



LEGAL ANALYSIS ON
AUTHORIZING FULL PARTICIPATION IN THE TRANSPORTATION CLIMATE INITIATIVE

In September of 2018 Virginia Governor Northam proposed¹ having the Commonwealth become a signatory to the Transportation and Climate Initiative (TCI)², joining 10 other northeast and mid-Atlantic states. Designed to discourage and eventually eliminate the use of fossil fuels in cars and trucks, TCI proposes rationing gasoline and diesel fuel sales and initiating a per gallon gas tax hike that in some states will rise to three dollars per gallon in future years, each element imposed with the intent to drive down demand.³ In Virginia this tax would begin at 17 cents per gallon. TCI members would use these new tax proceeds “to achieve carbon emission reductions and other policy goals—like improved air quality and more affordable access to transportation.”⁴ None of the taxes would be used for maintenance of roads or bridges – the traditional purpose of gasoline taxes. These taxes would come on top of the Governor’s proposed 12 cent per gallon excise tax that would go only to roads, bridges and transit,⁵ things not funded by the TCI tax. Such TCI-compliant rationing and taxing would have the effect of reducing the tax revenues dedicated to road and bridge maintenance at a higher price per gallon.

Issues:

While there are many questions about the legality of the TCI program, an initial question arises as to what the Governor has the authority to do unilaterally. The ultimate legal questions are whether the Governor can unilaterally: (i) join TCI; (ii) condition wholesale sales of gasoline and diesel fuels on payment for the right to sell these fuels; and, (iii) ration sales of these fuels.

I. May the Governor unilaterally join TCI?

No. To become a “Signatory Jurisdiction” of TCI, a state must adopt the TCI Memorandum of Understanding (MOU).⁶ In so doing, the signatories commit their states to implementing a rationing scheme that will reduce the sales of gasoline and diesel fuels within their states. Further, for the fuels still available for sale, the Commonwealth’s wholesalers would

¹ <https://www.governor.virginia.gov/newsroom/all-releases/2018/september/headline-829610-en.html>.

² An effort coordinated out of the Georgetown University’s Climate Center, a climate alarmism advocacy group funded by liberal organizations including the Rockefeller Brothers Fund, Kresge Foundation, John D. and Catherine T. MacArthur Foundation, Barr Foundation, Energy Foundation, Merck Family Fund, New York Community Trust, Town Creek Foundation, Doris Duke Charitable Foundation, The William and Flora Hewlett Foundation, John Merck Fund, and The Summit Foundation. <https://www.georgetownclimate.org/about-us/index.html>.

³ <https://www.transportationandclimate.org/sites/default/files/20190808%20-%20TCI%20Webinar%20-%20Reference%20Case%20Results.pdf>.

⁴ Framework for a Draft Regional Policy Proposal, https://www.transportationandclimate.org/sites/default/files/TCI-Framework_10-01-2019.pdf.

⁵ Richmond Times Dispatch, “Northam wants to boost tobacco and fuel taxes, end vehicle inspections, slash registration fees”, Dec. 17, 2019, available at https://www.richmond.com/news/virginia/northam-wants-to-boost-tobacco-and-fuel-taxes-end-vehicle/article_30f6bc9c-b0ad-5b0a-a270-e1931a1e72f9.html.

⁶ Draft Memorandum of Understanding of the Transportation and Climate Initiative, Dec. 17, 2019, available at https://www.transportationandclimate.org/sites/default/files/FINAL%20TCI_draft-MOU_20191217.pdf.

have to purchase “allowances” for each gallon sold, a program to be run by the Commonwealth. Finally, in becoming a signatory to the MOU, the Commonwealth would join a federally enforceable interstate compact in order to create a multi-state market for “allowances”.

The Virginia Constitution grants the Governor the exclusive right to “conduct, either in person or in such manner as shall be prescribed by law, all intercourse with other and foreign states.”⁷ The Governor is not, however, free to unilaterally negotiate and agree to any form of interstate compact or similar agreement. First, under the U.S. Constitution, Congress must give consent to states seeking to join such a compact.⁸ Second, to the degree a compact or other agreement encompasses adoption and implementation of a state law, only the Virginia General Assembly has the authority to enact general laws, including tax laws.⁹

Virginia has entered many interstate compacts.¹⁰ The process is well known. First, the legislature authorizes the Governor to address a specific issue with other states.¹¹ Having agreed on legislative text, the General Assembly enacts legislation identical to that enacted in other states who are party to the compact. This agreed upon language is then sent to the U.S. Congress for approval.¹² Only upon such approval does the compact become enforceable, and it becomes enforceable as both a state and federal law.¹³

As discussed further below, the Virginia Governor is not free to sign the TCI MOU absent enacted legislative authority granted by the General Assembly. Even should the General Assembly enact TCI legislation, the Governor may not implement and enforce the law until it is approved by the U.S. Congress.

II. May the Governor unilaterally condition wholesale sales of gasoline and diesel fuels on payment for the right to sell these fuels?

No. At core, the legal question is as to whether the payment per gallon is a fee or a tax. Where the primary purpose of the payment is to raise revenue for a public purpose which will benefit all the citizens equally, then it is a tax.¹⁴ Under the Virginia Constitution, “[a]ll taxes shall be levied and collected under general laws”¹⁵; “the General Assembly shall enact general laws”¹⁶; and, “[t]he legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others.”¹⁷ Thus, if the payment is a tax, it must rise from a general law established by the legislature and cannot rise from a unilateral action of the Governor.

⁷ Constitution of Virginia, Article B, Section 7.

⁸ U.S. Constitution, Article I, Sec. 10.

⁹ Constitution of Virginia, Article IV, Sec.15 (enactment of general laws); Article X, Sec. 1 (establishment of taxes).

¹⁰ See, <https://law.lis.virginia.gov/compacts/>.

¹¹ See, e.g. Code of Virginia, §53.1-166.

¹² See, e.g., *Gray v. Virginia*, 276 Va. 93, 98 (Va. 2008).

¹³ See, *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The Agreement is a congressionally sanctioned interstate compact within the Compact Clause, U.S. Const., Art. I, § 10, cl. 3, and thus is a federal law subject to federal construction.” *Citing to Cuyler v. Adams*, 449 U.S. 433, 438-442 (1981).”)

¹⁴ *Tidewater Assoc. v. City of Va. Beach*, 241 Va. 114, 120 (Va. 1991).

¹⁵ Article X, Sec. 1.

¹⁶ Article IV. Sec. 15.

¹⁷ Article III, Sec. 1.

In contrast, while required to be authorized by the legislature, a fee can be imposed by the Executive branch, as long as there is “a reasonable correlation between the benefit conferred and the cost exacted by the ordinance.”¹⁸ Thus, we must ask, can this TCI fuels payment qualify as a fee? Comparison of the fuels wholesaler license indicates the nature of a fee versus a tax in the Commonwealth.

Under Code of Virginia § 58.1, Subtitle II, Chapter 22, Article 2. “Motor Fuel Licensing”, the Commonwealth establishes several conditions precedent to obtaining a license that allows lawful sale, delivery and use of transportation fuels. Among these conditions is the requirement on the wholesaler (and others in related businesses) to post a bond or certificate of deposit. This bond or deposit of funds, while not described as a fee, it is also not a tax. It is most like a fee in that the court has construed this payment as “an additional means of insuring payment and compliance with other provisions.”¹⁹ In contrast, the Commonwealth assesses a true excise tax on fuels under § 38.1-2217 et seq. Those taxes are paid into the state treasury for the benefit of all citizens through the Commonwealth Transportation Fund.²⁰

The General Assembly has authorized true fees²¹, but they meet the exact formula as described in *Mountain View Partnership*, cited in the margin below. As well, the General Assembly has authorized local governments to assess payments for the simple right to do business²², but these are clearly described as license taxes, are to produce general revenue for localities and are not available for use by the Governor.²³

As established in the MOU, the payment per gallon of fuel is a condition precedent to a lawful sale of the fuel, not unlike a licensing tax. It is not a payment tied directly to the administration of fuels sales and distribution, as would be required if it were a fee.²⁴ Its purpose is to generate revenue to be spent on reducing emissions of greenhouse gases which will benefit all the citizens equally. None of these purposes constitutes a “fee-for-service” to the fuels wholesaler, as would be required of a fee.²⁵

III. May the Governor unilaterally ration sales of gasoline and diesel fuels?

No. The General Assembly has strictly prohibited capping or rationing sales of petroleum products to distributors, except under very limited circumstances, such as force majeure or as may be required by an agency of the federal or state government responsible for regulating allocations of petroleum products.²⁶ The only state authority allowing regulation of

¹⁸ *Mountain View Partnership v. Clifton Forge*, 256 Va. 304, 312 (Va. 1998).

¹⁹ *Commonwealth v. Shell Oil Co.*, 210 Va. 163, 167 (Va. 1969).

²⁰ *See*, Code of Virginia § 58.1-2289.

²¹ *See, e.g.*, Code of Virginia § 18.2-340.31 (audit and administration fee); *and see, Twietmeyer v. City of Hampton*, 255 Va. 387, 392 (Va. 1998) (“The fee is tied directly to the administration of stormwater management and is not meant to raise general revenue.”)

²² Code of Virginia § 58.1-3700.

²³ Code of Virginia § 58.1-3000.

²⁴ *Twietmeyer v. City of Hampton*, 255 Va. at 392.

²⁵ *Eagle Harbor, v. Isle of Wight County*, 628 S.E.2d 298, 304 (Va. 2006).

²⁶ Code of Virginia § 59.1-21.18:3.

allocations applies exclusively during periods of shortage; and then, the fuels must be apportioned among purchasers in the same proportion as when there is no shortage.²⁷

Conclusion

The Governor of Virginia is without authority to adopt, regulate under or enforce the Transportation and Climate Initiative Memorandum of Understanding absent new legislative authority to impose a carbon car tax on fuels and new legislative authority to ration fuels sales.

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²⁷ Code of Virginia § 59.1-21.16:2.