TWENTY-SEVENTH JUDICIAL CIRCUIT
OF VIRGINIA

FLOYD COUNTY COURTHOUSE
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COMMONWEALTH OF VIRGINIA

CIRCUIT COURT FOR THE COUNTIES OF
BLAND, CARROLL, FLOYD, GILES,
GRAYSON, MONTGOMERY, PULASKI AND WYTHE

CIRCUIT COURT FOR THE CITIES OF
GALAX AND RADFORD

November 18, 2024

VIA MAIL & EMAIL

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RE: Association of Energy Conservation Professionals v. Virginia State Air Pollution Control Board, et al. Floyd County Circuit Court: CL23000173-00

Dear Counsel,

This matter is before the Court upon the Petition of the Association of Energy Conservation Professionals appealing from the decision of the Virginia State Air Pollution Control Board repealing the RGGI Regulation. Oral arguments on the issue of appeal were held before the Court in September of 2024. The Court has considered all the evidence presented, the briefs submitted and the arguments of Counsel.

For the reasons set forth below, the Court finds that the 1) Petitioner does in fact have standing to bring this suit and 2) the putative repeal of the RGGI Regulation was beyond the statutory authority of the Respondents, and therefore unlawful and without effect.

Factual Background

Because all parties are well-acquainted with the record and procedural history of this case, the facts will be restated only briefly. The Regional Greenhouse Gas Initiative, or RGGI, is a market-based, cap-and-invest regional initiative designed to reduce carbon emissions by auctioning off carbon credits and utilizing the revenue from those auctions to fund various conservation, sustainability, and disaster prevention programs. At the time of this suit, RGGI consisted of nearly a dozen states in the Mid-Atlantic and New England.

In 2020, the Virginia General Assembly passed a statute which required the Commonwealth of Virginia to participate in "a market-based trading program consistent with RGGI." Va. Code § 10.1-1330(A & B). The RGGI Act compels the Department of Environmental Quality, or DEQ, to incorporate its provisions into a regulation which would bring Virginia into RGGI "without further action by the [Air] Board," and additionally "authorized" the Director of DEQ 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." Id at (A), (B). Subsection B of the RGGI Act was necessary because the Director of DEQ lacked the statutory authority to sell carbon allowances before the RGGI Act was passed.

This statute, along with the 2020 Utility Act, passed in the same legislative session, lays out a comprehensive scheme of carbon emission regulations for the years 2020 through 2050. The RGGI Act requires that the revenue it raises be allocated in the follow ways: forty-five percent to "assisting localities and their residents affected by recurrent flooding, sea level rise, and flooding from severe weather events." Fifty percent to "low-income energy efficiency programs, including programs for eligible housing developments." Three percent to administrative expenses of the allocation process. And two percent for the administrative costs of Subsection (C)(2), which is the fifty percent share listed above. Id at (C)(1)-(4). This allocation has the practical effect of generating large amounts of business for professionals in these fields.

Petitioner is an association of weatherization professionals whose mission is to provide, promote, and advocate for energy conservation measures on behalf of its members. Petitioner was originally established in 1995 to implement energy saving measures in low-income households pursuant to the federally funded Weatherization Assistance Program. Following the passage of the RGGI Act, Petitioner has worked to implement the Weatherization Deferral Repair program. This program is the sole source of funding for Petitioner and has allowed its members to support over fifty staff positions, seventeen of which were added directly as a result of funding from RGGI. Declaration of William Weitzenfeld ¶ 24.

In 2022, however, Virginia began a process of attempting to leave RGGI, starting with an executive order from Governor Glenn Youngkin. This executive order directed the Air Board "to re-evaluate Virginia's participation in [RGGI] and immediately begin regulatory processes to end it." EO 9. After a period of notice and comment, Respondents in this case repealed the RGGI Regulation on August 30, 2023.

The same day, Petitioner and three other parties served Respondents with a notice of appeal to the Circuit Court of Fairfax County under the Virginia Administrative Process Act, or VAPA. Petitioner's sole source of funding for its various programs and initiatives is the revenue raised by RGGI, and the loss of that funding poses an immediate threat to Petitioner's continued existence. The three other original parties were dismissed for lack of standing on November. 3, 2023. The Fairfax County Circuit Court did not rule on Petitioner's standing or on the merits of the case and transferred venue to Floyd County.

I: Petitioner Has Standing to Sue Because it has an Injury that Can Be Redressed

As a preliminary matter, Petitioner's standing to bring this case has been disputed by Respondents. Standing ordinarily requires "a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large." *Goldman v. Landsidle*, 262 Va. 364, 371-73 (2001). It also requires that the conduct in question be fairly traceable to the other party. *Layla H. v. Commonwealth*, 81 Va. App. 116, 134 (2024). Finally, standing requires that a favorable ruling by the court must be likely to redress the injury. *Spanos v. Taylor*, 76 Va. App. 810, 826 (2023).

Injury: Petitioner in this case has clearly suffered a unique injury that was not shared by the other original petitioners. Those other parties were pure advocacy organizations. While the repeal of the RGGI Regulation ran counter to their personal missions, the repeal did not result in a cognizable injury for purposes of standing. Petitioner in this case is different. Specifically, the entire business of this last remaining Petitioner depends on funding through the Weatherization Deferral Repair ("WDR") program, which itself was funded through the revenue generated by RGGI. The loss of that funding is an existential threat to Petitioner's members. Uncontroverted testimony from Petitioner establishes that it is able to support numerous jobs and careers solely as a result of the WDR program. Declaration of William Weitzenfeld ¶ 24.

Respondents have argued that the General Assembly's failure to appropriate funds to the Petitioner's program after the repeal of the RGGI Regulation is evidence that the Petitioner have not truly suffered an injury. Respondents also argue that Article X § 7 of the Virginia Constitution supports their contentions in that the original appropriation under the RGGI statute has expired. That may be so, but that is not relevant to the question of whether the repeal of the RGGI Regulation is the source of Petitioner's injury. It is not so much that Petitioner did not receive any funds, but rather that Petitioner's ability to access the funds in the first place has been frustrated. In this way, Respondents' position that there are no funds to appropriate is detrimental to their argument. If the RGGI Regulation had been preserved, and a decision was made to discontinue the program upon which Petitioner relies, that would be one thing. However, the issue in this case which grants Petitioner standing is that the mechanism by which Petitioner could receive funding, and without which Petitioner's business is severely impaired, is gone.

Fairly Traceable: In the same way, the conduct which caused this harm is in fact fairly traceable to Respondents. The traceability element is met even when the injurious conduct in question is not the final act in the chain of causation. See *Morgan v. Board of Supervisors*, 302 Va. 46, 64-65 (2023). Put another way, the causation element of a standing analysis is not as stringent as an analysis of proximate cause on the merits. Id. In this way, causation becomes straightforward: Respondents repealed the RGGI Regulation (allegedly unlawfully), and that repeal meant that a pool of funds upon which Petitioner relies no longer exists. A subsequent event which contributes to or follows from the injury, such as a constitutional limitation on the duration of appropriations, does not break the chain of causation for purposes of standing.

Redressability: Moreover, giving Petitioner back the chance to access the funds raised by RGGI is sufficient for redressability. Petitioner is not demanding a check from Respondents, and Petitioner has conspicuously chosen not to sue for damages of any kind. In Petitioner's own argument, their relief would simply consist of "making it possible, once again, for the General Assembly to appropriate funds to the WDR program," Petitioner's Reply Brief at 4.

With all this in mind, the Court finds that Petitioner has standing to bring this case. Respondents' concern that Petitioner's proposed relief is an overreach of judicial authority is also unfounded. Petitioner's requested relief does not involve ordering the Commonwealth to reenter RGGI and to negotiate a contract. The statute only requires the Commonwealth to participate in a program "consistent

with" RGGI, not necessarily RGGI itself. Petitioner is not dictating interstate policy to the Respondents. We now turn to the merits of the case.

II: Respondents Do Not Have the Authority to Repeal the RGGI Regulation

Executive agencies created by statute derive their powers from statute. *Muse v. Virginia Alcohol Beverage Control Bd.*, 9 Va. App. 74, 78 (1989) (citing *Portsmouth v. Virginia Railway & Power Co.*, 141 Va. 54, 61 (1925)); see also Va. Code § 2.2-4027(ii) (listing, as an issue for review by the courts, whether agency action comports with statutory authority). Neither the RGGI Act nor any other statute grants Respondents the authority to repeal the RGGI Regulation, and therefore the complained-of agency action is not in compliance with statutory authority. See Va. Code § 2.2-4027(ii). The putative repeal of the RGGI Regulation is unlawful and therefore void as a matter of law. See Va. Code § 2.2-4026(B).

By its very language, the RGGI Act explicitly circumvents the Air Board. It instructs the DEQ to incorporate its provisions into the RGGI Regulation and exempts said incorporation from the provisions of the Virginia Administrative Process Act. The statute authorizes the Director of DEQ to establish the program directed to be incorporated by regulation pursuant to Va. Code § 10.1-1330(B). Respondents contend that *Supervisors of Botetourt County v. Cahoon*, 121 Va. 768 (1917) supports their reading of the statute. The central holding of *Cahoon* is built upon many years of national precedent which held, as the Supreme Court of Virginia put it, that where there is a "duty coupled with the power...usually the power *must be exercised*, though conferred in merely permissive language." Id at 773 (emphasis added). Moreover, "whenever the public interest or individual rights call for [the exercise of governmental power] the language used, though permissive in form, is in fact preemptory. *What they are empowered to do... the law requires shall be done*." Id at 774 (emphasis added).

What separates *Cahoon* from the facts in the present case is that *Cahoon* concerned the authority of a locality to issue bonds to support road construction. The Court held that this did not concern "the protection of the health, morals, safety or welfare of the community." Id at 780. In other words, no direct public interest, and therefore no governmental duty, was implicated in the statute.

Here, it is plain from the language of the RGGI Act that such a duty exists. The very first substantive provision of the statute states that "[t]he provisions of this article *shall be incorporated* by the Department, without further action by the Board, into the final regulation adopted by the Board." Va. Code § 10.1-1330(A) (emphasis added). The Act goes on to say that "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." Id at (B) (emphasis added). Here, we have just such a "duty coupled with a power" which renders compulsory the exercise of the power the statute grants.

Even if Subsection A of the RGGI Act did not exist, the exercise of power would still be mandatory, as the provisions of the act are designed "for the protection of the health, morals, safety, or welfare of the community." *Cahoon*, 121 Va. at 780. It is long standing Virginia precedent that "[discretionary language] means 'must' or 'shall' in cases where the public interest and rights are concerned, and where the public or third persons have a claim *de jure* that the powers shall be exercised." *Bean v. Simmons*, 50 Va. 389, 391 (1852). There can be no doubt that the RGGI Act is designed for the purposes discussed in *Cahoon*.

As stated above, the reason for the choice of language in the RGGI Act was to grant the Director of DEQ a new authority that did not previously exist and without which participation in RGGI would be impossible. Executive agencies may only do that which is permitted by statute. The purpose of the word "authorized" in Subsection B was not to render the exercise of that authority permissive, but to create

power where there was none before. As such, the only body with the authority to repeal the RGGI Regulation would be the General Assembly. This is because a statute, the RGGI Act, *requires* the RGGI Regulation to exist. If Respondents had merely amended the RGGI Regulation in ways that were not inconsistent with the RGGI Act, it is doubtful that their authority to do so could be challenged. But that is not what happened here.

Because Respondents lacked the statutory authority to repeal the RGGI Regulation, it is unnecessary to address whether the decision to do so was supported by substantial evidence. See Va. Code § 2.2-4027(iv).

Conclusion

For the reasons set out in this opinion, the Court finds that the attempted repeal of the RGGI Regulation is unlawful, and thereby null and void.

It is requested that Counsel for Petitioner prepare an order that is in conformity with this opinion and circulate same to counsel for whatever endorsement they deem proper. Also, the order should include that the Court granted the motion of National Resources Defense Counsel requesting leave to file an Amicus Curiae Brief and further gave the petitioner and respondents the opportunity to respond to said amicus brief. Thereafter, the order should be presented to the Court for entry.

Sincerely,

C. Randall Lowe
Judge Designate