NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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Re: ***Association of Energy Conservation Professionals, et al. v. Virginia State Air Pollution Control Board, et al.***
Case No. CL–2023-12061

Dear Counsel:

In this administrative appeal of a Virginia State Air Pollution Control Board regulation, the threshold question is whether the Circuit Court of Fairfax is the proper venue for adjudication. The Court holds that venue is not proper in this Court because the only Fairfax County-based party lacks constitutional and statutory standing. It will transfer the appeal to the Circuit Court of Floyd County.

OPINION LETTER

I. BACKGROUND.[1]

After the Respondent-Virginia State Air Pollution Control Board (the "Board") issued a regulation repealing prior regulations made concerning Virginia's participation in the Regional Greenhouse Gas Initiative ("RGGI"), Petitioners-conservation organizations brought an administrative appeal questioning the authority of the Respondent to do so on August 21, 2023. In response, Respondents filed a Motion to Dismiss for lack of standing and a Motion to Transfer Venue. The Court consolidated both motions due to their interdependence.

The Petitioners appeal to this Court pursuant to the Virginia Administrative Process Act ("VAPA"), which permits "any person affected by and claiming the unlawfulness of any regulation" to appeal an administrative regulatory action in a court of competent jurisdiction. VA. CODE ANN. § 2.2–4026. As required under Virginia Rule of the Supreme Court 2A:4 and VAPA § 2.2–4027, Petitioners have specified three claims of error in this matter: that the Respondents (1) exceeded their statutory and constitutional authority by repealing the RGGI Regulation, (Pet. at 47–48), (2) exceeded their statutory and constitutional authority by repealing the RGGI Regulation on the basis of utility cost, (*Id.* at 48–50), and (3) violated the VAPA by failing to provide evidentiary support for the repeal of the RGGI regulation, and by ignoring conflicting evidence in the record, (*Id.* at 50–52).

As relief, Petitioners pray that this Court will (1) invalidate, vacate, and declare null and void the Respondents' approval and issuance of the Final RGGI Repeal, (2) direct the Respondents to take all necessary steps to reinstate the RGGI Regulation and continue participation in RGGI, and (3) award the Petitioners their reasonable costs and attorneys' fees. (*Id.* at 53.)

A. *The Regional Greenhouse Gas Initiative*

The RGGI is a non-profit corporation that "provides administrative and technical support for RGGI" but is "not a regulatory body, nor does it have any regulatory or enforcement authority." (*Id.* at 8 ¶ 26.) Through RGGI, states have taken a cooperative, market-based approach to reducing greenhouse gas emissions from power plants. (*Id.* at 8 ¶ 25.) The RGGI functions through states implementing independent regulatory schemes, consistent with RGGI's model rules. (Pet. at 8 ¶ 25.) These model rules require power plants to "own a carbon allowance for each ton of CO_2 the power plant emits," available for purchase and regulated by the states participating in the RGGI. (*Id.* at 8 ¶ 27.) Participating states drive down greenhouse gas emissions by reducing the supply of carbon allowances over time. (*Id.* at 8 ¶ 28.) Each state creates a pre-set number of these allowances, which are then distributed at quarterly auctions administered by RGGI. (*Id.* at 9 ¶ 30.) RGGI then distributes the proceeds of these auctions to each state in proportion to the state's quantity of carbon allowances sold. (*Id.*) This model has

[1] For the purposes of this Opinion Letter, the Court assumes, without finding as fact, that the allegations in the Petition for Appeal are true.

allegedly resulted in participating states seeing greenhouse gas emissions drop "90 percent faster than non-RGGI states." (Pet. at 9 ¶ 32.)[2]

Virginia enacted the Clean Energy and Community Flood Preparedness Act ("VCECPA") in part to join the RGGI. VA. CODE ANN. § 10.1-1330(B). The VCECPA and the ensuing RGGI Regulation establishes a direct auction process for the purchase of carbon allowances. *Id.* (Pet. at 17 ¶¶ 64–65.) Power plants must keep a record of their greenhouse gas emissions and hold one carbon allowance for every ton of CO_2 their plant emits. (Pet. at 17 ¶ 67.) This compliance regime applies "broadly to fossil-fuel burning power plants that produce at least 25 megawatts of electricity, encompassing approximately 26 different electric generating facilities in Virginia." (*Id.* at 17 ¶ 68.)

Since the enactment of the RGGI Regulation, Virginia participated in ten quarterly RGGI auctions, and has sold 100 percent of its allowances, generating approximately "$657 million to support the programs identified in the 2020 RGGI Act." (*Id.* at 18 ¶ 69.)[3] As allocated to the Department of Housing and Community Development, these proceeds have allowed for an expansion of the Weatherization Assistance Program, and funding at least 36 high-efficiency affordable housing projects, representing more than 2,300 affordable housing units. (*See id.* at 18–20 ¶¶ 71–77.)[4] Similarly, the proceeds allocated to the Virginia Community Flood Preparedness Fund—almost $97.7 million in funding—have been disbursed to "a total of 98 projects across Virginia." (*Id.* at 21 ¶¶ 79–82.)

B. *Governor Glenn Youngkin's Resistance to RGGI*

Shortly after winning the 2021 gubernatorial election, Governor Youngkin "stated at a public meeting that he would 'withdraw Virginia' from participating in RGGI through executive action once in office." (Pet. at 24 ¶ 90.) The same day Governor Youngkin was sworn into office in 2022, he issued Executive Order 9, which notes that "utilities are allowed to pass on the costs of purchasing allowances to their ratepayers." (*Id.* at 25 ¶ 93.) On the basis of the increased cost of utilities to consumers, Governor Youngkin directed the Director of the Department of Environmental Quality ("DEQ") to: (1) provide a report re-evaluating the costs and benefits of participation in the RGGI within 30 days, (2) develop a proposed emergency regulation for the Board's consideration to repeal its RGGI Regulation, (3) take steps so that any proposed regulation can be immediately presented for consideration for approval for public comment, and (4) notify the RGGI of the review and the Governor's intent to withdraw from RGGI. (*Id.* at 25 ¶ 94.)

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[2] Likewise, since 2021, Virginia has purportedly seen a 16.8% decrease in greenhouse gas emissions. (*See* Pet. at 9–10 ¶ 33.) This equates to a drop from 32.8 million short tons of emissions in 2020 to about 27.3 million short tons in 2022. (*Id.*)

[3] Since the filing of this Petition, Virginia has already missed one auction that was set for September 6, 2023; the next upcoming auctions are set in December, to be followed by another in March. (Pet. at 18 ¶ 70.)

[4] Petitioners aver that "[b]y staying in RGGI at least through 2030 . . . the resulting energy efficiency funding would support upgrades for up to 130,000 homes in Virginia, saving each household an average of $676 annually, creating up to 2,115 new jobs, and resulting in statewide economic benefits of $2.03 to $2.67 billion." (Pet. at 20–21 ¶ 78.)

Around the same time and in response to Governor Youngkin's intention to repeal the RGGI Regulation, multiple unsuccessful attempts were made in the General Assembly to repeal the 2020 RGGI Act. (*Id.* at 25 ¶ 95.) Two bills were introduced to repeal the 2020 RGGI Act, neither of which passed. (*Id.* at 25–26 ¶¶ 96–97.) Likewise, Governor Youngkin proposed amendments to the budget that would have effectively required Virginia to end its participation in RGGI; the General Assembly did not accept these budget amendments in the regular legislative session. (Pet. at 26 ¶ 98.) The General Assembly similarly did not "accept such a measure during negotiations in the special legislative session." (*Id.* at 26 ¶ 99.) "Ultimately, the [General Assembly] approved a 2022 budget that in no way changes the mandates of the 2020 RGGI Act or otherwise interferes with the RGGI Regulation." (*Id.*) Since then, another bill was proposed to the General Assembly in 2023 which would have effectively repealed the RGGI Act; this bill, too, failed. (*Id.* at 26 ¶ 100.)

C. *The Air Pollution Control Board Repeals RGGI.*

On August 31, 2022, the Board convened a public meeting to discuss, *inter alia*, the RGGI. (*Id.* at 27 ¶ 105.) At this meeting, Acting Secretary of Natural and Historic Resources Travis Voyles announced that the "administration had abandoned the emergency regulatory approach originally set forth in Executive Order 9 and instead would move forward with plans to repeal the RGGI Regulation through the non-emergency [VAPA] process, with the goal of withdrawing Virginia from RGGI by the end of 2023." (*Id.* at 27–28 ¶ 106.)

As promised, the DEQ published a Notice of Intended Regulatory Action on September 26, 2022, proposing the "development of a regulation to repeal the RGGI Regulation." (*Id.* at 28 ¶ 107.) Petitioners purportedly submitted public comments "opposing the decision to leave RGGI and questioning the legality of the effort." (*Id.* at 28 ¶ 110.)

At a public meeting on December 7, 2022, the Board voted 4-1[5] to issue the proposed regulation to repeal the RGGI Regulation. (*Id.* at 30 ¶¶ 118–19.)[6] The Board then published the proposed regulation for public comment on January 30, 2023. (*See id.* at 30 ¶ 120.) It convened a final public meeting on June 7, 2023. (*Id.* at 31 ¶¶ 123–24.) The DEQ recommended that the Board adopt the proposed regulation repealing the RGGI Regulation. (*Id.* at 32 ¶ 129.) The Board voted 4-3 to adopt the proposed final regulation. (Pet. at 32–33 ¶ 130.)[7]

The Final RGGI Repeal was published July 31, 2023, with an effective date of August 30, 2023. (*Id.* at 33 ¶ 131.) The Final RGGI Repeal regulation repeals the RGGI Regulation in its entirety. (*Id.* at 33 ¶ 132.) Petitioners served their Notice of Appeal on the Respondents the same day the Final RGGI Repeal was published. (*Id.* at 33 ¶ 133.)

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[5] Two Board members abstained from the vote. (*See* Pet. at 30 ¶ 119.)
[6] "All four of the members in favor of issuing the proposed regulation were appointed by Governor Youngkin." (Pet. at 30 ¶ 119.)
[7] Again, all four members in favor of the repeal were appointed by Governor Youngkin. (Pet. at 32–33 ¶ 130.)

D. *The Petitioners.*

Petitioners are four conservation organizations that have appealed the Virginia State Air Pollution Control Board's Final RGGI Repeal regulation. (*See id.* at 3–4 ¶¶ 10–12.) Petitioners are (1) the Association of Energy Conservation Professionals; (2) Virginia Interfaith Power & Light; (3) Appalachian Voices; and (4) Faith Alliance for Climate Solutions. (*Id.* at 4–6 ¶¶ 13–16.)

The Association of Energy Conservation Professionals ("AECP") is a "non-profit trade association based in Floyd, Virginia." (*Id.* at 4 ¶ 13.) AECP "works closely with the Department of Housing and Community Development in their administration of the Virginia Weatherization Assistance Program and Weatherization Deferral Repair Program." (*Id.*) AECP represents the interests of "approximately 15 non-profit weatherization organizations in Virginia" that "have contracts with the Department of Housing and Community Development . . . under the Weatherization Deferral Repair Program." (*Id.*) As noted, *supra*, the Weatherization Deferral Repair Program is funded solely by the proceeds from RGGI auction sales. (*Id.* at 5 ¶ 13.) The Executive Director of AECP, William Weitzenfeld, indicates, albeit indirectly, that without this funding from the RGGI auction sales, the Weatherization Deferral Repair Program will come to a halt, and will cause harm to the businesses of the Association's constituent member organizations. (Decl. of William Weitzenfeld at 4 ¶ 13, 5 ¶ 17, 6 ¶ 18–21, 9–11 ¶¶ 30–37). Director Weitzenfeld describes in detail how since "[r]evenues from the auctioning of carbon allowances under the RGGI Regulation is the exclusive source of funding for the Weatherization Deferral Repair program," the Final RGGI Repeal will "immediately disrupt our members' businesses" and "substantially impede project timelines," among other things. (*Id.* at 9–10 ¶¶ 30–33.)

Appalachian Voices is a "non-profit corporation with more than 300 members," with a mission to "reduce reliance on fossil fuels and transition to a clean energy economy in a way that is beneficial and fair to Appalachian communities." (Pet. at 5 ¶ 14.) The corporation is headquartered in Boone, North Carolina, and has offices in Charlottesville and Norton, Virginia. (*Id.*) The Director of State Energy Policy for Appalachian Voices, Peter Anderson, has indicated that the corporation has a "direct and concrete" interest in this litigation insofar as protecting the RGGI Regulation advances the mission of their corporation. (Decl. of Peter Anderson at 10 ¶ 30.)

Virginia Interfaith Power & Light ("VIPL") is "a not-for-profit corporation comprised of congregations and persons involved in faith communities across Virginia." (*Id.* at 5 ¶ 15.) VIPL's office is in Richmond, Virginia, and its mission is to "advocate for solutions to climate change with a key focus on environmental and social justice[.]" (*Id.*) VIPL advances its missions by "advocating for more effective laws and regulations, engaging and educating the public and faith communities, and directly participating in regulatory proceedings and governmental decision-making processes." (*Id.*) The Executive Director of VIPL, Faith Harris, avers that VIPL has a "direct and concrete" interest in "advancing climate and environmental justice solutions,

and the repeal of the RGGI Regulation will directly and significantly harm these interests." (Decl. of Faith B. Harris at 10 ¶ 28.)

Faith Alliance for Climate Solutions ("FACS") is a "non-profit corporation comprised of a network of over 200 faith communities and over 2,800 people of faith." (Pet. at 5 ¶ 16.) FACS' mission is to "develop local solutions to the climate crisis by sounding an ethical and spiritual call to address climate change, encouraging moral climate policies from a nonpartisan perspective, enabling congregations to implement projects and initiatives that reduce their carbon footprint or provide other environmental benefits, and empowering congregations to become champions of change." (*Id.* at 5–6 ¶ 16.) FACS is headquartered in Reston, Virginia. (*Id.* at 6 ¶ 16.) The Co-Founder of FACS, Scott Peterson, indicates that FACS has an interest in the outcome of this litigation insofar as the RGGI Regulation advances their organization's interest; likewise, Mr. Peterson indicates that FACS works with some faith communities that live near power plants subject to RGGI. (Decl. of Scott Peterson at 7 ¶ 22, 9 ¶¶ 26–28.)

Notably, only AECP alleges that their members work on projects funded by proceeds from RGGI auction sales. FACS, Appalachian Voices, and VIPL have only alleged that they are interested in this litigation because the RGGI Regulation advances their policy agendas.

II. ANALYSIS.

Petitioner FACS, the only petitioner with ties to Fairfax County, lacks both constitutional and statutory standing. Appalachian Voices and VIPL lack standing for the same reasons affecting FACS. Because FACS is the only Petitioner in this matter whose participation could justify maintaining venue in this Court, the Court determines that Fairfax County venue is improper. For the reasons stated below, the Court will transfer venue in this matter to the Circuit Court of Floyd County to adjudicate the issue of whether the remaining Petitioner, AECP, has standing to maintain this action and, if so, to adjudicate the balance of the appeal.

A. *Petitioners FACS, Appalachian Voices, and VIPL each lack constitutional standing.* [8]

Whether a party has constitutional standing to maintain an action is a "preliminary jurisdictional issue having no relation to the substantive merits of an action." *McClary v. Jenkins*, 299 Va. 216, 221 (2020) (quoting *Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 226 (1988)). A court inherently has jurisdiction to determine its jurisdiction. *Barrett v. Minor*, 299 Va. 27, 28 (2020). A party bringing an administrative appeal must "plead facts sufficient to demonstrate standing." *Reston Hosp. Center, LLC v. Remley*, 59 Va. App. 96, 110 (2011). "The concept of standing concerns itself with the characteristics of the person or entity who files suit."

[8] The Court assumes, without deciding, that a Petitioner in an administrative appeal brought pursuant to VAPA § 2.2–4026 must demonstrate both constitutional standing and statutory standing under the VAPA itself. Even if Petitioners need not demonstrate constitutional standing, Appalachian Voices, VIPL, and FACS all lack statutory standing as discussed below.

Anders Larsen Tr. v. Bd. of Sup'rs of Fairfax Cnty., 301 Va. 116, 120 (2022). The ultimate question in determining whether a party has standing is whether a claimant has a "personal stake in the outcome of the controversy." *Morgan v. Bd. of Sup'rs of Hanover Cnty.*, 883 S.E. 2d 131, 138 (Va. 2023) (quoting *McClary*, 299 Va. at 221–22).

A claimant has a personal stake in the outcome of a controversy where the claimant (1) has a concrete interest in the outcome of the litigation and (2) alleges a particularized harm that is "fairly traceable to the challenged action of the defendant." *Id.* at 141–42 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 573, n.8 (1992)). This particularized harm should be caused by the complained-of actions of the defendant in the case, meaning that the alleged harm must be actual or imminent. *Id.* at 141 (citing *Friends of the Rappahannock*, 286 Va. 38 (2013)); *see also Wilkins v. West*, 264 Va. 447, 459 (2002). "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). "Merely advancing a public right or redressing a public injury cannot confer standing on a complainant." *Wilkins*, 264 Va. at 458. Further, "[a]n individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so." *W.S. Carnes, Inc. v. Bd. of Sup'rs of Chesterfield Cnty.*, 252 Va. 377, 383 (1996) (collecting statutory examples) (finding that a trade association lacked standing where it did not, itself, perform the work thwarted by the contested legislation). Even so, a membership organization "can have standing as the representative of its members only if it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 516 (1975).

Respondents argue through their Motion that Petitioners lack standing "because they fail to identify any concrete harm that is particularized to them." (Resp.'s Mot. at 8.) Respondents argue that (1) global climate change is not a particularized harm, and is not fairly traceable to the challenged regulation, (*Id.* at 8–11), (2) Petitioners fail to show that they will be harmed by the lack of RGGI proceeds because they have no right to such proceeds and because the appropriations are expiring, (*Id.* at 11–13) and (3) Petitioners' voluntary re-allocation of their organizational resources is not a particularized harm fairly traceable to the challenged regulation, (*Id.* at 13–14).

Petitioners respond through their Opposition that they have "alleged particularized harms fairly traceable to Respondents' unlawful repeal of the RGGI Regulation and redressable by this Court." (Pet'r Opp'n at 4.) Petitioners argue that they have established particularized harms by virtue of (1) reputational harm, (*Id.* at 10–11), (2) air pollution, (*Id.* at 11), and (3) lost funding from the RGGI Regulation, (*Id.* at 11–13).

The Court holds these Petitioners lack both a concrete interest in the outcome of the litigation and particularized harms to support constitutional standing. They assert generalized grievances concerning a world-wide issue. To hold that these Petitioners have constitutional standing in this matter would directly controvert controlling precedent. *See, e.g.*, *Historic Alexandria Found. v. City of Alexandria*, 299 Va. 694, 699–700 (2021) (concluding that a historical preservation foundation lacked standing to challenge a land-use determination that

undermined the foundation's "interest in the preservation of historic buildings" where the foundation failed to allege "any form of particularized harm" not shared by the public); *McClary*, 299 Va. at 224 (concluding that local taxpayers lacked standing to challenge expenditures where they "merely identified a policy they disagree with and stated that any expenditures related to that policy were unlawful"); *Wilkins*, 264 Va. at 460–61 (concluding that putative complainants lacked standing to challenge redistricting legislation where none of the complainants resided in the district principally effected) ("The fact that a putative complainant's district *may* be affected is insufficient to establish the particularized injury required for standing in a redistricting case." (emphasis in original)). As noted in *Sierra Club v. Morton*, "mere interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluation of the problem, is not sufficient." 405 U.S. 727, 739 (1972).

1. Reputational harm. (Concrete interest).

FACS, Appalachian Voices, and VIPL argued at the hearing that they have a concrete interest in the subject matter of this suit since they all have expended resources geared toward encouraging the implementation of RGGI's aims in their respective localities—*i.e.*, by assisting organizations that are eligible to receive funds under the initiative to access those funds. This liminal interest in the initiative is a species of reputational harm and is simply not enough to confer standing upon these Petitioners. An organization's unilateral free choice to deploy resources in response to government action is an insufficient basis to support standing. *North Carolina State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 301 (4th Cir. 2020). Petitioners do not fully internalize this distinction between spending resources voluntarily versus doing so because of the government action. The latter is needed for standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Petitioners have not alleged that they will be directly affected by the repeal of RGGI, or that they will suffer some involuntary harm as a direct result thereof, which is a key to standing.

The reputational harm advanced by Petitioners in the form of potential lost goodwill is distinct from the kind of reputational harm that would be able to confer standing on the Petitioners. The United States Supreme Court held that a class of individuals had standing to sue a credit reporting agency by virtue of reputational harm incurred where the credit reporting agency "provided misleading credit reports to third-party businesses." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). These misleading credit reports resulted in a direct and particularized harm for the plaintiffs in that case because the plaintiffs were labeled "terrorists, drug traffickers, or serious criminals." *Id.* at 2209. Here, Petitioners are not being maligned because of the RGGI Repeal; at worst, the relationships they formed in pursuit of the aims of the RGGI regulations may dissipate.

The fact that FACS, Appalachian Voices, and VIPL all could suffer reputational harm after their advocacy efforts are undermined by the Final RGGI Repeal is insufficient to confer standing on these parties — they have no concrete interest in the continuation of the RGGI Regulation. They only have an "interest in a problem." *Sierra Club*, 405 U.S. at 739.

2. Air pollution harm.
(Particularized harm and concrete interest).

Both the Virginia Supreme Court and the Virginia Court of Appeals require a more substantial allegation of particularized harm than is advanced by Petitioners to confer standing. *See, e.g.*, *Morgan*, 883 S.E. 2d at 139 (finding that a set of complainants had standing to challenge a land-use determination where the complainants would experience increased noise levels, anticipated flooding, and night-sky light pollution); *Anders Larsen*, 301 Va. at 123–24 ("Their allegations of diminished property values and increased traffic to and from the residence rise beyond mere speculation and suffice to allege standing."); *Reston Hosp.*, 59 Va. App. at 115–16 ("We are not presented here with a case where some person virtually indistinguishable from the public has presented some fleeting, theoretical injury."). In fact, in each case where the courts have found a particular party to have standing, the party at issue has had some identifiable right—a "concrete interest"—that was purportedly being infringed upon; Petitioners FACS, Appalachian Voices, and VIPL fail to assert any such right. "Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures . . . courts decide only 'the rights of individuals[.]'" *TransUnion*, 141 S. Ct. at 2203 (quoting *Marbury v. Madison*, 1 Cranch 137, 170, 5 U.S. 137 (1803)).

These Petitioners failed to demonstrate that they have constitutional standing to maintain this action because of air pollution harm. They lack a concrete interest in air quality justifying them maintaining this suit. Indeed, the RGGI is a regional *carbon dioxide* trading program that expressly sells carbon dioxide pollution credits. 9 VAC 5-140-6010. Logically, while intended to reduce carbon dioxide emissions on a regional basis, market incentives may cause increased air pollution in pockets within the region. For example, a coal-based energy provider in Virginia may find it economical to save the expense of containing its carbon dioxide emissions, buy carbon dioxide allowances with that savings, and *expand* its production, increasing air pollution for its neighbors while simultaneously reducing the region's carbon dioxide emissions through the actions of more efficient providers in other states. The fact that Virginia's regulated utilities may pass along the cost of purchasing the carbon emission allowances to customers makes this a true concern. *See* VA. CODE ANN. § 56-585.1(A)(5)(e) ("A utility may petition for recovery from consumers of costs of allowances purchased through a market-based trading program for carbon dioxide emissions.") (cleaned up). Thus, the RGGI is not tied to regulation of air pollution in the traditional sense.

Petitioners did not proffer traditional evidence of direct air pollution harm to them or their members in the Petition for Appeal or the hearing on the present motion. To the extent that FACS' constituent faith community members live close to or near power plants subject to the RGGI regulations, FACS has failed to demonstrate that the repeal of the RGGI regulations would result in a particularized harm to FACS fairly traceable to the repeal. FACS has not identified specific power plants that would increase their production efforts—whether marginally or substantially—because of the RGGI repeal regulation; further, it has not demonstrated that any such possible increase could be traced back to the repeal of the RGGI regulations. Therefore, they are asserting standing based on a generalized concern about regional or global air pollution

and lack constitutional standing. *Cf. Morgan*, 883 S.E. 2d at 139 (finding that homeowners had standing to challenge a land-use determination because they did not "generalize about industrial sites in the abstract or speculate about potential harms associated with a permitted use within the general zoning classification of the property.").

3. Lost funding harm. (Concrete interest).

None of these three Petitioners—unlike, arguably, Petitioner AECP—have a concrete interest in the funding under the RGGI, since none of them or their members receive such funding. On this point, Petitioners rely heavily on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and its progeny. (Pet'r Opp'n at 10–11.) But the facts presented in *Havens Realty* are vastly different than those presented here, at least regarding FACS, Appalachian Voices, and VIPL.

In *Havens Realty*, the defendant-apartment complex engaged in discriminatory housing practices that directly "frustrated the [plaintiff-]organization's counseling and referral services" by denying housing to the plaintiff's clients because of their race. 455 U.S. at 369. The Supreme Court determined that the plaintiff-organization had standing because it (1) had a concrete interest in its ongoing business of providing housing to racial minorities, and (2) suffered a particularized harm because the defendant acted to *prevent* or *impede* the plaintiff's pursuit of that interest. *Id.* at 379.

The cases decided in the decades since the pronouncement of *Havens Realty* have featured facts that mirrored, or were plainly distinguishable from, their progenitor. *Compare Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012) ("An organization may suffer an injury in fact when a defendant's actions impede its efforts to carry out its mission.") (finding that an activist organization lacked individual standing to challenge a federal statute restricting interstate transfers of handguns where the organization's alleged harm resulted from their own budgetary choices) *with Fair Employment Council of Greater Wash., Inc. v. BMC Mktg Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (finding that organization engaged in assisting minorities with finding jobs had standing to bring Title VII action against defendant that engaged in systemic discriminatory hiring practices that directly impeded organization's activities).

The Circuit Court of Richmond recently visited the application of *Havens Realty* in *Virginia Student Power Network v. City of Richmond*, 107 Va. Cir. 137 (2021). There a non-profit organization sought to assert individual standing based on *Havens Realty* to challenge the constitutionality of the defendant's actions in dispersing a protest. *Student Power Network*, 107 Va. Cir. at **1, 4–5. The organization asserted that it suffered a particularized harm because it "need[ed] to continue to divert resources from its public education and organizing activities to ensur[e] fellows and event participants [could] exercise their rights safely." *Id.* at *5. The court in that case noted that the organization at issue "*decided* to devote its resources to challenge Defendants' allegedly unconstitutional practices," and made a conscious decision to shift its organizational goals in response to major social events at the time. *Id.* at *6 (emphasis supplied).

Based on these facts, the court determined that the organization lacked *Havens Realty* standing because the "Defendants' allegedly unconstitutional actions . . . in no way frustrated or impaired [the organization's] mission to educate its members and the public about social, racial, and economic injustices." *Id.*

Ultimately, as in *Student Power Network*, Petitioners do not allege that Virginia's withdrawal from the RGGI infringes their own rights. They do not allege that Respondents acted to prevent or impede the pursuit of their advocacy. There is no doubt that Petitioners have concrete interests in their advocacy goals, but the repeal of the RGGI regulations was not effectuated to directly impede those interests. To the contrary, there are innumerable ways to address climate change, air pollution, and the transition to renewable energy resources. While the repeal of the RGGI regulations—and its accompanying loss of funding—might mean that Petitioners will have to pivot in the execution of their goals, this is inapposite. The Petitioners' need to regroup in a post-RGGI world is simply not a particularized harm. Instead, it is a "conscious decision" that Petitioners will need to make "to reprioritize [their] efforts and redirect [their] resources." *Id.* at *6.

B. *FACS, Appalachian Voices, and VIPL lack statutory "affected by" standing under the Virginia Administrative Procedures Act ("VAPA").*

The parties' arguments as to statutory standing mirror their arguments as to constitutional standing.

Under the VAPA, "[a]ny *person affected* by and claiming the unlawfulness of any regulation or *party aggrieved* by and claiming unlawfulness of a case decision . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents . . . ." VAPA § 2.2–4026(A) (emphasis supplied). Under the presumption of meaningful variation, "[w]hen the General Assembly uses two different terms in the same act, it is presumed to mean two different things." *Forst v. Rockingham Poultry Mktg. Co-Op, Inc.*, 222 Va. 270, 278 (1981); *see also Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022) (citing A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 170 (2012)) ("We observed that Congress used 'more open-ended formulations' like 'affecting' or 'involving' commerce to signal 'congressional intent to regulate to the outer limits of authority under the Commerce Clause.").

"The use of the terms 'person affected' and 'affected person' in [VAPA § 2.2–4026(A) and VA. R. SUP. CT. 2A:1(c)] . . . leads to the conclusion that there is a larger, broader category of persons who may appeal to the circuit court when a regulation is at issue . . . as opposed to when a case decision issues without a formal hearing, where appeals are limited to parties." *Peed v. Dep't of Transportation*, 72 Va. App. 686, 695–96 (2021). Consistent with the Court of Appeals' reading of VAPA § 2.2–4026(A), the Supreme Court has opined, if only briefly, that the phrase "[a]ny person affected by and claiming . . . unlawfulness" refers to "challenges to the unlawfulness of agency regulations; but challenges to agency decisions require the petitioner to be 'aggrieved by and claiming unlawfulness.'" *Virginia Marine Resources Comm'n v. Clark*,

281 Va. 679, 688 n.4 (2011) *overruled on other grounds by Woolford v. Virginia Dep't of Taxation*, 294 Va. 377, 390 n.4 (2017). A claimant need not be "affected in a special and different way from others" because to require as such would "add a material provision to the statute rather than to give effect to it as written." *Continental Baking Co. v. City of Charlottesville*, 202 Va. 798, 804 (1961) (discussing the "affected by" standard in prior code § 15–152.6) ("Its language is that *any* persons affected by the proceedings have the right to appear and defend." (emphasis in original)).

Although the VAPA's "affected by" standing is broad, it is not all-encompassing—to conclude as such would lead to absurd results, insofar as any member of the public could be "affected by" a particular regulatory action. This result would divest the VAPA's "affected by" standing provision of any meaning. Instead, a party asserting standing under VAPA's "affected by" standard must at least demonstrate a minimal legal interest in the underlying regulatory action at issue. For instance, the Richmond Circuit Court held that a non-profit membership environmental association had "affected by" standing to challenge a regulation adopted by the Virginia State Water Control Board where its members were merely riparian owners. *Env'l Def. Fund, Inc. v. State Water Control Bd.*, 22 Va. Cir. 412, at *5 (Richmond 1991). Conversely, however, the Virginia Court of Appeals has declined to find that members of the public had "affected by" standing to challenge a regulation promulgated by the State Board for Community Colleges where they failed "to allege *any* interest in [the] suit, even as basic as alumni status." *Kwiatkowski v. State Bd. for Community Colleges*, No. 1292-22-4, 2023 WL 5684424, at *2 (Fairfax Sept. 5, 2023) (emphasis in original) ("Although a 'person affected by' an unlawful regulation is broad under the VAPA, it is not all-encompassing. The person must still be affected by the matter in some way.").

Here, FACS, Appalachian Voices, and VIPL are dissimilar to the petitioners before the Richmond Circuit Court in *Environmental Defense Fund*—there, the petitioners challenging a regulation related to water rights writ large at least had ownership interests in the waters at issue. *See* 22 Va. Cir. 412 at *5. In fact, the regulatory action at issue in that case ultimately placed a burden on the petitioners by diminishing the value of their riparian property interests. *Id.* at **1, 5 ("The injury they claim is damage to riparian property rights and values which has been caused by the presence of dioxin and which will continue unless the Board will regulate it effectively.").

The Petitioners at issue in this case have not alleged that any ownership interest of theirs will be devalued or negatively affected by the RGGI Repeal regulation. They have not alleged that they will lose any funding because of the repeal, nor that any of their members or constituents will lose any such funding. The mere fact that they will no longer be able to assist third parties with accessing the benefits of the initiative does not change the fact that these organizations do not, themselves, benefit from the initiative in any way. While it is true that the organizations at issue advocated for the implementation of the initiative, this is simply not enough to render them "affected by" the repeal of the regulatory scheme. As a result, FACS, Appalachian Voices, and VIPL failed to demonstrate that they are "affected by" the RGGI Repeal regulation.

C. *Venue is improper in this Court.*

"The party objecting to venue has the burden of establishing that the chosen venue is improper." *Meyer v. Brown*, 256 Va. 53, 57 (1998). "A defendant's objection to venue is a matter submitted to the circuit court's sound discretion, and the court's decision in overruling such an objection will not be disturbed on appeal unless the record shows an abuse of that discretion." *Barnett v. Kite*, 271 Va. 65, 69 (2006). Section 2.2–4003 of the Virginia APA provides that "[i]n all proceedings under § 2.2–4026, venue shall be as specified in subdivision 1 of § 8.01–261." Section 8.01–261 then provides that venue is proper:

> 1. In actions for review of, appeal from, or enforcement of state administrative regulations, decisions, or other orders:
>   a. If the moving or aggrieved party is other than the Commonwealth or an agency thereof, the county or city wherein such party:
>   (1) Resides;
>   (2) Regularly or systematically conducts affairs or business activity; or
>   (3) Wherein such party's property affected by the administrative action is located.

In this matter, only FACS has an office in Fairfax County, Virginia. Yet, having concluded that FACS lacks both constitutional and statutory standing to bring this suit, venue cannot be based on its participation in this matter. Therefore, the Circuit Court of Fairfax may not adjudicate this appeal.

Notwithstanding this, Respondents ask the Court to proceed to adjudicate the standing of all Petitioners, dismissing the entire case if none have standing and transferring venue to a surviving petitioner's home court if one or more does.

Since the Court has subject matter jurisdiction it may accept this invitation and will do so in part. The reasons Petitioners assert to support standing for FACS, Appalachian Voices, and VIPL are functionally identical. All are advocacy organizations who lack a concrete interest in, or a particularized harm from, Virginia's withdrawal from the RGGI. Naturally, the Court believes its ruling that FACS lacks standing is legally correct. Otherwise, it would not make such a ruling. There is no sense in wasting juridical resources in Charlottesville and Richmond, the circuits for Appalachian Voices and VIPL, for them to make identical rulings. Alternatively, it is bad public policy to have litigants seek conflicting rulings in the same case from different judges, effectively transforming them into courts of appeals for each other. So, for the same reasons the Court will dismiss FACS from the case due to lack of standing, the Court will dismiss Appalachian Voices and VIPL.

The only differently situated Petitioner is AECP, located in Floyd County, Virginia. Unlike FACS, Appalachian Voices, and VIPL, AECP asserts that its members have contracts with the Department of Housing and Community Development under the Weatherization Deferral Repair Program. RGGI auction sales solely fund this program. So, unique from the

other three petitioners, AECP members may suffer a direct financial loss if Virginia withdraws from the RGGI. The Court may adjudicate AECP's standing, but judicial humility necessitates that it not do so. Theoretically, based on this Court's ruling against the standing of the other three Petitioners, the present appeal should have been filed in the Circuit Court of Floyd for it to determine its own jurisdiction as to the remaining Petitioner. That circuit would have then adjudicated AECP's standing. If the Circuit Court of Fairfax were to decide standing using a rationale different than it used to dismiss FACS, it would effectively invite litigants without standing to enter a case so that a judge with improper venue could make the threshold ruling on standing for all other litigants in the case. The Circuit Court of Floyd does not need the Circuit Court of Fairfax to determine the standing of a litigant in Floyd for reasons different than those used by the Fairfax court to reject standing for the Fairfax litigant.

The Fairfax Circuit Court lacks jurisdiction to adjudicate this appeal because the party based in Fairfax lacks standing. For judicial economy, it makes a functionally identical analysis for the petitioners located in Charlottesville and Richmond. The Court should permit a court with proper jurisdiction to adjudicate whether the remaining Petitioner, AECP, with a very different argument, has standing. That court is the Circuit Court for Floyd County.

III. CONCLUSION.

Petitioners FACS, Appalachian Voices, and VIPL lack both constitutional and statutory standing to bring this administrative appeal of Respondents' regulatory action. The Court will grant Respondents' Motion to Dismiss FACS as a party. Since Appalachian Voices and VIPL are similarly situated, the Court will grant the Motion as to them, too.

However, Petitioner AECP has a materially different basis for standing than that of the other three Petitioners. A court with proper venue should decide the question of whether it has standing. That court is the Circuit Court of Floyd. The Court will grant Respondents' Motion to Transfer Venue.[9]

The Court, therefore, will grant in part Respondents' Motion to Dismiss for lack of standing as to Petitioners FACS, Appalachian Voices, and VIPL. Further, it will grant Respondents' Motion to Transfer Venue, and transfers venue in this matter to the Circuit Court of Floyd County.

An appropriate order is attached.

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[9] The Court recognizes the need for expeditious adjudication of this dispute. The parties need a court to make important decisions within two months laden with holidays. The Court already scheduled several pending motions and deeply studied the relevant statutes and regulations. It is situated to act with greater dispatch than another court looking at this complex appeal for the first time. Should the parties so desire, the Court invites them, pursuant to Virginia Code § 17.1–105(D), to petition the Supreme Court of Virginia to permit the undersigned judge to sit in designation in the Floyd County Circuit Court.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ASSOCIATION OF ENERGY CONSERVATION PROFESSIONALS, *et al.*	)	
Petitioners,	)	
v.	)	CL-2023-12061
VIRGINIA STATE AIR POLLUTION CONTROL BOARD, *et al.*	)	
Respondents.	)	

ORDER

THIS CAUSE CAME before the Court October 27, 2023, on Respondents' "Motion to Dismiss [for Lack of Standing]," and "Objection to Venue and Motion to Transfer Venue." For the reasons set forth in the Opinion Letter of November 3, 2023, incorporated by reference, it is

ORDERED Respondents' Motion to Dismiss [for Lack of Standing] is **GRANTED IN PART AND DENIED IN PART**;

ORDERED Petitioners Faith Alliance for Climate Solutions, Appalachian Voices, and Virginia Interfaith Power & Light are DISMISSED as Petitioners for lack of standing; and

ORDERED Respondents' Motion to Transfer Venue is **GRANTED** as to remaining Petitioner, Association of Energy Conservation Professionals, and venue is this matter is hereby **TRANSFERRED** to the Circuit Court of Floyd County.

THIS CAUSE CONTINUES.

[redacted]

JUDGE DAVID A. OBLON

NOV 0 3 2023

ENTERED

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA, ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT. ANY DESIRED ENDORSEMENT OBJECTIONS MAY BE FILED WITHIN TEN DAYS.