Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

VIRGINIA MANUFACTURERS ASSOCIATION	)	
Petitioner,	)	
v.	)	**Case No.: CL20-4918**
VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, DAVID PAYLOR DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, AND THE VIRGINIA STATE AIR POLLUTION CONTROL BOARD;	)	
Respondents.	)	

OPINION ORDER

Virginia Manufacturers Association (hereinafter, "VMA") came before the Court on June 30, 2021, to be heard on its Petition for Appeal which named the Virginia Department of Environmental Quality, David Paylor, and the Virginia State Air Pollution Control Board (hereinafter, "Respondents" or "DEQ") as Respondents. The Court took the matter under advisement and denies VMA's petition for the reasons set forth below.

I. Procedural History

VMA filed a Petition for Appeal on October 2, 2020 asserting six Assignments of Error, four of which outline how DEQ allegedly violated the Virginia Administrative Process Act ("VAPA") when it amended the regulation governing Virginia's CO_2 Budget Trading Program. The remaining Assignments of Error allege that the amended regulation is constitutionally infirm because it is both void for vagueness and levies a tax in violation of Article X, Section 7 of the Virginia Constitution. To remedy the alleged violations, VMA asks the Court to invalidate, vacate, and declare the amended regulation null and void.

On October 20, 2020, Virginia Interfaith Power & Light, Wetlands Watch, and Appalachian Voices (collectively, the "Conservation Organizations") filed a Motion to Intervene as Respondents. The Court denied the Motion to Intervene on February 9, 2021 for the reasons stated in the Court's Letter Opinion.

On October 28, 2020, DEQ filed a Motion to Dismiss the Petition for Appeal. The Court denied the Motion to Dismiss on January 29, 2021.

The Court entered a briefing schedule Order on April 1, 2021, and the parties' briefs were submitted in compliance with the deadlines established therein. On May 7, 2021, the Conservation Organizations filed a Motion for Leave to File an *Amicus Curiae* Brief in Support of Respondents. The *amicus* brief was filed contemporaneously with the motion.[1] The *amicus* brief assists the Court in deciding the issues presented in this appeal and therefore, the Court will take it into consideration. 4 Am. Jur. 2d *Amicus Curiae* §§ 1, 5 (2021); *Jones v. Caldwell*, 61 Va. Cir. 408 (2003).

II. Factual Background

As a preliminary matter, the issue on appeal is whether the amendment of the CO_2 Budget Trading Program was lawful. VMA devoted a considerable amount of time arguing that the amended trading program imposes significant financial burdens on the entities required to participate and that similar programs have failed to effectively reduce carbon emissions. On the other hand, DEQ argues that the trading program reduces CO_2 emissions, improves public health, and helps keep electricity costs down. The parties' dispute whether the CO_2 Budget Trading Program is "good" for the Commonwealth or "successful" in accomplishing the goal of reducing CO_2 emissions is irrelevant to the questions presented. However, the history of the CO_2 Budget Trading Program and the events preceding this appeal must be discussed to better understand the legal issues presented.

a. The Original Regulation

In June of 2016, former Governor McAuliffe issued Executive Order 57 which directed the Secretary of Natural Resources to convene a study and recommend ways in which the Commonwealth could attempt to reduce the amount of carbon dioxide emitted by utilities that produce electricity. The study group recommended, among other things, the need to promulgate a regulation "limiting the total amount of carbon dioxide emitted from electric power facilities." Va. Exec. Directive No. 11 (May 16, 2017). Governor McAuliffe agreed, directed DEQ to promulgate a regulation, and specified that it should:

a. Include[] provisions to ensure that Virginia's regulation is 'trading-ready' to allow for the use of market-based mechanisms and the trading of carbon dioxide allowances through a multi-state trading program; and

b. Establish[] abatement mechanisms providing for a corresponding level of stringency to limits on carbon dioxide emissions imposed in other states with such limits.

Id. DEQ published the proposed regulation in January of 2018 and presented it to the State Air Pollution Control Board for consideration for approval for public comment. *Id.* The regulation was re-proposed in February of 2019 to address feedback received from the VAPA notice and comment

[1] Although the Conservation Organizations were not subject to the filing deadlines set forth in the Court's briefing schedule Order, the *amicus* brief was filed in accordance with the deadlines applicable to DEQ.

process, and more public comment was received. Pet. for Appeal ¶ 33. The Air Board adopted the regulation (hereinafter, the "Original Regulation") on April 19, 2019, and it was published as a new chapter of the Air Board's regulations on May 27, 2019. *Id.* ¶ 35. Neither party disputes that the Original Regulation was fully vetted through the VAPA. *Id.* ¶ 33.

The Original Regulation established the Virginia component of the CO_2 Budget Trading Program. Designed to operate as a consignment-based, conditional allowance program, it proscribed that CO_2 allowances would be allocated to electricity manufacturers, sold by the manufacturers into an auction market, and thereafter repurchased by the manufacturers at auction. Pet. for Appeal ¶ 30-31. The auction market into which the CO_2 allowances were to be sold and purchased was that created by the Regional Greenhouse Gas Initiative ("RGGI"). *Id.* ¶ 31. At oral argument, the parties conceded that RGGI is the only currently existing auction house for trading CO_2 allowances.

Although properly adopted and intended to go into effect in 2020, the General Assembly passed a budget provision preventing DEQ from implementing the program and joining RGGI as a consignment member. H.B. 1700, CH. 854, Item 4-5.11, Reg. Sess. (Va. 2019).

b. The Clean Energy and Flood Preparedness Act

In 2020, the General Assembly struck the budgetary restriction. H.B. 29, Ch. 1283, Item 4-5.11, Reg. Sess. (Va. 2020). With the Original Regulation still intact, Virginia was permitted to join or participate in RGGI as a consignment member. Instead, the General Assembly enacted the Clean Energy and Flood Preparedness Act (the "Act"), Virginia Code § 10.1-1329 *et seq.*, which authorized DEQ to move away from the consignment-based model and establish a direct auction trading system.

The Act authorized the Director of DEQ "to establish, implement, and manage an auction program to sell allowances into a market-based trading program consistent with the RGGI program and this article." Va. Code § 10.1-1330(B). The Act also directed DEQ to incorporate "[t]he provisions of this article" into the Original Regulation "without further action by the [Air Pollution Control] Board," and provided that "[s]uch incorporation . . . shall be exempt from the" VAPA. Va. Code § 10.1-1330(A).

On July 10, 2020, DEQ issued Revision A20 (hereinafter, the "Amended Regulation") which amended the Original Regulation by converting the CO_2 Budget Trading Program from the prior consignment-based model to a direct auction trading system. VMA argues that DEQ acted beyond the scope of the Act's exemption in doing so and that no other VAPA exemptions save its actions. VMA additionally argues that the Amended Regulation is both unlawfully vague and imposes a tax which DEQ is not authorized to levy.

III. Standard of Review

As VMA is the "the party complaining of agency action," it carries the burden "to designate and demonstrate an error of law subject to review." Va. Code § 2.2-4027.

> Such issues of law include: (i) accordance with constitutional right, power, privilege, or immunity, (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, (iii) observance of required procedure where any failure therein is not mere harmless error, and (iv) the substantiality of the evidentiary support for findings of fact.

Id. The issues in this appeal concern matters of statutory interpretation. "A question of statutory interpretation is subject to review *de novo* on appeal." *Karr v. Va. Dep't of Envtl. Quality*, 66 Va. App 507, 513 (2016) (internal quotation and citations omitted). The parties do not dispute that the issues raised in VMA's Petition for Appeal present questions of statutory and constitutional interpretation. Accordingly, the Court must analyze the Act and DEQ's actions in accordance with well-settled principles of statutory interpretation to determine whether DEQ had "statutory authorization" to issue the Amended Regulation and whether "it did so within the statutory limits of its discretion and with the intent of the statute in mind[.]" *Va. Jockey Club, Inc. v. Va. Racing Comm'n*, 22 Va. App. 275, 286 (1996) (internal quotations and citation omitted). In doing so, the Court does not construe the statue "by singling out a particular phrase." *Va. Electric & Power Co. v. Citizens for Safe Power*, 222 Va. 866, 869 (1981).

IV. Discussion

a. Whether Amending the Regulation Was Exempt from the VAPA

VMA asserts the Act did not grant the Director of DEQ an unbridled VAPA exemption to substantively amend the Original Regulation. According to VMA, the General Assembly permitted the Director to incorporate or, in essence, lift the language from the Act and place it into the Original Regulation. It argues that any further action was subject to the requirements of the VAPA. Because DEQ allegedly acted outside the scope of the Act's VAPA exemption, VMA requests the Court to declare the Amended Regulation null and void.

As an initial matter, VMA claims that DEQ cannot invoke the VAPA exemption contained in Virginia Code § 2.2-4006(A)(4)(a). DEQ has conceded that it does not attempt to claim that exemption. Pursuant to Virginia Code § 2.2-4006(A)(4)(a), DEQ is permitted to bypass the VAPA when issuing regulations "[n]ecessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved." The Court agrees with DEQ that it never intended to, nor needed to, invoke this exemption. The Act contains a specific VAPA exemption rendering it unnecessary for DEQ to seek to comply with one which is broader and more generalized. Va. Code § 10.1-1330(A).

VMA concedes that "DEQ was permitted to avoid [V]APA procedural requirements for a revision" but argues that the exemption only permitted DEQ to copy the language of the Act and paste into the Original Regulation verbatim. Pet'r Br. in Supp. 19. Converting the CO_2 Budget Trading Program to a direct auction trading system, it argues, fell outside the scope of the Act's VAPA exemption and therefore, the Amended Regulation must be nullified because it was not vetted through the VAPA.

When the language of a statute is "clear and unambiguous," the Court is to "assign the statute its plain meaning." *Browning-Ferris Indus. v. Residents Involved in Saving the Env't, Inc.*, 254 Va. 278, 284 (1997). "The plain, obvious, and rational meaning of [the] statute is preferred

over any curious, narrow, or strained construction." *Karr*, 66 Va. App. at 527 (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395 (1998)).

The Act directs DEQ to incorporate its provisions into the Original Regulation. "Incorporate," as that word is commonly used, means "to unite or work into something already existent so as to form an indistinguishable whole." *Incorporate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/incorporate (last visited July 12, 2021). In context, DEQ was directed to take the provisions of the Act and unite them into the Original Regulation to create an indistinguishable regulation applicable to electricity manufacturers that emit CO_2. The incorporation language specifically identifies the already existent regulation into which the Act is to be incorporated – the Original Regulation – and expressly provides that the Air Board need not approve, and the VAPA shall not apply to, such incorporation. Va. Code § 10.1-1330(A).

It is well-settled "that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340 (1998). VMA argues that the General Assembly directed DEQ to take the language of the Act and add it to the Original Regulation verbatim. In other words, the General Assembly directed DEQ to recite what the General Assembly had already stated. Doing so, however, would have produced no change. The Original Regulation would proscribe the particulars of a consignment-based trading program but state that DEQ is authorized to "establish, implement, and manage" one that operates differently. If VMA were correct in arguing that DEQ had to comply with the VAPA before converting the Original Regulation to a direct auction program, the trading program would remain unchanged, and the Amended Regulation would have provided nothing more than what was stated in the Act itself. The amendment contemplated by VMA would have been wholly ineffectual.

When interpreting the plain language of a statute, the Court is to construe it "so as to avoid an absurd result." *Eastlack v. Commonwealth*, 282 Va. 120, 126 (2011) (citing *Commonwealth v. Doe*, 278 Va. 223, 230 (2009)). Here, however, VMA singles out the language of incorporation without reading the Act in context. If its cut and paste argument were correct, DEQ would have produced a convoluted and confusing regulatory scheme. The Original Regulation would specify how the consignment-based trading program shall operate and define terms such as "conditional allowances" and "consignment auctions." It would simultaneously state that the Director of DEQ is "authorized to establish, implement, and manage" a direct auction trading program under which CO_2 allowances are not consigned and consignment auctions are not held.

Further confusion would result from a verbatim transfer of language because certain language in the Act has no application to manufacturers required to participate in the CO_2 Budget Trading Program. For instance, VMA claims that DEQ failed to include a provision of the Act stating that the revenues generated by DEQ's sale of CO_2 allowances will be held by the state treasury and spent for enumerated purposes. Va. Code § 10.1-1330(C). It would be nonsensical to include such language in a regulation governing electricity manufacturers. The enacted language was not a directive to DEQ. Instead, its inclusion was necessitated by the fact the General Assembly authorized DEQ to sell CO_2 allowances directly into the auction market rather than

consign them to participants.[2] Determining what to do with the revenue generated from those sales was a question for the General Assembly which it answered in the Act.

Furthermore, VMA believes the General Assembly directed DEQ to add to the Original Regulation an entirely new set of definitions – those set forth in Virginia Code § 10.1-1329 – effectively creating two sets of definitions in a single regulation. Not only would doing so have been duplicative of certain definitions included in the Original Regulation, the newly defined terms would be meaningless. The newly added set of definitions would clarify that "'DHCD' means the Department of Housing and Community Development" and define what an "energy efficiency program" is, yet neither the abbreviation nor the phrase are used in the regulation itself. Va. Code § 10.1-1329. The newly added definitions would also be prefaced with the phrase, "[a]s used in this article, unless the context requires a different meaning[,]" yet appear in a regulation. *Id.*

The General Assembly did not direct DEQ to amend the Original Regulation in a manner which would only confuse those required to participate and substantively amend nothing. Rather, it authorized DEQ to convert the trading program to a direct auction trading system and directed DEQ to sell, not consign, CO_2 allowances. The General Assembly not only authorized this change, but it also exempted DEQ from requirements which would otherwise apply in the absence of language to the contrary.

It is worth noting that when DEQ issued the Original Regulation in response to the Governor's directive, it had to both comply with the VAPA and receive Air Board approval. If the General Assembly had not included the exemption in this new Act, the Amended Regulation would have been subject to the same requirements and the amendment process would have been prolonged.

VMA attempts to distinguish the VAPA exemption language from other instances in which the General Assembly granted exemptions, yet the examples they provided either applied to the enactment of wholly new regulations or contained differing exemption language for different mandates. The exemption language here applies to the amendment of a preexisting regulation and does not differentiate between exempt and non-exempt actions. "Courts assume that the General Assembly chose, with care, the words it used in enacting the statute." *Kalergis v. Comm'r of Highways*, 294 Va. 260, 266 (1017). If the General Assembly intended for the VAPA to apply, it would have stated so. In fact, in the same session in which the Act was enacted, the General Assembly did so expressly when it added a new subsection E to Virginia Code § 10.1-1308 which states: "Regulations adopted by the [Air Pollution Control] Board under this subsection shall be subject to the requirements set out in" specific provisions of the VAPA.[3]

The Court recognizes that bypassing the VAPA may have prevented interested parties from providing important input into the rulemaking process, but DEQ did what the General Assembly

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[2] Under the Original Regulation, DEQ was to consign the allocated number of CO_2 allowances to manufacturers. However, the Act stated that DEQ "shall seek to *sell* 100 percent of all allowances issued each year through the allowance auction[.]" Va. Code § 10.1-1330(B) (emphasis added). The revenue generated from the sale of allowances is to be held by the state treasury and used for environmental mitigation purposes. Va. Code § 10.1-1330(C).

[3] Other state statutes that authorize the issuance of regulations establishing the state's CO_2 Budget Trading Program expressly require compliance with that state's version of the APA, yet the General Assembly in this case provided the exact opposite. *See* Conn. Gen. Stat. § 22a-200c (requiring that adoption of such regulations be "in accordance with" Connecticut's Uniform Administrative Procedure Act).

required it to do. Therefore, the Court **FINDS** that DEQ did not violate the VAPA in issuing the Amended Regulation.

b. Whether DEQ Impermissibly Added a Permitting Requirement

VMA argues that the Amended Regulation impermissibly added a permitting requirement which was neither found in the Original Regulation nor authorized by the Act. DEQ argues that the Original Regulation contained the same permitting requirement and therefore, this provision of the Amended Regulation remains unchanged.

Subsection A of the "Applicability" provision specifies which manufacturers are required to participate in the CO_2 Budget Trading Program. 9 VAC 5-140-6040(A). Subsection B of the "Applicability" provision previously stated:

> *Exempt* from the requirements of this part is *any* fossil fuel *CO_2 budget source* located at or adjacent to and physically interconnected with a manufacturing facility that, prior to January 1, 2019, and in every subsequent calendar year, *met either of the following requirements*:
>
> . . .
>
> "Such CO_2 *budget source* shall have an operating permit containing the applicable restrictions *under this subsection*."

9 VAC 5-140-6040(B) (2019) (emphasis added) (amended 2020). The Amended Regulation merely added the word "exempt" to say: "Such exempt CO_2 budget source shall have an operating permit containing the applicable restrictions under this subsection." 9 VAC 5-140-6040(B). The permit requirement in the Original Regulation clearly applied to exempt budget sources. The word "exempt" only clarified, but did not change, what was previously required.

The other change VMA takes issue with is a provision clarifying that exempt budget sources must file an application permit by January 1, 2022. 9 VAC 5-140-6040(B). The Original Regulation required all CO_2 budget sources to file an application permit by January 1, 2020; however, that deadline was rendered obsolete as the Amended Regulation was issued on July 10, 2020. If DEQ had not changed the permitting deadline, the Amended Regulation would require budget sources to submit permit applications after the deadline for doing so had expired. DEQ simply extended the generally applicable permitting deadline to January 1, 2021 and provided exempt budget sources with a further extended deadline of January 1, 2022. *Compare* 9 VAC 5-140-6040(B), *with* 9 VAC 5-140-6150.

Exempt and non-exempt manufacturers are subject to the same permitting requirements that were set forth in the Original Regulation. The other change only extends the deadline by which exempt budget sources must submit permitting applications. For these reasons, the Court **FINDS** that the Amended Regulation did not add a new permitting requirement and that DEQ did not otherwise act outside the scope of the VAPA exemption.

c. Whether the Amended Regulation is Void for Vagueness

VMA argues that the Amended Regulation is so vague that no participant of ordinary intelligence can discern what is necessary for compliance. Specifically, VMA alleges that the Amended Regulation fails to define key operational aspects of the CO_2 Budget Trading Program such as how CO_2 allowances are to be obtained. It also asserts that the Amended Regulation does not mention "Regional Greenhouse Gas Initiative" or "RGGI" but participants must comply with RGGI's internal rules, which are "de facto" rules subject to the VAPA.

First, VMA has not pointed to any case in which the void for vagueness doctrine has been applied in the regulatory context. It cites to *Tanner v. City of Va. Beach*, 227 Va. 431 (2009) (analyzing whether a city noise ordinance was facially vague or vague as applied to plaintiffs) and *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327 (2010) (analyzing whether a statute was impermissibly vague as applied), but neither case contains a claim similar to the one asserted here. Furthermore, *Tanner* and *Volkswagen* establish that VMA carries a high burden to prevail on this assertion.

Second, VMA has not pointed to any vague or incomprehensible provision within the Amended Regulation. To comply with the CO_2 Budget Trading Program, electricity manufacturers must hold CO_2 allowances in an amount equal to or greater than the amount of CO_2 they emit. 9 VAC 5-140-6050(C). VMA participated in the development of the Original Regulation, and all material aspects of this provision remain identical. A statute, and perhaps also a regulation, is not vague if it can be "construed reasonably in a manner that will render its terms definite and sufficient[.]" *Tanner*, 227 Va. at 438-39. The Amended Regulation sets forth what the manufacturers need to do for compliance purposes – hold a certain amount of CO_2 allowances relative to the amount of CO_2 they emit – using explicit and definite terms. It specifies which entities must participate, the requirements for permitting and monitoring, where the allowances are to be held, how compliance is measured, penalties for non-compliance, recordkeeping requirements, and how Virginia's budget for allowances will change over time. The Amended Regulation sufficiently details what manufacturers are required to do for compliance purposes, and Virginia has since held two successful auctions with no reported confusion.

VMA next asserts that the rules governing the actual trading market are "de facto" rules created by RGGI which may change in the future and potentially deprive participants of their due process rights. However, the Original Regulation also required participants to use the RGGI auction house for trading allowances. *See* Pet. for Appeal ¶¶ 34, 36. VMA's concern that RGGI rules may change in the future are merely hypothetical and not ripe for review. Furthermore, the cases VMA cites for this proposition are inapposite because they involve an agency's interpretation of a regulation. *See Va. Bd. of Med. v. Va. Physical Therapy Ass'n*, 13 Va. App. 458 (1991); *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989). Lastly, manufacturers are only required to comply with RGGI rules if they choose to acquire allowances through the RGGI auction market. They are free to acquire the required amount of allowances on a secondary market.

For the foregoing reasons, the Court **FINDS** that VMA's vagueness claims fail.

d. Whether the Amended Regulation Imposes an Unconstitutional Tax

VMA alleges that the Amended Regulation imposes an illegal tax DEQ is not authorized to levy. It claims that participants will incur costs in complying with the Amended Regulation which will then be passed down to consumers under the guise of an "environmental compliance cost" which is a tax. Because the General Assembly possesses the authority to impose taxes and has not delegated such authority to DEQ, the Amended Regulation must be declared null and void.

This taxation argument focuses on the revenues the CO_2 Budget Trading Program will generate. DEQ argues that it only sells the CO_2 allowances into the market and enforces the Amended Regulation. While the revenue is generated from the sale by DEQ, it argues that it does nothing with respect to such revenues after the sale has been made. The Court agrees. The General Assembly directed DEQ to establish, implement, and manage the CO_2 Budget Trading Program. Va. Code § 10.1-1330(B). It also authorized DEQ to sell rather than consign CO_2 allowances. *Id.* As VMA notes, DEQ did not copy and paste Virginia Code § 10.1-1330(C) into the Amended Regulation, but it did not need to do so as discussed above. Aside from the requirements set forth in Amended Regulation, DEQ has no role.

VMA conceded at oral argument that the Amended Regulation does not cloak DEQ with authority to decide where the revenue is to be held or how it is to be spent. The operational aspects concerning revenues generated is controlled by the statute itself. Va. Code § 10.1-1330(C). As part of the Act, the General Assembly directed the state treasury to hold and allocate the auction proceeds. *Id.* The General Assembly also declared that the state treasury shall distribute the proceeds "without further appropriation." *Id.*

Because VMA's constitutional challenge is directed at the Act itself, the Court **FINDS** that the Amended Regulation is not violative of the Virginia Constitution.

V. Conclusion

Upon consideration of the pleadings, briefs, argument of counsel, and for the reasons discussed above, the Court **FINDS** that DEQ did not violate the VAPA or the Virginia Constitution when it issued the Revised Regulation. Therefore, VMA's Petition for Appeal is hereby **DISMISSED**.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the Parties' endorsement of this Order.

The Clerk is directed to forward a copy of this Order to all parties.

It is so **ORDERED**.

ENTER: 7/14/21

Beverly W. Snukals
Judge