CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

March 31, 2023

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Submitted via email to: karen.sabasteanski@deq.virginia.gov

RE: Repeal CO2 Budget Trading Program as required by Executive Order 9

Dear Ms. Sabasteanski:

The Chesapeake Bay Foundation ("CBF") respectfully submits the following comments on the Virginia Department of Environmental Quality's ("DEQ") proposal to rescind Virginia's legally binding commitment to participate in the Regional Greenhouse Gas Initiative ("RGGI") by repealing the regulations that facilitate Virginia's RGGI participation.

CBF is a non-profit organization founded in 1967 and is devoted to the restoration and protection of the Chesapeake Bay. It is the largest independent conservation organization dedicated solely to finding effective, science-based solutions to the pollution degrading the Bay and its rivers and streams within the 64,000-square-mile-watershed. CBF boasts more than 91,000 members in Virginia.

The proposed repeal of these regulations, which guide Virginia's participation in RGGI, is inconsistent with state law, will make achieving Chesapeake Bay goals more challenging, and will undermine Virginia's efforts to create more resilient communities.

I. Virginia is Bound by Law to Follow Through on its Commitments Under RGGI

The Clean Energy and Community Flood Preparedness Act ("the Act") does not simply authorize DEQ to implement RGGI, but rather mandates Virginia's participation in this regional cap-and-trade program. This means that the General Assembly has not delegated to DEQ the discretion to determine Virginia's participation status, and that DEQ's proposal to rescind the RGGI regulations is *ultra vires.*

Section 10.1-1330(A) of the Act mandates that DEQ "shall… incorporate[]" the provisions of the Act into the CO_2 Budget Trading Program regulation,[1] without any further

[1] 9 Va. Admin. Code § 5-140-6010 *et seq*.

action by the Air Board or need to undergo regulatory review under the Virginia Administrative Process Act.[2] This language does not give DEQ (or the Air Board) any discretion about whether to adopt the CO_2 Budget Trading Program.

Further, section 10.1-1330(B) of the Act grants DEQ the authority that it previously lacked to sell allowances, and then mandates that DEQ use this authority,[3] through stating that DEQ "shall seek to sell 100 percent of all allowances issued each year through the allowance auction" in a way that is not "inconsistent with the RGGI program."[4] This legislative command makes clear that DEQ has no discretion to choose not 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."[5]

Regulatory action cannot repeal or amend existing statutes, only subsequent legislation can. This is made perfectly clear by a 2022 advisory opinion from the Virginia Attorney General which states, in part: "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."[6] The opinion cites, and relies upon, 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."[7] Therefore, the intended regulatory repeal is decidedly unconstitutional.

Virginia also must remain in RGGI to fulfill its climate goals, as set forth in the Virginia Clean Economy Act ("VCEA"). The VCEA demands that the two monopoly utilities in the state, Dominion Energy Virginia and Appalachian Electric Power, produce 100 percent renewable electricity by 2045 and 2050, respectively.[8] However, this shift will not happen overnight, and RGGI is an indispensable tool for meeting the benchmarks set by the VCEA in the interim.

II. Repealing RGGI Regulations Will Undermine Virginia's Progress Toward Achieving its Chesapeake Bay Goals and Making its Communities More Resilient

Virginia's participation in RGGI reduces the harmful greenhouse gas emissions that ultimately make their way into the Chesapeake Bay, while also assisting Virginia communities to prepare for the increased flooding associated with climate change by generating millions of dollars for the Community Flood Preparedness Fund ("CFPF"), a fund which finances resilience projects that benefit water quality. Requiring Virginia to withdraw from the RGGI program when

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2 Va. Code Ann. § 10.1-1330(A).
3 *Id.*
4 Va. Code Ann. § 10.1-1330(B).
5 *Id.*
6 2021 Op. Va. Att'y Gen. No. 21-102, at 2 (Jan. 11, 2022), https://www.oag.state.va.us/files/Opinions/2022/21-102-Herring-Sullivan-Issued.pdf.
7 *Id.* (citing Va. Const., art. V, § 7).
8 Va. Code § 10.1-1308 *et seq*

climate change has made achievement of Bay goals more challenging—and in the absence of effective alternatives to RGGI funding—would be a significant setback to the Commonwealth and to the health of the Chesapeake Bay.

A. RGGI helps keep pollutants out of the Chesapeake Bay.

Since its inception, participants in RGGI have reduced their carbon dioxide (CO_2) emissions by 47 percent, which is 90 percent faster than the rest of the country.[9] These reductions have been accomplished without sacrificing economic progress. In fact, data has shown that participating states grew 31 percent faster economically than non-RGGI states.[10]

Participating in the RGGI program reduces not only greenhouse gases, but also reduces emissions of other pollutants, like nitrogen oxides (NOx), which add to the excess nutrient levels in waterways. NOx is a highly reactive compound that is released into the air when fossil fuel is burned. Through precipitation, NOx emissions eventually make their way into the watershed. In fact, over 85 million pounds of nitrogen—about one-third of the Bay's total yearly load—reach the Chesapeake Bay through air deposition.[11] Once it reaches the Bay, nitrogen helps fuel algal bloom growth. As the algae dies, oxygen in the water column is depleted, creating "dead zones" in the Bay.

The impacts of climate change are making it even harder for Virginia to achieve its Bay restoration goals. Climate models suggest the Bay region will experience more frequent and severe storms as climate change advances, which will increase stormwater runoff, and thus also increase the nutrient and sediment loads into the Bay.[12] Larger than average inflows of fresh water will also threaten oysters and push other Bay-life out of their traditional habitats.[13] Similarly, rising temperatures caused by global warming will lead to warmer water, which has less capacity to hold dissolved oxygen, thereby exacerbating the Bay's oxygen-deprived dead zones.[14] And rising sea levels are also projected to drown thousands of acres of environmentally critical wetlands.[15] Virginia cannot afford to add to the difficulties of meeting its Bay restoration goals.

B. The nature-based flood control solutions promoted by the CFPF ensure that water quality is a key resilience consideration.

The proceeds from RGGI auctions provide essential resilience funding in Virginia to address recurrent and severe weather flooding, sea level rise, and energy efficiency needs,

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[9] This data is from 2008 to 2018. *See* Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review,* at 2, 7 (2019), https://acadiacenter.org/wp-content/uploads/2019/09/Acadia-Center_RGGI_10-Years-in-Review_2019-09-17.pdf.
[10] *Id.* at 7.
[11] CBF, *Air Pollution*, (last visited Mar. 21, 2023), https://www.cbf.org/issues/air-pollution/.
[12] CBF, *Climate Change*, (last visited Mar. 21, 2023), https://www.cbf.org/issues/climate-change/.
[13] *Id.*
[14] *Id.*
[15] *Id.*

through the CFPF and the Housing Innovations in Energy Efficiency Program ("HIEE").[16] The CFPF represents dedicated state funding for flood resilience planning and project implementation for localities, tribes, and soil and water conservation districts across Virginia. To date, RGGI funding for the CFPF has totaled over $265 million.[17] Moreover, RGGI dollars provided through the CFPF are to be spent for projects that incorporate nature-based solutions—that is, project approaches that benefit water quality by harnessing environmental processes that emulate, protect, or restore natural features.[18] Prioritizing nature-based solutions is a guiding principle of the CFPF. [19]

C. There are no meaningful alternatives to the funding RGGI provides.

RGGI auction proceeds are currently the sole source of funding for the CFPF. Therefore, repealing the RGGI regulations will deprive communities of much needed resources for flood preparedness planning and projects. While there have been efforts to provide other sources of resilience funding, no reliable substitute has yet been enacted or appropriated. For example, in 2022, the General Assembly created the Resilient Virginia Revolving Loan Fund ("RVRLF") as an additional avenue to support localities implementing resilience projects. While the RVRLF was capitalized with funding from RGGI proceeds, the RVRLF is not equivalent to the dedicated funding of the CFPF by RGGI auction proceeds for the following reasons.

First, the RVRLF does not prioritize nature-based flood resiliency solutions as the CFPF does. Rather, the RVRLF prioritizes projects that have lower cost margins, but imposes no obligation to use nature-based solutions.[20] Second, unlike the ongoing, increasing source of revenue that RGGI provides, the RVRLF is a revolving loan fund that is intended to be self-replenishing as localities pay back their loans. However, the fund must first be capitalized by sufficient appropriations to finance those loans and no such state appropriation has been made to date. The CFPF, on the other hand, is not subject to fluctuating state budget cycles, but rather is financed by the revenues generated by RGGI's auction proceeds. These revenues are also designed to increase with every year, as every year more carbon credits are taken off the market,

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[16] The Housing Innovations in Energy Efficiency (HIEE) program provides energy efficiency upgrades to new and existing residential buildings to reduce energy bills for low-income Virginians. DHCD, *Housing Innovation and Energy Efficiency* (last visited Mar. 28, 2023), https://www.dhcd.virginia.gov/hiee. Included in this program is the Weatherization Deferral Repair (WDR) program. Like the CFPF, RGGI auction proceeds are the sole source of funding for this program.

[17] RGGI has generated $589,729,757 for Virginia in its 9 auctions to date, with 45 percent of those proceeds going directly to the CFPF (a total of $265,378,391). RGGI, *Auction Results: Virginia*, (last visited Mar. 28, 2023), https://www.rggi.org/auctions/auction-results.

[18] DCR, *2021 Grant Manual for the Virginia Community Flood Preparedness Fund*, at 6 (2021), https://www.dcr.virginia.gov/dam-safety-and-floodplains/document/2021-CFPF-Manual.pdf.

[19] The CFPF states that one of its guiding principles is to "[r]ecognize the importance of protecting and enhancing nature-based solutions in all regions, natural coastal barriers, and fish and wildlife habitat by prioritizing nature-based solutions." *Id.* at 5

[20] Va. Code § 10.1-603.35 ("In approving loans and grants, the Department shall give preference to loans and grants for projects that will utilize private industry in the operation and maintenance of such projects where a material savings in cost can be shown over public operation and maintenance; will serve two or more local governments to encourage regional cooperation; or both.").

making them more and more expensive. Additionally, no other fund prioritizes funding accessibility in marginalized and low-income communities as the CFPF does. While loan programs like the RVRLF are certainly needed, CFPF's grant approach ensures that resilience funding is more equitably distributed and more accessible to financially burdened localities needing resilience funding. The CFPF is also unique in that it provides money for capacity-building efforts not usually funded through federal grants, and those CFPF dollars can serve as a match for such programs. Without RGGI-supported CFPF funding, resilience funding for Virginia localities would be reduced, disappear, or be available only episodically, subject to budget fluctuations. The result would be disproportionate harm to under-resourced, small, and rural cities, towns, and counties that cannot address flood risk on their own.

Leaving Virginia without meaningful alternatives for flood resilience funding impacts not only the health of the Bay, but the health of Virginia's economy and citizens. It is estimated that flooding damages will cost the state $79.1 billion if left unchecked[21]—an amount which far exceeds any financial "burden" that participating in RGGI would impose.[22]

III. Conclusion

In summary, the proposed repeal of the RGGI regulations would be unlawful. Moreover, the consequences of such a repeal would be dire: It would reverse progress Virginia has already made through its participation in RGGI to reduce greenhouse gas and NOx emissions, improve energy efficiency, and protect communities from flooding and sea level rise. DEQ and the Air Board should decline to take this step.

We are grateful for the opportunity to comment on this regulation and hope that our concerns will be seriously considered. Please contact me at PFanning@cbf.org or (304) 952-7496 with any questions or to discuss any part of these comments.

Sincerely,

Patrick J. Fanning
Virginia Staff Attorney

cc: Michael Rolband, Director, Department of Environmental Quality
Peggy Sanner, Virginia Executive Director, CBF

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[21] Kaicey Baylor, *ODU researchers release new flooding costs report for Virginia*, 13 News Now, (Sept. 15, 2022), https://www.13newsnow.com/article/money/economy/odu-researchers-new-flooding-costs-report/291-059df778-b823-42c3-bf20-72b73f7ffb45.

[22] By comparison, Dominion Energy estimated that RGGI will cost ratepayers between $1 billion and $1.2 billion, or an additional $2.39 a month. Office of Gov. Glen Youngkin, *EO 9: Protecting Ratepayers from the Rising Cost of Living Due to the Regional Greenhouse Gas Initiative* (2022), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-9-RGGI.pdf.