UNIVERSITY of VIRGINIA SCHOOL OF LAW

ENVIRONMENTAL AND REGULATORY LAW CLINIC

CALE JAFFE, DIRECTOR

April 9, 2018

Ms. Karen G. Sabasteanski
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RE: State Air Pollution Control Board, Proposed Regulation 9 VAC 5-140. Regulation for Emission Trading Programs (adding 9 VAC 5-140-6010 through 9 VAC 5-140-6430).

Dear Ms. Sabasteanski:

The Environmental and Regulatory Law Clinic at the University of Virginia School of Law hereby submits these comments to the State Air Pollution Control Board and the Department of Environmental Quality ("DEQ") regarding the Proposed Regulation to amend 9 Va. Admin. Code § 5-140 (Regulations for Emission Trading Programs) by adding 9 Va. Admin. Code §§ 5-140-6010 through 5-140-6430.

I. Introduction

The Clinic is part of the University of Virginia'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, the Clinic submitted letters to the DEQ on the subject of regulating greenhouse gas ("GHG") pollution at the state level on June 24, 2017, and October 17, 2017. The Clinic also presented to then-Governor McAuliffe's Executive Order 57 Work Group on "Opportunities to Address Carbon Pollution Under Existing State Law," *see* Presentation of the UVA Environmental and Regulatory Law Clinic, U. Va. Sch. L.,

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https://naturalresources.virginia.gov/media/8129/5-uva-law-clinic-presentation-to-eo57-workgroup-final.pdf (last visited Apr. 2, 2018), and subsequently submitted written comments on April 30, 2017. The Clinic's presentation to the Executive Order 57 Work Group noted that several environmental advocacy organizations (the Natural Resources Defense Council, Appalachian Voices, and the Southern Environmental Law Center, among others) had advocated for adoption of a state-specific program aimed at reducing carbon pollution from stationary sources by 30% by 2030. The Clinic concluded that the so-called "30x30" plan would be lawful and within the State Air Pollution Control Board's authority under Va. Code § 10.1-1308.

After receipt of the final report from the Executive Order 57 Work Group, Governor McAuliffe issued Executive Directive 11, which directed the DEQ to develop a carbon-reduction program similar in many respects to the 30x30 proposal endorsed by environmental groups. The Clinic's comments today address various legal questions confirming the Commonwealth's authority to promulgate the Proposed Regulation, which would add 9 Va. Admin. Code §§ 5-140-6010 through 5-140-6430 to the Virginia Administrative Code. Specifically, these comments affirm: 1) that there is an urgent need to address GHG pollution in the Commonwealth through a state-level regulatory structure, and 2) that the Board has well-established authority to create a cap-and-trade program for GHG pollution pursuant to the state law savings clause of the federal Clean Air Act, 42 U.S.C. § 7416, and Va. Code § 10.1-1308.

II. The Urgent Need for a Robust, State-Specific Climate Policy

In 2009, the United States Environmental Protection Agency ("EPA") issued an Endangerment Finding, concluding that GHG pollution "endanger[s] both the public

health and the public welfare of current and future generations." *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 Fed. Reg. 66,496 (Dec. 15, 2009) (hereinafter the "Endangerment Finding"). The EPA's initial finding has since been repeatedly affirmed by the scientific community, most recently by the Fourth National Climate Assessment from the U.S. Global Change Research Program. *See* U.S. Glob. Change Research Program, Climate Science Special Report: Fourth National Climate Assessment, Volume I (2017), https://science2017.globalchange.gov/. (hereinafter the "USGCRP Report") The USGCRP Report is the work product of thirteen federal departments and agencies, including the EPA, with specialized expertise on questions related to global change. It affirms the scientific consensus that "it is extremely likely that human activities, especially emissions of greenhouse gases, are the dominant cause of the observed warming since the mid-20th century. For the warming over the last century, there is no convincing alternative explanation supported by the extent of the observational evidence." *See* USGCRP Report, at 10.

Despite this conclusion reached with the active participation of the EPA, the Agency has now inexplicably proposed repealing the primary federal program designed to slow the growth in emissions of pollutants linked to human-induced climate change, the federal Clean Power Plan. *See* Proposed Rule to Repeal Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generation Units, 82 Fed. Reg. 48,035 (Oct. 16, 2017). The mere threat of repealing the Clean Power Plan has already slowed progress in reducing carbon pollution in some states. *See* Brad Plumer & Nadja Popovich, "How Will the Clean Power Plan Repeal Change Carbon Emissions for

Your State?," NEW YORK TIMES (Oct. 10, 2017) (reporting on an analysis that breaks down which states are likely to miss their Clean Power Plan targets after repeal). In response, several states have initiated efforts to fill the gap, including Virginia. Given the climate change-related threats facing our Commonwealth—and considering the sources of pollution in the Commonwealth that contribute directly to those threats—it is entirely appropriate and necessary for the Board to initiate a regulatory program linking Virginia to the Regional Greenhouse Gas Initiative.

A. The Global Climate Generally, and the Virginia Climate Specifically, Have Been Warming.

In concluding that anthropogenic emissions of GHGs endanger human health and welfare, the EPA cited the "June 2009 USGCRP assessment that most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations." *See* Endangerment Finding at 66,518 (footnote omitted). At the time of the Endangerment Finding, climate data revealed "an unambiguous warming trend over the last 100 years, with the greatest warming occurring over the past 30 years." *See id.* at 66,517. The data showed "that eight of the 10 warmest years on record have occurred since 2001; that the 10 warmest years have all occurred in the past 12 years; and that the 20 warmest years have all occurred since 1981." *Id.*

More recent data, as outlined in the 2017 Climate Report, show that "[t]he global, long-term, and unambiguous warming trend has continued during recent years. . . . 2014 [was] the warmest year on record globally; 2015 surpassed 2014 by a wide margin; and 2016 surpassed 2015. Sixteen of the warmest years on record for the globe occurred in

the last 17 years." USGCRP Report at 13. Regarding global climate change, the USGCRP Report concluded the following:

> The global climate continues to change rapidly compared to the pace of the natural variations in climate that have occurred throughout Earth's history. Trends in globally averaged temperature, sea level rise, upper-ocean heat content, land-based ice melt, arctic sea ice, depth of seasonal permafrost thaw, and other climate variables provide consistent evidence of a warming planet. These observed trends are robust and have been confirmed by multiple independent research groups around the world.

Id. at 58. Regarding U.S. climate change, the Report confirmed that temperatures have been increasing in the United States, concluding that "[a]nnual average temperature over the contiguous United States has increased by 1.2°F (0.7°C) for the period 1986–2016 relative to 1901–1960 and by 1.8°F (1.0°C) based on a linear regression for the period 1895–2016." *Id.* at 185. This indicates even more substantial warming in the United States than the older reports on which the EPA's 2009 Endangerment finding was based.

The Commonwealth of Virginia has been uniquely affected by this global trend. In seventeen of the last eighteen years, the annual mean temperature in Virginia has exceeded the 20th-century average. *See* Climate System Research Center, University of Massachusetts Amherst, "How Will Global Warming of 2°C Affect Virginia? Observed and Projected Changes in Climate and Their Impacts." At the same time, the most recent decade (2001-2010) proved to be the warmest decade on record for the Southeastern United States as a whole. *See* Southeast Climate Consortium, Climate of the Southeast United States: Variability, Change, Impacts, and Vulnerability [Ingram, Keith T. et al. (eds.)] (2013), at 22. These rising temperatures present unique environmental and economic risks for Virginia. Growing risks to production "from harmful effects of extreme heat on livestock, drought affecting water supplies and crops, and invasive

weeds and pests that thrive in a warmer climate" become more prevalent as temperatures continue to rise in the state and threaten Virginia's economic prosperity. *See* Georgetown Climate Center, "Time to Act: Understanding Virginia's Vulnerability to Climate Change," at 2. *See also* U.S. EPA, "What Climate Change Means for Virginia," (Doc No. EPA 430-F-16-048) (Aug. 2016) (documenting similar, Virginia-specific impacts).

B. Air Pollution and the Warming Climate Endangers Human Health in Virginia.

The Endangerment Finding recognized that not only is the climate warming due to air pollution in the form of GHGs, but that this pollution endangers human health and welfare. GHGs and warming temperatures endanger human health in numerous ways, two of which were cited as support for the finding of endangerment and have been further bolstered by the USGCRP Report: (1) mortality caused by higher temperatures; and (2) increases in extreme weather events. Virginians are likely already suffering adverse impacts by both of these metrics.

Due to warming temperatures, "unusually hot days and heat waves are becoming more frequent, and . . . unusually cold days are becoming less frequent." *See* Endangerment Finding at 66,524. Furthermore, high temperatures are associated with increased morbidity because "[h]eat is already the leading cause of weather-related deaths in the United States." *Id.* The number of extreme cold events are likely to decrease in the future, which will likely lead to fewer cold-related deaths in the United States, but "increases in heat-related mortality due to global warming in the United States are unlikely to be compensated for by decreases in cold-related mortality." *Id.* at 66,525.

The USGCRP Report provides additional support for the conclusion that temperatures are increasing and threatening human health. The Report concludes that "[c]old extremes have become less severe over the past century," and there is "evidence of a slight increase in the intensity of heat waves nationwide as well as an increase in the concurrence of droughts and heat waves." *See* USGCRP Report at 189-92. Furthermore, "it is very likely that human influence has contributed to the observed changes in frequency and intensity of temperature extremes on the global scale since the mid-20th century." *Id.* at 193.

Increasing global temperatures lead to more frequent and more severe extreme weather events, such as hurricanes and flooding. *See* Endangerment Finding at 66,525. The increase in extreme weather events causes "the potential for increased deaths, injuries, infectious diseases, and stress-related disorders," as well as "other adverse effects associated with social disruption and migration from more frequent extreme weather." *Id.* Again, the USGCRP Report has provided additional support for the conclusion that climate change is causing an increase in extreme storms. The study of tropical cyclones is difficult, but "there is broad agreement that human factors have had an impact on the observed oceanic and atmospheric variability in the North Atlantic, and there is medium confidence that this has contributed to the observed increase in hurricane activity since the 1970s." *See* USGCRP Report at 259.

Paralleling these global and national trends, climate change is posing substantial risks to the Commonwealth of Virginia and the health of Virginia's residents. Increasing temperatures lead to a greater incidence of weather-related deaths and injuries, such as those caused by heat stroke and dehydration. *See* Georgetown Climate Center, "Time to

Act: Understanding Virginia's Vulnerability to Climate Change," at 2. In addition, serious illnesses such as "West Nile virus and Lyme disease, once extremely rare, now present increased health risks across the state." *Id.* Further, it is estimated that "three of the four leading causes of death in Virginia, [—] heart disease, stroke, and chronic disease of the lower respiratory tract [—], will be significantly exacerbated by climate changes." *See* Robert Repetto, "Economic and Environmental Impacts of Climate Change in Virginia," DEMOS, at 5.

C. Compromised Water Resources and Rising Sea Levels Endanger Public Welfare in Virginia.

Climate change represents a major threat to U.S. water resources, and the USGCRP Report provides support that climate change will compromise Virginia's water resources and will lead to rising sea levels affecting Virginia's coast. "[C]limate change has already altered, and will likely continue to alter, the water cycle, affecting where, when, and how much water is available for all uses." Endangerment Finding at 66,532. In addition, warming temperatures increase water evaporation and the atmosphere's water-holding capacity, which "favors increased climate variability, with more intense precipitation and more droughts." *Id.* This leads to less access to water, as well as decreasing water quality and more water pollutants. *Id.* at 66,532-33.

The USGCRP Report provides additional evidence of the changing precipitation patterns throughout the United States and the effect of this change on water resources. In terms of extreme precipitation in the United States, the Report concluded:

> [F]or the continental United States there is high confidence in the detection of extreme precipitation increases, while there is low confidence in attributing the extreme precipitation changes purely to anthropogenic forcing. There is stronger evidence for a human contribution (medium confidence) when taking into account

> process-based understanding (increased water vapor in a warmer atmosphere), evidence from weather and climate models, and trends in other parts of the world.

See USGCRP Report at 214. Modeling for future effects on United States water resources predicts that, "assuming no change to current water-resources management, chronic, long-duration hydrological drought is increasingly possible by the end of this century (very high confidence)." *Id.* at 240. Climate change and the associated sea level rise pose risks such as flooding and shoreline retreat and erosion in the coastal regions of the United States. *See* Endangerment Finding at 66,533. This trend presents dangers to major population centers that lie near the coast, such as the greater Hampton Roads and Tidewater areas. Coastal ecosystems face acute permit: "[u]p to 21 percent of the remaining coastal wetlands in the U.S. mid-Atlantic region are potentially at risk of inundation between 2000 and 2100." *Id.*

Again, the USGCRP Report has provided additional support for the Endangerment Finding's recognition of the risk of sea level rise. Global Mean Sea Level ("GMSL") has risen about 7-8 inches since 1900, with about three inches of that rise taking place since 1990. *See* Climate Report at 339. GMSL has been rising approximately 3 mm (0.12 inches) per year since 1993. *Id.* A number of studies "support[] the conclusion that a substantial fraction of GMSL rise since 1900 is attributable to human-caused climate change." *Id.* What is more, coastal flooding in the United States already has been increasing. "Nuisance" floods of one to two feet (*i.e.*, flooding that surpasses local emergency preparedness thresholds for minor tidal flooding, that begin to flood infrastructure and trigger coastal flood advisories by the National Weather Service) have increased five- to ten-fold or more since the 1960s. *See* USGCRP Report at 347. Over the

past several decades, minor tidal flood rates have been accelerating in over twenty-five East and Gulf Coast cities. *Id.* Rising sea levels also lead to more flooding due to storms:

> Assuming other storm characteristics do not change, sea level rise will increase the frequency and extent of extreme flooding associated with coastal storms, such as hurricanes and nor'easters. A projected increase in the intensity of hurricanes in the North Atlantic could increase the probability of extreme flooding along most of the U.S. Atlantic and Gulf Coast states beyond what would be projected based solely on [sea level] rise.

Id. at 349.

The Commonwealth is among those states most at risk with these global trends. The combination of Virginia's "land subsidence, sea level rise, flat and low tidewater topography and intensive coastal real estate and infrastructure development" puts Virginia Beach, Norfolk, and Hampton Roads region at extreme risk from storm surges. *See* Robert Repetto, "Economic and Environmental Impacts of Climate Change in Virginia," DEMOS, at 2. *See also* U.S. EPA, "What Climate Change Means for Virginia," (Doc No. EPA 430-F-16-048) (Aug. 2016) (highlighting the risks from "Rising Seas and Retreating Shores"). Cities near the Virginia coast and tidal rivers—including Alexandria, Norfolk, and Virginia Beach—face some of the highest costs from flooding damage. *See* Georgetown Climate Center, "Time to Act: Understanding Virginia's Vulnerability to Climate Change," at 2. Hampton Roads is home to 1.7 million people and is the second-most vulnerable city to rising sea levels in the United States, behind only New Orleans. *Id.* at 1. Overall, the Hampton Roads region is the tenth-most vulnerable globally in terms of assets exposed to loss from increased flooding. *See* Governor's Commission on Climate Change, "Final Report: A Climate Change Action Plan," at 5 (Dec. 15, 2008) (analysis included in report from the Kaine administration).

III. The Department's Authority to Create a Carbon Cap Program

Given the significant public health and environmental threats facing Virginia, it is necessary and appropriate for the Board to promulgate state-specific regulations aimed at reducing the Commonwealth's contribution to GHG pollution. The Office of the Attorney General of Virginia issued an official advisory opinion on May 12, 2017, which analyzed the relevant statutory and administrative authority and concluded "that the State Air Pollution Control Board is legally authorized to regulate GHG emissions." Letter from the Honorable Mark R. Herring, Va. Att'y Gen., to the Honorable David J. Toscano, Minority Leader, Va. House of Delegates (May 12, 2017), https://www.oag.state.va.us/files/Opinions/2017/17-010-Toscano-carbon-pollution-%20for-issuance.pdf. Specifically, the Attorney General noted that the Board is authorized to regulate "air pollution" in the Commonwealth, and observed that greenhouse gases unquestionably fall within the definition of "air pollution." *Id.* at 2. The Attorney General further concluded that because of its "broad statutory authority" under Va. Code § 10.1-1307(A), the Board can exercise its regulatory authority through imposition of a "statewide cap on GHG emissions." *Id.* at 2-3. As shown below, the Board also has the authority to maximize the efficiency and efficacy of a statewide cap by linking the program with the Regional Greenhouse Gas Initiative ("RGGI").

A. The Proposed Regulation is Not Preempted by the Clean Air Act.

At the initial stage, the Clinic has researched the authority, under federal law, that permits the Commonwealth of Virginia to link into a multi-state trading program to reduce GHG pollution. Our analysis shows that a state-led program is not preempted by

the federal Clean Air Act, and is, in fact, specifically authorized by the Clean Air Act's state law savings clause.

There are two, major, non-federal, GHG programs currently active in the United States that implement multi-state, cap-and-trade regimes. The first is the Regional Greenhouse Gas Initiative ("RGGI"), which is intended to reduce GHG emissions from the electricity sector only. The second program is based in California and was established by California Assembly Bill 32. The California program links with a sister program in Quebec, and covers not only emissions generated by the energy sector, but also large industrial facilities and transportation providers. Both programs allow for certain emissions to be "offset" by projects that reduce GHG pollution across state lines. Projects that are eligible for the award of offset allowances under RGGI must be located within one of RGGI's participating states (although not necessarily in the same state as the power plant seeking the offset allowance). The California program, by contrast, allows for a broader range of offsetting projects, including projects "located in the United States, United States Territories, Canada, or Mexico." See Cal. Code Regs. tit. 17, § 95973(a)(3). Neither the California or RGGI programs are preempted by federal law.

Our analysis begins with *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), which held that the federal Clean Water Act "precludes a court from applying the law of an affected State against an out-of-state source." *See id.* at 494-95. In *Ouellette*, property owners in Vermont were harmed by a New York paper company discharging effluent into Lake Champlain, which is located on the Vermont-New York border. The Court 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." *See id.* at 494-95.

A similar question was addressed more recently in the air pollution context. *See North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291 (4th Cir. 2010). In *Cooper*, the state of North Carolina brought a public nuisance suit against the Tennessee Valley Authority ("TVA"), alleging that "[p]revailing high pressure weather systems in the states where TVA operates tend to cause emissions to move eastward into North Carolina and other states." *See id.* at 297. TVA is an electricity provider for portions of seven states in the Tennessee Valley region including a small part of North Carolina, which accounts for approximately six percent of TVA's territory. Emissions from TVA's out-of-state plants were the subject of North Carolina's enforcement action. The Fourth Circuit rejected application of North Carolina's law against TVA sources in other states, in part because to do so would improperly apply "home state law extraterritorially." *Id.* at 296. The court relied on *Ouellette* to determine that "only source state law, here that of Alabama and Tennessee, could impose more stringent emission rates than those required by federal law on plants located in those two jurisdictions." *Id.* at 308. That is, North Carolina ran afoul of *Ouellette,* not by accounting for out-of-state pollution, but by *imposing* its own restrictions on those out-of-state sources.

A Virginia cap-and-trade system linked with RGGI would not impose higher emissions standards on out-of-state sources, but rather would allow in-state sources to offset pollution with allowances or credits obtained in another state. Unlike *Ouellette* and *Cooper*, which attempted to enforce liability on an out-of-state actor , the proposed Virginia program would not directly regulate the action of an out-of-state polluter at all.

The Court in *Ouellette* was concerned that the "[a]pplication of an affected State's law to an out-of-state source . . . would undermine the important goals of efficiency and predictability in the permit system." *Ouellette*, 479 U.S. 481, 496 (1987). Unlike the attempts in *Ouellette* and *Cooper* to use state law to impose an affirmative duty on an out-of-state polluter, the Virginia program would not require the imposition of any Virginia requirement on an out-of-state plant.

The legality of the Proposed Regulation is further confirmed by the state law savings clause within the federal Clean Air Act, which explicitly allows states to promulgate their own air pollution regulations. The Clean Air Act's provision on "Retention of State Authority," 42 U.S.C. § 7416, provides that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." Further, the Clean Air Act's citizen suit provision, 42 U.S.C. § 7604(e), states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency)." Interpreting these clauses, the U.S. Court of Appeals for the Sixth Circuit confirmed that "[t]he states' rights savings clause of the Clean Air Act expressly preserves the state common law standards." *Merrick v. Diageo Ams. Supply, Inc.,* 805 F.3d 685, 690 (6th Cir. 2015).

The same is unquestionably true for duly enacted state regulations, which would only be preempted by the Clean Air Act if "it impedes the execution of 'the full purposes and objectives'" of the federal scheme. *Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 89

(2d Cir. 2003). This "obstacle" preemption requires an actual impediment to a federal program—*i.e.*, a state regulation that *interferes* with a regulated entity's ability to comply with both state and federal schemes. *Id.* at 87 (holding that a New York statute aimed at restricting the use of tradeable credits under the Clean Air Act's acid rain trading program interfered with the very methods Congress established for complying with the program). Obstacle preemption is not triggered by the existence of an additional state standard that supplements a weaker, federal requirement, or operates in a space where there is no federal requirement at all. The U.S. Court of Appeals for the Fourth Circuit, for example, has noted that North Carolina lawfully promulgated "the North Carolina Clean Smokestacks Act … [to] require[] investor-owned public utilities that operate coal-fired generating units to reduce their emissions of NO_x and SO_2 to levels even lower than those specified in [the] EPA regulations promulgated pursuant to the Clean Air Act." *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 297 (4th Cir. 2010). The Fourth Circuit confirmed that North Carolina enacted more stringent air pollution controls "as it is allowed to do under the Clean Air Act." *Id.*

B. Well-Established Doctrines of Statutory Interpretation in Virginia Confirm the Board's Authority to Enact the Proposed Regulation.

Virginia statutory law provides the DEQ with far-reaching authority "to protect the environment of Virginia in order to promote the health and well-being of the Commonwealth's citizens." *See* Va. Code § 10.1-1183. This mandate includes the power to "establish and effectively implement a pollution prevention program to reduce the impact of pollutants on Virginia's natural resources." *Id.* Specific to air pollution, the DEQ's authority is cabined by regulations adopted by the State Air Pollution Control

Board. Accordingly, the Board has the "the power to promulgate regulations . . . abating, controlling and prohibiting air pollution throughout or in any part of the Commonwealth" after it has "studied air pollution in the various areas of the Commonwealth." Va. Code § 10.1-1308(A). Section 1308(A) further provides that the Board has the authority to adopt a regulation that is "more restrictive than applicable federal requirements;" when it enacts such a rule, it must provide the relevant standing committees in the General Assembly with an explanation of "why the more restrictive provisions are needed." That is, statutory law in the Commonwealth explicitly and unquestionably provides that the Board the authority to promulgate a carbon reduction program so long as it: 1) has studied the issue under Va. Code § 10.1-1308, and 2) notifies the General Assembly if the new regulation addresses the same pollution problem as an applicable federal requirement and is more restrictive than that requirement.

Critics of the Proposed Regulation might argue that Va. Code § 10.1-1308 specifically references air pollution in "the Commonwealth," and that a regulation linking Virginia's program to a multi-state Regional Greenhouse Gas Initiative might be misconstrued as regulating air pollution outside of the state. This argument, however, would misapprehend a basic understanding of the way that the DEQ's and the Board's regulations are designed to work. As shown in Part II above ("The Urgent Need for a Robust, State-Specific Climate Policy"), the impact of climate change on Virginia has been studied in-depth. From sea-level rise in Hampton Roads to adverse impacts on the economy and public health across the state, there are imminent and specific harms that Virginia citizens are currently experiencing because of global warming. Abundant research cautions that these harms will worsen in coming years. Accordingly, it is

appropriate that the DEQ and the Board act now to mitigate these injuries occurring within the Commonwealth. The most cost-effective way to take action and reduce GHG pollution is likely through a multi-state effort that leverages a free market, cap-and-trade system. This approach fosters competition within the electric power industry and encourages market participants to find the cheapest routes to cleaner energy production.

The DEQ, in fact, has taken similar action with regard to compliance with the U.S. EPA's National Ambient Air Quality Standards program. *See* Va. Code § 10.1-1322.3. This section explicitly authorizes the DEQ to enter into a multi-state, cap-and-trade program. It provides, in relevant part:

> "***In accordance with § 10.1-1308,*** the Board may promulgate regulations to provide for emissions trading programs to achieve and maintain the National Ambient Air Quality Standards ["NAAQS"] established by the United States Environmental Protection Agency, under the federal Clean Air Act. … No regulations shall prohibit the direct trading of air emissions credits or allowances between private industries, provided such trades do not adversely impact air quality in Virginia."

See Va. Code § 10.1-1322.3 (emphasis added). The General Assembly, in enacting this statute, explicitly acknowledged the Board's *preexisting* authority to address in-state air pollution problems through participation in a multi-state, cap-and-trade regime. The statute begins, "In accordance with § 10.1-1308," thereby unambiguously communicating the General Assembly's intention that the prior statute granted the Board the authority to participate in multi-state programs generally, and further directed the Board to join the NAAQS program under the federal Clean Air Act. The newly Proposed Regulation to amend 9 Va. Admin. Code § 5-140 is similar to the NAAQS program under Va. Code § 10.1-1322.3, in that it is a regulatory program promulgated "[i]n accordance with § 10.1-1308." Such a program would be designed with the purpose of "abating, controlling and

prohibiting air pollution throughout or in any part of the Commonwealth," as required by § 10.1-1308(A).

What is more, the General Assembly reaffirmed the Board's authority to enact the Proposed Regulation through passage of House Bill 1270 during the most recent legislative session. This bill, introduced at the behest of opponents of carbon regulation, sought to block the Proposed Regulation and prohibit the Board from adopting "any regulation, rule, or guidance document" that would "bring[] about the participation by the Commonwealth in a regional market for the trading of carbon dioxide allowances," and specifically referenced the Regional Greenhouse Gas Initiative. *See* 2018 Session, HB 1270 Regional Greenhouse Gas Initiative; prohibition on participation by Commonwealth, Va. Gen. Assembly, http://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+HB1270. The bill passed the House of Delegates and the Virginia Senate narrowly, and is subject to veto by the Governor.

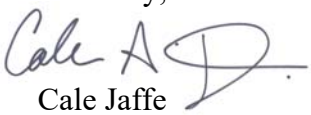
After a veto, House Bill 1270 would continue to provide important insight into the General Assembly's understanding of existing law and Va. Code § 10.1-1308. It is axiomatic "that every act of the legislature should be read so as to give reasonable effect to every word" and "no part [of a legislative act] will be considered meaningless unless absolutely necessary." *See Richmond v. Va. Elec. & Power Co.,* 787 S.E.2d 161, 164 (Va. 2016) (internal quotation marks and citations omitted). Thus, the General Assembly's passage of a bill to explicitly block participation in RGGI must be read as confirming the Board's preexisting authority to adopt the Proposed Regulation. Any other interpretation of House Bill 1270 would render the entire text of the legislative act superfluous. This reading of the bill is confirmed by the first phrase of the legislative text, which provides,

"Notwithstanding any other provision of law…." The intent here is explicit: "other provision[s] of law" grant the Board and the DEQ the authority to link Virginia carbon reduction program to RGGI.

IV. Conclusion

The Clinic appreciates this opportunity to submit comments to the Board and the DEQ on the Proposed Regulation. As detailed above, the Commonwealth's proposal to link with RGGI is necessary in light of the increasingly severe effects of climate change, a phenomenon whose existence has been repeatedly confirmed by the scientific community and federal agencies. The Proposed Regulation is not preempted by federal law, and is explicitly within the DEQ's authority under Virginia Law.

Sincerely,



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