market-based approach drive down emissions, it also significantly improves public health by reducing local air pollution. During that same initial decade, RGGI states experienced an estimated $5.7 billion in public health benefits due to improved air quality—fewer asthma attacks, premature deaths, and missed days of school and work.[7] On top of that, the economies of RGGI states grew at a faster rate than non-RGGI states during the same period, which shows that RGGI's method of reducing emissions does not impede economic growth.[8]

### 2. The History of Virginia's Participation in RGGI

Virginia's Emissions Reduction Program took years to develop over multiple administrations. Recognizing the threat climate change poses to the Commonwealth, in 2016 then-Governor McAuliffe issued an executive order directing the Secretary of Natural Resources to establish a work group to study and recommend methods for reducing carbon dioxide emissions from the electric power sector.[9] After almost a year of public engagement, the work group submitted its recommendations to the Governor.[10] Based on those recommendations, Governor McAuliffe issued an executive directive in 2017, which instructed DEQ to develop regulations to "abate, control, or limit carbon dioxide emissions from electric power facilities" using "market-based mechanisms" that allow for the "trading of carbon dioxide allowances through a multi-state trading program."[11]

Beginning in mid-2017, DEQ and the Air Board engaged in a multi-year public regulatory process that included two rounds of public comment and multiple revisions to the proposed

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[5] *See, e.g.*, Attachment 3, RGGI, Inc., Scope of Work in Support of Virginia Department of Environmental Quality Implementation of the Virginia Carbon Dioxide ($CO_2$) Budget Trading Program (Feb. 8, 2021), at 2 ("No Policy Role or Regulatory Authority" provision), *available at* https://www.rggi.org/sites/default/files/Uploads/RGGI-Inc-Documents/State-Contracts/VA_Contract.pdf.

[6] This data is from 2008 to 2018. *See* Attachment 4, Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review* (2019) ("Acadia Ctr. Report), at 2 & 7, *available at* https://acadiacenter.org/wp-content/uploads/2019/09/Acadia-Center_RGGI_10-Years-in-Review_2019-09-17.pdf.

[7] *Id.* at 1.

[8] *Id.* at 7.

[9] Attachment 5, Va. Exec. Order No. 57 (June 28, 2016).

[10] Attachment 6, Governor Terence R. McAuliffe's Executive Order 57 Work Group, *Report and Final Recommendations to the Governor* (May 12, 2017) (hereinafter "EO 57 Report").

[11] Attachment 7, Va. Exec. Directive No. 11 (May 16, 2017).

trading program. The Air Board ultimately approved a version of the program in 2019, although the original program's implementation was delayed due to a budget restriction in the state's 2019 budget.[12] This original program used a consignment model, whereby DEQ would have distributed Virginia's allowances to existing power plants in proportion to their historical emissions but would not sell those allowances directly at auction.[13]

Had this been the end of the story, future administrations could have changed course by following applicable regulatory processes, without involvement of the General Assembly. The original program had been promulgated under the Air Board's general regulatory authority, so in theory, the program could have been modified or even repealed under this same general authority.

But that is not the end of the story. In 2020, the General Assembly removed the budget restriction and passed a law specifically about Virginia's Emissions Reduction Program and participation in RGGI. The 2020 Clean Energy and Community Flood Preparedness Act (the "Act")[14] ***requires*** Virginia to issue the Emissions Reduction Program and participate in RGGI and ***requires*** the proceeds from the sale of Virginia's allowances to be used to help low-income families reduce energy bills and localities address recurrent flooding issues. In other words, the General Assembly decided as a matter of law that Virginia would in fact participate in RGGI. Virginia's Emissions Reduction Program was no longer subject only to the Air Board's general regulatory authority, but also the specific requirements of the 2020 law.

To comply with the requirements of the new law, DEQ revised the existing 2019 program.[15] Recognizing that the program had already gone through extensive public rulemaking, and had already been delayed a year, the General Assembly expressly exempted this revision process from the Administrative Process Act and required DEQ to issue the revised regulation directly. This exemption meant that the revision did not require public notice and comment, nor did it require the Air Board's approval. DEQ followed the requirements set forth by the General Assembly and issued a revised regulation establishing the current Emissions Reduction Program in August 2020.

Since January 1, 2021, power plant owners and operators in Virginia must account for their carbon pollution in accordance with the Emissions Reduction Program. Knowing that the supply of these allowances steadily reduces each year, power plant owners and operators must figure out the most cost-effective ways to reduce their emissions over time. Virginia's Emissions Reduction Program is a critical tool to address a major cause of climate change. It also complements another piece of historic legislation the General Assembly passed in 2020, the Virginia Clean Economy Act, which sets forth a pathway for a carbon-free electricity sector by mid-century. Virginia's participation in RGGI helps ensure Virginia fulfills the requirements of the Clean Economy Act in a sensible, cost-effective way.

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[12] 35 Va. Reg. Regs. 2332 (May 27, 2019); 2019 Va. Acts ch. 854 (Item 4-5.11).

[13] 35 Va. Reg. Regs. 2332 (May 27, 2019).

[14] 2020 Va. Acts ch. 1280.

[15] 36 Va. Reg. Regs. 2598 (Aug. 3, 2020).

Virginia's Emissions Reduction Program is benefitting all Virginians in numerous ways:

- Through its proven market-based mechanism, the program is working to drive down air pollution and improve public health;
- Continued participation in RGGI will help protect customers from rising fossil fuel prices as power plant owners reduce reliance on fossil fuels;
- Low-income households are getting their homes weatherized, finally getting the energy bill relief they need;
- Highly efficient affordable-housing units are under construction to help fill the severe affordable-housing gap with units that will come with low energy bills for tenants; and
- Localities finally have access to a dedicated state fund to help address the increasingly devastating flooding that is happening all across the Commonwealth.

Undoing the program and withdrawing from RGGI would severely hamper efforts to reduce air pollution and improve public health, and definitively eliminate those important sources of funding.

### 3. Current Administration's Efforts to Withdraw Virginia from RGGI

On December 8, 2021, prior to taking office, then-Governor-elect Glenn Youngkin announced his intention to "withdraw" Virginia from its participation in RGGI. According to those reports, the Governor-elect appeared poised to take executive action that would directly withdraw Virginia from its participation in RGGI.[16]

On January 11, 2022, then-Attorney General Mark Herring issued an official advisory opinion concluding that "the Governor may not repeal or eliminate, through an executive order or other action, the enacted statutes and regulations pertaining to the Commonwealth's participation in the Regional Greenhouse Gas Initiative and/or a market-based trading program like the Regional Greenhouse Gas Initiative, or do away with the requirement that electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions."[17] As the opinion explains, the "Constitution of Virginia does not grant the Governor the power to suspend laws, and in fact, it requires the opposite that '[t]he Governor shall take care that the laws be faithfully executed.'"[18] In addition, the opinion cites Article I, Section 7 of the Constitution of Virginia, which provides "[t]hat all power of suspending laws, or the execution of laws, by any

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[16] Attachment 8, Laura Vozzella, *Youngkin Says He Will Take Virginia out of the Regional Greenhouse Gas Initiative to Save Ratepayers Money*, Wash. Post (Dec. 8, 2021), *archived at* https://perma.cc/VQ4Z-G8Q6.

[17] Attachment 9, 2021 Op. Va. Att'y Gen. No. 21-102, at 2 (Jan. 11, 2022), *available at* https://www.oag.state.va.us/files/Opinions/2022/21-102-Herring-Sullivan-Issued.pdf.

[18] *Id.* (citing Va. Const., art. V, § 7).

authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."[19]

On January 15, 2022, the Governor was sworn into office. That same day, he signed Executive Order 9.[20] Rather than attempting to withdraw Virginia from RGGI directly by executive order—which according to former Attorney General Herring would violate Virginia's Constitution—the Governor asked the Air Board to repeal the underlying regulation.

Specifically, Executive Order 9 asked the Director of DEQ to develop two repeal tracks for Air Board approval. The first track (Directive 2) involved a proposal to repeal Virginia's program using "emergency" regulatory authority, *i.e.*, without the normal public comment period, and the second track (Directive 3) involved initiating a full rulemaking process to make the "emergency" repeal permanent. This latter track would follow the typical Administrative Process Act requirements.

The Executive Order also requested that DEQ create a "report re-evaluating the costs and benefits of participation in the Regional Greenhouse Gas Initiative Inc. in view of all available data, within 30 days."[21] On March 11, 2022, DEQ provided that report to the Governor, which included a draft proposed emergency regulation and a draft NOIRA for a permanent regulation.[22]

Attempts to repeal the underlying law failed in the 2022 General Assembly. Meanwhile, on the regulatory track, the administration took no action for nearly six months—despite the administration's claim that repealing RGGI was so urgent it warranted an unprecedented use of the Air Board's "emergency" regulatory powers. Finally, at the August 31, 2022 Air Board meeting, Acting Secretary of Natural and Historic Resources Travis Voyles announced that the administration had abandoned the emergency regulatory approach and instead would be moving forward with plans to repeal the Emissions Reduction Program regulations through the normal Administrative Process Act process, with the goal of withdrawing Virginia from RGGI by the end of 2023.[23] The administration subsequently published a NOIRA in the Register on September 26, 2022, which proposed the development of a regulation to repeal the Emissions Reduction Program.

### B. The Air Board Cannot Lawfully Repeal the Emissions Reduction Program.

As a policy matter, the current administration does not favor the Emissions Reduction Program and Virginia's participation in RGGI. Conservation Organizations disagree; the benefits of Virginia's participation in RGGI are clear and backed by a long track record of success. Not only does this flexible market-based approach drive down emissions and improve air quality, it also

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[19] *Id.*

[20] Attachment 10, Va. Exec. Order No. 9 (Jan. 15, 2022)

[21] *Id.* at 2.

[22] Attachment 11, DEQ in coordination with the Sec'y of Natural and Historic Resources, *Virginia Carbon Trading Rule and Regional Greenhouse Gas Initiative (RGGI) Participation, Costs and Benefits, A Report to the Honorable Glenn Youngkin, Governor, Commonwealth of Virginia* (Mar. 11, 2022) (hereinafter, "EO 9 Report").

[23] Attachment 12, Charlie Paullin, *Youngkin administration outlines plan to withdraw Virginia from carbon market by regulation*, Va. Mercury (Sept. 1, 2022), *archived at* https://perma.cc/BGA4-WQEP.

brings in critical proceeds to help Virginians reduce energy bills and begin to address recurrent flooding issues.

Regardless, neither we, the administration, nor the Air Board gets to decide this policy. The General Assembly decided Virginia's policy in 2020, when it passed the Act and thereby required Virginia's participation in RGGI. As such, it is the Air Board's responsibility to implement this law, not contradict it, which is what repealing Virginia's Emissions Reduction Program would do.

### 1. The Text of the Act Requires Adoption and Implementation of the Emissions Reduction Program.

Multiple provisions of the Act make clear that Virginia must join RGGI and that the Emissions Reduction Program cannot simply be repealed.

Foremost, the Act specifically requires DEQ to issue and implement the regulation establishing the program. The Act mandates that DEQ incorporate the provisions of the Act into the Emissions Reduction Program, without any further action by the Air Board or need to undergo regulatory review under the Virginia Administrative Process Act—thus giving DEQ (and the Air Board) no discretion about whether to adopt the Emissions Reduction Program.[24] The law expressly requires it.

The Act then grants DEQ the authority it had lacked previously: to sell allowances directly like every other state participating in RGGI.[25] The very next sentence then mandates that the Director of DEQ actually use this new authority, requiring the Director to sell the allowances in the RGGI auctions.[26] The Act goes on to require that DEQ and other agencies "prepare a joint annual written report describing the Commonwealth's participation in RGGI, the annual reduction in greenhouse gas emissions," and the use of revenues collected from RGGI auctions—further indicating the General Assembly's intent that Virginia would join RGGI.[27]

The Act is thus unequivocal. The General Assembly required the issuance of Virginia's Emissions Reduction Program and mandated that Virginia participate in RGGI. And in 2020 and 2021, agency officials did exactly what the law required. DEQ revised the program as required by statute, and Virginia has been participating in RGGI since January 1, 2021. Pursuant to the General Assembly's mandate, Virginia is selling 100 percent of its allowances in the RGGI auctions and using the proceeds to help Virginians as specified in the statute, while power plant owners and operators are acquiring the necessary allowances to account for their carbon pollution.

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[24] Va. Code Ann. § 10.1-1330(A).

[25] *Id.* § 10.1-1330(B) ("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.").

[26] *Id.* ("The Director ***shall*** seek to sell 100 percent of all allowances issued each year through the allowance auction.") (emphasis added).

[27] *Id.* § 10.1-1330(D).

Repealing the Emissions Reduction Program would contradict the law. Most evidently, the administration has no authority to repeal a regulatory program that the law specifically required to be issued and implemented. And without the Emissions Reduction Program, numerous other statutory provisions will be violated. Virginia will not generate allowances for the Director to sell at auction. The state treasury will be unable to distribute funds in accordance with the statute. The applicable agencies will be unable to report on the "Commonwealth's participation in RGGI" since Virginia will not be a participant in RGGI.

Not only would the repeal under consideration violate the Act, any decision to do so would also amount to a constitutional violation. The Air Board may not suspend or ignore the execution of laws, nor invade the General Assembly's legislative power, including taking actions contrary to statute,[28] which is exactly what repealing the Emissions Reduction Program would do.

### 2. The Governor's Misplaced View of the Law Directly Contradicts the Law's Plain Language, Contemporaneous Statements of the Law's Effect, and Prior Positions of DEQ and the Air Board.

Even though the text of the Act clearly establishes that Virginia must join RGGI, Governor Youngkin nevertheless takes an opposing view, suggesting in public news reports that the Act merely gave DEQ the discretion to decide whether to participate in RGGI.[29] This argument is based on just one sentence of the Act and ignores the fact that the Act specifically ***mandates*** the issuance of this regulation, and every other portion of the Act clearly ***mandates*** that Virginia participate in RGGI. The Governor's interpretation is a nonsensical reading of the statute that renders provisions of the law meaningless and adds qualifying language to mandatory requirements where no such qualification exists.

Not only is the language of the Act clear, contemporaneous statements from lawmakers and regulators clearly show an intention and expectation that the law itself required DEQ to adopt the Emissions Reduction Program so that Virginia would participate in RGGI. For example, after the Act was put on the Governor's desk, then-Governor Ralph Northam issued a press release stating: "The Act establishes a carbon dioxide cap-and-trade program to reduce emissions from power plants, in compliance with the Regional Greenhouse Gas Initiative (RGGI). The Department of Environmental Quality will establish and operate an auction program to sell allowances into a market-based trading program."[30] David Paylor, the Director of DEQ at the time, made similar statements about how the Act required participation in RGGI, as did Senator Lynwood Lewis, a co-sponsor of the legislation.[31] Moreover, a group of over 60 members of the

[28] Va. Const., art. I, §§ 5, 7; Va. Const. art. III, § 1.

[29] *See* Attachment 13, David Ress, *Youngkin: I have the power to pull out of RGGI*, Rich. Times-Dispatch (Sept. 12, 2022), *archived at* https://perma.cc/2DHF-KR7T.

[30] Attachment 14, Press Release, Va. Off. Of the Governor, Governor Northam Signs Clean Energy Legislation (Apr. 12, 2020), *archived at* https://perma.cc/4M4E-EMH7.

[31] *Id.*; *see also* Attachment 15, David K. Paylor, *Clean Air and Clean Water are More Important Now than Ever*, Va. Mercury (Apr. 24, 2020), *archived at* https://perma.cc/6CYV-U9VL; Attachment 16, Certificate and Notice of Filing Agency Record, *Va. Mfrs. Ass'n v. Va. Dep't of Envtl. Quality*, No. CL20-4918 (Richmond Cir. Ct. Mar. 18, 2021). In fact, even after the publication of the NOIRA proposing that Virginia withdraw from RGGI, DEQ's website continued to state "the Clean Energy and Community Flood Preparedness Act ***requires*** Virginia to join the

General Assembly, most of whom were members who voted on the Act, recently sent a letter to the Air Board reiterating that Virginia is required by law to participate in RGGI.[32]

The Governor's flawed interpretation is also diametrically opposed to the prior positions of DEQ, the Air Board, and the Attorney General's Office.

For example, after DEQ issued the regulations establishing the Emissions Reduction Program, the Virginia Manufacturers Association ("VMA") challenged the program, asking the Circuit Court for the City of Richmond to declare the program null and void. VMA argued that DEQ had "the optionality to comply with the Act by joining RGGI, another carbon trading program with an open carbon trading market, or by simply implementing the Original Trading Rule,"[33] and that therefore those discretionary decisions were not exempted from administrative process. The trade group also argued that the program was an unconstitutional tax and void due to vagueness.

In defending the program, the Attorney General's Office explained repeatedly that the Act did not merely provide DEQ with discretionary authority to run a direct auction program; rather, the Act ***mandated*** that DEQ ***actually use*** such authority by selling the allowances at auction.[34] The Circuit Court for the City of Richmond agreed with the Attorney General's Office and denied the VMA's challenge in its entirety.[35]

Similarly, the Attorney General's Office has also issued opinions concluding that the Act required DEQ to adopt and implement the Emissions Reduction Program, including selling allowances at RGGI auctions—and that this requirement could be reversed only by an act of the General Assembly, not by the Governor, DEQ or Air Board.[36]

As these statements show, lawmakers, regulators, and the Attorney General's Office have all consistently understood that the law ***requires*** Virginia's participation in RGGI. There is simply no basis for the current administration to take an opposing view—a view that sharply contradicts the law's plain language and the well-established understanding of the law as set forth by numerous officials and lawmakers, and in official court filings. The administration may not repeal the Emissions Reduction Program or withdraw Virginia from RGGI absent legislative consent.

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Regional Greenhouse Gas Initiative (RGGI)." Attachment 17, Va. Dept. of Envtl. Quality, *Greenhouse Gases* (Sept. 27, 2022), *archived at* https://perma.cc/8RRX-7PRB (emphasis added).

[32] Attachment 18, 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.

[33] Pet. for Appeal ¶ 38, *Va. Mfrs. Ass'n v. Va. Dep't of Envtl. Quality*, No. CL20-4918 (Richmond Cir. Ct. Oct. 2, 2020).

[34] *See, e.g.*, Attachment 19, Resp'ts Brief in Opp'n at 2, *Va. Mfrs. Ass'n v. Va. Dep't of Envtl. Quality*, No. CL20-4918 (Richmond Cir. Ct. May 7, 2021) ("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.").

[35] Attachment 20, Op. Order, *Va. Mfrs. Ass'n v. Va. Dep't of Envtl. Quality*, No. CL20-4918 (Richmond Cir. Ct. July 14, 2021).

[36] *See* Attachment 9, 2021 Op. Va. Att'y Gen. No. 21-102, at 2; Attachment 21, Patrick Wilson, *The Mystery of the Secret Virginia Air Board Document*, Rich. Times-Dispatch (May 13, 2022), https://perma.cc/9S3Q-9PEB.

### C. Participation in RGGI Provides a Substantial Net Benefit for Virginians, Not a Burden.

The administration also asserts that the Commonwealth must leave RGGI because "the benefits of RGGI have not materialized" and RGGI is placing "a substantial burden" on Virginians in terms of higher electricity costs.[37] Both assertions are disingenuous. Virginia has been part of RGGI for less than two years, so it is far too early to reach definitive conclusions about its success. Nevertheless, Virginia has already experienced substantial benefits from participating in RGGI, including reduced emissions (and corresponding improvements in public health) and hundreds of millions of new dollars in dedicated funding for flood prevention, weatherization of low-income homes, and construction of efficient affordable housing. Other RGGI states have experienced similar drops in emissions while maintaining solid economic growth, which indicates that the net benefits to Virginians will only continue to increase in the years to come.

Moreover, while we share the administration's concerns about high electricity bills for Virginians, repealing the Emissions Reduction Program in no way fixes that problem. Those increases are due to various non-RGGI factors, most notably increases in fossil fuel costs. And, more importantly, the appropriateness of electricity rates is a question for the General Assembly and the State Corporation Commission—the body the General Assembly has put in charge of evaluating utility rates. The Air Board and DEQ should be focusing on its charge, namely abating air pollution. Given that DEQ has said participation in RGGI is necessary to meet the Commonwealth's emissions goals, there is no reason to repeal the Emissions Reduction Program and withdraw from RGGI, even if the Air Board had the authority to do so.

#### 1. Participating in RGGI Is Vital To Meet Virginia's Climate Goals, Including Reducing Emissions.

Perhaps the most important benefit of participating in RGGI is that it will help drive reductions in power plant emissions in Virginia, which represent roughly 30% of the $CO_2$ emissions in the Commonwealth.[38] According to DEQ, "an emission reduction program or combination of programs will be required to meet the Commonwealth's climate goals of the [Virginia Clean Economy 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."[39] Continued participation in RGGI and implementation of the Emissions Reduction Program is thus vital to reducing emissions in Virginia and ensuring that the Commonwealth meets its climate goals.

Moreover, meeting that net zero goal is critical for helping Virginia avoid the worst impacts of climate change. Left unmitigated, it is estimated that sea level rise (and related coastal flooding) will cost the Commonwealth about $56 billion in financial damages and lead to a $79 billion

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[37] NOIRA at 2–3.

[38] Attachment 22, U.S. Energy Info. Admin., Table 3. 2020 State energy-related carbon dioxide emissions by sector, *available at* https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.eia.gov%2Fenvironment%2Femissions%2Fstate%2Fexcel%2Ftable3.xlsx&wdOrigin=BROWSELINK.

[39] Attachment 11, EO 9 Report at 14.

decline in economic output by the end of the century.[40] Sea level rise also could place as many as 400,000 Virginia homes and 900 miles of roads in the Virginia Beach-Hampton Roads area at risk from storm surges, and it would cost hundreds of billions of dollars to replace those homes and roads.[41] Climate-related shifts in precipitation and weather are also expected to cause water shortages in roughly half of Virginia's counties, potentially imperiling agriculture, which is "Virginia's largest industry, supporting almost 311,000 jobs with an annual economic impact of $52 billion."[42] All of these harms are being mitigated by Virginia's participation in RGGI, both by driving down climate changing emissions and by bringing in critical funding for flood planning and projects.

Given those long-term needs and goals, it makes sense that the General Assembly would want to ensure that Virginia participated in RGGI. The entire purpose of RGGI is to reduce emissions in participant states, and it has been effective in achieving that goal. As the current administration has acknowledged, "the RGGI region has a long track record of emission reductions since the beginning of the program."[43] The nine states that have participated in RGGI from the outset saw their power plant emissions collectively drop more than 50% between 2009 and 2020.[44] That net reduction is approximately 90% more than the rest of the U.S., showing that RGGI participation is a "key driver—and accelerator—of emissions reductions from power plants."[45]

Before joining, Virginia, like the other non-RGGI states, did not see its power plant emissions decline during that period. According to DEQ's EO 9 Report, between 2010 and 2020 (*i.e.*, before Virginia joined RGGI), "mass emissions [for the power sector] . . . remained fairly constant" in the Commonwealth, "with no discernable trend."[46]

But ever since Virginia joined RGGI, there has been a clear shift. Since the beginning of 2021, Virginia's power plant emissions have followed the same downward trajectory as other RGGI

[40] Attachment 23, Katherine Hafner, *Unchecked sea level rise would cost Virginia $79 billion this century, ODU says*, WHRO Public Media (Sept. 15, 2022), *archived at* https://perma.cc/F86K-ZPM4.

[41] Attachment 6, EO 57 Report at 1–2. One study estimated that rebuilding the residential property would cost $92 billion, and a separate study estimated that repairing the road damage would cost $87 billion. *See id.*

[42] *Id.* These figures are as of 2017 and appear to be even higher now. *See, e.g.,* Va. Dep't of Agriculture & Consumer Servs., *Agriculture Facts & Figures*, https://www.vdacs.virginia.gov/markets-and-finance-agriculture-facts-and-figures.shtml ("Agriculture is Virginia's largest private industry by far, with nothing else coming a close second. The industry has an economic impact of $70 billion annually and provides more than 334,000 jobs in the Commonwealth.").

[43] Attachment 11, EO 9 Report at 13.

[44] Attachment 24, RGGI, Inc., *The Investment of RGGI Proceeds in 2020* (May 2022), at 4, *available at* https://www.rggi.org/investments/proceeds-investments. This figure does not include New Jersey, which was a non-participant from 2011 to 2020.

[45] Attachment 4, Acadia Ctr. Report at Executive Summary.

[46] Attachment 11, EO 9 Report at 9–10. The EO 9 Report does note that "the overall state emission rate, which is the amount of $CO_2$ emissions produced by a set amount of electricity, has steadily and significantly been reduced" between 2010 and 2020, a point that the Administration has relied on elsewhere to argue that RGGI participation is unnecessary. *Id.* However, what matters for gauging climate impact and effects on public health is the actual amount of emissions produced, not the emission rate. As the report makes clear, even though the emission rate may have gone down in the past decade, the annual amount of emissions released did not meaningfully decrease in the pre-RGGI period.

participants. Virginia's total $CO_2$ emissions in 2021 were over four million tons lower than in 2020 (28.6 million tons v. 32.8 million tons), and emissions during the first half of 2022 have been even lower than the same period in 2021 (12.1 million tons v. 13.6 million tons).[47] While emissions totals can fluctuate from year to year, the pattern is obvious—a long period of stagnating emissions before Virginia joined RGGI, followed by a continual year-over-year decrease in emissions after it did so. Moreover, since RGGI is structured so that the number of available carbon allowances decreases 3 percent year-over-year, there is every reason to expect that those trends will continue.

All of this clearly indicates that RGGI helps drive emissions reductions in participating states and that Virginia's efforts to reduce emissions would be severely hampered if it repealed the Emissions Reduction Program and left RGGI.

### 2. RGGI Participation Substantially Benefits Virginians.

Participation in RGGI provides substantial benefits to Virginians and to the Commonwealth overall. As discussed above, it will help Virginia reduce a significant source of carbon dioxide emissions, helping to protect against the worst effects of climate change and reduce the overall costs of responding to extreme weather and sea level rise. Reducing emissions also will result in better health outcomes for Virginians by reducing particulate matter and other air pollutants. Additionally, RGGI auctions are bringing in hundreds of millions of dollars per year to the state, which is required to be used on weatherization, flood prevention, and other measures that are directly improving the lives of Virginians.

Carbon pollution poses a significant threat to Virginians' health, welfare and safety. According to the CDC, "the burning of fossil fuels has resulted in negative impacts to air and water quality and been linked to increased incidence of asthma and cardiovascular disease."[48] Climate change also is leading to "improved survival rates for disease vectors like ticks and mosquitos," resulting in "increased incidences of West Nile virus and Lyme disease."[49] Being part of RGGI will undoubtedly improve those health outcomes. One study estimated that in just the first six years of RGGI's existence (2009-14), emissions reductions from the program resulted in at least \$5.7 billion in health benefits, including avoidance of 39,000 lost work/school days, 8,200+ asthma attacks, and 300–830 excess deaths.[50] A later study identified an additional \$200+ million in

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[47] The EO 9 Report contains information about releases through 2021. *See id.* at 9–13. Information about 2022 emissions comes from EPA's Clean Markets Air Program Data (https://campd.epa.gov/data/custom-data-download). RGGI's $CO_2$ Allowance Tracking System (COATS) database (https://rggi-coats.org/eats/rggi/index.cfm?hc=ISkgICAK) contains similar information.

[48] Attachment 6, EO 57 Report at 1.

[49] *Id.* at 1–2.

[50] Attachment 25, Abt Assocs., *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative, 2009–2014* (Jan. 2017), *available at* https://www.abtassociates.com/rggi.

children's health benefits from reduced particulate contamination, including substantial reductions in instances of autism spectrum disorder.[51]

The sales of allowances at RGGI auctions are also netting significant revenues for the Commonwealth. To date, Virginia has participated in seven RGGI auctions and has sold all of the 40+ million allowances it has placed into those auctions, receiving approximately $452 million from those sales.[52] Virtually all of those revenues are being used to respond to critical needs for Virginians—helping low-income households to reduce energy bills and assisting localities across the Commonwealth with planning for and preventing recurrent flooding.[53]

As required by the Act, 50 percent of the proceeds from the RGGI allowance sales are "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."[54] The department, after consultation with a stakeholder advisory group and a series of public meetings, developed its "Housing Innovations in Energy Efficiency" funding program to distribute the proceeds. It currently allocates those funds to two programs: the Weatherization Deferral Repair Program and the Affordable and Special Needs Housing Program.[55]

The Weatherization Deferral Repair Program "funds repairs that have caused homes (or units in multifamily buildings) to be deferred from the Weatherization Assistance Program."[56] It is entirely funded by Virginia's sale of allowances in the RGGI auctions. The Weatherization Deferral Repair Program fills a significant gap in the Weatherization Assistance Program in Virginia. The Weatherization Assistance Program is a long-standing federally funded program to help low-income households improve their home's efficiency and reduce their utility bills.[57] The Weatherization Assistance Program "reduces household energy use through the installation of cost-effective energy savings measures, which also improve resident health and safety. Common

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[51] *See* Attachment 26, Frederica Perera et al., "Co-Benefits to Children's Health of the U.S. Regional Greenhouse Gas Initiative," *Environmental Health Perspectives* (July 2020), *available at* https://ehp.niehs.nih.gov/doi/10.1289/EHP6706.

[52] Attachment 27, RGGI. Inc., Auction 57 State Proceeds and Allowances (2022), *available at* https://www.rggi.org/sites/default/files/Uploads/Auction-Materials/57/Auction_57_State_Proceeds_and_Allowances.pdf.

[53] The EO 9 Report misleadingly calls these "separate and unrelated grant programs," even though weatherization and flood protection are efforts to respond to the clear effects of emissions-related climate change. Attachment 11, EO 9 Report at 4.

[54] Va. Code Ann. § 10.1-1330(C).

[55] Attachment 28, Va. Dep't of Housing & Cmty. Dev., *Housing Innovations in Energy Efficiency (HIEE)*, *archived at* https://perma.cc/BZU3-NLPT.

[56] Attachment 29, Va. Dep't of Housing & Cmty. Dev., *Weatherization Deferral Repair (WDR)*, *archived at* https://perma.cc/TE8V-BEGP.

[57] Attachment 30, Off. of Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, *Weatherization Assistance Program*, *archived at* https://perma.cc/KWX3-9B77.

measures includ[e] sealing air leaks, adding insulation, and repairing heating and cooling systems."[58]

Unfortunately, about 20% of otherwise eligible households cannot have their homes weatherized under the Weatherization Assistance Program due to underlying issues in their homes.[59] If a household has a leaky roof, biological contaminants (*e.g.*, mold), an unsafe HVAC system, or issues with moisture or with electrical or plumbing systems, it is "deferred" from receiving federally funded weatherization available under the Weatherization Assistance Program until those problems are repaired.[60] Since these households are by definition low-income, these repairs are often never completed, so they never receive the needed weatherization.[61]

The Department of Housing and Community Development is using a portion of Virginia's auction proceeds to get households off the deferral list. The RGGI-funded Weatherization Deferral Repair Program allows weatherization providers to make certain types of repairs, making the home eligible for the Weatherization Assistance Program. The weatherization provider is then required to perform the weatherization services, which improve the home's efficiency and reduce the household's energy bill.[62]

In addition to the Weatherization Deferral Repair Program, the Department of Housing and Community Development also is using RGGI proceeds for its Affordable and Special Needs Housing Program, which funds more highly efficient affordable housing units. These funds "assist affordable housing project development teams in completing energy efficiency upgrades that would not have been feasible otherwise."[63]

Through two rounds of applications, the Department of Housing and Community Development has used over $29 million in proceeds from Virginia's allowance sales to help fund 36 high-efficiency affordable housing projects, representing more than 2,200 affordable housing units. These projects are widely distributed across the state, including locations in Abingdon, Albemarle County, Arlington County, Charlottesville, Chesterfield County, Fairfax County, Grayson County, Harrisonburg, Henrico County, Kilmarnock, Lebanon, Newport News,

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[58] *Id.*

[59] Attachment 31, Va. Dep't of Housing & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022 (2021), *available at* https://dhcd.virginia.gov/sites/default/files/Docx/hiee/dhcd-weatherization-deferral-repair-program-guidelines.pdf; Attachment 32, Chase Counts, Utilizing Virginia RGGI Revenue to Support Existing Low-Income Energy Efficiency Programs (Dec. 11, 2020), *archived at* https://perma.cc/PB3C-VSHW /.

[60] Attachment 31, Va. Dep't of Housing & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022.

[61] Attachment 33, Elizabeth McGowan, *Virginia weatherization program is changing lives, but Gov. Youngkin wants to cut off its funding source*, Energy News Network (Sept. 21, 2022), *archived at* https://perma.cc/PB3C-VSHW.

[62] Attachment 31, Va. Dep't of Housing & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022.

[63] Attachment 34, Va. Dep't of Housing & Cmty. Dev., Affordable and Special Needs Housing – Consolidated Application Program Guidelines 2021-2022, at 4 (2021), *available at* https://www.dhcd.virginia.gov/sites/default/files/Docx/asnh/asnh_guidelines_21-22_final_1.pdf.

Norfolk, Portsmouth, Radford, South Boston, Staunton, Waynesboro, Williamsburg, and Wytheville.[64]

The Act requires another 45 percent of RGGI revenues to be placed in the Virginia Community Flood Preparedness Fund ("Flood Fund"), administered by the Department of Conservation and Recreation, "for the purpose of assisting localities and their residents affected by recurrent flooding, sea level rise, and flooding from severe weather events."[65] By statute, funds from the Flood Fund must be used "solely for the purposes of enhancing flood prevention or protection and coastal resilience . . . ."[66] Localities across the Commonwealth 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."[67] In addition, localities can use funds to "mitigate future flood damage and assist inland and coastal communities across the Commonwealth that are subject to recurrent or repetitive flooding."[68] The Department of Conservation and Recreation must ensure that at least 25 percent of the monies disbursed each year are used for projects in low-income geographic areas.[69]

To date, the Department of Conservation and Recreation has awarded a total of $45.9 million in grants from the Flood Fund across three rounds of grants ($7.8 million in October 2021, $24.5 million in December 2021, and $13.6 million in September 2022).[70] Those grants have been awarded to 76 different projects across all areas of Virginia, including Accomack-Northampton Planning District Commission ("PDC"), Albemarle County, Alexandria, Ashland, Buchanan County (and city), Central Virginia PDC, Charlottesville, Chesapeake, Christiansburg, Clintwood, Colonial Beach, Covington, Dickenson County, Fairfax, Front Royal, Grayson County, Hampton, Henrico County, Isle of Wight County, King George County, the Lenowisco PDC (covering Southwest Virginia), Middlesex County, Middle Peninsula PDC, Newport News, Norfolk, Northampton County, Northern Neck PDC, Northern Virginia Regional Commission,

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[64] Attachment 35, Press Release, Va. Dep't of Housing & Cmty. Dev., Governor Northam Announces Over $21 Million in Affordable and Special Needs Housing Loans (July 8, 2021), *archived at* https://perma.cc/TZK2-YKWR (Round 1 HIEE-funded projects); Attachment 36, Press Release, Va. Dep't of Housing & Cmty. Dev., Governor Northam Announces Over $60 Million in Affordable and Special Needs Housing Loans (Jan. 13, 2022), *archived at* https://perma.cc/H5PY-N97H (Round 2 HIEE-funded projects).

[65] Va. Code Ann. § 10.1-1330(C)

[66] *Id.* § 10.1-603.25(B).

[67] *Id.* § 10.1-603.25(E).

[68] *Id.*

[69] *Id.*

[70] Attachment 37, Va. Dep't of Conservation & Recreation, *Community Flood Preparedness Fund Grants and Loans*, *archived at* https://perma.cc/2KNN-HMS7. The department also is doing a supplemental review of 32 grant proposals from the most recent round of submissions, which could ultimately result in an additional $56.4 million being awarded in the coming months. Attachment 38, Press Release, Va. Dep't of Conservation & Recreation, Virginia announces $13.6 million in Community Flood Preparedness Fund grant awards (Sept. 28, 2022), *archived at* https://perma.cc/FP96-KYKA.

Petersburg, Portsmouth, Richmond, Roanoke, Scottsville, Shenandoah County, Southside PDC, Suffolk, Tappahannock, Virginia Beach, West Point, and Winchester.[71]

As discussed above, there is a massive present and future need for energy efficiency and flood funding throughout Virginia. Repealing the Emissions Reduction Program and withdrawing from RGGI would deprive citizens of hundreds of millions of dollars annually towards addressing these important causes. In most cases, RGGI revenues are the sole funding sources for those programs, so they would cease to exist if Virginia no longer participates in RGGI auctions.[72] Leaving RGGI would thus do a grave disservice to Virginians and cause substantial harm to those vulnerable communities.

### 3. RGGI Is Not Imposing a Burden on Virginians, and Withdrawing from RGGI Is Not the Proper Solution to High Electricity Rates.

The NOIRA and EO 9 Report both incorrectly claim that RGGI is placing a substantial burden on Virginians because RGGI compliance costs are driving rising electricity costs in Virginia.[73]

As an initial matter, the Air Board may not premise a repeal based on the fear that Virginia's participation in RGGI might cause electricity rates to rise. The General Assembly expressly authorized utilities to seek to recover RGGI compliance costs from customers through a rate adjustment clause, subject to State Corporation Commission ("SCC") approval.[74] The Air Board simply has no authority to second-guess the General Assembly's decision or take oversight authority away from the SCC.

But moreover, the entire repeal proposal rests upon a flawed premise. RGGI is not driving increases in electricity bills. In fact, as of October 26, 2022, there is no active SCC-approved rate adjustment clause for either Virginia Energy and Power's ("Dominion Energy" or "DEV") or Appalachian Power Company's ("Appalachian Power" or "APCo") RGGI compliance costs. In other words, if the administration's illegal repeal took effect immediately, customers would not save a single penny.

Even if there were SCC-approved rate adjustment clauses for either utility to cover RGGI compliance costs, electricity prices began increasing long before Virginia's participation in RGGI. Since Virginia re-regulated its electric utilities in 2007, customers have seen significant increases in electricity rates—increases that far exceed RGGI compliance costs. The SCC laid this fact out in stark detail in a report issued in September of this year, which included the

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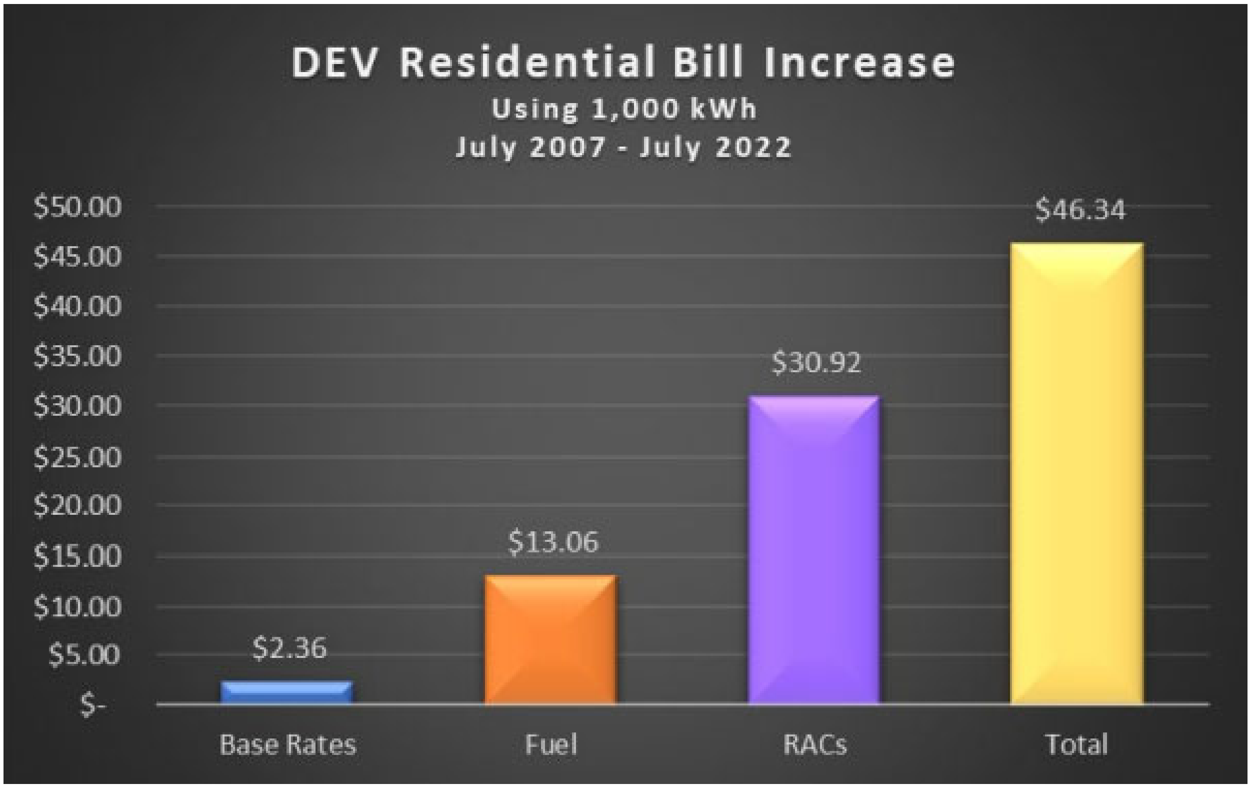
[71] Attachment 37, Va. Dep't of Conservation & Recreation, *Community Flood Preparedness Fund Grants and Loans*.

[72] RGGI revenues are the sole source of funding for the Flood Fund and Weatherization Deferral Repair Program. *See* Attachment 39, Charlie Paullin, *Flood Fund future uncertain as Youngkin pushes for carbon market withdrawal*, Va. Mercury (Sept. 30, 2022), *archived at* https://perma.cc/3HVM-M97Z; Attachment 33, Elizabeth McGowan, *Virginia weatherization program is changing lives, but Gov. Youngkin wants to cut off its funding source*. The Affordable and Special Needs Housing program receives some funds from non-RGGI sources. *See* Attachment 40, Va. Dep't of Housing & Cmty. Dev., *Affordable and Special Needs Housing (ASNH)*, *archived at* https://perma.cc/7WY5-UXDZ.

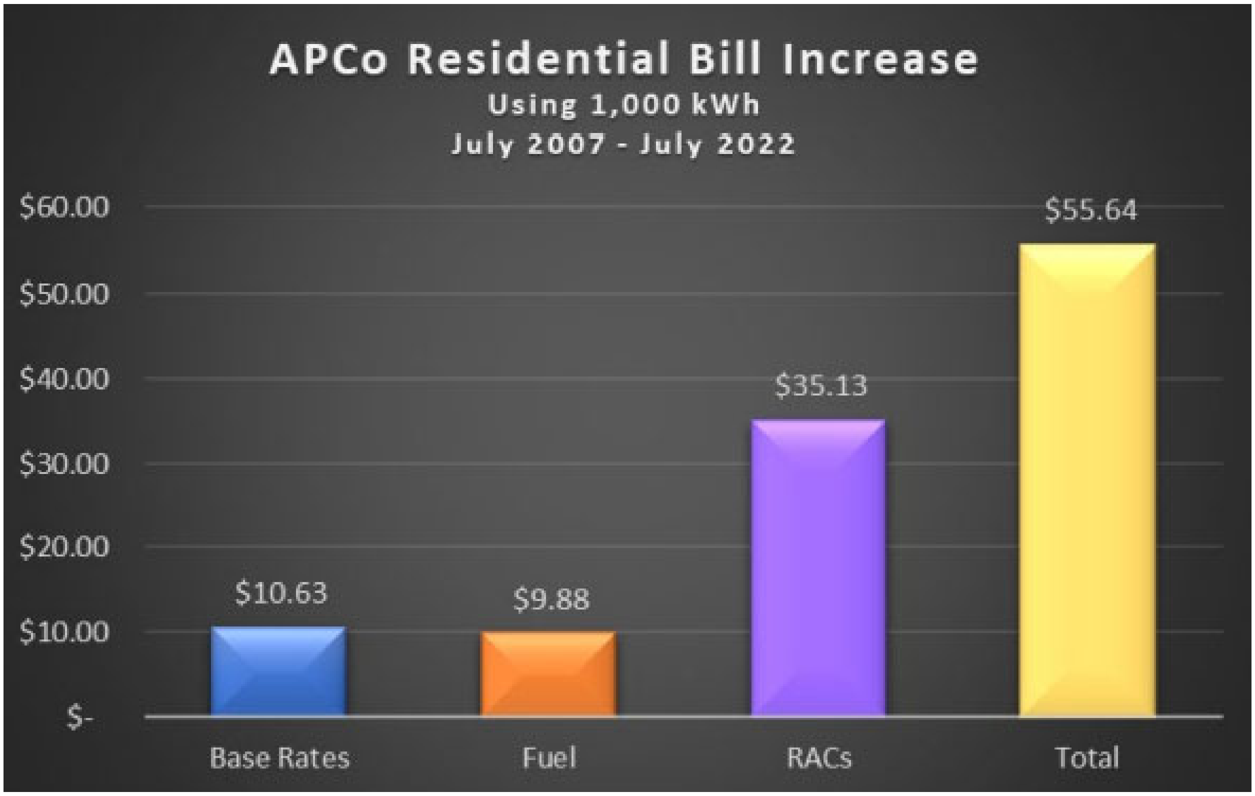
[73] NOIRA at 2–3; Attachment 11, EO 9 Report at 3–4.

[74] Va. Code. Ann. § 56-585.1(A)(5)(e).

following charts showing the factors increasing residential energy bills for Dominion Energy and Appalachian Power customers:[75]




[75] Attachment 41, SCC, Status Report: Implementation of the Virginia Electric Utility Regulation Act Pursuant to § 56-596 B of the Code of Virginia (Sept. 1, 2022) ("SCC Status Report") at 7, 10, *available at* https://www.scc.virginia.gov/getattachment/ce6d77b0-052c-4961-b5cf-064bad4be9b6/2022-VEUR.pdf.




The SCC's figures clearly show that, for both Dominion Energy and Appalachian Power, almost the entire increase in electricity costs has come from rate adjustment clauses ("RACs"), which are SCC-approved requests by utilities to recover costs for specific projects or compliance costs. The report also clarifies that none of these RAC-related cost increases are caused by RGGI, as seen in Tables 1 and 2 below:[76]

[76] Attachment 41, SCC Status Report at 8, 11.

| Recovery Mechanism | Description | Current Residential Bill | | Proposed Increase if Pending | | Proposed Bill | | Requested Effective Date |
|---|---|---|---|---|---|---|---|---|
| Base Rates | Base | $ | 70.63 | $ | - | $ | 70.63 | - |
| Fuel Factor | Fuel | $ | 35.38 | $ | - | $ | 35.38 | 7/1/22* |
| Rider T1 | Transmission | $ | 6.90 | $ | (3.69) | $ | 3.21 | 9/1/22 |
| Rider R | Bear Garden Gas CC | $ | 1.14 | $ | - | $ | 1.14 | - |
| Rider W | Warren Gas CC | $ | 2.34 | $ | (0.38) | $ | 1.96 | 4/1/23 |
| Rider BW | Brunswick Gas CC | $ | 2.10 | $ | 0.70 | $ | 2.80 | 9/1/22 |
| Rider GV | Greensville Gas CC | $ | 2.75 | $ | - | $ | 2.75 | - |
| Rider S | VCHEC | $ | 3.70 | $ | - | $ | 3.70 | - |
| Rider B | Biomass | $ | 0.30 | $ | 0.33 | $ | 0.63 | 4/1/23 |
| Rider US-2 | Solar | $ | 0.17 | $ | 0.05 | $ | 0.22 | 9/1/22 |
| Rider US-3 | Solar | $ | 0.96 | $ | - | $ | 0.96 | - |
| Rider US-4 | Solar | $ | 0.30 | $ | - | $ | 0.30 | - |
| Rider CE | Solar | $ | 1.32 | $ | 1.13 | $ | 2.45 | - |
| Rider SNA | Nuclear Relicensing | $ | - | $ | 2.11 | $ | 2.11 | 9/1/22 |
| Rider RPS | RECs | $ | 0.18 | $ | 1.64 | $ | 1.82 | 9/1/22 |
| Rider RGGI | RGGI | $ | - | $ | - | $ | - | 7/1/22** |
| Rider OSW | Offshore Wind | $ | - | $ | 1.45 | $ | 1.45 | 9/1/22 |
| Rider PPA | Renewable PPAs | $ | - | $ | (0.07) | $ | (0.07) | 9/1/22 |
| Riders C1A/C2A/etc. | Energy Efficiency | $ | 1.31 | $ | 0.29 | $ | 1.60 | 9/1/22 |
| Rider U | Strategic Undergrounding | $ | 2.50 | $ | (0.51) | $ | 1.99 | 4/1/23 |
| Rider GT | Grid Transformation | $ | 1.16 | $ | - | $ | 1.16 | - |
| Rider E | Coal Ash | $ | 1.25 | $ | 0.70 | $ | 1.95 | 9/1/22 |
| Rider CCR | Coal Ash | $ | 2.95 | $ | 0.01 | $ | 2.96 | 12/1/22 |
| Rider RBB | Rural Broadband | $ | 0.03 | $ | 0.14 | $ | 0.17 | 12/1/22 |
| PIPP USF*** | PIPP | $ | 0.03 | $ | - | $ | 0.03 | - |
| Rider VCR**** | Voluntary Credit Rider | $ | (0.47) | $ | - | $ | (0.47) | |
| **Total** | | **$** | **136.93** | **$** | **3.90** | **$** | **140.83** | |

*The fuel factor rate was implemented on an interim basis on 7/1/22, subject to modification.

**The Commission granted DEV's petition to reset Rider RGGI to zero and recover the unrecovered RGGI compliance costs through base rates.

***Current PIPP collections are designed to fund the estimated start-up costs of DSS needed to establish the PIPP. The PIPP will commence no later than one year after DSS publishes guidelines for the adoption, implementation, and general administration of the PIPP and Percentage of Income Payment Fund.

****Rider VCR provides bill credits to customers pursuant to the stipulation in DEV's 2021 triennial review.

*Table 1: Itemization of typical Dominion Energy residential customer bill (as of July 1, 2022)*

| APCo Electric Utility Bills<br>As of July 1, 2022<br>Recovery Mechanism | Description | Current Residential Bill | Proposed Increase if Pending | Proposed Bill | Requested Effective Date |
|---|---|---|---|---|---|
| Base Rates | Base | $ 65.40 | $ - | $ 65.40 | - |
| Fuel Factor | Fuel | $ 23.00 | $ - | $ 23.00 | - |
| TRR Rider Credit | Tax Reform | $ (3.12) | $ - | $ (3.12) | - |
| PIPP USF | PIPP* | $ 0.04 | $ - | $ 0.04 | - |
| T-RAC | Transmission | $ 31.55 | $ 2.88 | $ 34.43 | 8/1/22 |
| G-RAC | Dresden Gas CC | $ 2.55 | $ - | $ 2.55 | - |
| EE-RAC | Energy Efficiency | $ 1.12 | $ 0.34 | $ 1.46 | 9/1/22 |
| DR-RAC | Demand Response | $ 0.22 | $ - | $ 0.22 | - |
| E-RAC | Coal Ash | $ 2.11 | $ 0.80 | $ 2.91 | 12/1/22 |
| BC-RAC | Rural Broadband | $ 0.54 | $ (0.69) | $ (0.15) | 2/1/23 |
| RPS-RAC (legacy) | Voluntary RPS | $ (1.16) | $ - | $ (1.16) | - |
| RPS-RAC (new) | Mandatory RPS | $ - | $ 2.37 | $ 2.37 | 8/1/22 |
| Total | | $ 122.25 | $ 5.70 | $ 127.95 | |

*Table 2: Itemization of typical Appalachian Power residential customer bill (as of July 1, 2022)*

Even more recent rate increases are not due to RGGI. According to the same SCC report, "[f]actors contributing to increased utility costs include inflation, pandemic recovery, supply chain limitations, and high natural gas and other commodity prices, as well as geopolitical events."[77] RGGI was not listed as a contributing factor.

As can be seen on Table 1, "fuel factor" costs add over $35 a month to the average Dominion Energy residential bill—about one-quarter of the total bill. That includes an approximately $15 monthly increase that Dominion Energy recently applied for (and the SCC approved).[78] Due specifically to increased fossil fuel costs—primarily natural gas and coal, costs which have nearly doubled year over year—Dominion Energy had under-recovered fuel costs by $1 billion and sought approval to raise the fuel factor significantly to cover this significant shortfall.[79] Notably, this $1 billion shortfall is for a single year, but at Dominion Energy's request, customers will pay it off over three years. Had Dominion Energy opted to collect its under-recovery over a one-year period, as is typical, bills would have been raised by $24 per month.

[77] Attachment 41, SCC Status Report at 1.

[78] Attachment 42, *Application of Virginia Electric and Power Company to revise its fuel factor pursuant to Va. Code § 56-249.6*, SCC Case No. PUR-2022-00064 (May 5, 2022); Attachment 43, Charlie Paullin, *Regulators approve Dominion bill increase for rising fuel costs; Appalachian Power also seeking hike*, Va. Mercury (Sept. 19, 2022), *archived at* https://perma.cc/RE8N-2DCK. Utilities can seek recovery of "fuel costs, including the cost of purchased power," under the fuel factor. Va. Code Ann. § 56-249.6(A)(1).

[79] Dominion Energy's request was based on "the dramatic increases in fuel prices as a result of the [COVID-19] pandemic, inflation generally, and the war in Ukraine." Attachment 42, *Application of Virginia Electric and Power Company to revise its fuel factor pursuant to Va. Code § 56-249.6*, at 1.

Moreover, Dominion Energy may seek additional rate increases next year if fossil fuel costs remain high, which they are expected to do. This means customers may face *additional bill increases* due to fossil fuel costs, before they have even paid off the 1-year, $1 billion under-recovery.

The table also shows that numerous other rate adjustments (*i.e.*, "RACs" or "riders") are driving up customers' bills, most of which are also fossil fuel related. Dominion Energy customers pay over $17/month for riders specifically related to coal or gas facilities.[80] At present, the sole RGGI-related rate adjustment ("Rider RGGI") has been zeroed out, but even if Dominion Energy were to try to reinstate it, that amount ($2.39/month) would pale in comparison to the fossil fuel-related charges, which total well over $50/month for Virginia customers.[81]

This same pattern holds true for customers of Appalachian Power, the other monopoly utility in Virginia. As seen on Table 2, at present, Appalachian Power customers pay $23/month for "fuel factor" costs, though the utility has a pending request to raise that amount to over $40/month to address recent increases in fuel costs, similar to Dominion Energy.[82] If approved, that would mean that between a quarter and a third of Appalachian Power residential customer bills would be fossil fuel-related costs, not to mention another $5+/month for coal and gas-related operations (Rider E-RAC and Rider G-RAC).[83] By contrast, there are no approved RGGI-related surcharges for Appalachian Power customers currently, and less than $4/month is attributable to clean energy or energy efficiency programs.[84] As Appalachian Power itself acknowledges, the best way to reduce customers' bills is to "grow[] use of renewable energies such as solar and wind," so "there is less need for coal and natural gas to generate power."[85]

While an almost never-ending proliferation of rate adjustment clauses has undoubtedly driven customers' electricity rates up in Virginia, RGGI is not the cause of that increase. The administration has it exactly backwards when it comes to RGGI. As explained previously, without RGGI, Virginia power plant owners failed to reduce emissions from 2010 to 2020. Had RGGI been in place in Virginia during this time, customers would have been far better protected

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[80] Attachment 41, SCC Status Report at 8. This figure includes nearly $9/month for gas plant-related riders (Rider R, Rider W, Rider BW, and Rider GV), $5/month for coal ash-related riders (Rider CCR and Rider E), and $4/month for coal- and biomass-fired Virginia City Hybrid Energy Center ("VCHEC"). *See id.*

[81] Attachment 44, Sarah Vogelsong, *Dominion asks to halt ratepayer charge for carbon market*, Va. Mercury (May 6, 2022), *archived at* https://perma.cc/V2SR-HKGG. While the NOIRA complains about potential increases from clean energy projects like Dominion Energy's Coastal Virginia Offshore Wind Project (between $4.72 and $14.22/month) (see NOIRA at 3), importantly those projects have *zero* fuel costs and will help protect customers from the fossil fuel price risks that are currently driving up customer bills.

[82] Attachment 41, SCC Status Report at 11; Attachment 43, Charlie Paullin, *Regulators approve Dominion bill increase for rising fuel costs; Appalachian Power also seeking hike*.

[83] Attachment 41, SCC Status Report at 11. Appalachian Power is currently requesting a small increase to Rider E-RAC for RGGI allowance costs related to the one carbon-emitting facility it owns in Virginia. *See* Attachment 45, *Pet. of Appalachian Power Company for approval of a rate adjustment clause, the E-RAC, for costs to comply with state and federal environmental regulations pursuant to § 56-585.1 A 5 e of the Code of Virginia*, at 12-13, SCC Case No. PUR-2022-00001 (Mar. 18, 2022). The ruling from the SCC on that petition is pending.

[84] Attachment 41, SCC Status Report at 11.

[85] Attachment 43, Charlie Paullin, *Regulators approve Dominion bill increase for rising fuel costs; Appalachian Power also seeking hike*.

from the recent rise in fossil fuel costs. Participating RGGI states, for example, saw their emissions drop by 50% between 2009 and 2020, meaning existing RGGI states were far less reliant on fossil fuels prior to the recent rise in fossil fuel costs.[86] RGGI is a tool that protects customers from a major driver of rising electricity costs—fossil fuel costs—yet the administration seeks to repeal it.

Moreover, though electricity prices have increased, Virginia's average retail electricity prices remain below the national average, even since joining RGGI. As demonstrated in Figure 1 below, the average retail price of electricity across all sectors in Virginia (orange line) is consistently lower than the national average (blue line) over the last five years (*i.e.*, since January 2018).[87]

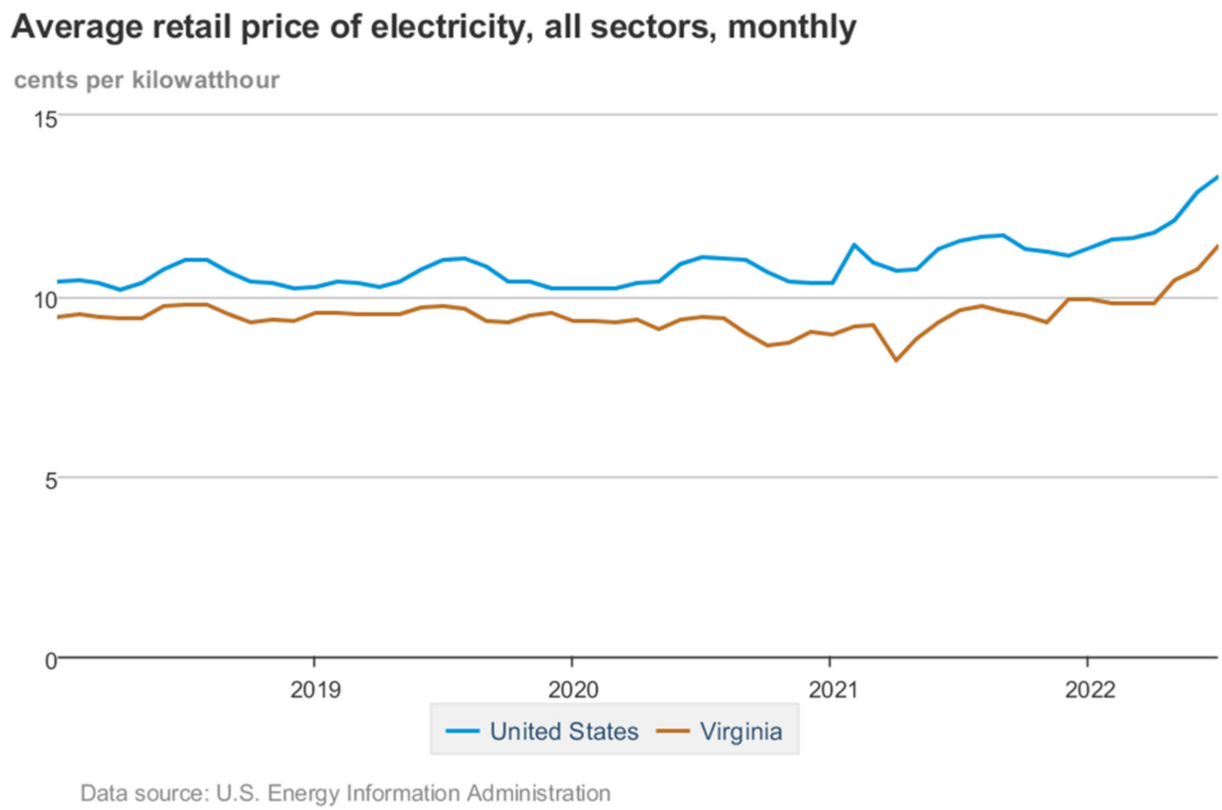


*Figure 1: Average retail price of electricity in United States (blue) and Virginia (orange), Jan. 2018 to July 2022.*[88]

The NOIRA states that "Virginians pay on average $2,323 per year in non-transportation energy costs, which is higher than the national average of $1,850."[89] The administration simply refers to

[86] Attachment 24, *The Investment of RGGI Proceeds in 2020* at 4.

[87] This figure comes from the U.S. Energy Information Administration's Electricity Data Browser (https://www.eia.gov/electricity/data/browser/) and uses the most recent retail prices, which are from July 2022.

[88] *See* Attachment 46, U.S. Energy Info. Admin., Electricity Data Browser, Average retail price of electricity, all sectors, monthly, *archived at* https://perma.cc/PY7D-GS25.

[89] NOIRA at 2.

the U.S. Department of Energy for these numbers (without a specific cite) but does not examine or explain the reasons for this difference. Are Virginians using more electricity? Are homes less efficient? Do they rely on electric heat more than other states? Are retail gas prices higher in Virginia than other states? Without understanding the cause, the administration has no basis for its misguided solution: repealing RGGI. And in fact, repealing RGGI will exacerbate this problem. Continuing Virginia's participation in RGGI will help lower non-transportation costs in two ways: (1) forcing utilities to reduce reliance on fossil fuels that are currently (and likely to continue) causing significant increases in customer electricity costs; and (2) providing funding to vulnerable Virginians to improve home efficiency and lower electricity bills.[90]

Moreover, the NOIRA is simply wrong in stating that "RGGI operates as a direct tax on households and businesses" in which all RGGI compliance costs are passed through directly to consumers with no incentives for the utility to change.[91] Rather, the law permits monopoly utilities to *seek* recovery of compliance costs, but the utility may recover only those costs the SCC finds to be "necessary" to comply with the Emissions Reduction Program, in accordance with the statutory standard.[92] Customers thus are charged only when the utility tries to recover the costs and the SCC finds the costs necessary. Notably, although Dominion Energy has sought to recover such costs in the past, it recently withdrew that rate adjustment request and the SCC approved that recission, meaning that customers have not been paying any RGGI-related costs for the past several months, even though Dominion Energy continues to participate in RGGI auctions.[93]

The data is clear. The real cause of rising electricity costs is not RGGI; instead, utility bills are high due to fossil fuel costs and myriad anti-customer provisions in Virginia's utility code that predate RGGI. Put another way, repealing RGGI will not reduce customers' electricity rates by a single penny as it stands today.

If the administration wants to work to reign in electricity prices, it should recognize that RGGI is a tool that can help protect customers from fossil fuel prices and instead focus efforts on ongoing bipartisan work to reform the ratemaking system. In the last several years and this year, many promising bills have been introduced that would advance fair energy utility rates and enhance the availability of customer refunds.

While it is beyond the Air Board's scope, if the administration truly wants to reduce Virginians' energy costs, it should focus on the fundamental problems with Virginia's utility regulation. None of the problems identified by the administration will be solved by repealing RGGI.

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[90] Va. Code Ann. § 10.1-1330(C).

[91] NOIRA at 3. The EO 9 Report makes similar claims. *See* Attachment 11, EO 9 Report at 4 ("RGGI is a bad construct that taxes consumers without providing incentives for change to the electricity producers." and "Current law allows power generators, such [sic] Dominion Energy, to pass on all their costs, essentially bearing no costs for the carbon credits.").

[92] Va. Code. Ann. § 56-585.1(A)(5)(e).

[93] *See* Attachment 47, *Pet. of Virginia Electric and Power Company for authority to suspend a rate adjustment clause, designated Rider RGGI, under § 56-585.1 A 5 e of the Code of Virginia and for alternate recovery mechanism of certain compliance costs*, SCC Case No. PUR-2022-00070 (May 5, 2022); Attachment 48, *Or. Granting Pet.*, SCC Case No. PUR-2022-00070 (June 15, 2022).

## CONCLUSION

Virginia's participation in the Regional Greenhouse Gas Initiative is required by law. As such, only the General Assembly has the power to withdraw Virginia's participation. Consistent with DEQ and the Air Board's responsibility to uphold the Constitution of the Commonwealth of Virginia, we urge both the Air Board and DEQ to reject efforts to permanently repeal the program.

Sincerely,

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