

IN THE CIRCUIT COURT FOR THE COUNTY OF FLOYD

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

Petitioners,

v.

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

Respondents.

Case No. CL23000173-00

**PROPOSED BRIEF OF THE CHESAPEAKE BAY FOUNDATION, INC. AS *AMICUS*
CURIAE IN SUPPORT OF PETITIONERS' REQUEST FOR INTERMEDIATE RELIEF**

The Chesapeake Bay Foundation, Inc. (“CBF”), by and through undersigned counsel, hereby files this brief as *amicus curiae* in support of the Motion for Intermediate Relief filed by the Association of Energy Conservation Professionals, *et al.* (“Petitioners”). CBF has informed all parties of its intent to file this brief, and Respondents have indicated that they take no position.

INTRODUCTION

On August 30, 2023, the Virginia State Air Pollution Control Board (“Board”) approved the Department of Environmental Quality’s (“DEQ”) proposal to repeal the regulation implementing the Clean Energy and Community Flood Preparedness Act, finalizing the

Administration’s years-long endeavor to cease Virginia’s participation in the Regional Greenhouse Gas Initiative (“RGGI”).¹ The decision by DEQ and the Youngkin Administration (together, “Agency Respondents”) to dismantle an effective and essential program, without adequate justification, will deprive Virginians of critical programs and funding necessary to address the harmful and unpredictable impacts of climate change.

The Commonwealth joined RGGI in 2020 following the General Assembly’s passage of the Clean Energy and Community Flood Preparedness Act (“RGGI Legislation”). Va. Code § 10.1-330. DEQ subsequently issued the required Emissions Reductions Program regulation (“RGGI Regulation”) allowing Virginia to commence RGGI related operations in 2021. 9VAC5-140-6010 *et seq.* The General Assembly established that reinvestment of Virginia’s RGGI auction proceeds would be achieved through the implementation of the RGGI Legislation, which directs forty-five percent of the revenue from RGGI auctions to the Virginia Community Flood Preparedness Fund (“Flood Fund” or “CFPF”),² and fifty percent to a fund designed to support low-income energy programs.³

Flood Fund projects are designed to provide support to localities throughout Virginia that are working to reduce the impacts of recurrent flooding and sea level rise driven by climate change. Without these funds, necessary resiliency planning and projects are once again out of reach for the localities who need them most. The Agency Respondent’s decision to repeal the

¹ RGGI is a coordinated effort between several Northeastern states to cap and reduce carbon pollution from the private sector. As a program, RGGI has been an effective tool in combatting both the drivers and impacts of climate change. Since its inception in 2009, the efforts of RGGI states have translated to a 50% reduction in CO2 emissions in the region, and raised close to \$7 billion. These results, combined with the potential for successful replication, have resulted in the steady adoption of the RGGI framework throughout the Northeast. THE REGIONAL GREENHOUSE GAS INITIATIVE, *About the Regional Greenhouse Gas Initiative*, (Jan. 2024) https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf.

² *Community Flood Preparedness Fund Grants and Loans*, VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf>.

³ VA. CODE §10.1-330 (C) (2021).

RGGI Regulation and cut off this critical funding source for its associated programs is inconsistent with State Law, will make achieving Chesapeake Bay restoration goals more challenging, undermines the Commonwealth's efforts to create more resilient communities, and leave citizens without critical resiliency funding.

INTEREST OF AMICUS CURIAE

The Chesapeake Bay Foundation, Inc. ("CBF") is a 501(c)(3) nonprofit organization whose mission is to "Save the Bay" and keep it saved. Through a combination of dedicated education, restoration, litigation, and advocacy, CBF aims to protect and restore the Chesapeake Bay watershed and ensure a safe and healthy environment for all those who live, work, and recreate within its bounds. CBF represents approximately 173,000 members and supporters across the watershed, including 54,651 in Virginia, where it maintains offices in Richmond and Virginia Beach.

The Chesapeake Bay is the nation's largest estuary, spanning 64,000 square miles and six states. As a result, there are a myriad of factors impacting both environmental and public health in the region. Climate change is already harming water quality, wildlife habitat, and human health and safety throughout the Bay watershed, making it harder for Virginia to achieve its Chesapeake Bay restoration goals.⁴ More frequent and severe storms increase stormwater runoff and nutrient and sediment loads to the Bay watershed; rising temperatures lead to warmer water with less capacity to hold dissolved oxygen; changes in salinity threaten habitat for oysters and aquatic life; and rising sea levels threaten to drown thousands of acres of environmentally critical wetlands.⁵

⁴ CHESAPEAKE BAY PROGRAM, *Climate Change*, <https://www.chesapeakebay.net/issues/threats-to-the-bay/climate-change>.

⁵ CHESAPEAKE BAY FOUNDATION, *The Issues: Climate Change*, <https://www.cbf.org/issues/climate-change/>.

In addition to the greenhouse gases fueling climate change, other harmful pollutants from power plants, like nitrogen oxides (“NOx”), sulfur dioxide, and particulate matter, also threaten environmental and human health in the region.⁶ In the Bay watershed, NOx pollution is of particular concern, with approximately one-third of the Chesapeake Bay’s total yearly nitrogen load contributed by atmospheric deposition.⁷ Accordingly, CBF’s advocacy to reduce pollution from fossil fuel driven power plants has included actively supporting the RGGI Legislation. Since its passage, CBF has continued to monitor the progress of its implementation, with a particular focus on the Flood Fund and its stated goals: to support resiliency planning efforts and the selection of projects that address increased flooding and sea level rise. *See* Va. Code § 10.1-1330(1).

In 2021, CBF submitted comments to the Department of Conservation and Recreation (“DCR”) on the proposed Flood Fund grant manual to advocate for the inclusion of guidelines that actively prioritize and seek out projects that utilize nature-based solutions and benefit low-income communities. CBF Grant Manual Comment Letter to Lisa McGee (May 12, 2021). CBF has also written in support of specific resiliency plans that prioritize water quality and equity, in an effort to support and highlight the intended goals of the Flood Fund. CBF Support Letter to DCR (April 8, 2022) (“The proposal acknowledges the risks to the tidal wetlands, beaches, and dunes, as well as uplands, and as such, will focus on those projects that maximize nature-based designs. Additionally, given the region-wide focus of the proposal, it also meets CFPF objectives for community scale.”).

⁶ CHESAPEAKE BAY FOUNDATION, *The Issues: Air Pollution*, <https://www.cbf.org/issues/air-pollution/index.html>.

⁷ U.S. ENVIRONMENTAL PROTECTION AGENCY, CHESAPEAKE BAY TOTAL MAXIMUM DAILY LOAD FOR NITROGEN, PHOSPHORUS, AND SEDIMENT, at 4-33 (Dec. 29, 2010), *available at* <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document> (hereinafter “Bay TMDL”).

Additionally, throughout the proposed repeal of the RGGI Regulation, CBF has consistently supported the proper and effective distribution of Flood Fund monies. In response to DEQ's Notice of Intended Regulatory Action to rescind the RGGI Regulation, CBF strongly urged the Commonwealth to remain a RGGI participant and stressed the program's ability to reduce emissions and support the important work funded by the Flood Fund. These comments emphasized that without Virginia's participation in RGGI, there would be no dedicated source of CFPF funding, dramatically impacting the development of nature-based flood resilience planning and projects. CBF NOIRA Comment Letter to Karen Sabasteanski (Oct. 26, 2022). CBF again commented on DEQ's final proposal to rescind the RGGI Regulation, reiterating that without the RGGI Legislation, there is no reliable funding source for the Flood Fund. CBF Proposal Comment Letter to Karen Sabasteanski (March 31, 2023).

Thus, as a vocal advocate for the benefits of RGGI's emission reductions, and as an active proponent of the Flood Fund's essential role in protecting communities and water quality throughout the Commonwealth, CBF has a unique perspective to offer the Court in its consideration of this case. CBF submits this brief in support of Petitioners' Motion for Intermediate Relief currently before the Court to explain why there is probable cause to believe that this litigation will result in a finding of reversible error and why such relief is necessary to prevent immediate and irreparable harm to the public. Specifically, a stay preventing Virginia's immediate withdrawal from RGGI via the dismantling of its regulatory framework will: (1) ensure that essential resiliency projects that have been proposed, approved or sought, continue to be funded as the legislature intended; and (2) avoid confusion and disruption of the government's administration of the Community Flood Preparedness Fund.

STANDARD OF REVIEW

It is within the power of this Court to grant intermediate relief, and stay the effectiveness of the Agency Respondents' decision to repeal the RGGI Regulation, as requested by the Petitioners. Section 2.2-4028 of the Virginia Administrative Process Act ("VAPA") provides that "the court may... issue all necessary and appropriate process to postpone the effective dates or preserve existing status or rights pending the conclusion of the review of proceedings." Intermediate relief is appropriate where (i) such an action is necessary to "prevent immediate, unavoidable, and irreparable injury," and (ii) where there are "substantial" issues of law or fact *and* "probable cause...to anticipate a likelihood of reversible error in accordance with § 2.2-4027." CBF avers that both of these requirements are met in the present case and accordingly, asks the Court to grant Petitioners' Motion for Intermediate Relief.

ARGUMENT

A stay is not only appropriate in this case, but also necessary to preserve the essential public function of the Community Flood Preparedness Fund. Petitioners' Motion for Intermediate Relief meets both elements of Section 2.2-4028 given the "immediate, unavoidable, and irreparable injury" to Virginia's resiliency efforts and that "there is probable cause...to anticipate a likelihood of reversible error" and therefore should be granted.

I. A stay in this case will prevent an immediate, unavoidable, and irreparable injury to the public.

CBF urges the Court to consider the interests of the public, and the enormity of the harm that is likely to occur if intermediate relief is not granted. The Agency Respondents' repeal of the RGGI Regulation, and resulting abandonment of the Clean Energy and Community

Flood Preparedness Act, summarily deprives Virginians of the essential support provided by the Community Flood Preparedness Fund and the Housing Innovations in Energy Efficiency program. While both programs are critical to the development of a resilient Commonwealth, CBF – as a result of its specialized advocacy – is particularly well-suited to discuss the benefits of the CFPF, and what is at stake should this court decline to grant Petitioners’ Motion.

The CFPF is an essential and irreplaceable component of the Commonwealth’s resiliency efforts. As provided in the RGGI Legislation, the CFPF is intended to “[assist] localities and their residents affected by recurrent flooding, sea level rise, and flooding from severe weather events.”⁸ Virginians have long struggled to protect their homes, families, and communities from the significant and unpredictable damage caused by storms, flood events, coastal erosion, and a myriad of other devastating environmental harms.⁹ While these issues were frequently identified as being exacerbated or caused by climate change, they were rarely capable of being addressed, much less prevented.

Fortunately, this dynamic has begun to shift in the years since the RGGI Legislation was passed and the CFPF was established. In just two years, RGGI auctions have raised more than \$600 million, and approximately \$97.7 million in Flood Fund monies have been awarded.¹⁰ Seventy-four percent of Flood Fund grantees are in designated low-income

⁸ VA. CODE § 10.1-1330(C)(1) (2021).

⁹ McKenna Oxenden & April Rubin, *Storms Drench Southwest Virginia, With Flooding, Landslides and Home Damage*, THE NEW YORK TIMES (Jul. 13, 2022), <https://www.nytimes.com/2022/07/13/us/virginia-flooding-missing.html>; see also Charlie Paullin, *As smoke from Canada enters Virginia research links climate change with more frequent wildfires*, VIRGINIA MERCURY (Jun. 12, 2023, 12:04 AM), <https://www.virginiamercury.com/2023/06/12/as-smoke-from-canada-enters-virginia-research-links-climate-change-with-more-frequent-wildfires/>.

¹⁰ WETLANDS WATCH, *The Community Flood Preparedness Fund*, <https://wetlandswatch.org/community-flood-preparedness-fund>.

geographic areas and recipients are located in every region of Virginia.¹¹ The projects supported by this funding range from investigative efforts to identify the specific needs of a locality, to the construction of necessary resiliency infrastructure that had previously been too expensive to complete. The Commonwealth's repeal of the RGGI Regulation, and resulting abandonment of the Flood Fund and energy efficiency subsidization funds, affects every locality in Virginia and its residents. Without CFPF funds, the essential projects and programs that it has buoyed will be mired in confusion, held in a frustrating state of administrative purgatory, or simply abandoned. Such a result is unavoidable in the current circumstances, and would lead to immediate and long-term irreparable harm. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251, 264 (4th Cir. 2020) (recognizing environmental harms as "often permanent or at least of long duration, i.e., irreparable" and, after considering where the "public interest lies", granting stay); *see also Env'tl. Def. Fund, Inc. v. Virginia State Water Control Bd.*, 25 Va. Cir. 64, 65 (1991) (holding that the "court will not enter an order which would result in greater harm to the environment" where its ruling had the potential to allow environmental harms to continue unchecked). Accordingly, and in light of the reasons discussed in greater detail below, CBF urges this Court to grant Petitioners' Motion for Intermediate Relief.

i. Immediate Harm

The Flood Fund, and the Commonwealth by extension, relies on the availability and continued disbursement of RGGI auction proceeds. During the pendency of this litigation, at least one RGGI auction cycle occurred in December, 2023. Future auctions will not merely be put on pause pending this litigation, but skipped altogether. Each RGGI auction in Virginia

¹¹ *Id.*

generates between \$45-85 million, and forty-five percent of these proceeds go to CFPF.¹²

Proceeds from a RGGI auction hosted in the second quarter of 2023 amounted to approximately \$67,312,561.¹³ With four auction rounds occurring each year, Virginians stand to lose anywhere from \$180-\$340 million in designated funding. The Court’s issuance of a stay in this litigation would prevent the immediate harm caused by the disruption of this consistent and substantial funding source, and would also allow the government agencies and participating localities that rely on it to continue providing essential services to the Commonwealth.

Additionally, the current disruption is not only financial, but practical. Apart from the provision of funds to localities that are often effectively disqualified from federal grant processes,¹⁴ CFPF projects address critical gaps in resiliency capabilities and planning. The efficacy of these projects is heightened by the program’s preference for community-scale proposals that work in concert with existing floodplain management plans and practices, and emphasize nature-based solutions rather than hardened, gray infrastructure.¹⁵

For example, the City of Norfolk recently received CFPF funding for its Riverside Memorial Cemetery Shoreline Restoration project (“Riverside Memorial Project”).¹⁶ The project aims to restore a highly eroded segment of shoreline in the Eastern Branch of the Elizabeth River utilizing “nature-based solutions such as living shoreline techniques, bank fill and grading, green block technology, and planted armored matting.”¹⁷ Techniques such as these are an essential part

¹² THE REGIONAL GREENHOUSE GAS INITIATIVE: AN INITIATIVE OF EASTERN STATES OF THE U.S., *Auction Results*, <https://www.rggi.org/auctions/auction-results>.

¹³ *Id.*

¹⁴ See e.g., Kelsey McNeill & Alyssa Glass, *Federal Funding Programs: Benefit-Cost Analyses and Low to Moderate Communities*, VIRGINIA COASTAL POLICY CENTER, Fall 2019, at 62, <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1064&context=vcclinic>.

¹⁵ *Id.*

¹⁶ CITY OF NORFOLK, *Application: Riverside Memorial Cemetery Shoreline Restoration* (Apr. 7, 2022), available at <https://www.dcr.virginia.gov/dam-safety-and-floodplains/document/cfpf/CFPF-22-03-48-CID510104-CityofNorfolk-CFPF-2.pdf> (hereinafter “Norfolk Application”).

¹⁷ Norfolk Application at 11.

of effective, long-term resiliency planning that allow for the proliferation of coastal habitats and expanded infiltration capacity at targeted sites. By installing this project, the City of Norfolk will prevent water from encroaching inland, providing necessary protections for the local community, which is at high risk for exposure to potential hazardous or toxic materials.¹⁸ Not only will this project limit flooding and resulting damage from flood events, the planned restoration of local wetlands could also help to filter pollutants from nearby toxic sites, benefiting public and environmental health in the area.¹⁹ Though the Riverside Memorial Project has already received its funding, many projects are in the proposal stage and set to be approved in the upcoming funding rounds. The provision of intermediate relief, as requested by Petitioners, would ensure that the funding and implementation of crucial resiliency projects remain undisturbed while the present litigation proceeds, all while having no identified or discernable impact on Respondents.

ii. Irreparable Harm

As evidenced by the widespread distribution of CFPF funds, the grant-based structure is a well-known and frequently utilized system. Petitioner organizations, CBF, and other environmental and public interest organizations have worked to improve and promote the Flood Fund's process, and ensure that local governments are aware of its capabilities. The results of these efforts are reflected in the Flood Fund's applicants. While the first round of grant funding in October 2021 primarily included applicants from the coastal regions of Virginia, the latest rounds (announced in December 2021 and September 2022) addressed project proposals from across the state.²⁰ Recent projects included: funding for the City of Danville to update its

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, *Community Flood Preparedness Fund Round 2 Awards*, <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf-awards-round2>; *see also* VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, *Community Flood Preparedness Fund Round 3 Awards*,

comprehensive plan for capacity building and planning; hydrologic and hydraulic studies to update FEMA maps in the Town of Front Royal; a \$2 million award to Dickenson County to mitigate flooding, implement floodproofing activities, and perform comprehensive streambank restoration activities; and many others.²¹ Overall, round three Flood Fund grant funding disbursed \$65.4 million in response to sixty-four (64) applications.²²

While the planned Riverside Memorial Project discussed above exemplifies the type of projects the Flood Fund was intended to support, the program also provides funding for capacity building, planning, and relevant studies necessary to develop projects. The Accomack-Northampton Planning District Commission recently received funding for capacity building to develop a regional resilience plan for Virginia’s Eastern Shore. The area is extremely vulnerable to climate change-driven flood events such as more frequent storm events, sea level rise, and increased rainfall.²³ Additionally, like Norfolk, the Eastern Shore comprises several low-income geographic areas where the implementation of resiliency projects has the potential to offset the costs associated with damage from large storm events, and in some cases prevent that damage from occurring.

Notably, one of the stated goals of the Accomack-Northampton planning projects is to “increase the number of community flood mitigation projects that meet criteria for the

VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf-awards-round3>.

²¹ VIRGINIA DEPARTMENT OF CONSERVATION AND RECREATION, *Community Flood Preparedness Fund: Grants and Loans: Virginia Community Flood Preparedness Fund Grant*, <https://www.dcr.virginia.gov/dam-safety-and-floodplains/dsfpm-cfpf-awards>.

²² WETLANDS WATCH, *The Community Flood Preparedness Fund*, <https://wetlandswatch.org/community-flood-preparedness-fund>.

²³ ACCOMACK-NORTHAMPTON PLANNING DISTRICT COMMISSION, *Capacity Building: Development of the Eastern Shore Regional Community Resilience Plan*, (Apr. 9, 2022) <https://www.dcr.virginia.gov/dam-safety-and-floodplains/document/cfpf/CFPF-22-03-60-A-NPDC-DCR1-Multi-Accomack-NorthamptonPDC-CFPF.pdf> (hereinafter “Accomack Application”).

[CFPF].”²⁴ This goal, and the goals of many other similar planning efforts, would be irreparably impaired by the loss of the Flood Fund. What is more, many localities may not even learn of this litigation's impact on CFPF funding until they attempt to apply for supplemental funds to support efforts that have already been approved. This harm would only be exacerbated by the fact that there are no available funding sources capable of replacing the CFPF. The impacts of the Agency Respondents’ discontinuation of the Flood Fund’s operations will be long-term, and therefore will irreparably harm, localities and residents who have only recently begun to address the persistent problem of flooding. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 981 F.3d 251, 264 (4th Cir. 2020).

1. There is no equivalent program to replace the Flood Fund.

The irreparable harm experienced by residents throughout the Commonwealth would only be exacerbated by the funding vacuum left in the absence of the CFPF. The Flood Fund was specifically designed to fill a gap in available funding for smaller and low-income communities threatened by increased flooding and seeking a way to fund resiliency planning and projects. *See* Va. Code § 10.1-603.25(E); *see also* CBF Grant Manual Comment Letter to Lisa McGee (May 12, 2021). Many of these communities do not have the personnel or resources to begin assessing the impacts from sea level rise and flooding, or the funds necessary to implement solutions. The Flood Fund directly responded to this need, and no equivalent program exists to fill that gap for communities in the Commonwealth.

Although the Resilient Virginia Revolving Loan Fund has been suggested as a replacement, it is a fundamentally different program that is incapable of achieving the goals of the Flood Fund. First, the Revolving Loan Fund is based on *loans*, as opposed to grants. Because

²⁴ Accomack Application at 1.

of this, many communities will not be in a financial position to participate if they do not already have the bond-rating necessary to seek a loan. Indeed, many localities can only afford to engage in this resiliency work *because* of the Flood Fund’s grant structure. Second, the Revolving Loan Fund is subject to the unpredictable budget process which can change based on political winds and competing budget priorities.²⁵ Comparatively, the Flood Fund—via funds from RGGI auctions—is a dedicated and reliable funding mechanism that provides a predictable source of support for communities seeking to plan and prepare for resilience. Finally, and critically, the Revolving Loan Fund provides no preference for nature-based or community-scale projects. Instead, it is tailored for businesses or individual homeowners who are in a financial position to obtain a loan. This function is fundamentally incompatible with the General Assembly’s goals in developing the CFPF. *See* VA. CODE §10.1-603.25(E) (“Priority shall be given to projects that implement community-scale hazard mitigation activities that use nature-based solutions to reduce flood risk.”). Absent a stay that protects and maintains the current funding structure for the Flood Fund, communities throughout the Commonwealth will lose the certainty that they can currently rely on, and the ability to engage in long-term planning for resilience in the face of increasing flood risk and damage.

II. Respondent’s failure to comply with State law supports a presumption of probable cause to anticipate a likelihood of reversible error.

Petitioners challenge the Board’s decision to approve the proposed repeal of the RGGI Regulation. According to §2.2-4027, reversible errors include (i) legal conclusions that fail to comply with statutory authority, and (ii) findings of fact that are not supported by substantial evidence in the agency record. Because of the factual and legal circumstances underlying this

²⁵ The Loan Fund was recently approved for one-time funding from the federal STORM Act. *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, *Safeguarding Tomorrow Revolving Loan Fund Program*, <https://www.fema.gov/fact-sheet/fema-safeguarding-tomorrow-revolving-loan-fund-program>.

action, there is probable cause to believe that both of these reversible errors were present in the Board's decision to approve the repeal of the RGGI Regulation, and as a result, this litigation is likely to result in reversible error.²⁶ The action at the heart of this litigation began with the Board's failure to comply with the relevant statutory authority – the Clean Energy and Community Flood Preparedness Act – which mandates Virginia's participation in RGGI. The terms of the RGGI Legislation are unequivocal and leave no room for discretionary implementation. The Act states that “the provisions of this article *shall* be incorporated by the Department” and the sections that follow include similarly binding language detailing the required sale and administration of funds. Va. Code § 10.1-330(A) (emphasis added). The Act mandates Virginia to participate in RGGI and in no way left the decision to the discretion of DEQ or the Board. In fact, just two years ago, the Board and DEQ defended the regulation in Richmond Circuit Court, and argued repeatedly in briefing that the law *requires* this regulation. *See Virginia Mfrs. Ass'n v. Virginia Dep't of Env'tl. Quality*, Case No. CL20-4918 (Rich. Cir. Ct. May 7, 2021). The Board's effort to remove Virginia from RGGI is not only contradictory, it is in contravention of the General Assembly's authority and a clear error of law under Section 2.2-4027.

Further, even if the Board did have the authority to repeal the RGGI Regulation, the decision lacks any material justification in the administrative record. Virginia courts have held that, under a substantial evidence standard, the reviewing court “may reject the agency's findings of fact...if a reasonable mind would necessarily come to a different conclusion after having considered the

²⁶ VA. CODE § 2.2-4027 (“The burden shall be upon the party complaining of agency action to designate and demonstrate an error of law subject to review by the court. Such issues of law include: ... (ii) compliance with statutory authority, jurisdiction limitations, or right as provided in the basic laws as to subject matter, the stated objectives for which regulations may be made, and the factual showing respecting violations or entitlement in connection with case decisions... and (iv) the substantiality of the evidentiary support for findings of fact.”).

record as a whole.” *Buschenfeldt v. Virginia Ret. Sys.*, 95 Va. Cir. 220, 2017 WL 9833503, at *2 (2017). As an example, the Agency Respondents relied heavily on the idea that RGGI is increasing utility bills as justification for their action, and moved forward under the guise of saving utility customers money. This conflicts with express policy decisions of the General Assembly, which allowed, but did not require, monopoly utilities to seek recovery of these specific compliance costs from customers, subject to approval by the State Corporation Commission. S. 1027, Chapter 1280, Gen. Assemb. Reg. Sess. (Va. 2020). In light of the dissonance between the evidence in the record and the actions of the Board, and equally unsupported justifications of the Administration, it is likely that these proceedings will demonstrate that a clear, reversible error has occurred.

CONCLUSION

For the reasons stated above, CBF urges the Court to grant Petitioners’ Motion for Intermediate Relief and stay the effective date of the Board’s repeal of the RGGI Regulation. Such a decision is appropriate and necessary to serve the public interest and prevent irreparable harm to the Commonwealth and its citizens.

Dated: January 15, 2024

Respectfully submitted,



Patrick Fanning (VSB No. 86341)
Virginia Staff Attorney
CHESAPEAKE BAY FOUNDATION, INC.
1108 E. Main Street, Suite 1600
Richmond, VA 23219
804-258-1481
Pfanning@cbf.org

*Counsel for Chesapeake Bay
Foundation, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that the following counsel have been served, via electronic mail only, a true and accurate copy of the Chesapeake Bay Foundation's Proposed Brief as *Amicus Curiae* in Support of Petitioners Request for Intermediate Relief.

Nate Benforado
Carrol Courtenay
Tyler Demetriou
Grayson Holmes
Southern Environmental Law Center
120 Garrett Street, Suite 400
Charlottesville, VA 22902
nbenforado@selcva.org
ccourtenay@selcva.org
tdemetriou@selcva.org
gholmes@selcva.org
Counsel for Petitioners

Andrew N. Ferguson
Thomas J. Sanford
Cooper Vaughan
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Aferguson@oag.state.va.us
Tsanford@oag.state.va.us
CVaughan@oag.state.va.us
Counsel for Respondents

Dated: January 15, 2024



Patrick Fanning (VSB No. 86341)
CHESAPEAKE BAY FOUNDATION, INC.
Virginia Staff Attorney
Chesapeake Bay Foundation, Inc.
1108 E. Main Street, Suite 1600
Richmond, VA 23219
804-258-1481
Pfanning@cbf.org

*Counsel for Chesapeake Bay Foundation,
Inc.*