



June 24, 2017

Ms. Karen G. Sabasteanski
Virginia Department of Environmental Quality
P.O. Box 1105
Richmond, VA 23218

RE: NOIRA to Establish a New Regulation to Reduce and Cap Carbon Dioxide from Fossil Fuel Fired Electric Power Generating Facilities by Means of an Interstate Trading Program (Revision C17)

Dear Ms. Sabasteanski:

The Environmental and Regulatory Law Clinic at the University of Virginia School of Law hereby submits these comments in response to the Notice of Intended Regulatory Action (“NOIRA”) published by the State Air Pollution Control Board for the above-captioned matter. Further, the Clinic respectfully requests inclusion as a panel member on the Regulatory Advisory Panel for this initiative.

The Environmental and Regulatory Law Clinic is part of the University’s Environmental and Land Use Law Program, which combines legal teaching with opportunities for interdisciplinary study, clinical experience, and scholarly inquiry. Consistent with this mission, on December 1, 2016, the Clinic presented to the Governor’s Executive Order 57 Work Group on “Opportunities to Address Carbon Pollution Under Existing State Law.”¹ The Clinic followed its presentation by submitting detailed, written comments to the Governor’s Work Group on April 30, 2017.² The Clinic’s legal research was cited by the Governor’s Work Group in its report on May 12, 2017.³ That report led to Governor McAuliffe’s Executive Directive 11, which has tasked the Department of Environmental Quality with initiating this regulatory process.⁴

Through engagement with the Governor’s Work Group, the Clinic explained how a state-specific program to reduce greenhouse gas emissions could be permissible under Virginia

¹ See Presentation of UVA Environmental and Regulatory Law Clinic, available at <https://naturalresources.virginia.gov/media/8129/5-uva-law-clinic-presentation-to-eo57-workgroup-final.pdf>.

² See UVA Environmental and Regulatory Law Clinic, *Comments Re: EO-57 Development of Carbon Reduction Strategies For Electric Power Generation Facilities* (Apr. 30, 2017).

³ See Governor Terence R. McAuliffe’s Executive Order 57 Work Group, *Report and Final Recommendations to the Governor*, at 5 (May 12, 2017).

⁴ See Executive Directive 11 (2017), *Reducing Carbon Dioxide Emissions From Electric Power Facilities and Growing Virginia’s Clean Energy Economy* (May 16, 2017), available at <http://governor.virginia.gov/media/9155/ed-11-reducing-carbon-dioxide-emissions-from-electric-power-facilities-and-growing-virginias-clean-energy-economy.pdf>.

State Air Pollution Control Law, Va. Code § 10.1-1300 *et seq.*, and the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.* Specifically, the Clinic noted that state law establishes a process for the adoption of regulations that are more stringent than applicable federal requirements. *See* Va. Code § 10.1-1308 A. Correspondingly, the federal Clean Air Act contains a states’ rights savings clause, which allows states to promulgate their own, more stringent, air pollution regulations. *See* 42 U.S.C. § 7416 (providing for the retention of state authority). The Clean Air Act’s citizen suit provision, 42 U.S.C. § 7604(e), confirms that federal law does not “restrict any right” to enforce state standards.⁵

The Clinic’s comments to the Executive Order 57 Work Group, however, also cautioned that establishing a multi-state trading program might present challenges—especially if the program were directly regulating out-of-state sources in a manner that conflicted with the law of the source state. *See North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 308 (4th Cir. 2010).

In *North Carolina*, the Fourth Circuit found that regulated sources covered by a state-specific program must be within the state’s boundaries: “only source state law ... could impose more stringent emission rates than those required by federal law on plants located in those ... jurisdictions.” The court relied, in part, on *International Paper Company v. Ouellette*, 479 U.S. 481, 494–95 (1987), which held that the Clean Water Act “precludes a court from applying the law of an affected State against an out-of-state source. ... If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State.”

The Commonwealth would need to consider the impact of this case law as it evaluates options for developing a “trading-ready” program that accounts for CO₂e allowances in a multi-state trading program. Dominion’s Mount Storm Power Station in West Virginia, for example, might need to be excluded from such a program.

As our sustained participation before the Governor’s Executive Order 57 Work Group amply demonstrates, the Clinic brings an expert focus on the interplay between environmental policy and regulatory authority to its work. The Clinic is uniquely well-suited to provide assistance on the implementation of Executive Directive 11. For these reasons, the Clinic respectfully requests inclusion on the Regulatory Advisory Panel.

Sincerely,



Cale Jaffe

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Director of the Environmental and Regulatory Law Clinic
University of Virginia School of Law

⁵ *See* UVA Environmental and Regulatory Law Clinic, *Comments Re: EO-57 Development of Carbon Reduction Strategies For Electric Power Generation Facilities*, at 3-4 (Apr. 30, 2017). *See also North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 297 (4th Cir. 2010) (upholding North Carolina’s Clean Smokestacks Act).