



COMMONWEALTH of VIRGINIA

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The Honorable Charniele L. Herring
Member, Virginia House of Delegates
Post Office Box 11779
Alexandria, Virginia 22312

The Honorable Richard "Rip" Sullivan
Member, Virginia House of Delegates
Post Office Box 50753
Arlington, Virginia 22205

Dear Delegates Herring and Sullivan:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You ask whether the Governor, solely through an executive order or other executive action, can repeal or eliminate the regulatory requirement that electric utilities and other electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions.

Discussion and Analysis

The Clean Energy and Community Flood Preparedness Act (the "Act") was passed by the General Assembly in 2020, amended Va. Code § 10.1-1330. The Act directs the Virginia Department of Environmental Quality to amend its regulations that established a carbon dioxide cap and trade program to reduce carbon dioxide emissions. Section 10.1-1330(B) authorizes the Director of DEQ "to establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the [Regional Greenhouse Gas Initiative] program and this article."¹

Consistent with the Act's requirements, DEQ issued amendments to its CO₂ Budget Trading Program regulations. Pursuant to those regulations, an owner or operator of a CO₂ budget source, such as an electric utility, must "hold CO₂ allowances . . . in an amount not less than CO₂ emissions that have been

¹ VA. CODE ANN. § 10.1-1300(B). This and other citations to the Code of Virginia herein are from the electronic version of the Code on LexisNexis and are current through the 2021 Regular Session and Special Session I and II of the General Assembly.

generated as a result of combusting fossil fuel” for a given time period.² Put differently, in order to lawfully produce electricity in Virginia by combusting fossil fuels, producers must now hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions. One of the ways producers obtain CO₂ allowances in order to comply with this regulation is by purchasing them through the Regional Greenhouse Gas Initiative auction. You have asked whether the Governor may, through an executive order or other executive action, do away with this regulatory requirement.

A recent Attorney General opinion discussed the separation of powers doctrine with respect to the Governor’s power to alter tax laws.³ The same rationale applies to validly enacted laws. The Constitution of Virginia does not grant the Governor the power to suspend laws, and in fact, it requires the opposite that “[t]he Governor shall take care that the laws be faithfully executed.”⁴ Article I, § 7 of the Constitution of Virginia provides “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”

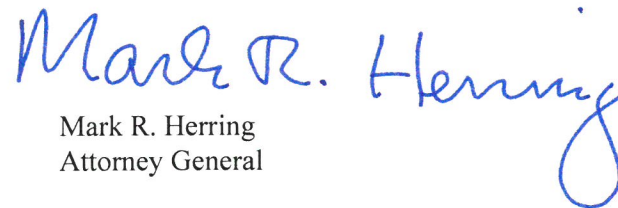
A previous Attorney General opinion explained the interplay between these sections of the Constitution. “Thus, the prohibition that is implicit in Article V, § 7’s ‘take care’ clause is made explicit by Article I, § 7: the Governor may not unilaterally direct, by any means, that a validly adopted regulation that has the force of law be suspended or ignored.”⁵ In my opinion, the Governor may not repeal or eliminate, through an executive order or other action, the enacted statutes and regulations pertaining to the Commonwealth’s participation in the Regional Greenhouse Gas Initiative and/or a market-based trading program like the Regional Greenhouse Gas Initiative, or do away with the requirement that electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions.

Conclusion

Accordingly, it is my opinion that the Governor may not, solely through an executive order or other executive action, repeal or eliminate the regulatory requirement that electric utilities and other electricity producers hold carbon dioxide allowances that equal the amount of their carbon dioxide emissions.

With kindest regards, I am,

Very truly yours,


Mark R. Herring
Attorney General

² 9 VA. ADMIN. CODE § 5-140-6050(C) (2021).

³ 2021 Op. Va. Att’y Gen. No. 21-087, available at <https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1917-2021-official-opinions#november>.

⁴ VA. CONST., art. V § 7.

⁵ 2014 Op. Va. Att’y Gen. 43, 45-46.