Ms. Karen G. Sabasteanski
Virginia DEQ
P.O. Box 1105
Richmond VA 23218

March 31, 2023

RE: Public comment regarding Proposed "Repeal CO2 Budget Trading Program as required by Executive Order 9 (Revision A22)"

Mr. Chairman and Members of the Board:

On behalf of our nearly 10,000 paying Virginia members, the Natural Resources Defense Council ("NRDC") appreciates the opportunity to provide comment on the above-referenced proposed regulation.

The NRDC respectfully observes that in adopting the proposed repeal as final, the Virginia Department of Environmental Quality, by and through its Air Pollution Control Board, would be acting in an arbitrary and capricious manner and contrary to law under the agency's basic law, and more specifically, under the Clean Energy and Community Flood Preparedness Act. Moreover, the agency has failed to comply with the Virginia Administrative Process Act (the "APA") in the Agency Background Document (December 7, 2022), which fails to provide a lawful basis for its action and otherwise fails to provide requisite supporting information as required by the APA.

Background

The underlying regulations at issue, 9VAC5-140-6010 et seq. (the "Carbon Trading Regulations"), were adopted as exempt from the APA as mandated by Virginia law, specifically the Clean Energy and Community Flood Preparedness Act (2020 Acts ch.1219) (the "RGGI Act"). The RGGI Act mandated the adoption of the Carbon Trading Regulations and does not provide discretion, or even any authority, to the Air Board to amend or repeal the regulations. The repeal of the regulations is therefore contrary to law and beyond the delegated authority of the Air Board.

The Department, as staff to the Board, has provided an agency background document ostensibly to meet the various procedural findings required under the APA. In its background document, however, the agency has failed to identify how or where the RGGI Act confers authority to the Air Board to repeal the regulations, which by law were adopted without any discretion or oversight by the Air Board. That document also fails as a matter of law because the agency failed to consider alternative approaches under a regulatory flexibility analysis. At a more basic level, the agency has failed to show that it is considering relevant facts, and taking agency action, in a way that is not arbitrary and capricious.

Simply put, the DEQ's proposed regulation cannot withstand even cursory legal scrutiny, as the DEQ: fails to show how the Board can overcome a binding RGGI statute, which repeatedly directs the Air Board that it "<u>shall</u>" participate in RGGI and explicitly withholds from the Board any discretionary

oversight of the program; fails to perform the statutorily-required consideration of regulatory alternatives to repeal; fails to demonstrate how the proposed repeal will not violate the DEQ's anti-backsliding statute; and fails to provide to the public a wide range of APA-required information.

The NRDC therefore respectfully requests that the Air Board return the proposed repeal to DEQ for additional consideration of the below comments and withdraw the proposed repeal. At a minimum, the proposed repeal should be deferred until a lawful basis is articulated in accordance with the APA and prior to any adoption. As currently drafted, the proposed repeal is unlawful on its face and will result in costly and unnecessary litigation, disruption in the trading market, and termination of vital public health and community benefits in the form of both energy efficiency and flood-prevention funding, and lower air pollution.

DISCUSSION

The NRDC offers the following comments on the proposed repeal:

1) The Air Board does not have the statutory authority to repeal the Carbon Trading Regulations, and in any case DEQ has failed to identify any valid authority for the proposed repeal.

The RGGI Act conspicuously excluded the Air Board from any role in the formation, adoption, or oversight of the Carbon Trading Regulations. Rather, the RGGI Act directed DEQ (using the unambiguous directive of "shall") to incorporate its provisions "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. There is not another provision of the RGGI Act that provides the Air Board authority to amend or repeal the Carbon Trading Regulations. See Va. Code §§ 10.1-1329 through 10.1-1331. As a result, the Air Board does not have any statutory authority to modify or repeal the Carbon Trading Regulations under the RGGI Act.

The Department, in its agency document, suggests that Code § 10.1-1308 serves as the statutory basis for the Air Board's proposed repeal. See p.4 ("Legal Basis"). This Code section does in fact confer authority to the Air Board to promulgate carbon trading regulations: see subsection (E) of Code § 10.1-1308. However, that section expressly states that any such regulations shall be adopted "*no earlier than July 1, 2024*" (emphasis added). That time limitation means that subsection (E) cannot serve as the basis for the Air Board's authority here, as both the adoption of the Carbon Trading Regulations and the proposed repeal would occur before July 1, 2024. In addition, the subject matter of the subjection (E) regulations is different than the Carbon Trading Regulations, specifically the implementation years. In sum, subsection (E) of Va. Code § 10.1-1308 cannot serve as the authority for the present action, and any other statutory basis for repeal cannot be located, as is summarily claimed by DEQ, anywhere in Code § 10.1-1308.

Similarly, the Board's <u>general</u> authority under subsection (A) of Va. Code § 10.1-1308, despite any facile claim to the contrary, cannot serve as the authority for the proposed repeal. That is because the General Assembly specifically addressed authority for the Carbon Trading Regulations in the law passed in 2020. The RGGI Act delegated to the Department (and not the Board) the responsibility for advancing the Carbon Trading Regulations specifically. The RGGI Act provisions would apply over any implied grant

of authority for carbon trading in Subsection A. In sum, the Air Board must find its authority for the proposed repeal in the RGGI Act itself, but no such authority can be found there.

2) DEQ does not have the statutory authority to opt out of the Carbon Trading Regulations – participation is mandatory until the General Assembly says otherwise.

The RGGI Act is mandatory. The law states that "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." Va. Code § 10.1-1330(A) (emphasis added). The RGGI Act then provides the Director with specific ministerial authority ("The Director is hereby authorized . . . ") to administer Virginia's entry into the RGGI program and provides a detailed breakdown of how auction proceeds are to be allocated within the state, again repeatedly using the unambiguous command of "shall." As a whole, the RGGI Act is a command to DEQ to join RGGI by adopting regulations conforming to the RGGI model rule (without the involvement of the Air Board). DEQ is nowhere given the discretion to leave RGGI after joining.

3) Executive Order 9 does not provide a lawful basis for the proposed repeal.

Confusingly, in addition to a facile claim of repeal authority under Code § 10.1-1308, the DEQ's agency background document also indicates, in multiple places, that the basis or mandate for the proposed repeal is Gov. Youngkin's Executive Order 9 ("Protecting Ratepayers from the Rising Cost of Living Due to the Regional Greenhouse Gas Initiative" (herein, "EO-9")).

However, a governor's order does not equate with an enacted statute and cannot override or undermine standing Virginia law, in this case the RGGI Act's unambiguous statutory directive that Virginia "shall" join RGGI. Even the barest notion of a governor ordering a law stricken by administrative fiat cannot withstand scrutiny, given the absurd legal and constitutional result that might arise with any stroke of an executive's pen.

Separation-of-powers fundamentals aside, a governor's order also cannot serve as a factual basis for agency action, as the agency -- as the statutorily-designated subject matter expert -- must assess the facts, and do so independently.

Simply put, "just following orders" cannot stand as a reasoned basis for regulatory action here. The Board's general regulatory mandate is found in Va. Code § 10.1-1308.A, where its regulatory authority follows the predicate: "after having studied air pollution in the various areas of the Commonwealth, its causes, prevention, control and abatement." Here, however, the Department and the Air Board have not studied the impacts and costs of the proposed repeal, nor has the agency considered possible alternatives.

More broadly, agency action must be based on evidence and not be arbitrary and capricious. However, the agencies here cannot know if the proposed repeal is sound and legal policy making, because they have erroneously accepted that they are under a purported directive to find reasons to repeal the Carbon Trading Regulations. (See, e.g. EO-9, item 3: "During this same period, [DEQ shall] take all necessary steps to so that any proposed regulation to the State Air Pollution Control Board can be immediately presented for consideration for approval for public comment"). Notably, the Economic Review Form of the Office of Regulatory Management (ORM) posted in the Town Hall for the proposed action similarly describes the situation this way: "All changes are mandated, and the agency is not exercising any discretion" (p. 3, 4). When prompted to weigh the costs and benefits of alternative

approaches, the ORM form again dutifully states: “All changes are mandated, and the agency is not exercising any discretion” (see Table 1c).

In failing to weigh any benefits or consider any alternative approach, DEQ has acted in a per se arbitrary and capricious manner. Administratively, its failure may be attributed to EO-9, which does not direct DEQ to independently weigh the costs and benefits of the proposed repeal. That excuse, “just following orders,” does not, however, render the proposed repeal any more valid. As such, the proposed repeal fails, constitutionally, statutorily, and procedurally.

4) The proposed repeal violates Virginia law under the “no backsliding” provision of the Air Board’s basic law.

Va. Code § 10.1-1308(A) provides in relevant part: “The regulations shall not promote or encourage any substantial degradation of present air quality in any air basin or region which has an air quality superior to that stipulated in the regulations.” The proposed repeal may be reasonably expected to cause a degradation of present air quality in different regions of the Commonwealth, particularly given the notable decline in carbon, NOX, SOX, and particulate matter in each of the first two years of the RGGI program. The expected results of repeal are not known, however, because the Department has failed, contrary to its basic law, to model or even consider them.

It is incumbent on DEQ to demonstrate that the proposed repeal will not cause a degradation of air quality in any of the air quality regions, or at the very least to model those impacts. DEQ has failed to consider what the “backsliding” impacts to air quality will be, and that failure, in addition to failing under the agency’s basic law, renders the proposed regulation arbitrary and capricious.

5) Va. Code § 2.2-4007.05 requires promulgating agencies to publish a concise statement of the basis, purpose, substance, and issues of the proposed regulation. The Agency Background Document entirely fails here, making the proposed repeal legally deficient under the APA, and rendering the Air Board’s adoption of the proposed repeal an arbitrary and capricious agency action. Simply put, DEQ has failed to provide the public with adequate notice or explanation of what it is doing.

The deficiencies of DEQ’s Agency Background Document are presented here in the order of sections within the Agency Background Document:

A. Mandate and Impetus section (Agency Background Document, pp. 2-4).

1. The agency is arbitrary and capricious in solely relying on economic and energy cost-related matters as the Mandate/Impetus for its regulatory change, rather than on air-related matters derived from the Air Pollution’s Control Board’s statutory charge to “promulgate regulations abating, controlling and prohibiting air pollution.” The agency appears to have willfully ignored its statutory role here as the agency charged with controlling air pollution.

2. The agency is arbitrary and capricious in stating that “the benefits of RGGI have not materialized,” when in fact the opposite has occurred. RGGI’s very purpose is to beneficially decrease air pollution, as well as direct beneficial funding to energy efficiency programs and flood prevention. The agency is arbitrary and capricious in its conspicuous omission of the fact that the year-over-year emissions from sources covered by the RGGI program have in fact been

reduced in each of the first two years of the RRGI program (by approx. 13% in the first year of the program (2021) and by approx. 5% in 2022), according to readily-available federal EPA data.

The agency is also arbitrary and capricious in its conspicuous omission of the fact that the RGGI Act has generated over $500 million for energy efficiency and flood prevention, according to readily-available data. In claiming "the benefits of RGGI have not materialized," the agency is also arbitrary and capricious to not include in its analysis (1) RGGI's meaningful public health benefits for Virginians, including the prevention of premature deaths, asthma attacks, and chronic disease, (2) cost reductions from energy efficiency upgrades funded by the RGGI program, and (3) the progressively lower cost of compliance with RGGI, as fewer allowances are needed to be purchased in each successive year.

3. In every paragraph in the agency's "Mandate and Impetus" section, the agency is arbitrary and capricious in solely relying on exclusively economic matters, as those are instead the statutory province of the Commonwealth's economic regulator, the State Corporation Commission. Erroneously taking on the mantle of an economic regulator, rather than air regulator, the DEQ repeatedly rests its regulatory "mandate" and authority on solely economic factors (e.g. citing "increased cost of electricity," "skyrocket[ing]" costs, "electricity prices rose," "rate increase," "average household's [electricity] bill," "upward pressure on utility costs," "energy cost increases," "rate of inflation for energy," real wage growth," "direct tax on households and businesses," "impact on electricity prices" "16 rate adjustments," "cumulative impact of the adjustments," Dominion's "proposed Coastal Virginia Offshore Wind Project," and the "incorporation into the base rate of their electricity bill").

   Utility customer bills are the exclusive province of the State Corporation Commission, not DEQ. *See* Va. Code § 56-576 *et seq* (providing rate review authorities to the Commission for electric utilities). These regulated utility matters are wholly unrelated to the Carbon Trading Rule, and the agency has failed to identify the statutory authority it has to address, or even consider, economic matters that are the exclusive province of the State Corporation Commission. Similar to the absurd legal chaos that would result if a governor's order could override laws, it is untenable, legally and functionally, for agencies to regulate based on issues that are the exclusive province of another agency, as here. Such agency encroachment would be arbitrary, as is the DEQ's present reliance on economic subject matters wholly under SCC jurisdiction.

4. The agency is arbitrary and capricious in relying exclusively on Dominion Energy-related matters as its "Mandate and Impetus": Dominion Energy-owned units are only responsible for just two-thirds of the emissions covered by the existing RGGI regulation; moreover, Dominion only serves approximately 68% of Virginia's electric customers. Yet, the agency wholly fails to address why it has arbitrarily omitted from the agency's proposed regulation analysis: (1) non-Dominion, RGGI-covered emissions, which amount to a full one-third of state emissions, and any associated costs and benefits related to those non-Dominion emissions; and (2) the proposed regulation's impact on the full one-in-three electric customers in Virginia not served by Dominion Energy (i.e. APCo, co-op, and municipal customers across Virginia). In short, DEQ has arbitrarily omitted a full third of the Commonwealth in its repeal proposal, and fails to explain why.

5. The agency is arbitrary and capricious in relying on RGGI's risk of "contributing to the increased cost of electricity" (p. 2), because by the agency's own admission, increases in retail rates are not being driven by RGGI allowance costs, but by natural gas price increases. ("Considering that Virginia obtains most of its electricity from natural gas, rising natural gas prices have forced electricity prices even higher…In May 2022 alone, Dominion filed for a rate increase with the State Corporation Commission (SCC) that could result in monthly rate increases between 12-20% *due to rising fuel costs*." (p. 3, emphasis added)) Given that RGGI in fact lessens Virginia's reliance on costly, carbon-based electricity, the agency by its own rationale is arbitrary and capricious in relying on increased electricity costs as a basis for its RGGI repeal attempt.

6. The agency is arbitrary and capricious in solely relying on Dominion rate increases that occurred over the period of July 2021 – July 2022 (p. 3): the agency has failed to examine forward-looking electricity prices: power prices in Virginia are expected to decrease over the next five years, due to clean energy tax credits under the federal Inflation Reduction Act. In NRDC's modeling of the IRA's clean electricity tax credits,[1] for example, utilizing the Integrated Planning Model® and assuming Virginia's continued participation in RGGI, firm power prices in Virginia in fact decrease through 2028, before flattening out. The agency was arbitrary and capricious in not assessing likely ongoing power prices in Virginia, by taking into account significant energy-sector developments readily known to the agency (including, specifically, the passage of the Inflation Reduction Act).

B. Legal Basis section (p. 4).

7. The agency is arbitrary and capricious in its failure to identify a specific lawful basis for the agency action, other than a facile citation of Va. Code § 10.1-1308 (presumably meaning subsection (A)). It does not explain how that general authority is durable in light of subsection (E) of the same code provision (see NRDC Section 1 above), or in light of the specific provisions of the RGGI Act, which on its face grants the Air Board no authority to modify or repeal the Carbon Trading Regulations.

8. The agency is arbitrary, capricious, and facially erroneous in citing as its legal authority its duty to "abate, control, and prohibit air pollution," per § 10.1-1308: the proposed regulation would instead return polluters in Virginia to unfettered carbon pollution (and with it increased co-pollutants like sulfur dioxide, particulate matter, and nitrogen oxide). Yet the cited authority, by contrast, solely grants the Board authority to do the opposite: "abate, control, and prohibit air pollution."

[1] "Issue Brief: Clean Electricity Tax Credits in the Inflation Reduction Act Will Reduce Emissions, Grow Jobs, and Lower Bills," NRDC, October 12, 2022, *available at* www.nrdc.org/resources/clean-electricity-tax-credits-inflation-reduction-act-will-reduce-emissions-grow-jobs-and.

9. The agency is arbitrary, capricious, and facially erroneous in its facile citation of a governor's order as a legal basis for promulgating the proposed regulation: executive orders apply only to executive actions, and do not supersede statutory law (see NRDC Section 3 above).

C. Purpose section (p. 4).

10. The agency is arbitrary and capricious in failing to clearly describe the "rationale or justification," the "specific reasons the regulatory change is essential to protect the health safety or welfare of citizens," and "the goals of the regulatory change," and instead merely makes spurious, passing reference to "public health, safety, and welfare."

11. The agency is arbitrary and capricious in attempting to incorporate by reference an executive order ("EO-9") as its "Purpose": EO-9 was not composed for the purpose of answering the required questions, EO-9 fails to address the requirements of this section, and EO-9 was not composed by the agency.

D. Issues section (p. 5).

12. Virginia's air agency is arbitrary and capricious in citing non-pollution related matters ("energy costs, "energy markets") as the proposed regulation's "primary advantage," when the agency's central charge is unrelated to economic or commerce impacts, but rather is wholly concerned with "abating, controlling, and prohibiting air pollution" (see NRDC Section 5A above).

13. Virginia's air agency is arbitrary and capricious in citing non air-related matters ("energy costs") as the proposed regulation's "primary advantage," when "energy costs" are the province of the Virginia SCC.

    The SCC is Virginia's designated entity charged with ensuring that Virginia ratepayers receive utility services at **"**just and reasonable rates." And that includes any compliance costs associated with the RGGI trading program, as well as all other environmental compliance costs that have long been a regular, ongoing function of providing electricity from state-regulated utilities (e.g. longstanding compliance costs from the sulfur dioxide trading program, the nitrogen oxide trading program, water pollution standards, coal ash remediation, particulate matter standards, etc.). There is nothing new or unique about oversight by the SCC of ensuring the lowest possible environmental compliance costs, to minimize the impact on total energy costs.

    If, in the specific case of RGGI, Dominion fails to prudently and economically reduce emissions under RGGI by increasing its energy efficiency and low-cost carbon-free resources, and instead continues to expose Virginia ratepayers to high fossil fuel costs, then it is up to the SCC to address these "energy costs" and determine whether the utility should indeed be able to recover them, if imprudently incurred. Indeed, Virginia law explicitly requires that Dominion's energy costs may be deemed recoverable by the SCC only if they are proven to be prudently incurred and not the result of the utility's unreasonable failure to minimize such costs. If the DEQ is concerned about energy costs, its appropriate venue is to intervene or otherwise participate in a cost-related case at the SCC, not to attempt to impact economic matters by tampering with standing air pollution law.

Virginia law is clear that "energy costs" are the province of the SCC, and DEQ is arbitrary and capricious to cite such consumer costs as a primary "issue" for an air agency to address.

14. Virginia's air agency is arbitrary and capricious in citing "transparency in the energy markets" as a primary advantage of the proposed action, as such matters are beyond the scope of the agency's statutory purpose. Even if "energy market transparency" were the air agency's province, the DEQ fails to account for the RGGI program's inherent transparency: pollution levels and allowance costs are known and publicly reported on an ongoing basis. As a cap-and-trade program, RGGI provides Virginia and the surrounding region with the transparent certainty of declining pollution over time. Without RGGI, emissions reductions are neither certain nor transparent.

15. The agency is arbitrary and capricious in its failure to include, as disadvantages, air pollution increases; loss of health benefits; loss of flood mitigation funding; loss of energy efficiency funding; and lower electric bills as a result of energy efficiency improvements funded by the existing regulation. In the case of energy efficiency benefits, energy efficiency programs bring critical advantages to the Commonwealth: by reducing energy waste, they reduce emissions and associated air pollution, reduce production costs associated with building new capacity to meet new demand, reduce transmission & distribution costs, and reduce Virginia's need to purchase or import electricity from out-of-state to meet demand.

    Energy efficiency measures can eliminate up to 35% of the excess energy burden faced by both single- and multifamily low-income households in Virginia.[2] For low-income families, the benefits of these programs are compounding: they will lower monthly energy bills, improve housing comfort and maintenance, and reduce indoor air pollution.

    The agency must include these readily-ascertained lost benefits as a disadvantage of the proposed repeal.

E. Agencies, Localities, and Entities Particularly Affected section (p. 5).

13. The agency is arbitrary and capricious in its failure to include all "particularly affected" agencies, such as the Virginia Resources Authority, the state treasury, Virginia Energy (formerly DMME), and the State Corporation Commission.

14. The agency is arbitrary and capricious in its failure to include those localities that have applied for or may apply for flood preparedness funding under the existing RGGI regulation.

15. The agency is arbitrary and capricious in its failure to include non-carbon emitting generating units and related businesses as "particularly affected" entities.

F. Economic Impact section (pp. 6-7).

[2] ACEEE, "How Efficiency Can Help Low-income Households in Virginia," *available at* www.aceee.org/sites/default/files/pdf/fact-sheet/ses-virginia-100917.pdf.

16. The agency is arbitrary and capricious in omitting from the impact on the DEQ itself the loss of funding for the agency's own statewide climate change planning and mitigation activities, as provided by the existing regulation.

17. The agency is arbitrary and capricious in its failure to include the projected cost to DHCD and DCR in its loss of funds to carry out those agencies' respective missions.

18. The agency is arbitrary and capricious to spuriously include "energy market transparency" as a "benefit" to every state agency, when most, if not all, state agencies have no discernible interest in the purported transparency of any particular interstate market.

19. The agency is arbitrary and capricious in failing to indicate tables 1a or 2, as is explicitly required of the agency in the "Impact on Localities" section (at p. 6).

20. The agency is arbitrary and capricious in failing to indicate tables 1a, 3, or 4, as is explicitly required of the agency in the "Impact on Other Entities" section (at p. 6).

21. The agency is arbitrary and capricious for not meaningfully responding to the DPB EIA.

G. Alternatives to Regulation section (p. 7).

22. The agency is arbitrary and capricious in citing a non-authoritative executive order ("EO-9") as its rationale for repealing a regulation.

23. The agency is arbitrary and capricious in citing "meet[ing] the stated purpose of the regulatory action," as this merely repeats the requirement of this section ("describe…the rationale used by the agency to select the least burdensome alternative that *meets the essential purpose of the regulatory change,*" (emphasis added)).

24. The agency is arbitrary and capricious in failing to provide any "rationale used by the agency to select the least burdensome alternative."

25. The agency is arbitrary and capricious in its failure to consider, list, or adopt the far less burdensome and intrusive alternative of a "consignment auction" approach to regulation (an approach cited by the agency itself, in the "Mandate and Impetus" section (p. 4)).

26. The agency is arbitrary and capricious in its statement that an alternative regulatory change, such as a "consignment auction" approach or simply maintaining a state-cap on carbon, would not meet the stated purpose of the regulatory action, when a "consignment auction" or simply maintaining a state cap on carbon, outside of the RGGI program, would be viable alternatives (given a consignment auction alternative's easily-measured impact on electricity prices and carbon emissions).

27. The agency is arbitrary and capricious in its total failure to include the unambiguously-required discussion of "alternatives for small businesses," particularly the merits of the "consignment auction" approach the agency itself separately references on page 4.

H. Regulatory Flexibility Analysis (p. 7).

28. The agency is arbitrary and capricious in its failure to fulfill the requirement of analyzing the alternative regulatory method of a "consignment auction" approach, and in its erroneous citation to the ORM Economic Impact form, which does not, in fact, include any such required analysis.

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The NRDC therefore again respectfully requests that the Air Board return the proposed repeal to DEQ for additional consideration of the below comments and withdraw the proposed repeal. At a minimum, the proposed repeal should be deferred until a lawful basis is articulated in accordance with the APA and prior to any adoption. As currently drafted, the proposed repeal is unlawful on its face and will result in costly and unnecessary litigation, disruption in the trading market, and termination of vital public health and community benefits in the form of both energy efficiency and flood-prevention funding, and lower air pollution.

Sincerely,

s/Walton Shepherd
NRDC Virginia Policy Director & Senior Attorney