



SCHOOL of LAW

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January 9, 2024

Hon. Rhonda T. Vaughn, Clerk
Floyd County Circuit Court
27th Judicial District of Virginia
100 East Main Street, Room 200
Floyd, Virginia 24091-0057

RE: Association of Energy Conservation Professionals, et al. v. State Air Pollution Control Board, et al., Case No. CL23000173-00

Ms. Vaughn:

Enclosed please find for filing in the above-captioned matter the Motion of Virginia Clinicians for Climate Action and the Virginia Energy Efficiency Council (Public Health and Energy Efficiency *Amici*) Seeking Leave to File a Brief as *Amici Curiae* in Support of Petitioners.

Also included with this filing, as Attachment A, is the proposed Brief of Amici Curiae.

The Motion and Brief are being filed in paper form via overnight mail. A return envelope (postage prepaid) is included and a date-stamped, return copy of this filing is requested. If you should have any questions, please contact me at (434) 924-4776, or via email at cjaffe@law.virginia.edu.

Respectfully,

Cale Jaffe

Counsel to Virginia Clinicians for Climate Action &
The Virginia Energy Efficiency Council

Cc (via email only):

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FILED IN THE CLERK'S OFFICE
OF THE CIRCUIT COURT OF THE
FLOYD CIRCUIT COURT
DATE: 01/09/2024 @10:06:00

RHONDA VAUGHN, CLERK
TESTE:
CLERK/DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FLOYD

ASSOCIATION OF ENERGY
CONSERVATION PROFESSIONALS, *et al.*,

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)

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Petitioners,

)

)

v.

)

Case No.: CL23000173-00

)

VIRGINIA STATE AIR
POLLUTION CONTROL BOARD, *et al.*,

)

)

)

Respondents.

)

MOTION OF VIRGINIA CLINICIANS FOR CLIMATE ACTION
AND VIRGINIA ENERGY EFFICIENCY COUNCIL
SEEKING LEAVE TO FILE A BRIEF AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

Virginia Clinicians for Climate Action¹ and the Virginia Energy Efficiency Council² (proposed “Public Health and Energy Efficiency *Amici*”) hereby file this Motion Seeking Leave to File a Brief as *Amici Curiae* in Support of Petitioners. The proposed Brief of Public Health and Energy Efficiency *Amici* is included with this Motion as Attachment A.

Virginia Clinicians for Climate Action (“Virginia Clinicians”) is an unincorporated association of over 500 medical professionals and allies. As an organization, Virginia Clinicians works on climate policy in Virginia, with an emphasis on the health benefits of climate solutions and the health dangers of inaction. In 2022, Virginia Clinicians published a report on heat-related illnesses in Virginia, delineating the connection between public health harms and intensifying climate change.

¹ *Virginia Clinicians for Climate Action*, <https://www.virginiaclinicians.org/> (last visited Jan. 5, 2024).

² *Virginia Energy Efficiency Council*, <https://www.vaeeec.org/> (last visited Jan. 5, 2024).

The Virginia Energy Efficiency Council (“VAEEC”) is a 501(c)(3) charitable organization that provides a platform for stakeholder engagement while analyzing and supporting cost-effective energy-efficient programs, best practices in the energy-efficiency industry, and sound policies that advance energy efficiency in Virginia. VAEEC is composed of a wide range of members, including major energy efficiency companies and local governments managing energy efficiency programs. The diverse membership of VAEEC contributes a profound wealth of knowledge and balanced perspective regarding energy efficiency.

The filing of a brief as *amici curiae* would be of assistance to the Court, as the brief would leverage Public Health and Energy Efficiency *Amici*’s expertise on the proposed withdrawal from RGGI, detailing how a withdrawal would be economically detrimental to Virginians by depriving families of necessary funding for low-income, energy-efficient housing and community flood preparedness initiatives, and by aggravating the acute, public health crises arising from climate-related impacts in Virginia. In giving the Court a perspective on these issues, the brief would reference comments shared by Public Health and Energy Efficiency *Amici* with Respondents during administrative processes before the Virginia Department of Environmental Quality.


No party would be prejudiced by the filing of this brief, as Public Health and Energy Efficiency *Amici* affirm that they reached out, by email on January 4, 2024, to advise all parties of their intention to file this Motion and the accompanying brief. Respondents have a full opportunity to respond to this brief in three subsequent pleadings: Respondents’ Reply on the Motion to Dismiss, Reply on the Demurrer, and Opposition to Petitioners’ Motion for Intermediate Relief.

Most significantly, circuit courts across the Commonwealth have granted motions seeking leave to file briefs as *amicus curiae* in other similar cases of significant public interest. *See, e.g., Commonwealth v. Sangha*, 107 Va. Cir. 408A (2021) (granting motions to appear as *amicus curiae*

from several non-parties, including the American Civil Liberties Union Foundation of Virginia and the Fairfax County Police Association); *Soering v. McDonnell*, 84 Va. Cir. 564 (2012) (granting motion to appear as *amicus curiae* from the Rutherford Institute); *Hudson v. Virginia Employment Commission*, 69 Va. Cir. 318 (2005) (considering “the position of the Veterans of Foreign Wars, which was allowed to file a memorandum in support of Hudson as *amicus curiae*”); *Virginia Jockey Club, Inc. v. Virginia Racing Commission*, 36 Va. Cir. 366 (1995) (noting arguments from “the Virginia Horsemen’s Association, which filed an ‘amicus curiae’ brief with the court which, though unsolicited, has been read.”).

Finally, Public Health and Energy Efficiency *Amici* further affirm that they have looked to Rule 5:30 of the Rules of Supreme Court of Virginia for guidance. That rule, applicable to appellate matters before the Supreme Court, provides, “A brief *amicus curiae* is timely if filed no later than 7 days after the principal brief or filing of the party supported.” This brief is being filed in support of Petitioners’ opposition to the Commonwealth’s demurrer and motion to dismiss (due to be filed on January 9, 2024), and in support of Petitioners’ motion for intermediate relief (due to be filed on January 10, 2024). If the Court were to adopt the approach of Rule 5:30, then the proposed brief of Public Health and Energy Efficiency *Amici* would be timely filed if submitted on or before January 16 or 17, 2024.

Respectfully submitted,


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COUNSEL TO VIRGINIA CLINICIANS FOR CLIMATE ACTION &
THE VIRGINIA ENERGY EFFICIENCY COUNCIL

DATED: January 9, 2024

ATTACHMENT A

**PROPOSED BRIEF OF VIRGINIA CLINICIANS FOR CLIMATE ACTION
AND THE VIRGINIA ENERGY EFFICIENCY COUNCIL
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FLOYD

ASSOCIATION OF ENERGY)
CONSERVATION PROFESSIONALS, *et al.*,)
)
 Petitioners,)
)
 v.) **Case No.: CL23000173-00**
)
 VIRGINIA STATE AIR)
 POLLUTION CONTROL BOARD, *et al.*,)
)
 Respondents.)

BRIEF OF VIRGINIA CLINICIANS FOR CLIMATE ACTION
AND VIRGINIA ENERGY EFFICIENCY COUNCIL
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

I. STATEMENT OF IDENTITY OF *AMICUS CURIAE*

Virginia Clinicians for Climate Action and the Virginia Energy Efficiency Council (collectively, “Public Health and Energy Efficiency *Amici*”), by and through undersigned counsel, hereby file this brief as *amici curiae* in support of the Motion for Intermediate Relief from the Association of Energy Conservation Professionals, *et al.* (collectively, the “Conservation Petitioners”) and in opposition to Agency Respondents’ Demurrer and Motion to Dismiss.¹

¹ No party, party’s counsel, or person other than the *amicus curiae*, its members, and its counsel contributed to the preparation or submission of this brief. Kevin Hoang, UVA Law Class of 2025, is a student enrolled in the Environmental Law and Community Engagement Clinic and has contributed substantially to the research, drafting, and editing of this brief.

Virginia Clinicians for Climate Action (“Virginia Clinicians”) is an unincorporated association of over 500 medical professionals who bring a broad spectrum of scientific insight into the public health benefits of climate solutions and the corollary health dangers of inaction.² In 2022, Virginia Clinicians published a report on heat-related illnesses in Virginia, delineating the connection between public health harms and intensifying climate change.³ As a group of practicing health professionals, Virginia Clinicians has first-hand experience with climate-driven, public health impacts.⁴ Indeed, pediatricians affiliated with Virginia Clinicians have seen a correlation between rising temperatures due to climate change and physical health harms in children.⁵ Virginia Clinicians’ work focuses on the public and environmental health impacts of climate change on patients, their families, and their communities.

The Virginia Energy Efficiency Council (“VAEEC”) is a 501(c)(3) charitable organization that analyzes and supports cost-effective, energy-efficient programs, best practices in the energy-efficiency industry, and sound policies that advance energy efficiency in Virginia.⁶ VAEEC is composed of a wide range of members, including Fortune 500 companies, nonprofits, and local governments managing energy-efficiency programs.⁷ The diverse membership of VAEEC has built an organization with a profound wealth of knowledge and balanced perspective regarding energy efficiency. This unique expertise has enabled VAEEC to share the cogent, fact-based voice

² VA. CLINICIANS FOR CLIMATE ACTION, <https://www.virginiaclinicians.org/> (last visited Jan. 5, 2024). Virginia Organizing, a non-partisan statewide grassroots organization, functions as the fiscal agent for Virginia Clinicians. Virginia Organizing is not seeking leave to submit a brief as *amicus curiae* or otherwise participate in this matter.

³ *Heat Illness in Virginia*, VA. CLINICIANS FOR CLIMATE ACTION (Feb. 2022), <https://www.virginiaclinicians.org/2022-heat-illness-report>.

⁴ *Commentary: Giving up on greenhouse gas plan is bad for climate, and our children*, RICHMOND TIMES DISPATCH (Aug. 2022), https://richmond.com/opinion/columnists/commentary-giving-up-on-greenhouse-gas-plan-is-bad-for-climate-and-our-children/article_0e9a192e-41ca-11ee-9b6f-1fbc4f5c0edc.html.

⁵ Brief of *Amicus Curiae* Virginia Clinicians for Climate Action in Support of Appellants, *Layla H., et al. v. Commonwealth Virginia*, No. 1639-22-2, (Va. Ct. App. filed Mar. 28, 2023).

⁶ *About*, VA. ENERGY EFFICIENCY COUNCIL, <https://www.vaeec.org/about/> (last visited Jan. 5, 2024).

⁷ *Id.*

of the energy-efficiency industry with local, state, and national policymakers. Simply put, VAEEC works to integrate energy efficiency into Virginia’s growing economy.⁸

The Conservation Petitioners allege that the State Air Pollution Control Board and Department of Environmental Quality (collectively, “Agency Respondents”) exceeded statutory authority and contravened the Clean Energy and Community Flood Preparedness Act, Va. Code § 10.1-1330, (“2020 RGGI Act”) by attempting to withdraw Virginia from the Regional Greenhouse Gas Initiative (“RGGI”). Further, Conservation Petitioners contend that Agency Respondents violated the Virginia Administrative Process Act, Va. Code § 2.2-4027, by failing to provide substantial evidentiary support for the repeal of RGGI.

In support of these claims, Public Health and Energy Efficiency *Amici* now discuss how withdrawal from RGGI would deprive Virginia communities of statutorily-directed funding for low-income, energy-efficient housing and community flood preparedness projects, as expressly required by the 2020 RGGI Act. Further, Agency Respondents’ rationale for withdrawing from RGGI (economic burden on the Commonwealth) is irreconcilable with overwhelming, scientific research indicating that health harms arising from climate change will cost Virginians billions in medical care, decreased productivity, and lost work and school days—and these costs increase the longer participation in RGGI is stymied.

Public Health and Energy Efficiency *Amici* shared their concerns with Agency Respondents in timely-filed comments on October 13, 2022 (VAEEC), March 2, 2023 (VAEEC), and March 31, 2023 (Virginia Clinicians). Those comments leveraged the Public Health and Energy Efficiency *Amici*’s expertise in reviewing the peer-reviewed, medical literature on the health benefits linked to RGGI. *Amici* also assessed the bread-and-butter infrastructure projects

⁸ *Id.*

and energy-efficiency programs that are funded through Virginia’s participation in RGGI. Agency Respondents’ dismissal of these comments—along with others like them filed by Conservation Petitioners—lacked substantial evidentiary support in the administrative record and was flatly inconsistent with the requirements of Virginia law.

II. STANDARD OF REVIEW

Virginia’s standing doctrine “asks only whether the claimant truly has ‘a personal stake in the outcome of the controversy.’”⁹ Thus, the Virginia Supreme Court recently reversed a circuit court’s flawed determination that a party had not alleged “a sufficient factual basis for standing,” unanimously finding that plaintiffs’ alleged harms were not “speculative.”¹⁰ The Supreme Court’s ruling in *Morgan v. Board of Supervisors v. Hanover County* is instructive, as Conservation Petitioners are involved in many aspects of RGGI, such as furthering the success of the Virginia Weatherization Assistance Program, a program that today relies on RGGI funding.¹¹

The Virginia Administrative Process Act also provides that a circuit court may issue an intermediate stay of agency action when, as is the case with Virginia’s active participation in RGGI, a stay is necessary to avoid “irreparable injury” and there is “probable cause . . . to anticipate a likelihood of reversible error”—*i.e.*, when Petitioners are likely to succeed on the merits.¹² Probable cause for reversible error exists here because a withdrawal from RGGI squarely violates the text of the Clean Energy and Community Flood Preparedness Act. Irreparable injury is shown because the sudden halting of RGGI funding will create acute harm to residents and organizations that currently benefit from the continued existence of RGGI-funded programs.

⁹ *Morgan v. Bd. of Supervisors of Hanover Co.*, 883 S.E.2d 131, 138 (2023).

¹⁰ *Id.* at 144.

¹¹ See Ass’n of Energy Conservation Prof., AECF: HISTORY, <https://aecfes.org/index.php/about/history> (last visited Jan. 2, 2024).

¹² See VA. CODE § 2.2-4028; cf. *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc.*, 550 F.2d 189 (4th Cir. 1977) (analyzing the likelihood of reversible error on the merits and irreparable injury in granting a stay).

Finally, because of the way that greenhouse gas (“GHG”) pollutants persist in the atmosphere long after they are emitted—in some cases for thousands of years—the costs of addressing climate change increases dramatically if action is delayed.¹³ Accordingly, Public Health and Energy Efficiency *Amici* are concerned about accelerating health harms attributable to climate change. These harms would be mitigated if the Commonwealth remained in RGGI—as the black-letter text of the Virginia Code requires.

III. AGENCY RESPONDENTS’ WITHDRAWAL FROM RGGI IS STATUTORILY AND CONSTITUTIONALLY PROHIBITED.

In 2020, the General Assembly passed the Clean Energy and Community Flood Preparedness Act (“2020 RGGI Act”), which mandates that the Department of Environmental Quality promulgate regulations necessary for Virginia to fully participate in RGGI.¹⁴ The 2020 RGGI Act also establishes that the Director “shall seek to sell 100 percent of all allowances” needed to participate in the RGGI program and use that revenue to support infrastructure projects across the Commonwealth.¹⁵ Specifically, the 2020 RGGI Act requires 45% of RGGI auction revenues to “be credited to . . . assisting localities and their residents affected by recurrent flooding, sea level rise, and flooding from severe weather events.”¹⁶ Another 50% “shall be credited to . . . support[ing] low-income energy efficiency programs” through the Department of Housing & Community Development.¹⁷ The remaining 5% is dedicated to administrative costs.¹⁸

The 2020 RGGI Act not only mandates Virginia’s participation in RGGI—the Act also spells out the exact manner in which Virginia will engage in carbon-trade auctions and the specific

¹³ U.S. Environmental Protection Agency, *Climate Change Indicators: Greenhouse Gases*, <https://www.epa.gov/climate-indicators/greenhouse-gases> (last updated July 26, 2023).

¹⁴ VA. CODE § 10.1-1330.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

projects that auction revenues will support. The robust regulatory framework that the General Assembly adopted in the 2020 RGGI Act unquestionably demonstrates that Virginia’s integration into RGGI is statutorily required and may only be repealed through subsequent legislative action.

IV. THERE IS NO REPLACEMENT FOR RGGI FUNDING.

Virginia’s unlawful exit from RGGI would lead to a loss of \$3 billion over the next decade, including \$125 million in annual funding for low-income energy efficiency and weatherization programs.¹⁹ Through such projects, RGGI has lowered energy bills for low-income households, reduced energy usage, and created safer, healthier living environments. Agency Respondents’ attempted withdrawal from RGGI risks bringing these projects to a screeching halt, leaving many in the energy-efficiency industry without immediate recourse.

RGGI funds are dedicated through the 2020 RGGI Act to support two energy-efficiency programs: the Weatherization Deferral Repair Program (“WDR”) and the Affordable and Special Needs Housing Program (“ASNH”). Additionally, RGGI supports the disbursement of Virginia Community Flood Preparedness Fund Grants. These three programs are discussed in turn.

First, the Weatherization Deferral Repair Program (“WDR”), funded by RGGI auction revenues, helps repair low-income houses and makes those homes eligible for support from the federal Weatherization Assistance Program (“WAP”).²⁰ WAP requires that homes be “weatherization-ready” prior to receiving federal money.²¹ This limitation means that buildings with major health and safety issues such as leaking roofs or non-functioning HVAC units may be *ineligible* for support—i.e., “deferred” until repairs are made. Approximately one-fifth of

¹⁹ Damian Pitt *et al.*, VA. COMMONWEALTH UNIV., INVESTING IN VIRGINIA THROUGH ENERGY EFFICIENCY: AN ANALYSIS OF THE IMPACTS OF RGGI AND THE HIEE PROGRAM 26 (2023).

²⁰ VIRGINIA DEP’T OF HOUSING AND COMM. DEV., VA. WEATHERIZATION DEFERRAL REPAIR PROGRAM GUIDELINES: 2021–2022 3 (2021).

²¹ *Weatherization Assistance Program*, OFF. OF STATE AND CMTY. ENERGY PROGRAMS, <https://www.energy.gov/scep/wap/weatherization-assistance-program> (last visited Oct. 17, 2023).

otherwise-qualifying households are federally “deferred.”²² The Virginia WDR program stands as a lead effort in making vital repairs.²³ Thanks to the use of RGGI funds, Virginia is closing the gap to federal assistance by making repairs on the most prevalent issues causing WAP deferrals.²⁴

Second, the Affordable and Special Needs Housing Program (“ASNH”), also funded through RGGI, provides critical funding to build highly efficient, affordable housing units.²⁵ ASNH has received over \$92 million from RGGI revenues, which has funded numerous affordable housing projects.²⁶ Energy insecurity is a pressing concern for low-income households in Virginia, with residents spending 17 percent of their income on home energy and utility costs.²⁷ ASNH’s investment in energy-efficient housing ensures that low-income families are able to dedicate more of their income to other critical needs such as healthcare, food, transportation, and education.²⁸ These two funds—WDR and ASNH—have been instrumental in providing energy-efficiency upgrades to 130,000 low-income homes, leading to \$89 million in annual customer bill savings, all while supporting a myriad of small-business jobs in the energy-efficiency industry.²⁹

²² Chase Counts, *Utilizing Virginia RGGI Revenue to Support Existing Low-Income Energy Efficiency Programs*, CMTY. HOUS. PARTNERS, (Dec. 11, 2020), archived at <https://perma.cc/PB3C-VSHW/>.

²³ *Housing Innovations in Energy Efficiency (HIEE)*, VA. DEP’T OF HOUS. AND CMTY. DEV., <https://www.dhcd.virginia.gov/hiee> (last visited Oct. 11, 2023); see also *Weatherization Deferral Program (WDR)*, VA. DEP’T OF HOUS. AND CMTY. DEV., <https://dhcd.virginia.gov/wdr> (last visited Oct. 11, 2023).

²⁴ *Weatherization Deferral Repair Program Program Guidelines*, DEP’T OF HOUS. & CMTY. DEV., <https://dhcd.virginia.gov/sites/default/files/Docx/hiee/dhcd-weatherization-deferral-repair-program-guidelines.pdf> (last visited Oct. 17, 2023).

²⁵ *Affordable & Special Needs Housing (ASNH)*, VIRGINIA DEP’T OF HOUSING AND COMM. DEV., <https://www.dhcd.virginia.gov/asnh> (last visited Nov. 2, 2023).

²⁶ *Distribution of Affordable & Special Needs Housing (ASNH) Funds*, VA. ENERGY EFFICIENCY COUNCIL (2023) <https://vaeec.org/wp-content/uploads/2023/08/ASNH-Funds-Map-8.31.23.pdf>

²⁷ Damian Pitt *et al.*, VA. COMMONWEALTH UNIV., INVESTING IN VIRGINIA THROUGH ENERGY EFFICIENCY: AN ANALYSIS OF THE IMPACTS OF RGGI AND THE HIEE PROGRAM 37 (2023).

²⁸ Tony G. Reames, *et al.*, *Exploring the Nexus of Energy Burden, Social Capital, and Environmental Quality in Shaping Health in US Counties*, 18 INT’L J. ENV’T RSCH. & PUB. HEALTH 1, 3 (2021) (establishing a relationship between a household’s energy burden and their medical expenses).

²⁹ Damian Pitt *et al.*, VA. COMMONWEALTH UNIV., INVESTING IN VIRGINIA THROUGH ENERGY EFFICIENCY: AN ANALYSIS OF THE IMPACTS OF RGGI AND THE HIEE PROGRAM 31 (2023).

Third, RGGI is needed to help Virginia communities prepare for the rising costs of climate-driven flooding.³⁰ Thus, the 2020 RGGI Act supports bread-and-butter infrastructure projects—road building, bridge repair, wetlands restoration—that help communities adapt to rising waters. Nearly \$2 million in RGGI resources are being used to plant native vegetation, help flood-proof buildings, and perform streambank restoration along the Russell Fork River in Dickenson County.³¹ In the Town of Buchanan, over \$50,000 in RGGI funds are being used to develop resiliency plans in response to frequent flooding from the James River.³² Respondents’ withdrawal from RGGI threatens these energy-efficiency and community flood preparedness projects.³³

Agency Respondents have suggested that “[o]ther sources of funding [for energy efficiency programs and flood resilience projects] are available, both state and federal.”³⁴ The reality on the ground, however, confirms that there simply is no substitute for RGGI proceeds. The Governor’s Amendments to the 2022-2024 Biennial Budget, filed on December 15, 2022, included no additional funding for low-income energy efficiency projects.³⁵ Indeed, the Governor’s December budget reflected a deduction in energy-efficiency funds for flood recovery.³⁶ Meanwhile, other funding sources have restrictions on their use and cannot simply be redirected to RGGI-supported programs. Critically, the Virginia WDR Program is needed so that homes in the Commonwealth

³⁰ See Katherine Hafner, *Unchecked sea level rise would cost Virginia \$79 billion this century, ODU says*, WHRO PUBLIC MEDIA (Sept. 15, 2022), at <https://whro.org/news/local-news/32263-unchecked-sea-level-rise-would-cost-virginia-79-billion-this-century-odu-says>.

³¹ *Community Flood Preparedness Fund Grants and Loans*, VA. DEP’T OF CONSERVATION & RECREATION, <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf-awards#round1> (last visited Oct. 16, 2023).

³² *Id.*

³³ See generally VA. CODE § 15.2.

³⁴ VA. STATE AIR POLLUTION CONTROL BOARD, FINAL REGULATION AGENCY BACKGROUND DOCUMENT, at 9 (2023).

³⁵ VA. DEP’T OF PLANNING & BUDGET, THE 2023 EXECUTIVE BUDGET DOCUMENT, GOVERNOR YOUNGKIN’S PROPOSED AMENDMENTS TO THE 2022-2024 BIENNIAL BUDGET (2022), <https://dpb.virginia.gov/budget/buddoc23/BudgetDocument.pdf>.

³⁶ *Id.*

can become eligible for federal WAP support in the future.³⁷ Arguing the federal WAP funding can replace state WDR funds is the rhetorical equivalent of declaring, “Let them eat cake.”

Similarly, federal incentives from the Inflation Reduction Act (“IRA”) are tied to specific energy-efficient measures such as electric heat pumps and cannot be redirected to programs like the Housing Innovations in Energy Efficiency program, which “is funded through [RGGI] proceeds.”³⁸ And unlike RGGI proceeds, which have already been put to work on real-world projects,³⁹ many IRA resources have yet to hit the ground.⁴⁰ Thus, electric utilities like Dominion have “not yet included the home appliance incentives and residential clean energy tax credits included in the IRA” in their Integrated Resource Plans.⁴¹ Even if federal funds could replace state programs—which they cannot—Agency Respondents still ignore that RGGI dollars far exceed energy-efficiency funds from other sources.⁴² Indeed, RGGI funding for energy-efficiency projects more than doubles other available funds in Virginia.⁴³ Simply put, the sources of revenue identified by Agency Respondents are dwarfed by RGGI revenues.⁴⁴

The starting point must be to protect the availability of RGGI funds; that is the revenue source that the General Assembly placed in the Virginia Code. Separation-of-Powers principles

³⁷ Virginia Department of Housing and Community Development, *Housing Innovations in Energy Efficiency (HIEE)* (last visited Oct. 11, 2023), <https://www.dhcd.virginia.gov/hiee>.

³⁸ *Id.*

³⁹ Virginia Department of Conservation and Recreation, *Community Flood Preparedness Fund Grants and Loans* (last visited Jan. 2, 2024), <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf> (noting that three rounds of grants have already been funded and a fourth round is underway, with an additional \$85 million to be made available).

⁴⁰ Indeed, states have until January 2025 to submit their rebate distribution plans. *See Home Energy Rebates Frequently Asked Questions*, OFF. OF STATE & CMTY. ENERGY PROGRAMS, <https://www.energy.gov/scep/home-energy-rebates-frequently-asked-questions> (last visited Nov. 2, 2023).

⁴¹ *See* Direct Testimony of Justin Schott on behalf of Appalachian Voices, at 38–39, *In Re: Virginia Electric and Power Company’s Integrated Resource Plan filing pursuant to § 56-597 et seq.*, Case No. PUR-2023-00066, Va. State Corp. Commission (filed Aug. 8, 2023) (quoting Dominion’s Response to Appalachian Voices’ Interrogatory, Set 14, Question 3(d)), at <https://www.scc.virginia.gov/docketsearch/DOCS/7%25%25h01!.PDF>.

⁴² Damian Pitt *et al.*, VA. COMMONWEALTH UNIV., *INVESTING IN VIRGINIA THROUGH ENERGY EFFICIENCY: AN ANALYSIS OF THE IMPACTS OF RGGI AND THE HIEE PROGRAM* 37 (2023).

⁴³ *Id.*

⁴⁴ *Id.*

demand that if Agency Respondents want to pursue a different course, they need to convince the General Assembly to change the law. Failing that, they are bound to maintain the RGGI program and make those funds available to the kinds of programs on which many Virginians rely.

V. LEAVING RGGI WOULD INCREASE HEALTHCARE COSTS.

RGGI funds are largely focused on *adapting* to climate change by making communities more resilient and homes more efficient. But RGGI is also aimed at *mitigation*, which means reducing the emission of GHG pollutants that are exacerbating climate change. Agency Respondents' proposal to withdraw from RGGI would abdicate the Commonwealth's responsibility to account for health costs correlated with climate change.

These public health harms are being reflected in Virginia today in the form of lost workdays, increased medical costs, and decreased student learning and worker productivity, among other economic burdens. Agency Respondents' contention that Virginia should withdraw from RGGI for economic prudence flatly contradicts a substantial body of medical and scientific literature. Indeed, medical research has already demonstrated that climate change has worsened a myriad of adverse health impacts right here *in Virginia*—ranging from heat-related illnesses to respiratory illness due to decreased air quality.⁴⁵

Agency Respondents have failed to meaningfully respond to comments in the administrative record documenting these public health costs.⁴⁶ The first-hand experience of Public Health and Energy Efficiency *Amici*—shared with Agency Respondents in publicly filed comments—augments the peer-reviewed evidence and confirms the value of RGGI participation

⁴⁵ See, e.g., Robert E. Davis, *et al.*, *Climate and Human Mortality in Virginia, 2005-2020*, SCI. TOTAL ENV'T, 894 (2023) 164825 (June 10, 2023), <https://www.sciencedirect.com/science/article/pii/S0048969723034484> (providing “a comprehensive examination of the associations between climate and mortality in the Commonwealth of Virginia” and finding that “the fundamental relationships between climate and mortality have been established”).

⁴⁶ VA. STATE AIR POLLUTION CONTROL BOARD, FINAL REGULATION AGENCY BACKGROUND DOCUMENT, at 88–90 (2023).

to Virginia's economy. As such, the proposed withdrawal from RGGI on economic grounds constitutes a violation of the Virginia Administrative Process Act, which demands substantial evidentiary support for findings of fact.⁴⁷

The most acute harms in leaving RGGI are associated with respiratory health. Scientific research over decades has documented the role that air pollutants associated with fossil-fuel combustion play in leading to increased incidences of asthma, cardiovascular disease, reduced lung function, and respiratory hospitalization.⁴⁸ In Virginia alone, 130,000 children already suffer from asthma,⁴⁹ and particulate matter pollution contributes to 7,000 new cases of asthma and 230,000 asthma exacerbations in Virginia per year in women and children.⁵⁰ Continued warming will increase these health harms. The EPA has reported that an additional 34,500 cases of asthma would be diagnosed annually in the United States with 2 degrees Celsius (°C) of global warming, along with an increase of 6,240 additional emergency room visits.⁵¹ These public health harms have major economic consequences.⁵² In Virginia alone, the cost of morbidity and mortality resulting from ambient fine particulate matter ("PM_{2.5}"), a significant pollutant linked to fossil-fuel use, is currently estimated at \$23,000,000.⁵³

⁴⁷ See VA. CODE § 2.2-4027(iv).

⁴⁸ *Climate Change and Children's Health and Well-Being in the United States*, EPA, at 36–37 (April 2023), <https://www.epa.gov/cira/climate-change-and-childrens-health-report>.

⁴⁹ *Estimated Prevalence and Incidence of Lung Disease*, AMERICAN LUNG ASS'N (June 14, 2023), <https://www.lung.org/research/trends-in-lung-disease/prevalence-incidence-lung-disease>.

⁵⁰ *An Assessment of the Health Burden of Ambient PM_{2.5} Concentrations in Virginia*, INDUS. ECON., INC., at 5, 12 (October 28, 2020), https://cee8204b-70a4-447f-9567-a8b385f8bd93.filesusr.com/ugd/b42d13_16d1da1c63e84d328db4239aea371617.pdf.

⁵¹ *Climate Change and Children's Health and Well-Being in the United States*, EPA, at 36–39 (April 2023), <https://www.epa.gov/cira/climate-change-and-childrens-health-report>.

⁵² See Aaron S. Bernstein & Mary B. Rice, *Lungs in a Warming World: Climate Change and Respiratory Health*, 143 CHEST 1455, 1456 (2013).

⁵³ *An Assessment of the Health Burden of Ambient PM_{2.5} Concentrations in Virginia*, INDUS. ECON., INC., at 5 (October 28, 2020), https://cee8204b-70a4-447f-9567-a8b385f8bd93.filesusr.com/ugd/b42d13_16d1da1c63e84d328db4239aea371617.pdf.

Already, physicians are seeing pediatric respiratory health harms correlated with fossil-fuel use and the resulting climate change.⁵⁴ Children exposed to high levels of air pollution suffer higher rates of oxidative stress, inflammation, and endothelial dysfunction.⁵⁵ The cellular damage caused by air pollution contributes to diseases like asthma, cancer, adverse birth outcomes, and potentially neurodevelopmental disorders.⁵⁶ Levels of these pollutants—in addition to GHG emissions—are being reduced in Virginia thanks to the Commonwealth’s participation in RGGI.

In addition to the respiratory health-related harms discuss above, warming temperatures linked to fossil-fuel development are also understood to be a contributing factor to tick-range expansion and increased transmission of tick-borne illnesses.⁵⁷ The Virginia Department of Health has reported rising rates of Lyme disease and other tick-borne illnesses,⁵⁸ with children among the most vulnerable.⁵⁹ Rising ocean temperatures are also associated with increased concentrations of

⁵⁴ Jill A. Poole, MD, *et al.*, *Impact of Weather and Climate Change with Indoor and Outdoor Air Quality in Asthma: A Work Group Report of the AAAAI Environmental Exposure and Respiratory Health Committee*, 143 J. ALLERGY & CLINICAL IMMUNOLOGY 1702 (2019), <https://doi.org/10.1016/j.jaci.2019.02.018>.

⁵⁵ Caroline J. Smith, *Pediatric Thermoregulation: Considerations in the Face of Global Climate Change*, 11 NUTRIENTS, Aug. 2019, at 12, <https://www.mdpi.com/2072-6643/11/9/2010>.

⁵⁶ See Philip J. Landrigan *et al.*, *The Lancet Commission on Pollution and Health*, 391 LANCET 462, 465 (2018), [https://doi.org/10.1016/S0140-6736\(17\)32345-0](https://doi.org/10.1016/S0140-6736(17)32345-0); see also Heather L. Brumberg *et al.*, *Ambient air pollution: Health hazards to children*, 6 PEDIATRICS 147 (2021), <https://doi.org/10.1542/peds.2021-051484>.

⁵⁷ Rebecca J. Eisen *et al.*, *Linkages of Weather and Climate with Ixodes scapularis and Ixodes pacificus (Acari: Ixodidae) in the Continental United States*, 53 J. MED. ENTOMOLOGY 349, 351 tbl.1 (2016) (reporting that in 1996 ticks were reported or established in twelve Virginia counties, whereas in 2015 ticks were reported or established in seventy-two counties). See also Dorothy Wallace *et al.*, *Effect of Rising Temperature on Lyme Disease: Ixodes scapularis Population Dynamics and Borrelia burgdorferi Transmission and Prevalence*, 2019 CANADIAN J. INFECTIOUS DISEASES & MED. MICROBIOLOGY, Sept. 2019, <https://doi.org/10.1155/2019/9817930>; Daniel E. Sonenshine, *Range Expansion of Tick Disease Vectors in North America: Implications for Spread of Tick-Borne Disease*, 15 INT’L J. ENV’T RSCH. & PUB. HEALTH 478 (2018), <https://doi.org/10.3390/ijerph15030478>; Filip Dantas-Torres, *Climate Change, Biodiversity, Ticks and Tick-Borne Diseases: The Butterfly Effect*, 4 INT’L J. PARASITOLOGY: PARASITES & WILDLIFE 452 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4699983/>.

⁵⁸ *Lyme Disease and Other Tickborne Illnesses Are Increasing*, VA. DEP’T HEALTH (Aug. 22, 2019), <https://www.vdh.virginia.gov/news/archived-news-releases/2019-regional-news-releases/lyme-disease-and-other-tickborne-illnesses-are-increasing/>.

⁵⁹ Jennifer S. Read, *Tickborne Diseases in Children in the United States*, 40 PEDIATRICS REV. 381, 383–84, 386 (2019), <https://doi.org/10.1542/pir.2018-0304>.

Vibrio vulnificus bacteria in seawater, potentially causing severe illness among Virginians exposed to contaminated shellfish.⁶⁰

Participation in RGGI is also vital to caring for patients with heat-related illnesses and preparing for more severe heat waves. Because GHGs persist in the atmosphere for decades, failing to reduce emissions today exacerbates the scale of the problem tomorrow. Temperatures in Virginia have already increased by over 0.8°C since the beginning of the twentieth century. Absent dramatic GHG emission reductions, the Commonwealth is projected to face unprecedented warming and more intense heat waves by mid-century.⁶¹ Low-income families face heightened risks.⁶²

In particular, rising temperatures have disproportionate negative effects on children.⁶³ Children make up almost half of the individuals affected by heat-related illnesses, which include heat stroke, electrolyte imbalance, and kidney-associated diseases.⁶⁴ This vulnerability begins before birth. Maternal heat exposure has been associated with pre-term birth and low birth weight, which may lead to long-term health consequences.⁶⁵ Extreme heat may also impair learning, as exposure to higher temperatures has been associated with reduced cognitive function and loss of

⁶⁰ Jonathan L. Goodall *et al.*, THE IMPACT OF CLIMATE CHANGE ON VIRGINIA'S COASTAL AREAS, at vi, 18 (2021). This is particularly a problem for Virginia's oyster industry. *See also* Baker-Austin C *et al.*, *Non-cholera vibrios: The microbial barometer of climate change*, 25 TRENDS IN MICROBIOLOGY 1, 76–84 (2016), <https://doi.org/10.1016/j.tim.2016.09.008>.

⁶¹ Jennifer Runkle *et al.*, *State Climate Summary 2022: Virginia*, NOAA NAT'L CTRS. FOR ENV'T INFO 1, 1–3 (2022), <https://statesummaries.ncics.org/downloads/Virginia-StateClimateSummary2022.pdf>.

⁶² Mohammad Reza Alizadeh *et al.*, *Increasing Heat-Stress Inequality in a Warming Climate*, 10 EARTH'S FUTURE 1, 8 (2022).

⁶³ *See* Margaretha Barkhof *et al.*, THE COLDEST YEAR OF THE REST OF THEIR LIVES: PROTECTING CHILDREN FROM THE ESCALATING IMPACTS OF HEATWAVES (2022), <https://www.unicef.org/reports/coldest-year-rest-of-their-lives-children-heatwaves>.

⁶⁴ Daniel Helldén *et al.*, *Climate Change and Child Health: A Scoping Review and an Expanded Conceptual Framework*, 5 LANCET PLANETARY HEALTH 164, 166 (2021), [https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196\(20\)30274-6/fulltext](https://www.thelancet.com/journals/lanplh/article/PIIS2542-5196(20)30274-6/fulltext); Courtney W. Mangus & Therese L. Canares, *Heat-Related Illness in Children in an Era of Extreme Temperatures*, 409 PEDIATRICS REV. 97, 98 (2019), <https://doi.org/10.1542/pir.2017-0322>.

⁶⁵ Matthew F. Chersich *et al.*, *Associations between high temperatures in pregnancy and risk of preterm birth, low birth weight, and stillbirths: Systematic review and meta-analysis* (2020), <https://doi.org/10.1136/bmj.m3811>.

educational achievement.⁶⁶ The public health toll imposed by extreme heat is currently mitigated by the energy-efficiency programs that RGGI supports. Energy-efficient homes created through ASNH funding, for example, are designed to maintain stable thermal environments and protect vulnerable communities during power outages.⁶⁷

Reducing emissions through participation in RGGI has already been shown to protect public health. Since its inception in 2009, states participating in the RGGI program have reduced power-plant carbon pollution by nearly 50 percent, outpacing the rest of the country by 22 percent.⁶⁸ After remaining constant over the last decade,⁶⁹ power plant pollution in Virginia has decreased in just two years of RGGI participation by 12.5 percent (between 2020 and 2021) and nearly 8 percent (between 2021 and 2022).⁷⁰

Researchers have already begun quantifying the health-related benefits delivered by RGGI.⁷¹ One study estimated that in just six years, participating states realized at least \$5.7 billion in health benefits from reduced emissions, including the avoidance of 39,000 lost work/school days, a reduction of over 8,200 asthma attacks, and the avoidance of 300–830 excess deaths.⁷² Given the economic benefits Virginia has already accrued from RGGI, Agency Respondents' contention that withdrawing from RGGI is economically defensible is impossible to swallow. It

⁶⁶ R. Jisung Park *et al.*, *Learning is inhibited by heat exposure, both internationally and within the united states*, 5 NATURE HUMAN BEHAVIOUR 1. 19–27 (2021), <https://doi.org/10.1038/s41562-020-00959-9>.

⁶⁷ Ran Wang *et al.*, *The energy performance and passive survivability of high thermal insulation buildings in future climate scenarios*, 15 BLDG. SIMULATION 1209, 1210 (2022) (defining passive survivability).

⁶⁸ ACADIA CTR., THE REGIONAL GREENHOUSE GAS INITIATIVE: 10 YEARS IN REVIEW 1 (2022).

⁶⁹ See VIRGINIA CARBON TRADING RULE AND REGIONAL GREENHOUSE GAS INITIATIVE (RGGI) PARTICIPATION: COSTS AND BENEFITS, VA. DEP'T OF ENV'T QUALITY 10, 14 (2022), <https://www.deq.virginia.gov/home/showpublisheddocument/13813/637829669069026180>.

⁷⁰ EPA's Clean Markets Air Program Data, U.S. ENV'T PROT. AGENCY, <https://campd.epa.gov/data/custom-data-download> (last visited, Nov. 2, 2023).

⁷¹ See Frederica Perrera *et al.*, *Co-Benefits to Children's Health of the U.S. Regional Greenhouse Gas Initiative*, 128 ENV'T HEALTH PERSPECTIVES 1; ABT ASSOCS., ANALYSIS OF THE PUBLIC HEALTH IMPACTS OF THE REGIONAL GREENHOUSE GAS INITIATIVE, 2009–2014 (2017).

⁷² ABT ASSOCS., ANALYSIS OF THE PUBLIC HEALTH IMPACTS OF THE REGIONAL GREENHOUSE GAS INITIATIVE, 2009–2014 1–2 (2017).

stands in obvious tension with the consensus of scientific and medical research. As a result, Agency Respondents' action is not supported by substantial evidence in the administrative record.

Public Health and Energy Efficiency *Amici* affirm that the medical literature on public health strongly supports a finding that these adverse health impacts of climate change are being realized today in Virginia.⁷³ The harm is acute and immediate. What is more, the harm is economically quantifiable. Agency Respondents' economic analysis of the RGGI withdrawal thus lacks a critical piece of evidentiary support and is fatally flawed.

VI. CONCLUSION

Agency Respondents exceeded their delegated statutory authority in attempting to withdraw Virginia from participation in RGGI. This is especially troubling, as Virginia's participation in RGGI is critical to funding efforts that protect public health and support access to energy efficiency programs in the Commonwealth. Public Health and Energy Efficiency *Amici* therefore urge the Court to grant Conservation Petitioners' Motion for Intermediate Relief and deny Agency Respondents' Demurrer and Motion to Dismiss.

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⁷³ Robert E. Davis, *et al.*, *Climate and Human Mortality in Virginia, 2005-2020*, SCI. TOTAL ENV'T, 894 (2023) 164825 (June 10, 2023), <https://www.sciencedirect.com/science/article/pii/S0048969723034484>.

CERTIFICATE OF SERVICE

I hereby certify that the following counsel have been served with true and accurate copies, via electronic mail only, of the Motion of Virginia Clinicians for Climate Action and The Virginia Energy Efficiency Council Seeking Leave to File a Brief as *Amici Curiae* in Support of Petitioners and the proposed Brief of Public Health and Energy Efficiency *Amici Curiae*:

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