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RE: Comments on Proposed Regulation to Repeal Virginia's CO_2 Budget Trading Program

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 Department of Environmental Quality's ("DEQ") proposed regulation entitled "Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22)." This proposed regulation would repeal Part VII of 9 Va. Admin. Code § 5-140, also known as "Virginia's CO_2 Budget Trading Program" or the "Emissions Reduction 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 mandated in the 2020 Clean Energy and Community Flood Preparedness Act that DEQ promulgate the Emissions Reduction Program, through which Virginia would participate in the Regional Greenhouse Gas Initiative ("RGGI"). The Air Board and DEQ cannot override those legislative mandates.

Beyond the fact that DEQ and the Air Board lack the authority to take this action, withdrawing Virginia from RGGI is also bad policy. States participating in RGGI have historically reduced their emissions at a much more rapid rate than non-participants, and Virginia is no exception. Virginia's participation in RGGI is already bringing numerous benefits to the Commonwealth, 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 the Clean Energy and Community Flood Preparedness Act.[1] Moreover, the funds gained from sales of RGGI allowances are being used to protect Virginians against the worst impacts of climate change, including sea level rise. The funds are also improving the financial wellbeing and indoor air quality of low-income households across

[1] Attachment 1, 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* 14 (Mar. 11, 2022) [hereinafter "EO 9 Report"].

the state by increasing their energy efficiency and reducing their utility bills. These funds will be eliminated if Virginia withdraws from RGGI.

In the first section of these comments, we explain why any non-legislative effort to withdraw the Commonwealth from RGGI—including the proposed regulation—is improper, unlawful, and unconstitutional. We describe how the text and context of both the Clean Energy and Community Flood Preparedness Act and the Virginia Clean Economy Act show that the General Assembly intended to require participation in RGGI when it directed DEQ to develop the Emissions Reduction Program. We additionally dispel the current administration's arguments that DEQ and the Air Board have the authority to pull Virginia out of RGGI through this proposed regulation. In the second section, we respond to the administration's misplaced policy critiques of RGGI and explain the significant benefits to the Commonwealth of continuing participation in RGGI, both through driving down greenhouse gas emissions and through flood resilience and low-income energy efficiency programs funded by the RGGI revenue. Lastly, we respond to the administration's inaccurate claims that participation in RGGI is increasing electricity rates. Because the Emissions Reduction Program is not behind this increase, repealing the program will not lower Virginians' electricity bills.

Given the lack of legal authority for the proposed action, and the very real benefits RGGI is already providing to Virginians, Conservation Organizations respectfully ask that DEQ and the Air Board abandon the proposed regulation and instead continue Virginia's participation in RGGI.

A. The Air Board Cannot Lawfully Repeal the Emissions Reduction Program.

Virginia began participating in RGGI 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 (the "Act"),[2] a bipartisan law that requires Virginia's participation in RGGI and implementation of an 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, but it also brings in critical proceeds to help Virginians reduce their 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. Although there have been attempts to repeal the 2020 law, all such efforts have failed.[3] Thus, it remains the Air Board's responsibility to implement this law, not contradict it, which is what repealing Virginia's Emissions Reduction Program would do.

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[2] 2020 Va. Acts ch. 1280.

[3] *See* 2022 General Assembly, SB 532, HB 1301, Item 4-5.12 #1g (HB30), & Item 4-5.12 (SB30); 2023 General Assembly, SB 1001.

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 by DEQ and the Air Board.

Prior to the passage of the Act, the General Assembly had not authorized the Air Board or DEQ to raise revenue by selling allowances at auction and receiving the proceeds.[4] Thus, in 2019 when the Air Board finalized an earlier version of the program, that regulation would have allowed Virginia to participate in RGGI without raising revenue. The original regulation, however, was never implemented due to a budgetary restriction.

The 2020 Act made important departures from the unimplemented original regulation.

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 DEQ—thus removing from DEQ (and the Air Board) any discretion about whether to adopt the Emissions Reduction Program.[5] This process stands in stark contrast to the process for the 2019 regulation, which the Air Board promulgated under general discretionary rulemaking authority.[6]

The Act also expressly exempts the Emissions Reduction Program from the usual regulatory process under the Virginia Administrative Process Act,[7] an exemption the General Assembly would not have included if it intended the DEQ and the Air Board to choose whether or not to pass the regulation. Thus, the law requires DEQ and the Air Board to promulgate the Emissions Reduction Program.

In addition, the General Assembly provided DEQ the authority it had lacked previously: to sell allowances directly, like every other state participating in RGGI.[8] Virginia Code Section 10.1-1330(B) states, "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." But the General Assembly did not simply authorize the allowance sales—it also

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[4] *See* Attachment 2, Resp'ts' Br. in Opp'n at 2, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. May 7, 2021) (noting that, as of 2019, "DEQ lacked legislative authority to either directly sell CO_2 allowances in an auction or spend or receive proceeds from an auction"); Attachment 3, Sarah Vogelsong, *Virginia Lawmakers Agreed to Join a Regional Carbon Market. Here's What Happens Next.*, Va. Mercury (Apr. 14, 2020), https://perma.cc/66VW-DWBU.

[5] Va. Code Ann. § 10.1-1330(A); *see also* Attachment 12, Certificate and Notice of Filing Agency Record, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. Mar. 18, 2021) at pdf p.63 ("The mandate for this regulatory action is a directive from the General Assembly (Chapter 1219, 2020 Acts of Assembly).").

[6] *See* Va. Code Ann. § 10.1-1308 (giving the Air Board "the power to promulgate regulations . . . abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth in accordance with the provisions of the Administrative Process Act"); Attachment 11, Agency Background Document, Regulation for Emissions Trading at 3 (Apr. 22, 2019) (citing general regulatory authority under Va. Code Ann. § 10.1-1308 as legal basis for 2019 regulation).

[7] Va. Code Ann. § 10.1-1330(A).

[8] *Id.* § 10.1-1330(B).

requires the sales. The very next sentence mandates that the Director of DEQ actually use this new authority, requiring the Director to sell the allowances in the RGGI auctions: "The Director ***shall*** seek to sell 100 percent of all allowances issued each year through the allowance auction."[9]

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 confirming the General Assembly's intent for Virginia to join RGGI.[10]

The Act is unequivocal. The General Assembly required the issuance of Virginia's Emissions Reduction Program and mandated that Virginia participate in RGGI. Following the law's passage, 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% 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.

The VCEA further confirms that participation in RGGI is mandatory through 2030. Certain provisions of the VCEA expressly require the Air Board to have in place regulations to continue reducing CO_2 emissions during the 2031 to 2050 timeframe, though the Air Board has some level of discretion about how to do so.[11] That section of code also provides that, during the period 2031 to 2050, the Air Board "may utilize its existing regulations to reduce carbon dioxide emissions from electric power generating facilities[.]"[12] Through these two statutes, both enacted in 2020, the General Assembly has established a continuous regulatory framework for CO_2 emissions through 2050. Pursuant to the Clean Energy and Community Flood Preparedness Act, the General Assembly has required Virginia to participate in RGGI at least through 2030. Then, for the 2031 to 2050 time period, the General Assembly has required the Air Board to continue reducing CO_2 emissions through a regulatory program, including by continuing participation in RGGI or using alternative options. Notably, the VCEA language referring to an "existing regulation" confirms the General Assembly's expectation that Virginia would be participating in RGGI at least through 2030.

Repealing the Emissions Reduction Program would contradict the law. Most evidently, the administration has no authority to repeal a regulatory program that a statute specifically requires to be issued and implemented. And without the Emissions Reduction Program, numerous other

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[9] *Id.* (emphasis added).

[10] *Id.* § 10.1-1330(D). A joint report was issued in December 2021, but it does not appear that subsequent reports have been issued. *See* Attachment 4, Va. Dep't of Env't Quality et al., *Virginia Clean Energy and Community Flood Preparedness Act: A Joint Report to Governor Ralph S. Northam and the General Assembly of Virginia* (Dec. 2021), https://perma.cc/U394-39XL.

[11] Va. Code Ann. § 10.1-1308(E) ("Notwithstanding any other provision of law and no earlier than July 1, 2024, the Board shall adopt regulations to reduce, for the period of 2031 to 2050, the carbon dioxide emissions from any electricity generating unit in the Commonwealth, regardless of fuel type, that serves an electricity generator with a nameplate capacity equal to or greater than 25 megawatts that supplies (i) 10 percent or more of its annual net electrical generation to the electric grid or (ii) more than 15 percent of its annual total useful energy to any entity other than the manufacturing facility to which the generating source is interconnected (covered unit).").

[12] *Id.*

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. Finally, there will be no "existing regulation" for the Air Board to consider in accordance with its responsibilities under the VCEA for the 2031 to 2050 time period.

Not only would the repeal under consideration violate multiple statutory provisions, but 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 by taking actions contrary to statute.[13]

2. The History of Virginia's Emissions Reduction Program Underscores that the Act Requires 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 Terence 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.[14] After almost a year of public engagement, the work group submitted its recommendations to the Governor.[15] 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."[16]

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 trading program.[17] 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.[18] This original program used a consignment model, whereby DEQ would have distributed

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

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

[15] 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"].

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

[17] Attachment 8, Agency Background Document, Regulation for Emissions Trading (May 22, 2017, modified May 21, 2017) (NOIRA for program); Attachment 9, Agency Background Document, Regulation for Emissions Trading (Nov. 16, 2017) (discussing proposed regulation); Attachment 10, Agency Background Document, Regulation for Emissions Trading (Nov. 27, 2018, modified Jan. 16, 2019) (discussing revised proposed regulation); Attachment 11, Agency Background Document, Regulation for Emissions Trading (Apr. 22, 2019) (discussing final regulation).

[18] 35 Va. Reg. Regs. 2332 (May 27, 2019); 2019 Va. Acts ch. 854 (Item 4-5.11).

Virginia's allowances to existing power plants in proportion to their historical emissions but would not sell those allowances directly at auction.[19]

Had this been the end of the story, future administrations could have changed course by promulgating regulations, without involvement of the General Assembly. The original program had been promulgated under the Air Board's general regulatory authority, so, in theory, the Air Board could have at that time modified or even repealed the Program 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 the Act, a law solely focused on Virginia's Emissions Reduction Program and participation in RGGI. The Act ***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.[20] 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.[21] 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.

3. The Administration's View of the Act Contradicts the Act's Plain Language and Conflicts with the Executive Branch's Previous Understanding.

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.[22]

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[19] 35 Va. Reg. Regs. 2332 (May 27, 2019). As noted above, DEQ adopted this approach because it did not at that time have authority to raise revenue by selling allowances at auction and receiving the proceeds. The consignment model was designed to drive down emissions without raising revenue, consistent with then-existing regulatory authority. *See* Attachment 2, Resp'ts' Br. in Opp'n at 2, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. May 7, 2021) ("The Original Regulations were limited because DEQ lacked legislative authority to either directly sell CO_2 allowances in an auction or spend or receive proceeds from an auction. . . . The Original Regulations worked around these limitations by utilizing a consignment model.").

[20] 36 Va. Reg. Regs. 2598 (Aug. 3, 2020); *see also* Attachment 12, Certificate and Notice of Filing Agency Record, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. Mar. 18, 2021).

[21] Va. Code Ann. § 10.1-1330(A).

[22] Attachment 13, Laura Vozzella, *Youngkin Says He Will Take Virginia out of the Regional Greenhouse Gas Initiative to Save Ratepayers Money*, Wash. Post (Dec. 8, 2021), https://perma.cc/VQ4Z-G8Q6.

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."[23] 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.'"[24] 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 authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."[25]

On January 15, 2022, the Governor was sworn into office. That same day, he signed Executive Order 9.[26] 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 Administrative Process Act procedures.

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."[27] On March 11, 2022, DEQ provided that report to the Governor, which included a draft proposed emergency regulation and a draft Notice of Intended Regulatory Action ("NOIRA") for a permanent regulation.[28]

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 that 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 routine, non-emergency Administrative Process Act process, with the goal of withdrawing Virginia from

[23] Attachment 14, 2021 Op. Va. Att'y Gen. No. 21-102, at 2 (Jan. 11, 2022), https://perma.cc/UGQ7-HDQT.

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

[25] *Id.*

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

[27] *Id.* at 2.

[28] Attachment 1, EO 9 Report.

RGGI by the end of 2023.[29] 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.[30]

Even though the text of the Act clearly establishes that Virginia must join RGGI, the administration now asserts that the Act merely gave DEQ the discretion to decide whether to participate in RGGI.[31] This argument is based on just one sentence of the Act—the portion of § 10.1-1330(B) stating that "[t]he Director is hereby authorized to establish, implement, and manage an auction program to sell allowances"—and ignores other portions of the Act and the VCEA, which clearly mandate Virginia's participation in RGGI. The administration's interpretation is a nonsensical reading of the statute that renders multiple provisions of the law meaningless, and reads qualifying language into mandatory requirements where no such qualification exists.

The mistaken interpretation also ignores critical context. As Attorney General Jason Miyares recently stated in an official opinion, "The scope of an agency's regulatory authority is determined by taking into 'account the text as well as the context of the underlying statute,' whereby it is viewed it as a 'symmetrical and coherent regulatory scheme.' The purposes underlying the basic law also are to be considered when examining the validity of agency action."[32] As discussed above, the Act refers to the Director being "authorized" to sell allowances because DEQ and the Air Board did not previously have authority to do so and would need that authority to carry out the remaining provisions of the Act, all of which relate to actions the Director and other state agencies would take once Virginia joined RGGI. The General Assembly was not trying to suggest that the Director had any discretion about whether to participate in RGGI.[33]

Not only is the language of the Act clear, but contemporaneous statements from lawmakers and regulators demonstrate a clear understanding and intention 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."[34] David Paylor, the Director of DEQ at the time, made similar

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[29] Attachment 16, Charlie Paullin, *Youngkin Administration Outlines Plan to Withdraw Virginia from Carbon Market by Regulation*, Va. Mercury (Sept. 1, 2022), https://perma.cc/BGA4-WQEP.

[30] 39 Va. Reg. Regs 57 (Sep. 26, 2022).

[31] *See* Attachment 17, Proposed Regulation: Agency Background Document, Repeal CO_2 Budget Trading Program as required by Executive Order 9 (Revision A22), at 14 (Dec. 7, 2022) [hereinafter "Agency Background Document"]; Attachment 18, David Ress, *Youngkin: I Have the Power to Pull Out of RGGI*, Rich. Times-Dispatch (Sept. 12, 2022), https://perma.cc/2DHF-KR7T.

[32] Attachment 19, 2022 Op. Va. Att'y Gen. No. 22-033, at 3 (Oct. 14, 2022) (quoting *Kavanaugh ex rel. Kavanaugh v. Va. Birth-Related Neurological Injury Comp. Program*, 60 Va. App. 440, 447 (2012)).

[33] As prior opinions of Attorneys General have noted, the administration has no authority to suspend a validly executed regulation or fail to implement a duly adopted regulation or statute. *See* Attachment 20, 2014 Op. Va. Att'y Gen. 78 (May 30, 2014); Attachment 21, 2014 Op. Va. Att'y Gen. 43 (Jan. 3, 2014).

[34] Attachment 22, Press Release, Va. Off. Of the Governor, Governor Northam Signs Clean Energy Legislation (Apr. 12, 2020), https://perma.cc/4M4E-EMH7.

statements about how the Act required participation in RGGI, as did Senator Lynwood Lewis, a co-sponsor of the legislation.[35]

Even more recently, a group of over 60 members of the General Assembly, most of whom were members who voted on the Act, sent a letter to the Air Board reiterating that Virginia is required by law to participate in RGGI.[36] Additionally, in December 2022, the Joint Commission on Administrative Rules ("JCAR") held a hearing on this process and officially objected to this regulatory action.[37] JCAR's established purpose is to review existing and proposed rules and regulations issued by any state agency and to "make recommendations to the Governor and General Assembly."[38] It is authorized by statute to determine whether a proposed rule or regulation "is authorized by statute" or "complies with legislative intent," and to "[f]ile with the Registrar and the agency promulgating the regulation an objection to a proposed or final adopted regulation."[39] By objecting to this process, JCAR has likewise affirmed that the Act mandates RGGI participation.

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 in 2020, 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,"[40] 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

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[35] *Id.*; *see also* Attachment 23, David K. Paylor, *Clean Air and Clean Water Are More Important Now than Ever*, Va. Mercury (Apr. 24, 2020), https://perma.cc/6CYV-U9VL; Attachment 12, Certificate and Notice of Filing Agency Record, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. Mar. 18, 2021). In fact, even after the publication of the NOIRA proposing that Virginia withdraw from RGGI, DEQ's website continued to state: "[T]he Clean Energy and Community Flood Preparedness Act ***requires*** Virginia to join the Regional Greenhouse Gas Initiative (RGGI)." Attachment 24, Va. Dep't of Env't Quality, *Greenhouse Gases* (Sept. 27, 2022), https://perma.cc/8RRX-7PRB (emphasis added). "[A]n agency's interpretation of its governing statutes, *as reflected in its regulations*, is entitled to great weight." *Manassas Autocars, Inc. v. Couth*, 274 Va. 82, 87 (2007) (emphasis added).

[36] Attachment 25, 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.

[37] *See* 39 Va. Reg. Regs. 1436 (Jan. 30, 2023); *see also* Attachment 26, Charlie Paullin, *Legislative Commission Objects to Withdrawal from Regional Carbon Market*, Va. Mercury (Dec. 20, 2022), https://perma.cc/7QYD-9TDX.

[38] Va. Code Ann. § 30-73.1.

[39] *Id.* § 30-73.3(A)(2), (3).

[40] Attachment 27, Pet. for Appeal ¶ 38, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. Oct. 2, 2020).

also ***mandated*** that DEQ ***actually use*** such authority by selling the allowances at auction.[41] The Circuit Court for the City of Richmond agreed with the Attorney General's Office and denied VMA's challenge in its entirety.[42]

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 by 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 the Air Board.[43]

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 reasonable 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.

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

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.

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 and finally getting the energy bill relief they need;

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[41] *See, e.g.*, Attachment 2, Resp'ts' Br. in Opp'n at 2, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. 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.") (emphasis added).

[42] Attachment 28, Op. Order, *Va. Mfrs. Ass'n v. Va. Dep't of Env't Quality*, No. CL20-4918 (Rich. Cir. Ct. July 14, 2021).

[43] *See* Attachment 14, 2021 Op. Va. Att'y Gen. No. 21-102, at 2; Attachment 29, Patrick Wilson, *The Mystery of the Secret Virginia Air Board Document*, Rich. Times-Dispatch (May 13, 2022), https://perma.cc/9S3Q-9PEB.

- Highly efficient affordable-housing units are under construction to help fill the severe affordable-housing gap, and these units 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.

Dismantling 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.

The administration 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.[44] Both assertions are disingenuous. Virginia has been part of RGGI for just over two years, so it is far too early to reach definitive conclusions about the magnitude of its long-term 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.[45]

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 caused by various non-RGGI factors, most notably increases in fossil fuel costs. Furthermore, 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 should focus on its charge, namely controlling and abating air pollution.

1. Participating in RGGI Is Vital To Meeting 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.[46] 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,

[44] Attachment 17, Agency Background Document at 2, 4.

[45] Notably, other states are currently pursuing efforts to join RGGI, including Pennsylvania, and Washington recently began implementing an even more comprehensive market-based carbon reduction program. *See* Ad Crable, *PA Governor's First Budget Includes RGGI, Abandoned Wells, Park Improvements*, Chesapeake Bay J. (Mar. 13, 2023), https://perma.cc/F2QB-XPB5; Wash. Dep't of Ecology, *Washington's Cap-and-Invest Program*, https://perma.cc/4EHL-J6NQ. If participating in such programs was a bad deal economically, these states would not be trying to join them.

[46] Attachment 30, U.S. Energy Info. Admin., Table 3. 2020 State Energy-Related Carbon Dioxide Emissions by Sector, https://perma.cc/36ZP-MN86.

emissions may not reduce sufficiently to achieve these goals."[47] 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, reducing and ultimately eliminating carbon emissions from power plants 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 decline in economic output by the end of the century.[48] 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.[49] There are similar risks for communities in Appalachia, which are experiencing increasingly frequent severe floods, causing significant damage.[50] 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."[51] 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. 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.[52] The General Assembly directed DEQ to do so, and DEQ complied by adopting the Emissions Reduction Program.[53]

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

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[47] Attachment 1, EO 9 Report at 14.

[48] Attachment 31, Katherine Hafner, *Unchecked Sea Level Rise Would Cost Virginia $79 Billion This Century, ODU Says*, WHRO Public Media (Sept. 15, 2022), https://perma.cc/F86K-ZPM4.

[49] 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.*

[50] Attachment 32, Roxy Todd, *As Flooding Risks Increase, This Small Town in Appalachia Is Working on a Flood Mitigation Plan*, Radio IQ (Nov. 23, 2022), https://perma.cc/4EWF-K4HY; Attachment 33, Molly Born, *As Floods Worsen in Appalachia, Disaster Prep Gets More Complex — and Necessary*, Southerly (Sept. 16, 2021), https://perma.cc/5SUR-FEEW.

[51] Attachment 6, EO 57 Report at 1–2. These figures are as of 2017 and appear to be even higher now. *See, e.g.*, Va. Dep't of Agric. & Consumer Servs., *Agriculture Facts & Figures*, https://perma.cc/BF7D-RUGH ("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.").

[52] *See* Attachment 34, RGGI, Inc., Model Rule Part XX CO_2 Budget Trading Program (rev. 2018), https://perma.cc/MS85-CD25. States are not required to adopt the model rule as written; rather, they may use it as a starting point for crafting statutes or regulations that are generally consistent with the principles laid out in the model rule. Participating states have employed a variety of approaches to accomplish this task. *See generally* RGGI, Inc., *State Statutes & Regulations*, https://perma.cc/FU54-LK6L.

[53] 9 Va. Admin. Code § 5-140-6010 *et seq*.

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.[54]

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% annually. By reducing the supply each year, the RGGI states will drive down their overall emissions by 30% from 2020 to 2030.[55]

RGGI has been effective in reducing emissions in participant states. As the current administration has acknowledged, "the RGGI region has a long track record of emission reductions since the beginning of the program."[56] 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.[57] 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."[58]

Not only does RGGI's 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.[59] 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.[60] In fact, RGGI participation is estimated to have created over $4 billion in net economic gains and over 44,000 job years of employment in participating states through 2017.[61]

In the decade before joining RGGI, Virginia did not see its power plant emissions decline. According to DEQ's EO 9 Report, between 2010 and 2020 (*i.e.*, before Virginia joined RGGI),

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[54] *See* Attachment 35, RGGI, Inc., *RGGI 101 Factsheet* (Sept. 2021), https://perma.cc/8CTZ-6Z53. This type of system is not new; EPA used the same market-based approach to address acid rain in the United States beginning in the 1990s. *See* Attachment 36, EPA, *Acid Rain Program Results*, https://perma.cc/Q5W6-GBRF.

[55] *See* Attachment 37, RGGI, Inc., *Summary of RGGI Model Rule Updates* (Dec. 19, 2017), https://perma.cc/YVD8-MPPD.

[56] Attachment 1, EO 9 Report at 13.

[57] Attachment 38, RGGI, Inc., *The Investment of RGGI Proceeds in 2020,* at 4 (May 2022), https://perma.cc/6E8D-J3G5. This figure does not include New Jersey, which did not participate from 2011 to 2020.

[58] Attachment 39, Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review*, at Executive Summary (2019), https://perma.cc/3MYA-DUR9.

[59] *Id.* at 1.

[60] *Id.* at 7 (noting that "RGGI states have seen 31% more economic growth than the rest of the country" between 2008 and 2018). This figure does not include California, which also had similar limits on carbon emissions and experienced similar economic growth. *Id.*

[61] Attachment 40, Paul J. Hibbard, et al., *The Economic Impacts of the Regional Greenhouse Gas Initiative on Nine Northeast and Mid-Atlantic States* 9–10, 48 (Apr. 17, 2018), https://perma.cc/WN25-EWZG.

"mass emissions [for the power sector] . . . remained fairly constant" in the Commonwealth, "with no discernable trend."[62]

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 participants. Virginia's annual total CO_2 emissions from power plants declined by about 5.5 million tons/year—from about 32.8 million tons in 2020 to about 27.3 million tons in 2022—a total decrease of 16.8% over just two years.[63] 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.[64] There is every reason to expect that those trends will continue, since RGGI is structured so that the number of available carbon allowances decreases 3% year-over-year, as well as RGGI's long track record of driving down emissions since its start in 2009.

All of these data clearly indicate 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 Benefits Virginians Through Both Climate Benefits and Revenue.

Participation in RGGI provides substantial benefits to Virginians and to the Commonwealth overall. Indeed, Virginians recognize this — the majority of Virginians want to stay in RGGI.[65]

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[62] Attachment 1, 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 Youngkin administration has relied on elsewhere to argue that RGGI participation is unnecessary. *Id.*; *see also* Attachment 41, Travis A. Voyles, Report to the Air Board, at Slide 15 (Aug. 31, 2022). However, what matters for gauging climate impact and effects on public health is total emissions, not the emission rate. As the report makes clear, even though the emission *rate* may have decreased in the past decade, the total annual emissions did not meaningfully decrease in the pre-RGGI period.

[63] Attachment 42, EPA, Clean Markets Air Program Data, https://perma.cc/3HPY-EJV9 (showing Virginia power plant emissions between 2020 and 2022).

[64] The Agency Background Document claims that "emissions of CO_2 and other pollutants have been and continue to decrease within Virginia's borders" and that "[s]uch decreases are not directly attributable to participation in RGGI but are primarily the result of other ongoing programs." Attachment 17, Agency Background Document at 9. The EO 9 Report makes a similar claim: "Overall, CO_2 emissions in Virginia have fallen substantially since 2005, demonstrating that Virginia has been reducing their CO_2 emissions without regard to RGGI." Attachment 1, EO 9 Report at 16. While annual CO_2 emissions from power plants have decreased by about 11.7 million tons per year since 2005, almost half of that decrease (5.50 million tons per year) came in the two years since Virginia joined RGGI—and the percentage decline from 2020 to 2022 (16.8%) is higher than from 2005 to 2020 (14.8%). Attachment 43, EPA, Clean Markets Air Program Data, https://perma.cc/SV3T-TTJV (showing Virginia power plant emissions between 2005 and 2022). Clearly, participating in RGGI is resulting in emissions decreases.

[65] Polls taken in early 2022 and early 2023 consistently show that about two-thirds of Virginia voters want to stay in the RGGI program. Attachment 44, Wason Center, Christopher Newport University, *State of the Commonwealth 2022* (Feb. 21, 2022), https://perma.cc/2AJ4-Z8JM (reporting that 67% of survey respondents wanted to stay in RGGI); Attachment 45, Wason Center, Christopher Newport University, *State of the Commonwealth 2023* (Jan. 27, 2023), https://perma.cc/S82F-KBN6 (reporting that 66% of survey respondents wanted to stay in RGGI). Additionally, more than 90% of the comments on the NOIRA opposed the decision to leave the RGGI program. *See* Attachment 46,

As discussed above, participation in RGGI 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 are 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."[66] 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."[67] 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.[68] A later study identified an additional $200+ million in children's health benefits from reduced particulate contamination, including substantial reductions in instances of autism spectrum disorder.[69]

The sales of allowances at RGGI auctions are also netting significant revenues for the Commonwealth. 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 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.[70]

Travis A. Voyles, Presentation to Air Board on Proposed Regulation: Repeal CO_2 Budget Trading Program, 9VAC5 Chapter 140 (Rev. A22), at Slide 11 (Dec. 7, 2022); *see also* Attachment 47, Karin Rives, *Virginians Rally for RGGI Carbon Market as Pennsylvania Cools to Idea*, S&P Glob. Mkt. Intel. (Oct. 28, 2022), https://perma.cc/YA7Q-FBCP (concluding that, of the people commenting on the NOIRA,"[m]ore than 95% said the Commonwealth should remain part of the 12-state carbon market").

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

[67] *Id.* at 1–2.

[68] Attachment 48, Abt Assocs., *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative, 2009–2014* (Jan. 2017), https://perma.cc/KH8A-6GDU.

[69] Attachment 49, Frederica Perera et al., *Co-Benefits to Children's Health of the U.S. Regional Greenhouse Gas Initiative*, Env't Health Persps. (July 2020), https://perma.cc/P8DY-5DME.

[70] *See, e.g.*, Attachment 50, RGGI, Inc., Scope of Work in Support of Virginia Department of Environmental Quality Implementation of the Virginia Carbon Dioxide (CO_2) Budget Trading Program 2 (Feb. 8, 2021) ("No Policy Role or Regulatory Authority" provision), https://perma.cc/S79W-MNQU.

To date, Virginia has participated in nine RGGI auctions and has sold all of the more than 45 million allowances it has placed into those auctions, receiving approximately $590 million from those sales.[71] 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.[72]

As required by the Act, 50% 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."[73] The Department, after consultation with a stakeholder advisory group and a series of public meetings, developed its "Housing Innovations in Energy Efficiency" ("HIEE") 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.[74]

The Weatherization Deferral Repair Program "funds repairs that have caused homes (or units in multifamily buildings) to be deferred from the Weatherization Assistance Program."[75] 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.[76] 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 measures includ[e] sealing air leaks, adding insulation, and repairing heating and cooling systems."[77]

Unfortunately, about 20% of otherwise eligible households cannot have their homes weatherized under the Weatherization Assistance Program due to underlying issues in their homes.[78] 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

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[71] Attachment 51, RGGI. Inc., Auction 59 State Proceeds and Allowances (2023), https://perma.cc/2A76-FMEQ.

[72] 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 1, EO 9 Report at 4.

[73] Va. Code Ann. § 10.1-1330(C).

[74] Attachment 52, Va. Dep't of Hous. & Cmty. Dev., *Housing Innovations in Energy Efficiency (HIEE)*, https://perma.cc/BZU3-NLPT.

[75] Attachment 53, Va. Dep't of Hous. & Cmty. Dev., *Weatherization Deferral Repair (WDR)*, https://perma.cc/TE8V-BEGP.

[76] Attachment 54, Off. of Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, *Weatherization Assistance Program*, https://perma.cc/KWX3-9B77.

[77] *Id.*

[78] Attachment 55, Va. Dep't of Hous. & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022 (updated July 2021), https://perma.cc/X6JC-P7VJ; Attachment 56, Chase Counts, *Utilizing Virginia RGGI Revenue to Support Existing Low-Income Energy Efficiency Programs*, LinkedIn (Dec. 11, 2020), https://perma.cc/PB3C-VSHW/.

federally funded weatherization available under the Weatherization Assistance Program until those problems are repaired.[79] Since these households are by definition low-income, these repairs are often never completed, so they never receive the needed weatherization.[80]

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.[81]

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 ("ASNH") 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."[82]

To date, approximately $252 million has been allocated to the HIEE program.[83] So far, 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 through the ASNH program, improving 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, Norfolk, Portsmouth, Radford, South Boston, Staunton, Waynesboro, Williamsburg, and Wytheville.[84] Another $80 million in HIEE funding has been made available for ASNH projects during the upcoming fiscal year.[85]

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[79] Attachment 55, Va. Dep't of Hous. & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022 (updated July 2021), https://perma.cc/X6JC-P7VJ.

[80] Attachment 57, Elizabeth McGowan, *Virginia Weatherization Program Is Changing Lives, but Gov. Youngkin Wants to Cut Off Its Funding Source*, Energy News Network (Sept. 21, 2022), https://perma.cc/PB3C-VSHW.

[81] Attachment 55, Va. Dep't of Hous. & Cmty. Dev., Virginia Weatherization Deferral Repair Program Guidelines 2021-2022 (updated July 2021), https://perma.cc/X6JC-P7VJ.

[82] Attachment 58, Va. Dep't of Hous. & Cmty. Dev., Affordable and Special Needs Housing – Consolidated Application Program Guidelines 2021-2022, at 6 (updated Sept. 2022), https://perma.cc/7RZC-H6ZQ.

[83] Attachment 59, Damien Pitt et al., *Investing in Virginia through Energy Efficiency: An Analysis of the Impacts of RGGI and the HIEE Program* 11 (Jan. 2023), https://perma.cc/BQT8-AQ44.

[84] Attachment 60, Press Release, Va. Dep't of Hous. & Cmty. Dev., Governor Northam Announces Over $21 Million in Affordable and Special Needs Housing Loans (July 8, 2021), https://perma.cc/TZK2-YKWR (Round 1 HIEE-funded projects); Attachment 61, Press Release, Va. Dep't of Hous. & Cmty. Dev., Governor Northam Announces Over $60 Million in Affordable and Special Needs Housing Loans (Jan. 13, 2022), https://perma.cc/H5PY-N97H (Round 2 HIEE-funded projects). The administration recently allocated over $93 million in ASNH loans, though it did not specify what portion of that funding comes from the HIEE program. *See* Attachment 62, Press Release, Va. Dep't of Hous. & Cmty. Dev., Governor Youngkin Announces Over $93 Million in Affordable and Special Needs Housing Loans (Mar. 10, 2023), https://perma.cc/8XQV-2B4D.

[85] Attachment 59, Damien Pitt et al., *Investing in Virginia through Energy Efficiency: An Analysis of the Impacts of RGGI and the HIEE Program* at 13.

Additionally, to date, the Weatherization Deferral Repair Program has used about $8 million in proceeds on about 550 projects totaling over 1,000 single family or multi-family units.[86]

This energy efficiency funding will have broad and long-lasting benefits for Virginians. A recent study estimated that continued participation in RGGI—just through 2030—would result in between $1.24 billion to $1.64 billion in energy efficiency funding.[87] That funding alone would support energy efficiency upgrades for up to 130,000 homes in the Commonwealth, resulting in "over 546,000 MWh in annual electricity reductions and $82 million in annual customer bill savings, for an average of $676 in annual savings per household," in addition to creating and sustaining up to 2,115 new jobs.[88] Moreover, every dollar spent of that funding is anticipated to generate $1.66 in benefits, resulting in a statewide economic impact of $2.03 to $2.67 billion by 2030 alone.[89] Continued participation beyond 2030 would result in comparable annual benefits.[90]

The Act requires another 45% 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."[91] By statute, funds from the Flood Fund must be used "solely for the purposes of enhancing flood prevention or protection and coastal resilience . . . ."[92] 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."[93] 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."[94] The Department of Conservation and Recreation must ensure that at least 25% of the monies disbursed each year are used for projects in low-income geographic areas.[95]

To date, the Department of Conservation and Recreation has awarded a total of $97.7 million in grants from the Flood Fund across three rounds of grants (Round 1: $7.8 million in October 2021; Round 2: $24.5 million in December 2021; Round 3: a total of $65.4 million in September and

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[86] *Id.* Based on recent email correspondence with staff at the Department of Housing and Community Development, the Department has pre-approved at least 694 WDR projects estimated to cost nearly $9 million, not counting administration fees. To date, 366 of those projects have received a total of nearly $5.7 million in funding. *See* E-mail from Aaron Shoemaker, Program Adm'r, Energy Efficiency Office, Dep't of Hous. & Cmty. Dev. to Billy Weitzenfield, Executive Dir., Ass'n of Energy Conservation Prof's (Mar. 16, 2023 4:07 PM) (on file with author).

[87] Attachment 59, Damien Pitt et al., *Investing in Virginia through Energy Efficiency: An Analysis of the Impacts of RGGI and the HIEE Program* at vii.

[88] *Id.* at i.

[89] *Id.*

[90] *Id.* at vi.

[91] Va. Code Ann. § 10.1-1330(C).

[92] *Id.* § 10.1-603.25(B).

[93] *Id.* § 10.1-603.25(E).

[94] *Id.*

[95] *Id.*

December 2022).[96] Those grants have been awarded to 98 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, Danville, Dickenson County, Fairfax County (and city), Front Royal, Gloucester County, Grayson County, Hampton, Hampton Roads PDC, Henrico County, Isle of Wight County, King George County, the Lenowisco PDC (covering Southwest Virginia), Mathews County, Middle Peninsula PDC, Middlesex County, Newport News, Norfolk, Northampton County, Northern Neck PDC, Northern Virginia Regional Commission, Occoquan, Petersburg, Portsmouth, Rappahannock-Rapidan Regional Commission, Richmond, Roanoke, Salem, Scottsville, Shenandoah County, Southside PDC, Suffolk, Tappahannock, Tazewell County, Virginia Beach, West Point, and Winchester.[97]

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.[98] Leaving RGGI would thus do a grave disservice to Virginians and cause substantial harm to those vulnerable communities.

The administration has suggested that there may be alternative funding mechanisms for these areas if Virginia leaves RGGI. To date, no real substitutes have been identified. The Resilient Virginia Revolving Fund, which was created last year and can be the source of loans or grants for governments and other entities performing projects focused on resilience or lowering flood risks,[99] is separate and distinct in key ways from the Flood Fund. Moreover, the Resilient Virginia Revolving Fund has yet to issue a single loan or grant, or had its operations outlined, and at present, the fund has no ongoing source of funding. While budget negotiations are still underway, the only funds currently available are the $25 million in seed money redirected from the Flood Fund.[100] Thus if Virginia were to leave RGGI, there would be no consistent source of funding for the vital flood prevention and energy efficiency work currently being funded by RGGI proceeds.

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[96] Attachment 63, Va. Dep't of Conservation & Recreation, *Community Flood Preparedness Fund Grants and Loans*, https://perma.cc/99GN-UPUC.

[97] *Id.*

[98] RGGI revenues are the sole source of funding for the Flood Fund and Weatherization Deferral Repair Program. *See* Attachment 57, Elizabeth McGowan, *Virginia Weatherization Program Is Changing Lives, but Gov. Youngkin Wants to Cut Off Its Funding Source*; Attachment 64, Cha rlie Paullin, *Flood Fund Future Uncertain as Youngkin Pushes for Carbon Market Withdrawal*, Va. Mercury (Sept. 30, 2022), https://perma.cc/3HVM-M97Z. The Affordable and Special Needs Housing program receives some funds from non-RGGI sources. *See* Attachment 65, Va. Dep't of Hous. & Cmty. Dev., *Affordable and Special Needs Housing (ASNH)*, https://perma.cc/7WY5-UXDZ.

[99] *See* Attachment 66, Charlie Paullin, *Virginia Looking to Loans for Local Flood Resiliency Efforts*, Va. Mercury (Oct. 10, 2022), https://perma.cc/K8DY-XZCZ; *see also* Va. Code Ann. §§ 10.1-603.28–40.

[100] *See id.*

3. RGGI Is Not Increasing Virginians' Electricity Bills, So Withdrawing from RGGI Will Not Lower Electricity Rates.

The Agency Background Document 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.[101]

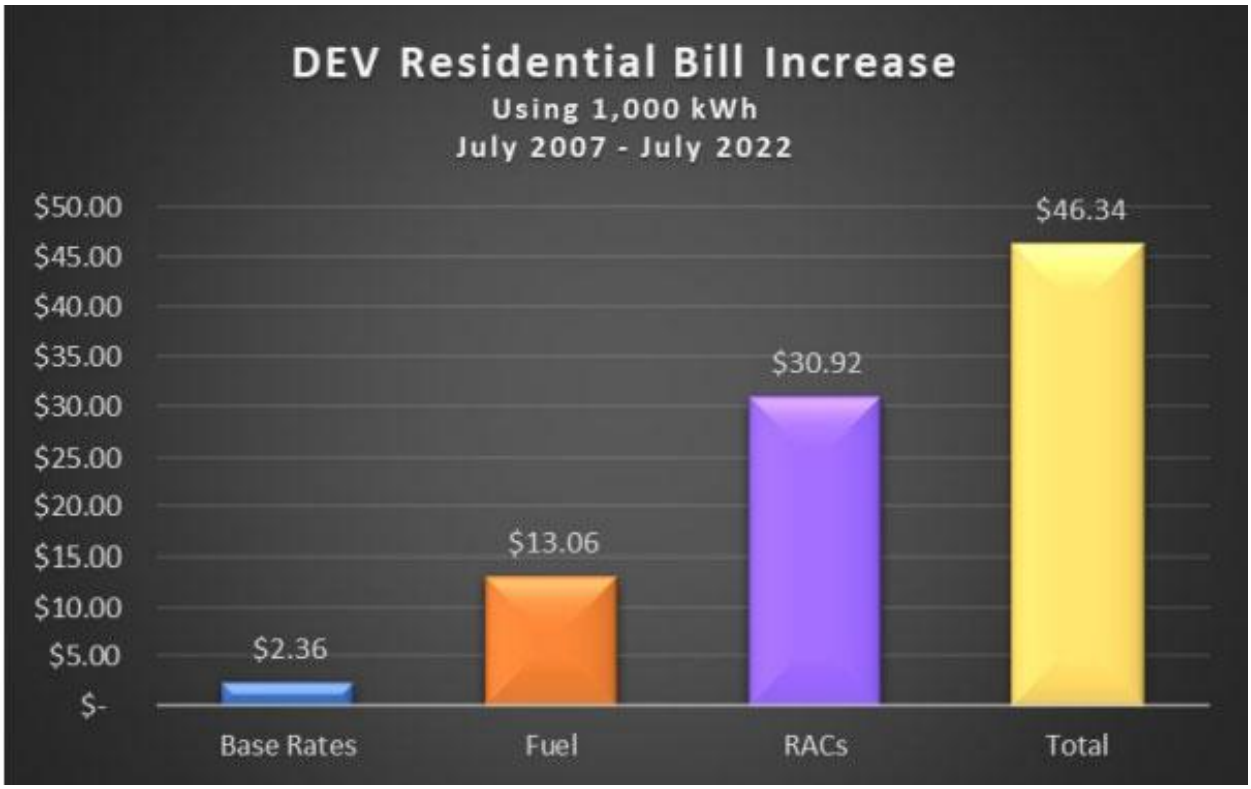
As an initial matter, the Air Board may not premise a repeal based on the fear that Virginia's participation in RGGI might cause electricity rates to rise. The General Assembly expressly authorized utilities to seek to recover RGGI compliance costs from customers through a rate adjustment clause, subject to State Corporation Commission ("SCC") approval.[102] The Air Board simply has no authority to second-guess the General Assembly's decision or take oversight authority away from the SCC.

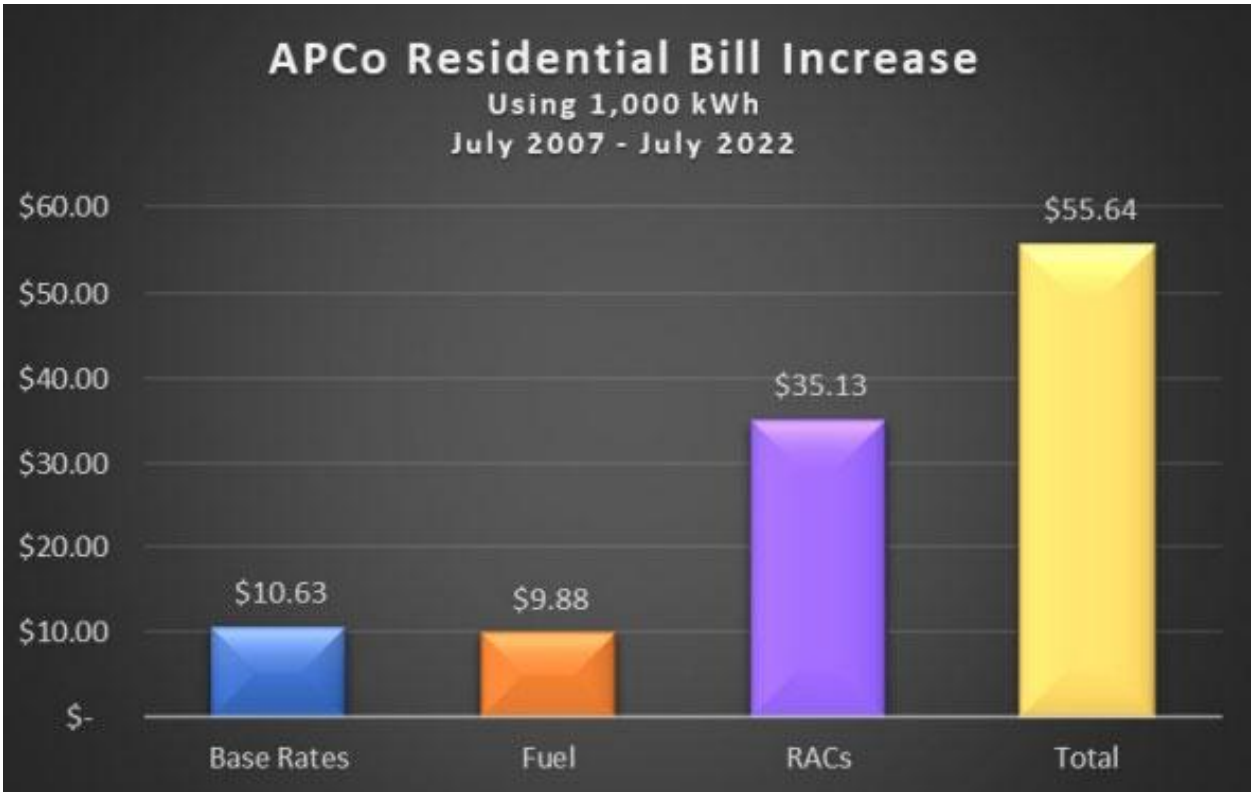
But moreover, the entire repeal proposal rests upon a flawed premise. RGGI is not driving increases in electricity bills. In fact, electricity prices began increasing long before Virginia's participation in RGGI. Since Virginia re-regulated its electric utilities in 2007, customers have seen significant 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 last year, which included the following charts showing the factors increasing residential energy bills for customers of Virginia Energy and Power ("Dominion Energy" or "DEV") and Appalachian Power Company's ("Appalachian Power" or "APCo") over the last fifteen years:[103]

[101] Attachment 1, EO 9 Report at 3–4; Attachment 17, Agency Background Document at 2–4.

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

[103] Attachment 67, Va. State Corp. Comm'n, *Status Report: Implementation of the Virginia Electric Utility Regulation Act Pursuant to § 56-596 B of the Code of Virginia* 7, 10 (Sept. 1, 2022) [hereinafter "SCC Status Report"], https://perma.cc/WVY7-BTCS.





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 these RAC-related cost increases are predominantly unrelated to RGGI, as seen in Tables 1 and 2 below:[104]

DEV Electric Utility Bills
As of July 1, 2022

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)

[104] *Id.* at 8, 11.

APCo Electric Utility Bills
As of July 1, 2022

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)

Although the Agency Background Document attempts to blame RGGI for recent rate increases, the SCC apparently disagrees. According to the SCC, "[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."[105] 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).[106] 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

[105] *Id.* at 1. All of Virginia's gas and electric utilities also agree that these global factors are increasing customers' bills. *See* Attachment 68, Charlie Paullin, *Virginians Feeling the Heat of High Utility Bills This Winter*, Va. Mercury (Feb. 20, 2023), https://perma.cc/NUM5-8TBV ("In filings with the SCC over the past few months, numerous gas and electric utilities have asked to raise rates to make up for rising fuel costs, as well as others like lost COVID-19 revenues from forgone late fees and inflationary pressures.").

[106] Attachment 69, *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 70, Charlie Paullin, *Regulators Approve Dominion Bill Increase for Rising Fuel Costs; Appalachian Power Also Seeking Hike*, Va. Mercury (Sept. 19, 2022), 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).

sought approval to raise the fuel factor significantly to cover this significant shortfall.[107] 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 significantly more.[108] Moreover, Dominion Energy may seek additional rate increases for the current 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.[109] At present, the sole RGGI-related rate adjustment ("Rider RGGI") has been zeroed out, though Dominion Energy has recently petitioned to reinstate it.[110] Even if the SCC approves Dominion Energy's request in full, the new Rider RGGI amount (approximately $4.64/month) would pale in comparison to the fossil fuel-related charges, which total well over $50/month for Virginia customers.[111]

This same pattern holds true for customers of Appalachian Power, the other monopoly utility in Virginia. Table 2 shows Appalachian Power customers paying $23/month for "fuel factor" costs; however, the SCC recently approved the utility's request to raise that amount to more than $43/month to address recent increases in fuel costs, similar to Dominion Energy.[112] With that approval, roughly 30% of Appalachian Power residential customer bills would be fossil fuel-

[107] 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 69, *Application of Virginia Electric and Power Company to revise its fuel factor pursuant to Va. Code § 56-249.6* at 1.

[108] *See id.* at 2–4 (describing recovery options under one-year, two-year, and three-year scenarios).

[109] Attachment 67, 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.*

[110] Attachment 71, Sarah Vogelsong, *Dominion Asks to Halt Ratepayer Charge for Carbon Market*, Va. Mercury (May 6, 2022), https://perma.cc/V2SR-HKGG; Attachment 72, *Pet. of Virginia Electric and Power Company for revision and reinstatement of rate adjustment clause: Rider RGGI, pursuant to § 56-585.1 A 5 e of the Code of Virginia*, SCC Case No. PUR-2022-00070 (Dec. 14, 2022); *see also* Attachment 73, *Pet. of Virginia Electric and Power Company for approval of a rate adjustment clause, designated Rider RGGI, under sec. 56-585.1 A 5 e of the Code of Virginia*, SCC Case No. PUR-2020-00169 (Nov. 9, 2020); Attachment 74, *Order Approving Rate Adjustment Clause*, SCC Case No. PUR-2020-00169 (Aug. 4, 2021); Attachment 75, *Pet. of Virginia Electric and Power Company for revision of rate adjustment clause: Rider RGGI, pursuant to § 56-585.1 A 5 e of the Code of Virginia*, SCC Case No. PUR-2021-00281 (Dec. 6, 2021); Attachment 76, *Mot. to Withdraw Application*, SCC Case No. PUR-2021-00281 (Jan. 10, 2022); Attachment 77, *Order Granting Mot.*, SCC Case No. PUR-2021-00281 (Apr. 1, 2022).

[111] Attachment 72, *Pet. of Virginia Electric and Power Company for revision and reinstatement of rate adjustment clause: Rider RGGI, pursuant to § 56-585.1 A 5 e of the Code of Virginia* at 7. While the Agency Background Document 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* Attachment 17, Agency Background Document at 3, it is important to note that those projects have *zero* fuel costs and will help protect customers from the fossil fuel price risks that are currently driving up customer bills.

[112] Attachment 43, Charlie Paullin, *Regulators Approve Dominion Bill Increase for Rising Fuel Costs; Appalachian Power Also Seeking Hike*, Va. Mercury (Sept. 19, 2022), https://perma.cc/RE8N-2DCK; Attachment 67, SCC Status Report at 11; Attachment 78, Order Establishing 2022-2023 Fuel Factor, *Application of Appalachian Power Company to increase its fuel factor pursuant to § 56-249-6 of the Code of Virginia*, SCC Case No. PUR-2022-00139 (Mar. 6, 2023).

related costs, not to mention another $4.50/month for coal and gas-related operations (Rider E-RAC and Rider G-RAC).[113] By contrast, less than $4/month is attributable to clean energy or energy efficiency programs.[114] 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."[115]

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 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.[116] 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.

Additionally, the General Assembly recently passed a utility rate reform package that may mitigate the administration's concerns about the rising costs of electricity bills.[117] Governor Youngkin has expressed his support for the package, particularly the fact that it will lower electricity bills.[118] The package would require Dominion Energy to, among other things, roll into base rates at least $350 million worth of rate adjustment clauses and to securitize some of its fuel costs.[119] Those changes, among with other important reforms, should help provide relief to customers.[120] The securitization of fuel costs also could help reduce fuel factor costs, and other portions of the package may lower bills as well. These statutory reforms represent the sorts of changes that can provide direct relief to utility customers, while simultaneously highlighting that RGGI itself is not the cause of high electricity bills.

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[113] Attachment 67, SCC Status Report at 11. Table 2 shows a proposed $0.80 increase to Rider E-RAC, which the SCC subsequently approved. *See* Attachment 79, Final Order, *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*, SCC Case No. PUR-2022-00001 (Nov. 21, 2022) at 2. A small portion of that proposed increase was for RGGI allowance costs related to the one carbon-emitting facility Appalachian Power owns in Virginia. *See* Attachment 80, *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*, SCC Case No. PUR-2022-00001 (Mar. 18, 2022) at 12–13. As discussed below, a portion of those RGGI-related costs were disallowed.

[114] Attachment 67, SCC Status Report at 11.

[115] Attachment 43, Charlie Paullin, *Regulators Approve Dominion Bill Increase for Rising Fuel Costs; Appalachian Power Also Seeking Hike*, Va. Mercury (Sept. 19, 2022), https://perma.cc/RE8N-2DCK.

[116] Attachment 38, *The Investment of RGGI Proceeds in 2020*, at 4.

[117] Attachment 81, 2023 General Assembly, HB 1770; Attachment 82, Charlie Paullin, *General Assembly Deal Sets Dominion Profits for Two Years While Overhauling Regulatory System*, Va. Mercury (Feb. 25, 2023), https://perma.cc/QR7J-4PMW.

[118] Attachment 82, Charlie Paullin, *General Assembly Deal Sets Dominion Profits for Two Years While Overhauling Regulatory System*, Va. Mercury (Feb. 25, 2023), https://perma.cc/QR7J-4PMW.

[119] *Id.*

[120] *See id.*

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).[121]

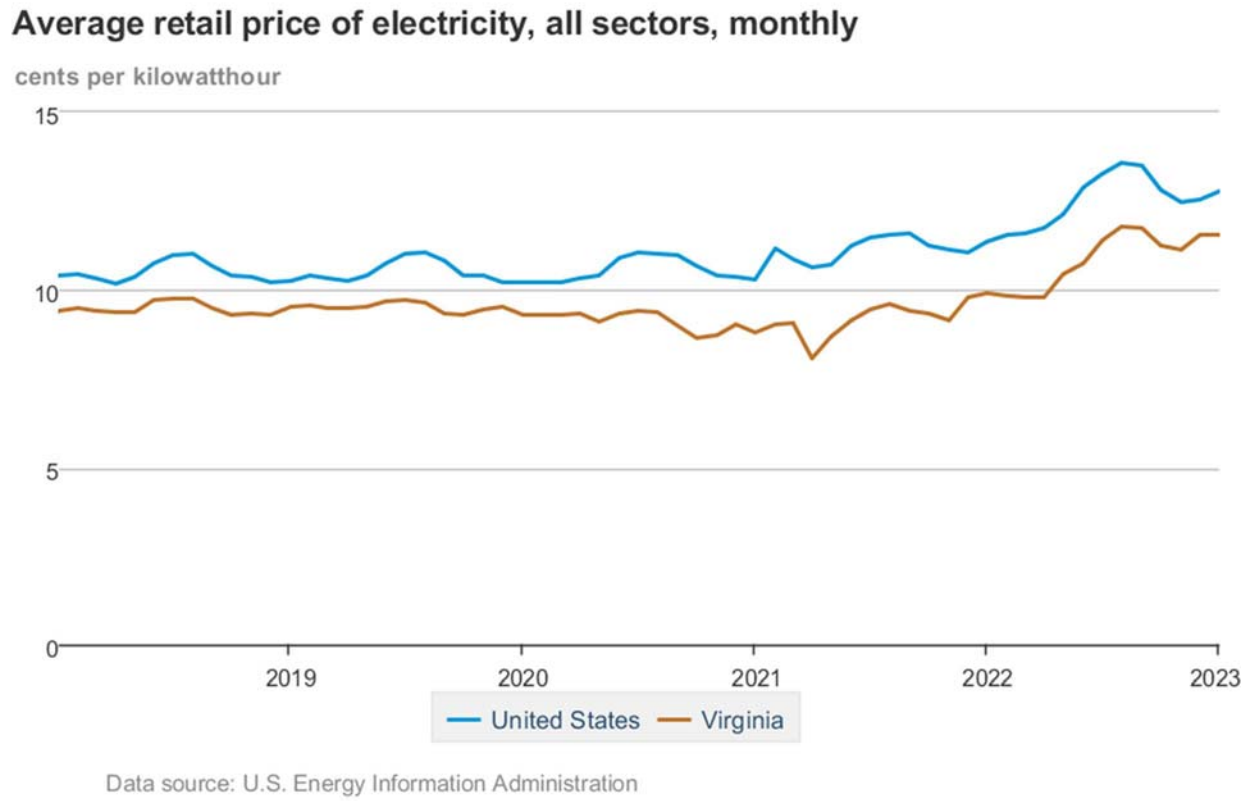

Figure 1: Average retail price of electricity in United States (blue) and Virginia (orange), Jan. 2018 to Jan. 2023.[122]

The Agency Background Document 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."[123] The administration refers generally to the U.S. Department of Energy for these numbers (without citing a specific source citation) but does not examine or explain the reasons for this difference. Are Virginians using more electricity? Are Virginians higher energy bills due to an unfair utility code? Are homes less efficient? Do they rely on electric heat more than other states? Are retail gas prices higher in Virginia than other states?[124] Without understanding the cause, the administration has no

[121] 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 November 2022.

[122] *See* Attachment 83, U.S. Energy Info. Admin., Electricity Data Browser, Average Retail Price of Electricity, All Sectors, Monthly, https://perma.cc/P8K3-K2WP.

[123] Attachment 17, Agency Background Document at 3.

[124] The Agency Background Document cites a 38.4% increase in the natural gas index and 13% increase in the electricity index "over the last 12 months" and asserts that the two are connected: "Considering that Virginia obtains most of its electricity from natural gas, rising natural gas prices have forced electricity prices even higher." Attachment

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 energy 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.[125]

Moreover, the Agency Background Document is simply wrong in stating that "RGGI operates as a direct tax on households and businesses" in which "all RGGI costs are passed through to the ratepayers as required by state law," with no incentives for the utility to change.[126] 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.[127] Customers thus are charged only when the utility tries to recover the costs and the SCC finds the costs necessary. Notably, the SCC recently exercised that power, denying approximately $95,000 in 2021 RGGI compliance costs that Appalachian Power had sought to recover.[128] That denial meant that Appalachian Power customers would not be responsible for about one-quarter of the utility's 2021 RGGI costs.[129]

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. This year, the administration rightfully helped advance meaningful, bipartisan rate reform legislation. We thank the administration for this work and hope these efforts will continue.

But none of the problems identified by the administration will be solved by repealing RGGI. In fact, repealing RGGI will remove an important tool that can help protect customers from fossil fuel prices.

17, Agency Background Document at 2. However, it does not address whether other states have experienced similar increases. It is also worth noting that those cited increases are for the 12 months ending in June 2022—the same data cited in the NOIRA—and that increases in subsequent months have been lower. *See* Bureau of Labor Statistics, 12-Month Percentage Change, Consumer Price Index, Selected Categories, https://www.bls.gov/charts/consumer-price-index/consumer-price-index-by-category-line-chart.htm. If RGGI really were to blame for higher prices, one would expect those figures to keep increasing. Additionally, that volatility in natural gas prices further shows why it benefits customers to reduce fossil fuel use.

[125] Va. Code Ann. § 10.1-1330(C).

[126] Attachment 17, Agency Background Document at 3, 10–11. The EO 9 Report makes similar claims, as did Acting Secretary of Natural and Historic Resources Travis Voyles in his December 2022 presentation to the Air Board. *See* Attachment 1, EO 9 Report at 4 (stating that "RGGI is a bad construct that taxes consumers without providing incentives for change to the electricity producers" and that "[c]urrent law allows power generators, such [sic] Dominion Energy, to pass on all their costs, essentially bearing no costs for the carbon credits"); Attachment 46, Travis A. Voyles, Presentation to Air Board on Proposed Regulation: Repeal CO_2 Budget Trading Program, 9VAC5 Chapter 140 (Rev. A22), at Slide 7 (Dec. 7, 2022) ("RGGI operates as a direct tax because all fees paid are passed through to ratepayers.").

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

[128] *See* Attachment 79, Final Order, SCC Case No. PUR-2022-00001 at 2.

[129] *See* Attachment 84, Report of D. Mathias Roussy, Jr., Hearing Examiner, *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*, SCC Case No. PUR-2022-00001 (Oct. 18, 2022) at 22 (noting that APCo had incurred about $341,000 in RGGI costs through December 31, 2021).

CONCLUSION

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

Sincerely,

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