



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

March 5, 2007

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Mr. David K. Paylor  
Director, Department of Environmental Quality  
P.O. Box 1105  
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Dear Mr. Paylor:

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

## Issues Presented

At the request of the State Air Pollution Control Board ("Board"), you ask several questions concerning the Board's regulatory authority pursuant to Chapters 867 and 920 of the 2006 Acts of Assembly<sup>1</sup> ("2006 Amendment"). Specifically, you ask whether: (1) the Board may include a renewable energy set-aside<sup>2</sup> or a public health set-aside<sup>3</sup> pursuant to § 10.1-1328(C)-(D); (2) the Board is authorized

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<sup>1</sup> Chapters 867 and 920 of the 2006 Acts of Assembly are identical. See 2006 Va. Acts chs. 867, 920, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+CHAP0867+pdf>, <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+CHAP0920+pdf>, respectively (adding Article 3, Chapter 13 of Title 10.1, §§ 10.1-1327 and 10.1-1328).

<sup>2</sup> A renewable energy set-aside generally refers to making a certain amount of mercury emission allowances available for distribution to renewable energy units. The Board's recently adopted regulations implementing EPA's Clean Air Interstate Rule ("CAIR") define a renewable energy unit as "an electric generator that began commercial operation after January 1, 2006 and is powered by (i) wind, solar, ocean thermal, wave, tidal, geothermal, or biomass energy, or (ii) fuel cells powered by hydrogen generated by a renewable energy source. Renewable energy does not include energy derived from: (i) material that has been treated or painted or derived from demolition or construction material; (ii) municipal, industrial or other multiple source solid waste; and (iii) co-firing of biomass with fossil fuels or solid waste." DEP'T OF ENVTL. QUAL., Air Regulations – Chapter 140, Part II, at \*12, available at <http://www.deq.state.va.us/air/pdf/airregs/c140p2.pdf> (last visited Jan. 4, 2007) (to be codified at 9 VA. ADMIN. CODE § 5-140-1020) [hereinafter "CAIR REGS. II"]; *id.* Part III, at \*14, available at <http://www.deq.state.va.us/air/pdf/airregs/c140p3.pdf> (last visited Jan. 4, 2007) (to be codified at 9 VA. ADMIN. CODE § 5-140-2020) [hereinafter "CAIR REGS. III"]. It is my understanding that the Board adopted its CAIR regulations on December 6, 2006. Such regulations will not, however, become effective until thirty days after publication in the Virginia Register of Regulations. See VA. CODE ANN. §§ 2.2-4013(D), 2.2-4015(A) (2005). The relevant portions of the federal CAIR program provide a cap-and-trade program for emissions of nitrogen oxides and sulfur dioxides. See *infra* note 38.

to impose restrictions on the purchase of mercury allowances to demonstrate compliance with the “state-specific” regulation mandated by § 10.1-1328(D); (3) federal law prevents the Board from prohibiting Virginia sources’ compliance with a “state-specific” regulation through the purchase of mercury allowances; (4) federal law preempts § 10.1-1328(D);<sup>4</sup> (5) federal law preempts the Board from implementing § 10.1-1328(F);<sup>5</sup> and (6) whether the Commerce Clause of the Constitution of the United States prohibits the Board from adopting the regulations outlined in § 10.1-1328(D) and (F), placing restrictions on the ability of Virginia facilities to purchase mercury allowances from a national emissions market.

### Response

It is my opinion that the Board must include a renewable energy set-aside in adopting regulations implementing § 10.1-1328(C) and may construe § 10.1-1328(D) as authorizing a renewable energy set-aside. It is my opinion, however, that although the Board may authorize voluntary public health set-asides pursuant to § 10.1-1328(C)-(D), the apparent intent of the General Assembly weighs against the Board construing § 10.1-1328(C) or (D) as providing authority to the Board to include a mandatory public health set-aside under either section.

Also, questions (2) through (6), above, ask whether the identified provisions are inconsistent with the United States Constitution and thus unconstitutional either because they are preempted under the Supremacy Clause,<sup>6</sup> *i.e.*, preempted by federal law, or inconsistent with the Commerce Clause.<sup>7</sup> Attorneys General historically have refrained from opining that a statute is unconstitutional unless the statute clearly

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<sup>3</sup>You state that the Board is contemplating setting aside a portion of the total state mercury budget for public health. The allowances in the public health set-aside would be retired and not allocated to regulated entities. For purposes of this opinion, I will refer to such allowances as a “mandatory” public health set-aside. Additionally, for purposes of this opinion, the phrase “voluntary public health set-aside” refers to allowances that have been allocated to regulated entities and which are subsequently voluntarily surrendered to the permitting authority and permanently retired for public health purposes by the original holder or a subsequent transferee. As provided in the Board’s CAIR regulations cap-and-trade program, “[a]ny allowances contributed to the public health set-aside will be permanently retired and will not be available for compliance for any affected unit.” *See* CAIR REGS. II, *supra* note 2, at \*31 (to be codified at 9 VA. ADMIN. CODE § 5-140-1420(F)); CAIR REGS. III, *supra* note 2, at \*36 (to be codified at 9 VA. ADMIN. CODE § 5-140-2420(H)).

<sup>4</sup>Section 10.1-1328(D) provides for a state-specific rule in connection with mercury emissions from electric generating units.

<sup>5</sup>Section 10.1-1328(F) prohibits any electric generating facility located in a nonattainment area from meeting its compliance obligations by purchasing allowances from another facility.

<sup>6</sup>The Supremacy Clause of the United States Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

<sup>7</sup>“The Congress shall have Power” “[t]o regulate Commerce ... among the several States[.]” *Id.* art. I, § 8, cls. 1, 3, respectively.

is unconstitutional beyond a reasonable doubt.<sup>8</sup> Applying that standard, I am unable to conclude that any provision of the 2006 Amendment is unconstitutional.

### Applicable Law and Discussion

Under the federal Clean Air Act<sup>9</sup> (“CAA”), the Administrator of EPA must regulate electric utility steam generating units under 42 U.S.C.S. § 7412 (“Hazardous air pollutants”) if he finds that it is appropriate and necessary in accordance with § 7412(n)(1)(A). Regulation under § 7412 entails strict emission limitations for new and existing sources as described in § 7412(d). EPA made such an “appropriate and necessary” finding on December 20, 2000.<sup>10</sup> EPA subsequently revised the December 2000 finding on March 29, 2005, and removed coal- and oil-fired electric utility steam generating units from the list of source categories subject to regulation under § 7412.<sup>11</sup> On May 18, 2005, EPA promulgated the Clean Air Mercury Rule<sup>12</sup> (“CAMR”). Pursuant to CAMR, mercury emissions from new and existing coal-fired electric utility steam generating units are regulated pursuant to 42 U.S.C.S. § 7411.<sup>13</sup> The emissions limitations requirements of § 7411 are not as stringent as would be applicable under § 7412.

EPA promulgates standards of performance applicable to new sources as provided in accordance with 42 U.S.C.S. § 7411(b).<sup>14</sup> Additionally, § 7411(d) authorizes EPA to require states to submit a plan for EPA approval to regulate existing sources in the source category. EPA has promulgated 40 C.F.R. § 60.24(h), which requires such a plan from all fifty states and the District of Columbia. The primary requirement is that the plan contain emissions standards and compliance schedules that demonstrate it will result in compliance with the state’s annual electrical generating unit mercury budget.<sup>15</sup> Virginia’s budget is 0.592 tons for the years 2010 through 2017 and 0.234 tons for the year 2018 and thereafter.<sup>16</sup> States may, instead, adopt regulations substantively identical to EPA’s mercury budget trading program<sup>17</sup> and

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<sup>8</sup>See 1995 Op. Va. Att’y Gen. 164, 165 and opinions cited therein; see also *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) (“It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies.”); *Westover v. Barton Elec. Dep’t*, 543 A.2d 698, 699, 1988 Vt. LEXIS 26, \*3 (Vt. 1988) (“[T]he great majority of state courts have held that administrative agencies have no power to determine the constitutional validity of statutes.”); *First Bank v. Conrad*, 350 N.W.2d 580, 585, 1984 N.D. LEXIS 314, \*11-12 (N.D. 1984) (“As a general rule, administrative agencies do not determine constitutional issues, especially those under which they are to act. To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made.”) (citation omitted)).

<sup>9</sup>42 U.S.C.S. §§ 7401 to 7671q (LexisNexis 1997 & Supp. 2006).

<sup>10</sup>65 Fed. Reg. 79,825 (Dec. 20, 2000).

<sup>11</sup>70 Fed. Reg. 15,994 (Mar. 29, 2005).

<sup>12</sup>See 70 Fed. Reg. 28,606, 28,606-700 (May 18, 2005).

<sup>13</sup>*Id.* at 28,606.

<sup>14</sup>The CAMR standard for mercury for new sources is contained in 40 C.F.R. § 60.45Da and varies depending on the type of coal burned.

<sup>15</sup>40 C.F.R. § 60.24(h)(3) (2006).

<sup>16</sup>*Id.*

<sup>17</sup>See 40 C.F.R. § 60.24(h)(6)(i) (2006) (providing that state may “adopt[] regulations substantively identical to subpart HHHH”). Subpart HHHH is comprised of 40 C.F.R. §§ 60.4101 to 60.4176.

qualify for automatic approval of the state plan.<sup>18</sup> If EPA does not approve a state's plan, or if a state does not submit a plan, EPA will prescribe a federal plan for that state pursuant to § 7411(d)(2)(a). EPA has proposed its mercury budget trading program as the federal plan.<sup>19</sup>

The 2006 Session of the General Assembly enacted Article 3 ("Air Emissions Control"), Chapter 13 of Title 10.1.<sup>20</sup> Article 3 consists of two sections, § 10.1-1327, which contains definitions, and § 10.1-1328, which concerns implementation of EPA's CAIR<sup>21</sup> and CAMR.<sup>22</sup> Additionally, § 10.1-1328 provides state-specific requirements concerning mercury emissions from certain classifications of owners of electric generating units or facilities.

Section 10.1-1328(C) requires the Board to adopt EPA's mercury budget trading program rule. As previously noted, Virginia's adoption of EPA's mercury budget trading rule automatically is approved by operation of law and implements federal regulation. Virginia's state-specific CAMR legislation, § 10.1-1328(D), however, directs the Board to adopt a separate state-specific rule that is not to be submitted to EPA. Compliance with the state-specific rule is to be separately determined from compliance with the Board-adopted mercury budget trading rule.<sup>23</sup> The Virginia state-specific CAMR legislation applies to all owners of coal-fired electric generating units ("EGUs") whose combined mercury emissions in 1999 exceeded 200 pounds.<sup>24</sup> The Virginia state-specific CAMR legislation effectively identifies two separate ownership-related classifications of coal-fired EGUs for the state-specific rule.<sup>25</sup>

Section 10.1-1328(D)(3) prohibits all owners subject to the state-specific rule from demonstrating compliance with the state-specific rule by purchasing allowances.<sup>26</sup> You state that EPA has advised the Department of Environmental Quality that it must consider the state-specific rule to determine whether its

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<sup>18</sup> *Id.*

<sup>19</sup> See 71 Fed. Reg. 77,100, 77,100-147 (Dec. 22, 2006) (to be codified at 40 C.F.R., pt. 62, subpt. LLL, §§ 62.15901 to 62.15975).

<sup>20</sup> See *supra* note 1.

<sup>21</sup> See *infra* note 38.

<sup>22</sup> The Clean Air Mercury Final Rule amended federal regulations at 40 C.F.R. parts 60, 72, and 75. See 70 Fed. Reg., *supra* note 12, at 28,606-700. Following consideration of several petitions for administrative reconsideration, EPA amended certain provisions of CAMR not pertinent to the questions presented herein. See 71 Fed. Reg. 33,388, 33,388-402 (June 9, 2006).

<sup>23</sup> Section 10.1-1328(D)(4) (2006).

<sup>24</sup> Section 10.1-1328(D).

<sup>25</sup> See § 10.1-1328(D)(1) (applying to owner of one or more EGUs within Commonwealth whose combined emissions of mercury from such units exceeded 900 pounds in 1999), § 10.1-1328(D)(2) (applying to owner of one or more EGUs within Commonwealth whose combined mercury emissions in 1999 were less than 900 pounds and whose combined capacity within Commonwealth is greater or equal to 600 MW). Theoretically, there could be a third classification, all other EGUs covered by the state-specific rule. I am advised, however, that the first two classifications exhaust the universe of owners of electric generating units that fall within the applicability provision of § 10.1-1328(D) (combined emissions of mercury exceeded 200 pounds in 1999).

<sup>26</sup> The owners of EGUs covered by § 10.1-1328(D)(1)-(2), while precluded from demonstrating compliance by purchasing allowances, may demonstrate compliance with the state-specific rule by the aggregation methods described therein.

implementation restricts the ability of affected sources in Virginia from obtaining excess allowances from other sources in order to comply with their reductions under the CAMR trading program.

Additionally, § 10.1-1328(F) requires the Board to “prohibit any electric generating facility located within a nonattainment area from meeting its mercury compliance obligations through the purchase of allowances from another facility.”<sup>27</sup>

### I. Public Health Set-Asides

CAMR imposes a statewide budget (cap) on mercury emissions for the combined affected EGUs within each state.<sup>28</sup> Under CAMR’s cap-and-trade program<sup>29</sup> a share of the available budget is to be allocated to each existing affected EGU in the form of allowances.<sup>30</sup> EPA grants states the discretion to determine the methodology for allocating allowances among affected EGUs, including provisions for set-asides.<sup>31</sup>

The General Assembly, consistent with that federally authorized discretion, has determined a set-aside percentage that reduces the amount of Virginia’s budget that will be available for allocation to existing affected EGUs each year. Section 10.1-1328(C) requires the Board to adopt EPA’s Clean Air Mercury Rule, *i.e.*, EPA’s model mercury budget trading program. Specifically, § 10.1-1328(C) directs the Board to “include a set-aside of mercury allowances for new sources not to exceed 5% of the total state budget for each control period during the first five years of the program and 2% thereafter.” Accordingly, existing affected facilities may only receive 95% of the allowances that may otherwise be available under CAMR for the first five years and then 98% thereafter. Section 10.1-1328 is silent regarding whether the Board may establish an additional reduction from the overall budget in order to create a “public health” set-aside.

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.<sup>32</sup> “A statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it[.]”<sup>33</sup> Section 10.1-1328(C)-(D) establishes a dual regulatory program that provides a more stringent state-specific regulation, but also allows affected sources to satisfy EPA’s federally established CAMR requirements by participating in the national mercury trading program. Section 10.1-1328(C) specifically requires that the Board’s regulation adopting CAMR shall “include full participation by Virginia electric generating units in the EPA’s national mercury trading program.” Clause

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<sup>27</sup> Section 10.1-1328(F) does, however, allow compliance to be demonstrated by the aggregation method described therein.

<sup>28</sup> 40 C.F.R. § 60.24(h)(3).

<sup>29</sup> See *supra* note 17 and accompanying text.

<sup>30</sup> An allowance is an authorization to emit one ounce of mercury during a control period for the year allocated or any calendar year thereafter under the mercury budget trading program. See 40 C.F.R. § 60.4102 (2006) (defining “Hg Allowance”).

<sup>31</sup> See 40 C.F.R. § 60.24(h)(6)(ii).

<sup>32</sup> See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1990 Op. Va. Att’y Gen. 155, 155 and opinions cited therein.

<sup>33</sup> *Esteban v. Commonwealth*, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003); accord *Ambrogi v. Koontz*, 224 Va. 381, 386-87, 297 S.E.2d 660, 663 (1982).

2 of the 2006 Amendment<sup>34</sup> provides guidance in discerning the legislative intent. Clause 2 directs the Department of Environmental Quality to conduct a detailed assessment of mercury deposition in Virginia in order to determine whether additional steps should be taken to control mercury emissions within Virginia.<sup>35</sup> The Department must report its final findings to the Chairmen of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources as soon as practicable, but no later than October 15, 2008.<sup>36</sup> Clause 2 appears to confirm the General Assembly's intent to consider the requested report before requiring or authorizing mercury emission reductions beyond that which it has addressed in §§ 10.1-1328(D) and (F). It is my opinion that this statutory scheme adopted in the 2006 Amendment reflects the General Assembly's intention that the portion of Virginia's mercury budget available for allocation to existing affected EGUs will not be reduced further than that which it has specified for the new source set-aside. Accordingly, the addition of a mandatory public health set-aside, which would further reduce the mercury budget available for allocation to existing affected EGUs, would be inconsistent with that intent.

After allowances are allocated to regulated sources, they are available for compliance, banking for future years' compliance, trading, or voluntary retirement. The federal scheme does not preclude an original holder or a subsequent transferee of an allowance from voluntarily choosing not to use that allowance for compliance demonstration purposes. Thus, it would be consistent with the federal scheme and not inconsistent with the General Assembly's intent to provide a repository (*i.e.* a voluntary public health set-aside) for the permanent retirement of that allowance so that it may not be used for compliance purposes.

## II. Renewable Energy Set-Asides

Section 10.1-1328(A)(4), which pertains to CAIR,<sup>37</sup> a different EPA regulatory cap-and-trade program,<sup>38</sup> provides that the Board's implementing regulations "shall include a 5% set-aside of [nitrogen oxide] allowances during the first five years of the program and 2% thereafter for new sources, *including renewables and energy efficiency projects.*" (Emphasis added.) On the other hand, § 10.1-1328(C) is silent regarding whether a renewable energy set-aside is required or may be included within the new source set-aside under CAMR. At issue is whether the omission of any reference to a renewable energy set-aside in § 10.1-1328(C) demonstrates the General Assembly's intent to prohibit the Board from including such a set-aside within the CAMR set-aside for new sources.

Again, I must consider the rules of statutory construction, which provide "[w]hen a statute contains a given provision with reference to one subject, the omission of such provision from a similar statute dealing with a related subject is significant to show the existence of a different legislative intent."<sup>39</sup> However, the provision for a renewable energy set-aside in § 10.1-1328(A)(4) is mandatory making it

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<sup>34</sup> See *supra* note 1.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *supra* note 2.

<sup>38</sup> The relevant portions of EPA's CAIR provide a cap-and-trade program for emissions of nitrogen oxides and sulfur dioxides. See 40 C.F.R. §§ 96.101 to 96.188 (2006) (annual emissions of nitrogen oxides); §§ 96.201 to 96.288 (2006) (annual emissions of sulfur dioxides); §§ 96.301 to 96.388 (2006) (ozone season emissions of nitrogen oxides).

<sup>39</sup> *Williams v. Matthews*, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994).

distinguishable. Additionally, Attorneys General defer to interpretations of the agency charged with administering the law unless such interpretation clearly is wrong.<sup>40</sup> Therefore, it is my opinion that the Board may interpret the silence in § 10.1-1328(C) as the absence of a mandate to permit a renewable energy set-aside in the CAMR implementing regulation and authorize a renewable energy set-aside. The Board may deem promotion of the development and utilization of renewable energy and energy efficient projects to be consistent with its general statutory authority under Virginia's Air Pollution Control laws<sup>41</sup> to abate and control air pollution within the Commonwealth. The inclusion of a renewable energy set-aside within the new source set-aside percentage would not further limit the allowances available for allocation to existing sources and would not diminish the ability of those sources to satisfy the federally established requirements in EPA's national mercury cap-and-trade program. Thus, Virginia may participate fully in the program.

### **III. Attorneys General Refrain from Declaring Statutes Unconstitutional Unless Unconstitutionality is Clear**

You also ask several questions concerning the effect of federal law on the Board's authority to implement Virginia's state-specific CAMR legislation, especially in light of certain provisions of the United States Constitution.<sup>42</sup> Among the questions you raise are concerns regarding whether the 2006 Amendment violates the Supremacy and/or Commerce Clause of the United States Constitution.<sup>43</sup> I am unaware of any other potential federal law bases that could reasonably be viewed as invalidating provisions of the 2006 Amendment.<sup>44</sup>

A 1995 opinion of the Attorney General provides an analysis of the role of the Attorney General in opining on the constitutionality of Virginia statutes.

I am aware of no court decision or prior opinion of the Attorney General that resolves this issue.<sup>[45]</sup> In assessing ... constitutionality ..., I am guided by the doctrine that a statute is not to be declared unconstitutional unless the court is driven to that conclusion. "Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature." Following this doctrine, it has been a long-standing practice of Virginia's Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt. This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute. Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force. Further, by opining that a statute

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<sup>40</sup>2002 Op. Va. Att'y Gen. 293, 294.

<sup>41</sup>Sections 10.1-1300 to 10.1-1328 (2006).

<sup>42</sup>In addition to concerns the Board expresses about the Commerce Clause, questions about whether certain provisions of Virginia law are authorized or preempted by federal law are also questions concerning constitutionality under the Supremacy Clause of the United States Constitution.

<sup>43</sup>Specifically, you ask whether federal law prevents the implementation of Virginia law. I will address the question as an issue of preemption.

<sup>44</sup>See *supra* note 20 and accompanying text.

<sup>45</sup>Since the 1995 opinion was issued, there have been federal district and circuit court decisions. See *Clean Air Markets Group v. Pataki*, 194 F. Supp. 2d 147 (N.D. NY 2002), *aff'd* 338 F.3d 82 (2d Cir. 2003). The litigation is distinguishable factually and legally.

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is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute. This an Attorney General should not do unless he is certain beyond a reasonable doubt that a reviewing court would strike down the statute.<sup>[46]</sup>

Applying that standard, I am unable to conclude that the 2006 Amendment is unconstitutional in any respect.

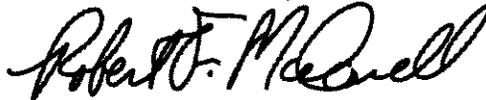
### Conclusion

Accordingly, is my opinion that the Board must include a renewable energy set-aside in adopting regulations implementing § 10.1-1328(C) and may construe § 10.1-1328(D) as authorizing a renewable energy set-aside. It is my opinion, however, that although the Board may authorize voluntary public health set-asides pursuant to § 10.1-1328(C)-(D), the apparent intent of the General Assembly weighs against the Board construing § 10.1-1328(C) or (D) as providing authority to the Board to include a mandatory public health set-aside under either section.

Also, questions (2) through (6), above, ask whether the identified provisions are inconsistent with the United States Constitution and thus unconstitutional either because they are preempted under the Supremacy Clause,<sup>47</sup> *i.e.*, preempted by federal law, or inconsistent with the Commerce Clause.<sup>48</sup> Attorneys General historically have refrained from opining that a statute is unconstitutional unless the statute clearly is unconstitutional beyond a reasonable doubt.<sup>49</sup> Applying that standard, I am unable to conclude that any provision of the 2006 Amendment is unconstitutional.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

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<sup>46</sup> 1995 Op. Va. Att'y Gen., *supra* note 8, at 165 (citations omitted).

<sup>47</sup> *See supra* note 6.

<sup>48</sup> *See supra* note 7.

<sup>49</sup> *See supra* note 8.