

# EXHIBIT A

# Title 26 DEPARTMENT OF THE ENVIRONMENT

## Subtitle 11 AIR QUALITY

### 26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units

Authority: Environment Article, §§1-404, 2-103, and 2-301—2-303, Annotated Code of Maryland

#### Notice of Final Action

On January 16, 2015, the Secretary of the Environment adopted new Regulations .01 and .06 under 26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units. This action, which was proposed for adoption in 41:24 Md. R. 1449-1454 (December 1, 2014), has been adopted with the nonsubstantive changes below.

**Effective Date: February 2, 2015**

#### Attorney General's Certification

In accordance with State Government Article, §10-113, Annotated Code of Maryland, the Attorney General certifies that the following changes do not differ substantively from the proposed text. The nature of the changes and the basis for this conclusion are as follows: the following text clarifications that do not change the intent or impact of the Section.

#### **.03 2015 NO<sub>x</sub> Emission Control Requirements.**

A. Daily NO<sub>x</sub> Reduction Requirements During the Ozone Season.

(1) Not later than 45 days after the effective date of this regulation, the owner or operator of an affected electric generating unit shall submit a plan to the Department and EPA for approval that demonstrates how each affected electric generating unit ("the unit") will operate installed pollution control technology and combustion controls to meet the requirements of §A(2) of this regulation. The plan shall summarize the data that will be collected to demonstrate compliance with §A(2). The plan shall cover all modes of operation, including but not limited to normal operations, start-up, shut-down and low *[[capacity]] load* operations.

(2) (proposed text unchanged)

#### **.05 Compliance Demonstration Requirements.**

A. Procedures for demonstrating compliance with §.03(A) of this chapter.

(1) (proposed text unchanged)

(2) An affected electric generating unit shall not be required to submit a unit-specific report consistent with §A(3) of this regulation *[[where]] when* the unit emits at levels that are at or below the following rates:

(3) The owner or operator of an affected electric generating unit subject to §.03(A)(2) of this chapter shall submit a unit-specific report for each day the unit exceeds its NO<sub>x</sub> emission rate of §A(2) of this regulation, which shall include the following information for the entire operating day:

(a) – (g) (proposed text unchanged)

(h) (proposed text unchanged)

(i) – (ii) (proposed text unchanged)

(iii) dispatch requirements that mandate unplanned operation (e.g. start-ups and shut-downs, idling and operation at low voltage or low *[[capacity]] load*);

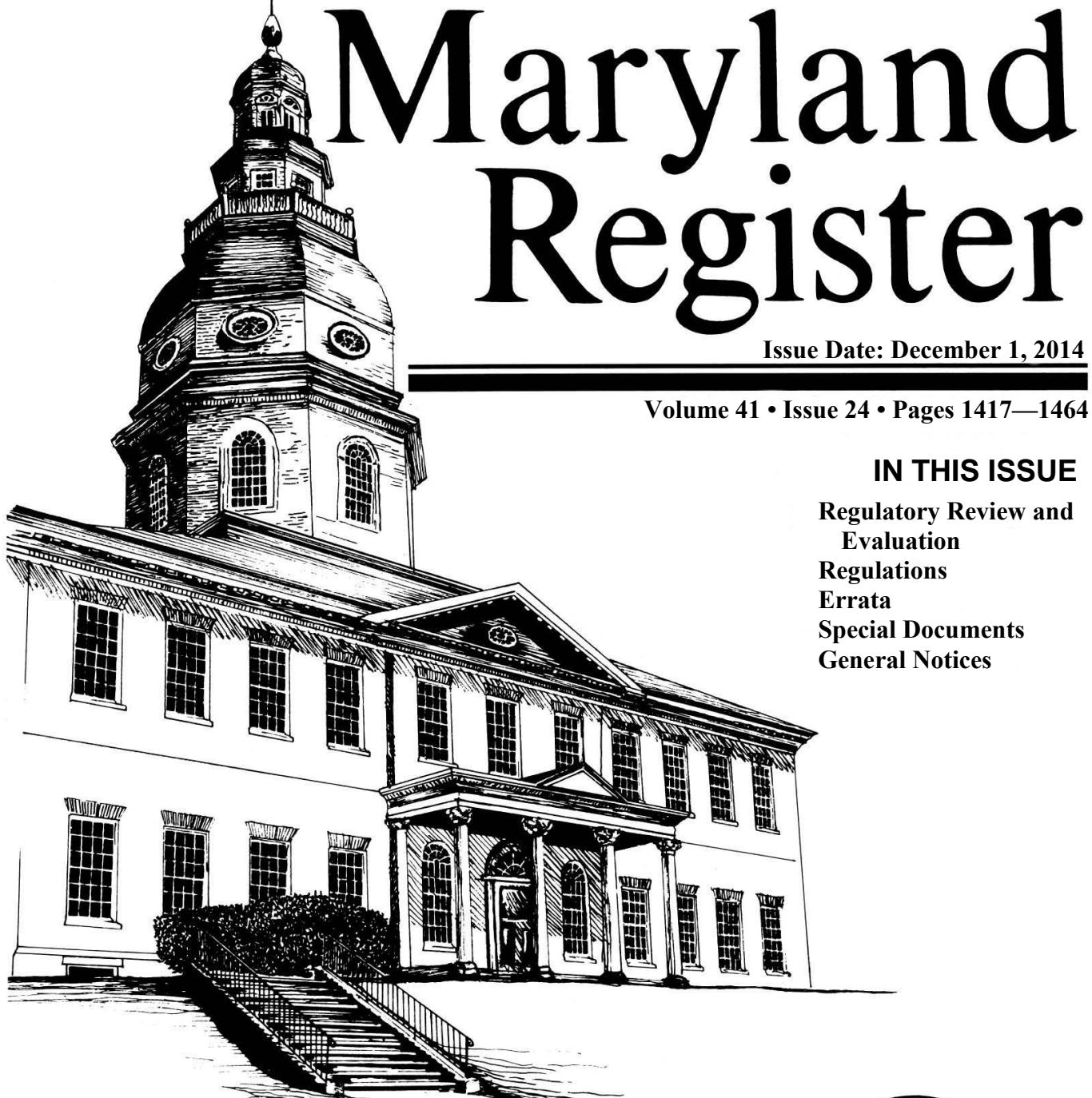
(i) – (j) (proposed text unchanged)

(4) An exceedance of the emissions rate of §A(2) of this regulation as a result of factors, including but not limited to start-up and shut-down, days when the unit was directed by the electric grid operator to operate at low [[capacity]] load or to operate pursuant to any emergency generation operations required by the electric grid operator, including necessary testing for such emergency operations or to have otherwise occurred during operations which are deemed consistent with the unit's technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions, shall not be considered a violation of §.03A(2) of this chapter provided that the provisions of the approved plan as required in §.03A(1) are met.

B. (proposed text unchanged)

David Costello  
Acting Secretary of the Environment

# EXHIBIT B



# Maryland Register

Issue Date: December 1, 2014

Volume 41 • Issue 24 • Pages 1417—1464

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Regulatory Review and  
Evaluation  
Regulations  
Errata  
Special Documents  
General Notices

Pursuant to State Government Article, §7-206, Annotated Code of Maryland, this issue contains all previously unpublished documents required to be published, and filed on or before November 7, 2014, 5 p.m.

Pursuant to State Government Article, §7-206, Annotated Code of Maryland, I hereby certify that this issue contains all documents required to be codified as of November 7, 2014.

Brian Morris  
Acting Administrator, Division of State Documents  
Office of the Secretary of State



# Information About the Maryland Register and COMAR

## MARYLAND REGISTER

The Maryland Register is an official State publication published every other week throughout the year. A cumulative index is published quarterly.

The Maryland Register is the temporary supplement to the Code of Maryland Regulations. Any change to the text of regulations published in COMAR, whether by adoption, amendment, repeal, or emergency action, must first be published in the Register.

The following information is also published regularly in the Register:

- Governor's Executive Orders
- Attorney General's Opinions in full text
- Open Meetings Compliance Board Opinions in full text
- State Ethics Commission Opinions in full text
- Court Rules
- District Court Administrative Memoranda
- Courts of Appeal Hearing Calendars
- Agency Hearing and Meeting Notices
- Synopses of Bills Introduced and Enacted by the General Assembly
- Other documents considered to be in the public interest

### CITATION TO THE MARYLAND REGISTER

The Maryland Register is cited by volume, issue, page number, and date. Example:

- 19:8 Md. R. 815—817 (April 17, 1992) refers to Volume 19, Issue 8, pages 815—817 of the Maryland Register issued on April 17, 1992.

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### CITATION TO COMAR REGULATIONS

COMAR regulations are cited by title number, subtitle number, chapter number, and regulation number. Example: COMAR 10.08.01.03 refers to Title 10, Subtitle 08, Chapter 01, Regulation 03.

### DOCUMENTS INCORPORATED BY REFERENCE

Incorporation by reference is a legal device by which a document is made part of COMAR simply by referring to it. While the text of an incorporated document does not appear in COMAR, the provisions of the incorporated document are as fully enforceable as any other COMAR regulation. Each regulation that proposes to incorporate a document is identified in the Maryland Register by an Editor's Note. The Cumulative Table of COMAR Regulations Adopted, Amended or Repealed, found online, also identifies each regulation incorporating a document. Documents incorporated by reference are available for inspection in various depository libraries located throughout the State and at the Division of State Documents. These depositories are listed in the first issue of the Maryland Register published each year. For further information, call 410-974-2486.

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An Administrative History at the end of every COMAR chapter gives information about past changes to regulations. To determine if there have been any subsequent changes, check the "Cumulative Table of COMAR Regulations Adopted, Amended, or Repealed" which is found online at [www.dsd.state.md.us/CumulativeIndex.pdf](http://www.dsd.state.md.us/CumulativeIndex.pdf). This table lists the regulations in numerical order, by their COMAR number, followed by the citation to the Maryland Register in which the change occurred. The Maryland Register serves as a temporary supplement to COMAR, and the two publications must always be used together. A Research Guide for Maryland Regulations is available. For further information, call 410-260-3876.

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- By submitting data or views on proposed regulations either orally or in writing, to the proposing agency (see "Opportunity for Public Comment" at the beginning of all regulations appearing in the Proposed Action on Regulations section of the Maryland Register). (See SG, §10-112)
- By petitioning an agency to adopt, amend, or repeal regulations. The agency must respond to the petition. (See SG §10-123)
- By petitioning an agency to issue a declaratory ruling with respect to how any regulation, order, or statute enforced by the agency applies. (SG, Title 10, Subtitle 3)
- By petitioning the circuit court for a declaratory judgment on the validity of a regulation when it appears that the regulation interferes with or impairs the legal rights or privileges of the petitioner. (SG, §10-125)
- By inspecting a certified copy of any document filed with the Division of State Documents for publication in the Maryland Register. (See SG, §7-213)

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Copies of the proposed action and supporting documents are available for review at the following locations:

- The Department of the Environment's website at:  
[http://www.mde.state.md.us/programs/regulations/air/Pages/req\\_comments.aspx](http://www.mde.state.md.us/programs/regulations/air/Pages/req_comments.aspx)
- The Air and Radiation Management Administration; and
- Regional offices of the Department in Cumberland and Salisbury.

Anyone needing special accommodations at the public hearing should contact the Department's Fair Practices Office at (410) 537-3964.

TTY users may contact the Department through the Maryland Relay Service at 1-800-735-2258.

Editor's Note on Incorporation by Reference

Pursuant to State Government Article, §7-207, Annotated Code of Maryland, the California Code of Regulations (CCR), Title 13 Motor Vehicles, Division 3 Air Resources Board, Chapters 1, 2, 3, and 4.4 has been declared a document generally available to the public and appropriate for incorporation by reference. For this reason, it will not be printed in the Maryland Register or the Code of Maryland Regulations (COMAR). Copies of this document are filed in special public depositories located throughout the State. A list of these depositories was published in 41:1 Md. R. 9 (January 10, 2014), and is available online at [www.dsd.state.md.us](http://www.dsd.state.md.us). The document may also be inspected at the office of the Division of State Documents, 16 Francis Street, Annapolis, Maryland 21401.

**.02 Incorporation by Reference.**

A. (text unchanged)

B. Documents Incorporated.

(1)—(8) (text unchanged)

(9) Title 13, California Code of Regulations (CCR), Division 3, Chapter 1, Article 2, §1962.1 Zero-Emission Vehicle Standards for 2009 through 2017 Model Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, as effective [December 31, 2012] *July 10, 2014*.

(10) Title 13, California Code of Regulations (CCR), Division 3, Chapter 1, Article 2, §1962.2 Zero-Emission Vehicle Standards for 2018 and Subsequent Model Year Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles, as effective [December 31, 2012] *July 10, 2014*.

(11)—(33) (text unchanged)

(34) Title 13, California Code of Regulations (CCR), Division 3, Chapter 2, Article 2.1, §2111 Applicability, as effective [August 16, 2009] *December 8, 2010*.

(35)—(45) (text unchanged)

(46) Title 13, California Code of Regulations (CCR), Division 3, Chapter 2, Article 2.2, §2122 General Provisions, as effective [January 4, 2008] *December 8, 2010*.

(47)—(59) (text unchanged)

(60) Title 13, California Code of Regulations (CCR), Division 3, Chapter 2, Article 2.3, §2136 General Provisions, as effective [January 4, 2008] *December 8, 2010*.

(61)—(64) (text unchanged)

(65) Title 13, California Code of Regulations (CCR), Division 3, Chapter 2, Article 2.4, §2141 General Provisions, as effective [January 4, 2008] *December 8, 2010*.

(66)—(78) (text unchanged)

(79) Title 13, California Code of Regulations (CCR), Division 3, Chapter 4.4, §2235 Requirements, as effective August [7] 8, 2012.

ROBERT M. SUMMERS, PH.D.  
Secretary of the Environment

## Subtitle 11 AIR QUALITY

### 26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units

*Authority: Environment Article, §§1-404, 2-103, and 2-301—2-303, Annotated Code of Maryland*

#### Notice of Proposed Action

[14-349-P]

The Secretary of the Environment proposes to adopt new Regulations **.01—06** under a new chapter, **COMAR 26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units**.

#### Statement of Purpose

The purpose of this action is to establish new nitrogen oxides (NO<sub>x</sub>) emission standards and additional monitoring and reporting requirements for coal-fired electric generating units in Maryland. The new standards for coal-fired electric generating units in Maryland and resulting reductions in NO<sub>x</sub> emissions are needed to achieve attainment of the National Ambient Air Quality Standard (NAAQS) for ozone and will satisfy the requirements of §182 of the federal Clean Air Act.

This action will be submitted to the U.S. Environmental Protection Agency (EPA) for approval as part of Maryland's State Implementation Plan.

#### Background

In 2012, portions of Maryland were designated as nonattainment for the 75 parts per billion (ppb) ozone NAAQS. Ozone is produced when volatile organic compounds (VOCs) and nitrogen oxides (NO<sub>x</sub>) react in the presence of heat and sunlight. The Department has found through a research partnership with the University of Maryland that NO<sub>x</sub> reductions are more effective at reducing ozone levels than VOC reductions.

Under the federal Clean Air Act, 42 U.S.C. § 7401 et seq., sources in ozone nonattainment areas classified as moderate and above are subject to a NO<sub>x</sub> Reasonably Available Control Technology (RACT) requirement.

Section 182 of the Clean Air Act requires the Maryland Department of the Environment (MDE) to review and revise NO<sub>x</sub> RACT requirements in the Maryland State Implementation Plan (SIP) as necessary to achieve compliance with new more stringent ambient air quality standards. EPA defines RACT as the lowest emissions limitation (e.g., on a part per million or pound per million Btu basis) that a particular source is capable of meeting by the application of control technology (e.g., installation and operation of low-NO<sub>x</sub> burners) that is reasonably available considering technological and economic feasibility. In reviewing existing NO<sub>x</sub> RACT requirements for adequacy, the Department considers technological advances, the stringency of the revised ozone standard and whether new sources subject to RACT requirements are present in the nonattainment area. Maryland's RACT SIP for the new 75 ppb ozone standard must examine existing controls on major sources of NO<sub>x</sub> to determine whether additional controls are economical and technically feasible.

In 2015, MDE is also required to submit an ozone attainment SIP that includes emission reduction strategies designed to achieve compliance with the 75 ppb ozone standard by 2018. Reductions in NO<sub>x</sub> emissions from coal-fired electric generating units on high electricity demand days during the ozone season are necessary to achieve compliance with the 75 ppb standard and will also be necessary to achieve compliance with the more stringent ozone standard EPA is expected to propose in December 2014. The measures required by this proposed action to reduce NO<sub>x</sub> emissions



## PROPOSED ACTION ON REGULATIONS

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will address peak day NO<sub>x</sub> emissions as well as satisfy the requirement to update the NO<sub>x</sub> RACT standard.

To comply with the Maryland Healthy Air Act (or HAA), all active coal-fired electric generating units installed NO<sub>x</sub> reduction technologies that utilize chemical reductants to lower NO<sub>x</sub> emissions. These technologies included selective catalytic reduction (SCR), selective non-catalytic reduction (SNCR), and selective alternative catalytic reduction (SACR). Implementation of the Healthy Air Act resulted in significant reductions in NO<sub>x</sub> emissions through the establishment of separate annual and ozone season mass emission limitations or caps on the affected coal-fired units. The HAA allows system-wide averaging to demonstrate compliance with the emission limits, i.e., compliance is demonstrated so long as total NO<sub>x</sub> emissions from all units in a system do not exceed the aggregate tonnage limit for all units in the “system”—defined as all units under the same ownership. At this time, there are two “systems” in Maryland: (1) the Raven Power Finance LLC (Raven Power) System comprised of Brandon Shores Units 1 and 2, H. A. Wagner Units 2 and 3, and C. P. Crane Units 1 and 2; and (2) the NRG Energy, Inc. (NRG) system comprised of Morgantown Units 1 and 2, Chalk Point Units 1 and 2, and Dickerson Units 1, 2 and 3.

Previously owners of the plants now owned by Raven Power and NRG installed SCR, SNCR or SACR on units subject to the Healthy Air Act. The ability to average emissions across a system provided flexibility to install the most advanced controls (SCR) at some units, and controls with lower NO<sub>x</sub> emission removal efficiency (SACR and SNCR) at the remaining units. “Baseload” units were equipped with SCR while “load following” units were predominantly equipped with SNCR or SACR. Overall, the operation of the combination of controls yielded a 75 percent reduction in NO<sub>x</sub> emissions from 2002 levels. The mass emission caps driving this reduction were established based on historic comparatively high utilization rates for the units.

In recent years the utilization of coal plants has changed dramatically on a national level, as well as in Maryland. The sharp decline in natural gas prices, rising cost of coal, and reduced demand for electricity are all contributing to a substantial reduction in the utilization of coal-fired plants. With increasing frequency, these older, less efficient plants operate primarily during periods of peak demand. This reduction in operation results in lower system-wide annual and ozone season NO<sub>x</sub> emissions, thereby allowing the units to operate at higher emission rates, while remaining below the HAA emission caps.

The Department found, through its recent review of 2007 through 2013 emissions data from Maryland coal-fired units equipped with SCRs, SNCRs and SACRs many of the coal-fired units were not consistently operating their previously installed controls to optimize emission reductions—particularly during ozone season periods of high electricity demand when ozone levels are highest. In fact, during the most recent years, average ozone season NO<sub>x</sub> emission rates for certain units were increasing. This practice has resulted in high NO<sub>x</sub> emissions on days when emission reductions are most needed to avoid exceedances of the ozone standard.

This proposed regulation, when effective, will result in immediate reductions in ozone season NO<sub>x</sub> emissions from these sources, which are needed to achieve and maintain compliance with the 75 ppb ozone standard. In the longer term additional reductions will come primarily from seven units that are not equipped with SCR controls and are high NO<sub>x</sub> emitters when called upon to run — Chalk Point Unit 2; Wagner Unit 2; Crane Units 1 and 2; and Dickerson Units 1, 2, and 3.

#### Affected Sources

This action impacts coal-fired electric generating units (EGUs) in Maryland, which account for more than 80 percent of the State’s

power plant NO<sub>x</sub> emissions. Affected EGUs include: Brandon Shores (Units 1 and 2); C.P. Crane (Units 1 and 2), H.A. Wagner (Units 2 and 3) plants; Chalk Point (Units 1 and 2), Morgantown (Units 1 and 2), Dickerson (Units 1, 2 and 3); and AESWarrior Run.

#### Requirements

This action is part of a broader strategy to further reduce NO<sub>x</sub> emissions from coal-fired EGUs in the State by requiring owners and operators of affected EGUs to comply with the following measures:

- No later than 45 days after the effective date of this regulation, submit a plan to MDE, for approval by MDE and EPA, that demonstrates how the unit will operate installed pollution control technology and combustion controls to minimize emissions;

- Beginning May 1, 2015, and during the entire ozone season whenever the unit is combusting coal, operate and optimize the use of all installed pollution and combustion controls consistent with the technological limitations, manufacturers’ specifications, good engineering, maintenance practices, and air pollution control practices to minimize emissions (as defined in 40 C.F.R. § 60.11(d));

- Demonstrate compliance by meeting a system-wide NO<sub>x</sub> emission rate of 0.15 lbs/MMBtu as a 30-day rolling average during the ozone season. A unit that is located at an electric generating facility that is the only facility in Maryland directly, or indirectly owned, operated or controlled by the owner, operator or controller of the facility is exempt from the obligation to meet this NO<sub>x</sub> emission rate;

- Continue to meet the ozone season and annual NO<sub>x</sub> reduction requirements set forth in COMAR 26.11.27;

- Meet a NO<sub>x</sub> emission rate of 0.10 lbs/MMBtu as a 24-hour block average on an annual basis if the unit is a fluidized bed combustor;

- No later than June 1, 2020, the owner or operator of C.P. Crane Units 1 and 2, Chalk Point Unit 2, Dickerson Units 1, 2, and 3 and H.A. Wagner Unit 2 must comply with one the following three options:

- (i) install and operate a selective catalytic reduction (SCR) control system during the ozone season and meet a NO<sub>x</sub> emission rate of 0.09 lbs/MMBtu, as determined on a 30-day rolling average during the ozone season;

- (ii) permanently retire the unit; or

- (iii) switch the unit’s fuel from coal to natural gas.

- Demonstrate compliance with the requirements and emission rates in the regulation in accordance with the prescribed procedures.

#### Projected Emissions Reductions

The Department projects that implementation of Regulation .03 requirements will result in an estimated daily NO<sub>x</sub> emission reduction of 25 percent and 9 tons from average levels of 36 tons/day during the period from 2011 through 2013 as long as the two current systems remain intact. Additional emission reductions should be realized on peak days as the NO<sub>x</sub> emission rate restrictions will achieve better performance from units that traditionally are operated only upon high electricity demand days. A more accurate estimate of daily reductions can be made after compliance plans from the affected sources are approved by the Department. The estimated daily NO<sub>x</sub> emission reduction due to implementation of Regulation .04 in 2020 ranges from 30 to 36 percent below the aggregate potential to emit with a maximum reduction of 17 tons/day.

#### Comparison to Federal Standards

There is a corresponding federal standard to this proposed action, but the proposed action is not more restrictive or stringent.

PROPOSED ACTION ON REGULATIONS

Estimate of Economic Impact

**I. Summary of Economic Impact.** As described above, the new regulation provides three options from which affected sources may choose to achieve compliance with the 2020 requirements. Affected sources have 5 years to analyze compliance options and projected changes in energy markets to select the most cost-effective compliance option. The flexible regulatory approach and 5-year lead time makes it difficult at this time to quantify future costs.

Implementation of these regulations will result in reduced ozone levels thereby reducing the adverse health impacts experienced by many Marylanders caused by exposure to high levels of ozone. These benefits include a lower incidence of hospitalizations, respiratory illnesses, and restricted activity days. Health benefits are influenced by many factors and monetizing benefits is difficult. Ozone season economic benefits from reduced incidents ranges from \$60,000—\$300,000,000 (in 2010 dollars).

All of Maryland’s coal-fired EGUs are currently equipped with either the most efficient or second most efficient available NO<sub>x</sub> control technology, SCR and SNCR or SACR, respectively. Compliance with the 2015 requirements will require all coal-fired units to operate and optimize existing pollution and combustion controls to minimize NO<sub>x</sub> emissions during the ozone season. The cost of optimizing operation of the existing control technologies (SCR and SNCR and SACR) annually for each affected unit individually is estimated to be in the range of \$430,000 to \$4,300,000 for each affected unit.

As noted above, compliance with the 2020 requirements can be achieved through one of three options. Under the first option for 2020 compliance, units currently equipped with SNCR or SACR control technologies could remove and replace those technologies with the more advanced SCR technology. Installation of state-of-the-art SCR controls on a unit can cost up to \$200,000,000. The performance and removal efficiency of the controls at a specific unit can depend in part on how much the unit operates. We note that in 2012 Securities and Exchange Commission filings, the previous owners of the units now owned by NRG indicated their intent to install SCR technology at Chalk Point Unit 2 and Dickerson Units 1, 2 and 3.

Under the second compliance option, affected units could convert to cleaner burning natural gas. The installed cost of a natural gas combined cycle unit is approximately \$1,000,000 per megawatt of capacity. The regulation provides a significant 5-year compliance lead time. This is particularly important for the natural gas option, as the utilization of natural gas is projected to significantly increase due to the dynamics of the energy market. The availability of natural gas, site specific constraints and market fuel prices will factor into decisions about selection of this option.

The third compliance option is retirement of the unit(s). Many of the units subject to this regulation were built in the 1950s and are much less efficient than modern units. Some of these units may simply be reaching the end of their ability to efficiently produce energy and the costs associated with fuel switching or installation and operation of advanced NO<sub>x</sub> controls would reduce the unit’s profitability.

There will be no expected impact on the Department, other State agencies, or local governments as a result of this action.

II. Types of Economic Impact.	Revenue (R+/R-)	Magnitude
	Expenditure (E+/E-)	
A. On issuing agency: (E+)		Minimal
B. On other State agencies:	NONE	Minimal

C. On local governments:	NONE	Minimal
	Benefit (+) Cost (-)	Magnitude
D. On regulated industries or trade groups:		
Compliance Costs (-)		\$430,000— \$300,000,000
E. On other industries or trade groups:		
MD Contractors (+)		Indeterminate
F. Direct and indirect effects on public:		
(1) Health Benefits (+)		\$60,000— \$300,000,000
(2) Electricity Rates (-)		Indeterminate

**III. Assumptions.** (Identified by Impact Letter and Number from Section II.)

A. The Department maintains both a compliance and permitting program for major sources as required by the Clean Air Act. These programs will implement these regulations.

B. There are no anticipated tasks or compliance activities required of other State agencies due to these regulations.

C. There are no anticipated tasks or compliance activities required of local government due to these regulations.

D. It is difficult to determine the precise costs to regulated entities associated with implementation of this action because there can be of a number of site-specific requirements and variables associated with the cost of installation and operation of pollution control equipment or installation of new equipment at specific plants. Companies must optimize their existing control equipment to meet the 2015 requirements. The annual operating and maintenance cost for a single unit can range from \$430,000 to \$4,300,000. Optimization of the operation of the existing controls many push annual operating and maintenance costs toward the high end of the estimates or even add some additional costs but the exact additional cost if any cannot be determined at this time. Companies can choose from three options to meet 2020 requirements. Raven Power and NRG submitted cost analyses for the replacement of existing SNCR/SACR control technology with SCR control technology for certain units. Capital cost estimates for this change in technology on an individual unit range from \$40,000,000 to \$200,000,000. Operating and maintenance costs range from \$430,000 to \$4,300,000 (in 2014 dollars). Additionally, the regulations allow fuel switching to natural gas. Current publications and review of recently built facilities that have installed natural gas boilers indicates the cost of installation to be approximately \$1,000,000 per megawatt of capacity. Therefore an anticipated range of cost for installing a natural gas boiler is \$25,000,000 to \$300,000,000 (in 2014 dollars). In the case of a unit retirement, the company will lose revenue and may face decommissioning costs. Therefore the Department anticipates costs will range from \$430,000 to \$300,000,000 for any of the options.

E. Installation of SCR technology or natural gas-fired boilers is usually performed by specially trained tradesmen. Maryland contractors and equipment manufacturers may see an increase in demand for services; however, the magnitude of the increase that may result is indeterminate.

F(1). Health benefits are influenced by many factors and monetizing benefits is difficult. Implementation of these regulations

## PROPOSED ACTION ON REGULATIONS

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will result in a reduction of incidents in which Marylanders experience adverse health effects, including hospitalizations, illnesses, restricted activity days and other effects caused by air pollution and exposure to ground level ozone. Ozone season economic benefits from reduced incidents ranges from \$60,000 to \$300,000,000 (in 2010 dollars).

F(2). Commercial and consumer electricity rates are influenced by many factors. The costs associated with implementation of this action may be one factor that influences these rates, but the magnitude of that influence is difficult to quantify when considered along with other factors that significantly affect electric rates.

#### Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

#### Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

#### Opportunity for Public Comment

The Department of the Environment will hold a public hearing on the proposed action on January 7, 2015 at 11 a.m. at the Department of the Environment, 1800 Washington Boulevard, 1st Floor Conference Rooms, Baltimore, Maryland 21230-1720. Interested persons are invited to attend and express their views. Comments may be sent to Mr. Randy Mosier, Chief of the Regulation Division, Air and Radiation Management Administration, Department of the Environment, 1800 Washington Boulevard, Suite 730, Baltimore, Maryland 21230-1720, or email to [randy.mosier@maryland.gov](mailto:randy.mosier@maryland.gov). Comments must be received no later than January 7, 2015, or be submitted at the hearing. For more information, call Randy Mosier at (410) 537-4488.

Copies of the proposed action and supporting documents are available for review at the following locations:

- The Department of the Environment's website at: [http://www.mde.state.md.us/programs/regulations/air/Pages/req\\_comments.aspx](http://www.mde.state.md.us/programs/regulations/air/Pages/req_comments.aspx)
- The Air and Radiation Management Administration; and
- Regional offices of the Department in Cumberland and Salisbury.

Anyone needing special accommodations at the public hearing should contact the Department's Fair Practices Office at (410) 537-3964.

TTY users may contact the Department through the Maryland Relay Service at 1-800-735-2258.

#### .01 Definitions.

A. In this chapter, the following terms have the meanings indicated.

##### B. Terms Defined.

(1) "Affected electric generating unit" means any one of the following coal-fired electric generating units:

- (a) Brandon Shores Units 1 and 2;
- (b) C.P. Crane Units 1 and 2;
- (c) Chalk Point Units 1 and 2;
- (d) Dickerson Units 1, 2, and 3;
- (e) H.A. Wagner Units 2 and 3;
- (f) Morgantown Units 1 and 2; and
- (g) Warrior Run.

(2) "Operating day" means a 24-hour period beginning midnight of one day and ending the following midnight, or an alternative 24-hour period approved by the Department, during which time an installation is operating, consuming fuel, or causing emissions.

(3) "Ozone season" means the period beginning May 1 of any given year and ending September 30 of the same year.

(4) System.

(a) "System" means all affected electric generating units within the State of Maryland subject to this chapter that are owned, operated, or controlled by the same person and are located:

(i) In the same ozone nonattainment area as specified in 40 CFR Part 81; or

(ii) Outside any designated ozone nonattainment area as specified in 40 CFR 81.

(b) A system must include at least two affected electric generating units.

(5) "System operating day" means any day in which an electric generating unit in a system operates.

(6) "30-day rolling average emission rate" means a value in lbs/MMBtu calculated by:

(a) Summing the total pounds of pollutant emitted from the unit during the current operating day and the previous 29 operating days;

(b) Summing the total heat input to the unit in MMBtu during the current operating day and the previous 29 operating days; and

(c) Dividing the total number of pounds of pollutant emitted during the 30 operating days by the total heat input during the 30 operating days.

(7) "30-day system-wide rolling average emission rate" means a value in lbs/MMBtu calculated by:

(a) Summing the total pounds of pollutant emitted from the system during the current system operating day and the previous 29 system operating days;

(b) Summing the total heat input to the system in MMBtu during the current system operating day and the previous 29 system operating days; and

(c) Dividing the total number of pounds of pollutant emitted during the 30 system operating days by the total heat input during the 30 system operating days.

(8) "24-hour block average emission rate" means a value in lbs/MMBtu calculated by:

(a) Summing the total pounds of pollutant emitted from the unit during 24 hours between midnight of one day and ending the following midnight;

(b) Summing the total heat input to the unit in MMBtu during 24 hours between midnight of one day and ending the following midnight; and

(c) Dividing the total number of pounds of pollutant emitted during 24 hours between midnight of one day and ending the following midnight by the total heat input during 24 hours between midnight of one day and ending the following midnight.

#### .02 Applicability.

The provisions of this chapter apply to an affected electric generating unit as that term is defined in Regulation .01B of this chapter.

#### .03 2015 NO<sub>x</sub> Emission Control Requirements.

A. Daily NO<sub>x</sub> Reduction Requirements During the Ozone Season.

(1) Not later than 45 days after the effective date of this regulation, the owner or operator of an affected electric generating unit shall submit a plan to the Department and EPA for approval that demonstrates how each affected electric generating unit ("the unit") shall operate installed pollution control technology and combustion controls to meet the requirements of §A(2) of this regulation. The plan shall summarize the data that will be collected to demonstrate compliance with §A(2) of this regulation. The plan shall cover all modes of operation, including but not limited to normal operations, start-up, shut-down and low capacity operations.

PROPOSED ACTION ON REGULATIONS

(2) Beginning on May 1, 2015, for each operating day during the ozone season, the owner or operator of an affected electric generating unit shall minimize NO<sub>x</sub> emissions by operating and optimizing the use of all installed pollution control technology and combustion controls consistent with the technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions, as defined in 40 C.F.R. § 60.11(d), for such equipment and the unit at all times the unit is in operation while burning any coal.

**B. Ozone Season NO<sub>x</sub> Reduction Requirements.**

(1) Except as provided in §B(3) of this regulation, the owner or operator of an affected electric generating unit may not exceed a NO<sub>x</sub> 30-day system-wide rolling average emission rate of 0.15 lbs/MMBtu during the ozone season.

(2) The owner or operator of an affected electric generating unit subject to the provisions of this regulation shall continue to meet the ozone season NO<sub>x</sub> reduction requirements in COMAR 26.11.27.

**(3) Ownership of Single Electric Generating Facility.**

(a) An affected electric generating unit is not subject to §B(1) of this regulation if the unit is located at an electric generating facility that is the only facility in Maryland directly or indirectly owned, operated or controlled by the owner, operator or controller of the facility.

(b) For the purposes of Regulation .03B(3) of this chapter, the owner includes parent companies, affiliates and subsidiaries of the owner.

**C. Annual NO<sub>x</sub> Reduction Requirements.** The owner or operator of an affected electric generating unit subject to the provisions of this regulation shall continue to meet the annual NO<sub>x</sub> reduction requirements in COMAR 26.11.27.

**D. NO<sub>x</sub> Emission Requirements for Affected Electric Generating Units Equipped with Fluidized Bed Combustors.**

(1) The owner or operator of an affected electric generating unit equipped with a fluidized bed combustor is not subject to the requirements of §§A, B(1), B(2) and C of this regulation.

(2) The owner or operator of an affected electric generating unit equipped with a fluidized bed combustor may not exceed a NO<sub>x</sub> 24-hour block average emission rate of 0.10 lbs/MMBtu.

**.04 Additional NO<sub>x</sub> Emission Control Requirements Beginning June 1, 2020.**

A. This regulation applies to C.P. Crane units 1 and 2, Chalk Point unit 2, Dickerson units 1, 2, and 3 and H.A. Wagner unit 2.

B. General Requirements. The owner or operator of the affected electric generating units subject to this regulation shall choose from the following:

(1) Not later than June 1, 2020:

(a) Install and operate a selective catalytic reduction (SCR) control system; and

(b) Meet a NO<sub>x</sub> emission rate of 0.09 lbs/MMBtu, as determined on a 30-day rolling average during the ozone season;

(2) Not later than June 1, 2020, permanently retire the unit; or

(3) Not later than June 1, 2020, switch fuel from coal to natural gas for the unit.

**.05 Compliance Demonstration Requirements.**

A. Procedures for Demonstrating Compliance with Regulation .03(A) of this Chapter.

(1) An affected electric generating unit shall demonstrate, to the Department's satisfaction, compliance with Regulation .03(A)(2) of this chapter, using the information collected and maintained in accordance with Regulation .03(A)(1) of this chapter and any additional documentation available to and maintained by the affected electric generating unit.

(2) An affected electric generating unit shall not be required to submit a unit-specific report consistent with §A(3) of this regulation where the unit emits at levels that are at or below the following rates:

Affected Unit	24-Hour Block Average NO <sub>x</sub> Emissions in lbs/MMBtu
Brandon Shores	
Unit 1	0.08
Unit 2	
< 650 MWg	0.07
≥ 650 MWg	0.15
C.P. Crane	
Unit 1	0.30
Unit 2	0.28
Chalk Point	
Unit 1 only	0.07
Unit 2 only	0.33
Units 1 and 2 combined	0.20
Dickerson	
Unit 1 only	0.24
Unit 2 only	0.24
Unit 3 only	0.24
Two or more Units combined	0.24
H.A. Wagner	
Unit 2	0.34
Unit 3	0.07
Morgantown	
Unit 1	0.07
Unit 2	0.07

(3) The owner or operator of an affected electric generating unit subject to Regulation .03(A)(2) of this chapter shall submit a unit-specific report for each day the unit exceeds its NO<sub>x</sub> emission rate of §A(2) of this regulation, which shall include the following information for the entire operating day:

(a) Hours of operation for the unit;

(b) Hourly averages of operating temperature of installed pollution control technology;

(c) Hourly averages of heat input (MMBtu/hr);

(d) Hourly averages of output (MWh);

(e) Hourly averages of Ammonia or urea flow rates;

(f) Hourly averages of NO<sub>x</sub> emissions data (lbs/MMBtu and tons);

(g) Malfunction data;

(h) The technical and operational reason the rate was exceeded, such as:

(i) Operator error;

(ii) Technical events beyond the control of the owner or operator (e.g. acts of God, malfunctions); or

(iii) Dispatch requirements that mandate unplanned operation (e.g. start-ups and shut-downs, idling and operation at low voltage or low capacity);

(i) A written narrative describing any actions taken to reduce emission rates; and

(j) Other information that the Department determines is necessary to evaluate the data or to ensure that compliance is achieved.

(4) An exceedance of the emissions rate of §A(2) of this regulation including but not limited to start-up and shut-down, days when the unit was directed by the electric grid operator to operate at low capacity or to operate pursuant to any emergency generation operations required by the electric grid operator, including

## PROPOSED ACTION ON REGULATIONS

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necessary testing for such emergency operations or to have otherwise occurred during operations which are deemed consistent with the unit's technological limitations, manufacturers' specifications, good engineering and maintenance practices, and good air pollution control practices for minimizing emissions, shall not be considered a violation of Regulation .03A(2) of this chapter provided that the provisions of the approved plan as required in Regulation.03A(1) of this chapter are met.

B. Procedures for Demonstrating Compliance with NO<sub>x</sub> Emission Rates of this Chapter.

(1) Compliance with the NO<sub>x</sub> emission rate limitations in Regulations .03B(1), .03D(2), .04B(1)(b) and .05A(2) of this chapter shall be demonstrated with a continuous emission monitoring system that is installed, operated, and certified in accordance with 40 CFR Part 75.

(2) For Regulation .03B(1) of this chapter, in order to calculate the 30-day system-wide rolling average emission rates, if 29 system operating days are not available from the current ozone season, system operating days from the previous ozone season shall be used.

(3) For Regulation .04B(1) of this chapter, in order to calculate the 30-day rolling average emission rates, if 29 operating days are not available from the current ozone season, operating days from the previous ozone season shall be used.

#### **.06 Reporting Requirements.**

##### **A. Reporting Schedule.**

(1) Beginning 30 days after the first month of the ozone season following the effective date of this chapter, each affected electric generating unit subject to the requirements of this chapter shall submit a monthly report to the Department detailing the status of compliance with this chapter during the ozone season.

(2) Each subsequent monthly report shall be submitted to the Department not later than 30 days following the end of the calendar month during the ozone season.

B. Monthly Reports During Ozone Season. Monthly reports during the ozone season shall include:

(1) Daily pass or fail of the NO<sub>x</sub> emission rates of Regulation .05A(2) of this chapter.

(2) The reporting information as required under Regulation .05A(3) of this chapter.

(3) The 30-day system-wide rolling average emission rate for each affected electric generating unit to demonstrate compliance with Regulation .03B(1) of this chapter; and

(4) Beginning June 1, 2020, the daily 30-day rolling average heat input calculated in lbs/MMBtu to demonstrate compliance with the requirements of Regulation .04B(1)(b) of this chapter.

ROBERT M. SUMMERS, Ph.D.  
Secretary of the Environment

# Title 36 MARYLAND STATE LOTTERY AND GAMING CONTROL AGENCY

## Subtitle 01 GENERAL PROVISIONS

### 36.01.01 General

Authority: State Government Article, §§9-110(a) and 9-111(a)(7), Annotated Code of Maryland

#### Notice of Proposed Action

[14-345-P]

The Maryland Lottery and Gaming Control Agency proposes to amend Regulation .04 under **COMAR 36.01.01 General**. This action was considered at the Maryland State Lottery and Gaming Control Commission open meeting held on September 25, 2014, notice of which was given pursuant to State Government Article, §10-506(c), Annotated Code of Maryland.

#### Statement of Purpose

The purpose of this action is to incorporate provisions that better refine the requirements of the agency.

#### Comparison to Federal Standards

There is no corresponding federal standard to this proposed action.

#### Estimate of Economic Impact

The proposed action has no economic impact.

#### Economic Impact on Small Businesses

The proposed action has minimal or no economic impact on small businesses.

#### Impact on Individuals with Disabilities

The proposed action has no impact on individuals with disabilities.

#### Opportunity for Public Comment

Comments may be sent to James B. Butler, Director of Legislative and Policy Affairs, Maryland Lottery and Gaming Control Agency, 1800 Washington Blvd., Suite 330, Baltimore, MD 21230, or call (410) 230-8781, or email to [jbutler@maryland.gov](mailto:jbutler@maryland.gov), or fax to (410) 230-8727. Comments will be accepted through December 31, 2014. A public hearing has not been scheduled.

#### **.04 Lottery and Gaming Control Director.**

A. (text unchanged)

B. Powers of Director.

(1)—(3) (text unchanged)

(4) With the approval of the Commission, the Director may:

(a) (text unchanged)

(b) Enter into private sector cooperative marketing project agreements as provided for in State Finance and Procurement Article, §11-203[(a)(1)(xiv)], Annotated Code of Maryland.

(5)—(11) (text unchanged)

STEPHEN L. MARTINO

Director

Maryland State Lottery and Gaming Control Agency

# EXHIBIT C

## MARYLAND REGISTER

**Final Action on Regulations**

Transmittal Sheet  <b>FINAL</b>  Action on Regulations	<b>TO BE COMPLETED BY DSD</b>
	<b>Date Filed with Division of State Documents</b>
	01/16/2015
	<b>Document Number</b>
	14-349-F
	<b>Date of Publication in MD Register</b>
	1/23/2015

**1. COMAR Codification**

**Title Subtitle Chapter Regulation**

26 11 38 .01 - .06

**2. Name of Promulgating Authority**

Department of the Environment

**3. Name of Regulations Coordinator**

Carolyn A Jones

**Telephone Number**

410-537-4210

**Mailing Address**

1800 Washington Blvd

**City State Zip Code**

Baltimore MD 21230

**Email**

carolyn.a.jones@maryland.gov

**4. Name of Person to Call About this Document Telephone No.**

Randy Mosier

410-537-4488

**Email**

Randy.Mosier@maryland.gov

**5. Check applicable items:**

X- New Regulations

- Amendments to Existing Regulations
- Repeal of Existing Regulations
- Recodification
- Incorporation by Reference

**6. Final Action was Taken on the Following Date: January 16, 2015**

**7. Final Action Becomes Effective on the Following Date:**

- 10th Day after issue of the Maryland Register, or  
 Later Date, Specified Here:

**8. Check Kind of Final Action Taken:**

- a)  Adopted as proposed.
- b)  Adopted with nonsubstantive changes.
- c)  Withdrawn voluntarily.

**9. Indicate whether final action involves a reproposal of substantively different text:**

- Yes  No

(If yes, give Maryland Register citations to both initial proposal and reproposal in No. 11 below.)

**10. Give Maryland Register Doc. No. of the proposed action 14-349 -P.**

**11. Proposed Action Published in the Maryland Register**

41:24 Md. R. 1449 1454

**12. Certificate of Authorized Officer**

I certify that the attached document is in compliance with the Administrative Procedure Act. I also certify that the attached text has been approved for legality by Michael Strande, Assistant Attorney General, (telephone #410-537-3421) on January 16, 2015. A written copy of the approval is on file at this agency.

**Name of Authorized Officer**

David Costello

**Title**

Acting Secretary of the Environment

**Telephone No.**

410-537-3084

**Date**

1/16/15



# EXHIBIT D

STATE OF MARYLAND  
OFFICE OF THE GOVERNORLARRY HOGAN  
GOVERNOR

January 21, 2015

**VIA HAND DELIVERY**Mr. Brian P. Morris  
Administrator  
Maryland Division of State Documents  
16 Francis Street  
Annapolis, Maryland 21401

Dear Mr. Morris:

As Governor, I have decided to postpone all pending Maryland regulations. I hereby direct that all regulations that are scheduled for final publication on January 23 not be published. In addition, today I am directing all agencies of State government to begin a comprehensive review of all pending regulations. That review process is to allow public input, public hearing, and full due process before regulations may be finalized.

Thank you for your attention to this matter.

Sincerely,

  
Lawrence J. Hogan, Jr.  
Governor

cc: John Wobensmith, Acting Secretary of State

EAST90062343.1 1/20/15

# EXHIBIT E



April 22, 2015

**VIA CERTIFIED MAIL, RETURN RECEIPT REQUEST**

Governor Lawrence J. Hogan, Jr.  
100 State Circle  
Annapolis, MD 21401

Benjamin J. Grumbles  
Secretary  
Maryland Department of the Environment  
1800 Washington Blvd.  
Baltimore, MD 21230

John C. Wobensmith,  
Secretary of State  
Fred L. Wineland Building  
16 Francis St., Annapolis, MD 21401

Brian Morris  
Administrator  
Division of State Documents  
16 Francis Street - Jeffrey Building  
Annapolis, Maryland 21401

The Honorable Brian E. Frosh  
Maryland Attorney General  
St. Paul Plaza, 200 St. Paul Place  
Baltimore, MD 21202

**RE: Sierra Club and Chesapeake Physicians for Social Responsibility's Notice of Intent to Sue Under the Maryland Environmental Standing Act to Require Publication and Enforcement of the Regulations for the Control of NOx Emissions from Coal-Fired Electric Generating Units, COMAR 26.11.38**

Governor Hogan, Secretary Grumbles, Administrator Morris, and Attorney General Frosh:

Pursuant to Section 1-505(b) of the Maryland Environmental Standing Act ("MESA"), Md. Code, Nat. Res. § 1-501 et seq., the Maryland Chapter of the Sierra Club and the Chesapeake Chapter of the Physicians for Social Responsibility ("PSR") hereby provide notice of their intent to file a suit for mandamus, declaratory relief, and equitable relief to compel the Maryland Division of State Documents ("Division"), Maryland Governor Lawrence J. Hogan,

April 22, 2015

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and the Maryland Department of the Environment (“MDE”) to publish in the Maryland Register and enforce the Regulations for the Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units, COMAR 26.11.38, which were adopted by MDE on January 16, 2015 (hereinafter “Adopted NO<sub>x</sub> Regulations”). MDE’s adoption of the NO<sub>x</sub> Regulations imposed a non-discretionary, ministerial duty on the Division to publish the regulations, which the Division has unlawfully failed to perform. And by preventing the Adopted NO<sub>x</sub> Regulations from being published and treating the regulations as not having any force or effect, the Governor and MDE are failing to “enforce an applicable environmental quality standard for the protection of the air.” Md. Code, Nat. Res. § 1-503(b). Unless the Adopted NO<sub>x</sub> Regulations are published in the Maryland Register and treated as having force and effect, Sierra Club and PSR intend to file on or after thirty days from the date of this notice an action for mandamus, declaratory relief, and equitable relief to compel the publication and enforcement of those regulations.

By reducing emissions of nitrogen oxides (“NO<sub>x</sub>”), which is a primary precursor to ozone pollution, the Adopted NO<sub>x</sub> Regulations would provide significant public health benefits to the approximately five million Marylanders who live in portions of the state that have been designated as having unhealthy levels of ozone pollution. Such regulations are required to satisfy Maryland’s legal duty under the federal Clean Air Act to submit a plan to address such unhealthy levels of ozone in the areas of the state that the U.S. Environmental Protection Agency (“EPA”) has designated as out of attainment with public health based ozone standards. The Adopted NO<sub>x</sub> Regulations would achieve the necessary reductions in ozone pollution by requiring the state’s largest sources of NO<sub>x</sub> – coal-fired power plants – to install and operate readily available pollution controls. Such requirements were developed through a lengthy stakeholder process, and have garnered the support of not only public health and environmental organizations that represent tens of thousands of Marylanders, but also of Raven Power, one of the two entities subject to the regulations, thereby leaving only NRG in opposition. As such, not only the law, but also public health and popular support, compel the conclusion that the Governor, MDE, and the Division must satisfy their legal duty to publish the Adopted NO<sub>x</sub> Regulations and allow them to become effective. This letter serves as notice that if you fail to do so within thirty days, Sierra Club and PSR are prepared to bring suit to ensure that the law is enforced.

## **I. Parties to this Notice**

The Sierra Club is the nation’s largest and oldest grassroots environmental organization, with a mission to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. Sierra Club’s Maryland Chapter has more than 13,000 members. For decades, the Sierra Club in Maryland has worked to clean up and protect the state’s air, water, and lands, and to promote public health through regulatory, legislative, and legal processes, and through grassroots engagement. The Sierra Club actively participated in MDE’s stakeholder process for developing the Adopted NO<sub>x</sub> Regulations including attending all public meetings and submitting multiple rounds of written comments to the agency. As a legal entity doing business in the State, the Maryland Chapter of

April 22, 2015

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the Sierra Club has standing to bring the action identified herein under MESA Sections 1-501(b) and 1-503(a)(3).

Physicians for Social Responsibility is dedicated to creating a healthy, just, and peaceful world for both the present and future generations. Among other efforts, PSR uses its medical and public health expertise to slow, stop and reverse global warming and the toxic degradation of the environment. The Chesapeake PSR has approximately 300 members. As an entity incorporated under the laws of the State of Maryland, and a legal entity doing business in the State, the Chesapeake PSR has standing to bring the action identified herein under MESA Sections 1-501(b) and 1-503(a)(3).

Attached to this notice letter as Exhibits 1 through 4 are statements of support from Sierra Club members Barbara Bien, Doris Toles, and Dr. Thomas Ihde, and from Chesapeake PSR board member Dr. Gwen DuBois, each of whom live in or near Baltimore or southern Maryland. In their statements, Ms. Bien, Ms. Toles, Dr. Ihde, and Dr. DuBois detail the health impacts they experience from, and the concerns they have about, the air pollution that would be significantly reduced by the Adopted NOx Regulations. Such demonstrations of individualized harm to their members are not necessary for Sierra Club and PSR to establish standing to bring this action against the Governor, Division, and MDE. Md. Code, Nat. Res. §§ 1-503(a), (b); *Med. Waste Associates, Inc. v. Maryland Waste Coalition*, 327 Md. 596, 616-17 (Md. 1992). Instead, such statements are provided to underscore the importance of your complying with your legal duty to publish the Adopted NOx Regulations and allow them to take effect.

## **II. Maryland's Process for Promulgating and Adopting Regulations**

Under Maryland law, a “regulation” is defined as a “statement or amendment or repeal of a statement” that, *inter alia*: has general application; has future effect; and “is adopted by a unit” to “detail or carry out a law that the unit administers.” Md. Code, State Gov’t § 10-101(g). The process for promulgating a regulation is governed primarily by the Maryland Administrative Procedure Act (“APA”) and other statutory provisions that outline the Division’s responsibilities. *See generally id.* §§ 10-101 *et seq.*; *id.* §§ 7-201 *et seq.* Together, these provisions govern the timing of submission, review, adoption, and publication of regulations. The APA also provides a default date on which adopted regulations become effective.

Once an agency develops a proposed regulation, the formal process for promulgating that regulation generally begins when the agency submits the proposed regulation to the Joint Committee on Administrative, Executive, and Legislative Review (“AELR Committee” or “Committee”) for preliminary review. Md. Code, State Gov’t § 10-110(c)(1). The agency then submits the proposed regulation to the Administrator of the Division for publication in the Maryland Register. In addition to the proposed regulation itself, the agency must submit a “notice of the proposed adoption” to be published in the Register. *Id.* § 10-112(a)(2); *see also id.* § 10-112(a)(3) (required contents of a notice of proposed adoption). Once submitted, these documents are published in the next issue of the Maryland Register, *id.* § 7-206(a)(2)(vi), which the Division must publish at least once every two weeks. *Id.* § 7-210(a).

April 22, 2015

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When a proposed regulation is published in the Register, a 45-day review period is triggered, during which the AELR Committee may review the regulation. *Id.* § 10-111(a)(1)(ii). The agency must also provide a public comment period of at least 30 days. *Id.* § 10-111(a)(3). If the AELR Committee elects to review a proposed regulation, it will consider whether the regulation “is in conformity with the statutory authority of the promulgating unit” and “reasonably complies with the legislative intent of the statute under which the regulation was promulgated.” *Id.* § 10-111.1(b). If the Committee does not oppose the proposed regulation, and the public comment requirements have been satisfied, an agency can adopt the regulation at the end of the 45-day review period. *Id.* §§ 10-111(a)(1) (“[A] unit may not adopt a regulation until . . . at least 45 days after its first publication in the Register.”); 10-111(a)(3).<sup>1</sup>

While the Maryland APA does not specifically define the term “adoption,” it provides that “[a]fter adopting a regulation,” the agency is required to submit a “notice of adoption, for publication in the Register” to the Division. *Id.* § 10-114(a).<sup>2</sup> The statute’s use of the word “after” necessarily means that a regulation’s adoption must occur before the notice is published in the Register.

The Maryland APA includes provisions that specifically address situations where an agency may wish to withdraw or modify its proposed regulation. The APA provides that an agency “may withdraw a proposed regulation at any time before its adoption.” *Id.* § 10-116(a)(1).<sup>3</sup> And the APA establishes the process that must be followed if an agency wishes to modify a proposed regulation that has already been published in the Register. More specifically, if the agency changes the text of a proposed regulation such that it “differs substantively from the text previously published in the Register,” the agency must go through the entire rulemaking process again from the beginning. *Id.* § 10-113(b).

The Division is responsible for compiling and editing the Code of Maryland Regulations (“COMAR”) and the Register. *Id.* § 7-204(a). Under the Maryland APA, each issue of the Register “shall contain” any of a list of documents “that has been submitted to the Division before the closing date and hour and has not been published previously.” *Id.* § 7-206(a)(2). The list of documents to be published includes, in addition to those specifically identified, “each other document that is required to be published in the Register.” *Id.* § 7-206(a)(2)(ix). Because notices of adoption must be published in the Register, *id.* § 10-114(a), they fall within this category. Publication of the Register is required at least once every two weeks. *Id.* § 7-210(a).

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<sup>1</sup> If the Committee votes to oppose the adoption of a proposed regulation, it will provide written notice of its opposition to both the Governor and the promulgating agency. *Id.* § 10-111.1(c)(1). If notified of the Committee’s opposition, an agency can withdraw or modify the proposed regulation. *Id.* § 10-111.1(c)(2). And if the agency still wishes to adopt the regulation, it can submit the proposed regulation to the Governor along with a statement explaining its position. *Id.* § 10-111.1(c)(2)(iii). In order to be adopted, the agency’s decision must be approved by the Governor. *Id.* §§ 10-111.1(c)(3), 10-111.1(d). And the Governor can instead order the agency to withdraw or modify the opposed regulation. *Id.* § 10-111.1(c)(3).

<sup>2</sup> An agency’s adoption of a regulation is indicated in the Maryland Register through the publication of a notice, entitled “Notice of Final Action” and indicating the title, citation, and date of adoption of a previously-published proposed regulation.

<sup>3</sup> A proposed regulation can also be withdrawn through inaction: A proposed regulation is automatically withdrawn if it is not adopted by the agency within one year of its last publication in the Register. *Id.* § 10-116(b)(1).

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An adopted regulation becomes effective 10 days after the notice is published in the Register, unless the agency identifies a later effective date. *Id.* § 10-117(a).

### III. The Adopted NO<sub>x</sub> Regulations

In accordance with its statutory authority,<sup>4</sup> MDE prepared a draft NO<sub>x</sub> Regulation in December 2013. After a series of stakeholder meetings over the ensuing months, MDE revised the draft, and then presented a proposed NO<sub>x</sub> Regulation to the AELR Committee. The proposed regulations were published in the Maryland Register on December 1, 2014. 41:24 Md. R. 1449-54 (Dec. 1, 2014). The stated purpose of the regulation is “to establish new nitrogen oxides (NO<sub>x</sub>) emission standards and additional monitoring and reporting requirements for coal-fired electric generating units in Maryland.” *Id.* at 1449. As required by the APA, MDE provided a public comment period, and it also held a public hearing on January 7, 2015. MDE received numerous comments supporting the proposed regulation, and the AELR Committee did not oppose the regulation.

The Secretary of the Environment adopted those regulations on January 16, 2015, as Regulations .01 – .06 under Chapter 26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units, by issuing a Notice of Final Action stating that the NO<sub>x</sub> Regulation “has been adopted” and identifying an effective date of February 2, 2015.<sup>5</sup> MDE sent the Notice of Final Action to the Division upon adopting the regulation on January 16th.<sup>6</sup> As a result, the Notice of Final Action for the NO<sub>x</sub> Regulation was legally required to have been published in the next available issue of the Maryland Register.

Such publication, however, never occurred because on January 21, 2015 the newly-elected Governor ordered the Division not to publish any regulations that had been scheduled for final publication on January 23, 2015.<sup>7</sup>

The stated purpose of the Adopted NO<sub>x</sub> Regulations is “to establish new nitrogen oxides (NO<sub>x</sub>) emission standards and additional monitoring and reporting requirements for coal-fired electric generating units in Maryland.”<sup>8</sup> Such standards and requirements are necessitated by the fact that the Baltimore area has been designated as a “moderate” non-attainment area under the 2008 ozone National Ambient Air Quality Standards (“NAAQS”) that were established by the U.S. Environmental Protection Agency (“EPA”) under the Clean Air Act (“CAA”). Baltimore’s “moderate” non-attainment designation was the worst ozone designation east of the Mississippi

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<sup>4</sup> Md. Code, Environment § 1-404(b)(1) authorizes the Secretary of the MDE to “adopt rules and regulations to carry out the provisions of law that are within the jurisdiction of the Secretary.” The Adopted NO<sub>x</sub> Regulations would further the purpose of Md. Code, Environment §§ 2-103 and 2-301 – 303, which govern Ambient Air Quality Control, and would also help MDE comply with its duty under the federal Clean Air Act to submit a state implementation plan to address non-attainment of the ozone NAAQS in the Baltimore area.

<sup>5</sup> See Notice of Final Action, *26.11.38 Control of NO<sub>x</sub> Emissions from Coal-Fired Electric Generating Units*, attached as Exhibit 5.

<sup>6</sup> Maryland Register, Transmittal Sheet - Final Action on Regulations (Jan. 16, 2015), attached as Exhibit 6.

<sup>7</sup> Letter from Governor Lawrence J. Hogan to Brian P. Morris, Administrator of the Maryland Division of State Documents (January 21, 2015), attached as Exhibit 7.

<sup>8</sup> 41:24 Md. R. 1449-54 (Dec. 1, 2014).



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River, reflecting air quality further out of attainment with the 2008 8-hour ozone NAAQS than any other area in the eastern United States. As a consequence, MDE was required no later than July 20, 2014, to submit to EPA a State Implementation Plan (“SIP”) that included Reasonably Available Control Technology (“RACT”) limits for the State’s coal-fired electric generating units.<sup>9</sup> While the Adopted NOx Regulations establish such RACT limits, the failure to publish the adopted regulations in the State Register has further delayed MDE’s submission of a SIP to EPA. Maryland’s SIP is now more than nine months overdue.<sup>10</sup>

The Adopted NOx Regulations would go a long ways towards addressing the serious health threat posed to Marylanders by ozone pollution. 86% of Marylanders—more than five million people—live in areas with air that has been classified by EPA under the 2008 ozone NAAQS as unsafe to breathe.<sup>11</sup> That number could rise once EPA finalizes its revised ozone NAAQS, which EPA has proposed in a range below the current standard. Both short-term (acute) and repeat (chronic) exposure to ozone is well understood to cause or exacerbate respiratory impacts such as breathing discomfort (e.g., coughing, wheezing, shortness of breath, pain upon inspiration), decreasing lung function and capacity, and lung inflammation and injury.<sup>12</sup> Ozone exposure has also been linked to the development, induction, and exacerbation of asthma, which makes Baltimore’s elevated ozone levels especially problematic given that 20% of Baltimore City children under the age of eighteen have asthma, which is more than double the national average.<sup>13</sup> By significantly reducing NOx emissions, which are a precursor to ozone pollution, the Adopted NOx Regulations would provide significant public health benefits to people throughout Maryland.

The Adopted NOx Regulations would achieve these public health benefits by requiring readily achievable reductions in NOx emissions from the state’s largest individual sources of such pollution – coal-fired power plants. Maryland’s seven coal plants combined account for 14% of the State’s overall annual NOx emissions,<sup>14</sup> and the contribution of those plants to ozone precursors is especially significant on high energy demand days during which conditions are also optimal for ozone formation. While the Maryland Healthy Air Act required some reductions in emissions from those plants, that Act included only annual and ozone season fleetwide tonnage

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<sup>9</sup> In addition, MDE has an independent obligation to submit these NOx RACT limits because Maryland is within the CAA’s Ozone Transport Region (“OTR”). See 42 USC 7511c(b)(1)(B), 7511a(f); see also 57 Fed. Reg. 55620, 55622 (Nov. 25, 1992). The SIP deadline for OTR states was also July 20, 2014. See 80 Fed. Reg. 12264, 12295 (Mar. 6, 2015).

<sup>10</sup> As explained *supra* in note 9, MDE has an independent duty to establish NOx RACT emissions limits due to Maryland’s designation as part of the OTR. In any event, EPA has not made a final determination on this proposal, and the proposed CDD is legally and factually flawed. As Sierra Club, Earthjustice, and the Environmental Integrity Project explained in comments on the proposed CDD, attached as Exhibit 8, the CDD should not be approved because several air quality monitors shut off and failed to record air quality data during peak ozone season, and because lower monitored air quality data is the result of abnormally cooler and wetter weather during the 2013 and 2014 ozone seasons, rather than the type of permanent and enforceable emission reductions needed to ensure attainment with the 2008 ozone NAAQS.

<sup>11</sup> EPA’s Green Book, *available at* <http://www.epa.gov/oaqps001/greenbk/anc1.html> and the United States Census (2013).

<sup>12</sup> For a thorough discussion of the serious health impacts of ozone exposure, see the January 7, 2015 Comments of Sierra Club, et al, on the Proposed NOx Regulations, attached as Exhibit 9.

<sup>13</sup> Baltimore City Health Department: Asthma, *available at* <http://health.baltimorecity.gov/node/454>.

<sup>14</sup> EPA 2011 National Emissions Inventory, *available at* <http://www.epa.gov/ttnchie1/net/2011inventory.html>.

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caps on NO<sub>x</sub> and, therefore, did not meaningfully constrain the daily or even hourly emissions that can cause significant ozone NAAQS violations.<sup>15</sup> In addition, only approximately half of the units in each plant owner's fleet are equipped with state-of-the-art selective catalytic reduction controls for NO<sub>x</sub> emissions, and MDE has compiled data showing that many of Maryland's coal plants were not consistently operating their existing NO<sub>x</sub> controls. As a result, the most poorly controlled coal units in Maryland emit NO<sub>x</sub> at rates ten times higher than those of the best controlled coal plants,<sup>16</sup> and on peak ozone days the most poorly controlled units in Maryland have become the largest contributors of ozone precursors.<sup>17</sup> By reducing NO<sub>x</sub> emissions from these facilities, especially on the dates of highest energy demand and the highest potential for ozone formation, the Adopted NO<sub>x</sub> Regulations will have large ameliorative effects on air quality in Maryland.

#### **IV. Maryland Law Requires Publication of the Adopted NO<sub>x</sub> Regulations in the Maryland Register.**

##### **A. The Maryland APA Establishes Adoption, Not Publication, as the Final Substantive Step in Promulgating a Regulation.**

A plain reading of the Maryland APA demonstrates that the Adopted NO<sub>x</sub> Regulations are legally required to be published in the Maryland Register because the APA establishes adoption, rather than publication, as the substantive end point of the process of promulgating a regulation. Such a reading of the APA is established in at least three ways.

First, the APA defines a regulation in terms of adoption rather than publication. In particular, the APA defines a "regulation" as a "statement" that is "adopted by a unit" to accomplish a legal objective. Md. Code, State Gov't § 10-101(g)(1). The fact that the APA defines a regulation in terms of adoption, rather than publication or its effective date, demonstrates that adoption represents the moment when a regulation becomes final. Consequently, an adopted regulation cannot be withdrawn or rescinded without undergoing a new regulatory process (which has not occurred here).

Second, that plain text reading is further supported by the fact that a regulation's adoption creates a non-discretionary, ministerial duty for the Division to publish that regulation in the Maryland Register. Specifically, the APA provides that an agency "shall submit" to the Division a notice of adoption to be published in the Register. *Id.* § 10-114(a). And once such notice of adoption is submitted, the Division is legally required to publish the regulation. In particular, under Sections 7-206 and -210 of the APA, the Register "shall be published" and "shall contain," respectively, the documents specified in Section 7-206(a)(2), which include notices of

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<sup>15</sup> MDE, A History of Power Plant Controls in Maryland: What Did We Learn? – Where Do We Go Next? Part 2 – NO<sub>x</sub> Issues (Oct. 21, 2013), at Slides 3, 6, *available at* <http://www.mde.state.md.us/programs/regulations/air/Pages/StakeholderMeetings.aspx>.

<sup>16</sup> EPA, Air Markets Program Database ([ampd.epa.gov/ampd/](http://ampd.epa.gov/ampd/)) (Crane Units 1 & 2 and Wagner Unit 2 routinely emit at rates exceeding 0.35 lb/MMBtu, while the Morgantown units routinely achieve emission rates of 0.035 lb/MMBtu).

<sup>17</sup> Part 2 – NO<sub>x</sub> Issues at Slides 8-9, 26, 43, & 48.

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adoption.<sup>18</sup> In other words, once a regulation is adopted by an agency, the agency is required to submit it to the Division for publication, and the Division is required to publish it.

The status of adoption as the final substantive step in an agency's process of promulgating a regulation is further supported by the fact that the APA expressly authorizes agencies to amend or withdraw a proposed regulation before its adoption, but lacks any provision permitting amendment or withdrawal after a regulation has been adopted. Under State Gov't § 10-116(a)(1), an agency can withdraw a proposed regulation, of its own accord, "at any time before its adoption." And under Section 10-113(b), an agency can make substantive changes to a proposed regulation that's been published in the Register only if it follows the procedures established in Sections 10-111 and -112—the procedures for "propos[ing] anew" a regulation.

If an agency could modify or withdraw a regulation after its adoption, that would obviate the need for Sections 10-113(b) and 10-116(a)(1)—which by their terms apply to proposed regulations that have not been adopted. And courts have cautioned against interpretations that render statutory language superfluous. *See Evans v. State*, 420 Md. 391, 400 (Md. 2011) (the Court "read[s] the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory") (citation omitted). Interpreting the APA to allow a regulation to be withdrawn or modified after its adoption would also run afoul of *expressio unius est exclusio alterius*, the canon of construction holding that the expression of one thing indicates the exclusion of another. *See, e.g., WFS Financial, Inc. v. Mayor & City County of Baltimore*, 402 Md. 1, 14 (Md. 2007) (rejecting a statutory interpretation that would permit municipalities to impose additional conditions on the lienholder of a seized vehicle).

This interpretation is further supported by the fact that the APA specifically defines a "regulation" to include the "amendment or repeal" of a statement that is adopted by an agency. *Id.* § 10-101(g)(1). As such, the proper way for an agency to amend or repeal a regulation once it has been adopted is to undertake the process of promulgating and adopting a new regulation, not simply withdrawing the first regulation with no process.

As for the Governor's authority to withdraw a regulation, that authority can be exercised, through agency officials, under the same circumstances that apply to the agency itself. In other words, the Governor, acting through an appointed agency secretary, "may withdraw a proposed regulation at any time before its adoption." *Id.* § 10-116(a)(1). The APA also expressly allows the Governor to control the fate of a proposed regulation if the AELR Committee objects to the proposed regulation. In that situation, the Governor can instruct the agency to withdraw or modify a proposed regulation, or he can approve the adoption of the regulation. *See id.* § 10-111.1(c)(3). In each of these circumstances, however, the Governor's authority applies to *proposed* regulations; nothing in the APA empowers the Governor to tamper with an already-adopted regulation. The absence of any such provision further underscores that the Governor cannot order the withdrawal of a regulation after its adoption.

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<sup>18</sup> The documents specified in Section 7-206 include "each other document that is required to be published in the Register," *id.* § 7-206(a)(2)(ix), which, pursuant to Section 10-114(a) of the APA, includes notices of adoption. The Division is also required to include in the Register "each other document that is required by law to be published in the Code of Maryland Regulations," *id.* § 7-206(a)(2)(viii), which includes "each regulation." *Id.* § 7-205(a)(2). And, as described above, a "regulation" exists once the agency adopts it. *Id.* § 10-101(g)(1).

In summary, under the terms of the APA, an agency or the Governor can only withdraw a proposed regulation prior to its adoption, and once an agency adopts a regulation, it is final—it must be published and may not be withdrawn. In other words, publication is a necessary effect of, and not a prerequisite to, adoption of a regulation. As such, the Division’s failure to publish the Adopted NOx Regulations, and the Governor and MDE’s interference with those regulations being published and becoming effective, were directly contrary to the plain requirements of the Maryland APA that were triggered when MDE adopted the regulations.

**B. The December 12 Letter Does Not Demonstrate that the Governor or Agency Had the Authority to Withdraw the Adopted NOx Regulation Before its Publication in the Register**

We presume that you will point to the informal advice letter written by an employee of the Attorney General’s Office in an attempt to justify the withdrawal of the Adopted NOx Regulations. *See* Letter from Sarah Benson Brantley, Counsel to the General Assembly, to Senator David R. Brinkley, dated Dec. 12, 2014 (the “December 12 Letter”).<sup>19</sup> The December 12 Letter, however, fails to address the straightforward reading of the Maryland APA set forth above, and acknowledges that the author of the letter “could find no Maryland case law or previous opinion of the Attorney General” addressing the question of whether a Governor or agency could withdraw an adopted regulation before its publication. December 12 Letter at 1.

Instead, the December 12 Letter offers only a “predict[ion] how a reviewing court would interpret the law” based on a state law argument that does not hold water. The Letter cites to Md. Code, State Gov’t § 7-215, which states that the Division may request reimbursement from an agency “for the cost of a publication of a document in an issue of the Register if the unit submits, withdraws, or changes the document after the closing date and hour of that issue.” The December 12 Letter argues that, since this provision mentions the possibility of an agency’s submitting, withdrawing, or changing a document after the required deadline, *any* change or withdrawal of a regulation may be allowed prior to publication. Nothing in Section 7-215, however, suggests that it gives an agency the authority to withdraw a document that the agency does not otherwise have the authority to withdraw. A more reasonable reading of the provision is that it refers to minor linguistic changes requested by an agency, corrections of errors, or modifications to documents which might logically be subject to routine change—such as hearing schedules or notices of appointment.<sup>20</sup>

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<sup>19</sup> As an informal advice letter, rather than an official opinion of the Attorney General, the December 12 Letter would not be entitled to any deference in court. *See, e.g., Pub. Serv. Comm’n of Maryland v. Wilson*, 389 Md. 27, 57 n.18 (Md. 2005) (“Although we quote here from the advice letter of the Assistant Attorney General, we afford no enhanced weight to its conclusions and analysis. We have remarked in several instances that, although we may give some consideration to formal opinions of the Attorney General, we are not bound by them. . . . In this case, however, we are confronted not with a formal opinion, but an informal advice letter.”).

<sup>20</sup> The December 12 Letter also briefly cites *Ashburn v. Anne Arundel County* to support the claim that the mandatory language of the APA requiring publication of an adopted regulation does not foreclose the Executive Branch from discretionarily withdrawing an adopted regulation at any time before publication. But that case holds only that a discretionary decision concerning whether to indefinitely detain a drunk driver was not converted into a ministerial duty simply through the existence of a mandatory procedure for processing drunk drivers. 306 Md. 617, 624-25 (Md. 1986). In other words, the *Ashburn* court addressed only whether an existing agency authority is ministerial or discretionary. The *Ashburn* court did not address the question at issue here and in the December 12

**C. Federal Law Does Not Support the Conclusion that the Governor or an Agency Can Withdraw an Adopted Regulation Before It is Published.**

Recognizing the lack of Maryland cases addressing whether a Governor or agency can withdraw an adopted regulation before publication, the December 12 Letter cites federal case law to support its conclusion that withdrawal is permissible. In particular, the letter cites to *Kennecott Utah Copper Corp. v. U.S. Dept. of Interior*, 88 F.3d 1191 (D.C. Cir. 1996), in contending that an agency may withdraw a regulation after it has been submitted for publication. But the advice letter's attempted analogy is inapposite: Both the *Kennecott* decision and the federal rulemaking process are distinguishable from the Maryland APA in material ways. These distinctions lead to the conclusion that the question of whether a regulation can be withdrawn before publication should be decided differently under Maryland law than under federal law.

First, in *Kennecott*, the Office of the Federal Register had a specific regulation allowing for pre-publication withdrawal of a regulation during a three-day period. By contrast, neither Maryland's APA nor the Division has any corresponding provisions allowing withdrawal of an adopted regulation after it has been submitted for publication.

Second, the *Kennecott* court specifically declined to decide a key issue at stake in the Adopted NOx Regulations situation, which is whether the federal regulations were "'adopted' by virtue of the Assistant Secretary's signature, and thus whether there was a statutory duty to publish the document." 88 F.3d at 1202. By contrast, the Maryland APA and the Notice of Final Action issued by MDE both make clear that the Adopted NOx Regulation at issue here has been "adopted," which, as described in Section IV.A above, thereby triggered a statutory duty for the Division to publish the notice of adoption in the next issue of the Maryland Register.

Third, while the court in *Kennecott* found that the Office of the Federal Register could not be ordered to publish the regulations in that proceeding, the legal context was considerably different than what is at issue here. The petitioners in *Kennecott* claimed that the Department of the Interior violated the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by failing to publish certain regulations in the Federal Register. The court agreed with petitioners' assertion that FOIA requires each agency to "publish in the Federal Register for the guidance of the public... substantive rules of general applicability adopted as authorized by law." 5 U.S.C. § 552(a)(1)(D). The court denied the requested relief, however, on the grounds that FOIA's

remedial provision... is aimed at relieving the injury suffered by the individual complainant, not by the general public... Providing documents *to the individual* fully relieves whatever *informational* injury may have been suffered by that particular complainant; ordering publication goes well beyond that need.

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Letter, which is whether a particular discretionary decision-making power *exists at all*. As discussed above, the APA and related laws contain no indication that the Executive Branch may withdraw an adopted regulation submitted by an agency to the Division; therefore, the question addressed in *Ashburn* of whether such a duty would be ministerial or discretionary is irrelevant.

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*Id.* at 1203 (emphasis added). By contrast, the statutes at issue in Maryland do require publication of adopted regulations—a question the *Kennecott* court found it was not required to answer with respect to the requirements of the federal APA, as petitioners did not raise this argument in their initial complaint. *See id.* at 1202. Thus, the *Kennecott* holding, in addition to being an interpretation of federal rather than Maryland state law, addresses substantively different questions than those at issue here.

Finally, any reliance on federal law is unpersuasive because of a crucial difference between Maryland and federal law regarding how a regulation is defined. As discussed in Section IV.A above, the Maryland APA defines a regulation as a statement that, in pertinent part, “is adopted by a unit.” Interpreted as a cohesive statutory scheme, Title 10, Subtitle 1 of the Maryland APA indicates that a regulation is finalized when it is adopted by an agency. At this point, the regulation leaves the subjective control of the agency; it is then published and becomes effective according to the mandates of the APA.

The federal definition of “Rule” does not include the term “adopted”; nor does it specify what event triggers the finalization of a rule. Federal courts, however, have held that under the federal APA, a rule becomes final when it is published in the Federal Register. *See Natural Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 759 (3d Cir. 1982); *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004). Until that point, the promulgating agency, or the President through executive order, may withdraw, postpone, or otherwise prevent the rule from taking effect. *See Kennecott*, 88 F.3d at 1208; *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338 (4th Cir. 1996) (withdrawal of proposed rule through executive order did not violate required procedures for repeal of a rule; because proposed rule was never published, it never became final). As such, federal law does not overcome the plain requirements of the Maryland APA because federal law establishes publication as the substantive culmination of the process for promulgating a regulation, while Maryland law establishes adoption as the substantive culmination of the process.

**V. Sierra Club and PSR Are Entitled to a Writ of Mandamus and Other Equitable Relief to Require Publication and Enforcement of the Adopted NOx Regulations.**

As demonstrated above, the Division is legally required to publish the Adopted NOx Regulations in the Maryland Register, and the Governor and MDE have acted without legal authority in withdrawing the regulations before they could be published. Because the Governor and MDE are unwilling to allow the Division to carry out its duty of publication, Sierra Club and PSR are entitled to a writ of mandamus to require that the Adopted NOx Regulations be published and allowed to take effect. Such a writ is intended “to compel . . . public officials[] or administrative agencies to perform their function, or perform some particular duty imposed upon them which in its nature is imperative” and, therefore, is well-suited to the situation presented here. *Baltimore County v. Baltimore County Fraternal Order of Police Lodge No. 4*, 439 Md. 547, 569-70 (Md. 2014) (citations omitted).

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Courts will generally issue a writ of mandamus if two requirements are met: *First*, “the party against whom enforcement is sought must have an imperative, ‘ministerial’ duty to do as sought to be compelled, i.e., ‘a duty prescribed by law.’” *Id.* at 571 (citations omitted). *Second*, “the party seeking enforcement of that duty must have a clear entitlement to have the duty performed. The writ should not be issued where the right to the performance of the duty is doubtful.” *Id.* Sierra Club and PSR satisfy both requirements. First, as explained in Section IV.A above, the Division had an “imperative, ‘ministerial’ duty” to publish the Adopted NOx Regulations once MDE had adopted them. The Division’s failure to timely publish the Adopted NOx Regulations, and the Governor’s withdrawal of the regulations before the Division could publish them, violated this duty, and is therefore redressable by a writ of mandamus. *Maryland Com’n on Human Relations v. Downey Comms., Inc.*, 110 Md. App. 493, 536 (Md. App. 1996) (“[I]f the agency fails to act within an appropriate time, the party adversely affected may be entitled to pursue an action for mandamus.”). Second, Sierra Club and PSR both have “a clear right to the performance of the duty [they] seek[] to compel,” *Baltimore County*, 439 Md. at 571, given that both organizations have established standing under MESA, and have numerous members who are adversely impacted by the pollution that would be addressed by the Adopted NOx Regulations.

Sierra Club and PSR may also accompany any petition for a writ of mandamus with a request for a declaratory judgment that the Adopted NOx Regulations must be published in the Maryland Register and take effect, and a mandatory injunction against the Governor and MDE to prohibit them from further interfering with the publication of the Adopted NOx Regulations or the ability of those Regulations to take effect.

Sierra Club and PSR are granted standing to bring such claims by the Maryland Environmental Standing Act, which applies to actions regarding: (1) an officer or agency’s failure “to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation, or order,” or (2) an officer or agency’s “failure to enforce an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State, as expressed in a statute, ordinance, rule, regulation, or order of the State.” Md. Code, Nat. Res. § 1-503(b). Sierra Club and PSR’s above-noticed lawsuit fits within both of these categories.

First, as discussed in Section IV.A above, the Division had a “nondiscretionary ministerial duty” to publish the Adopted NOx Regulations in the Maryland Register, which it failed to perform because of the Governor’s unauthorized withdrawal of the regulations. And while the Maryland APA sets forth the requirement to publish an adopted regulation, the actual duty for the Division to publish the regulation was “imposed upon” the Division by MDE’s adoption of the NOx Regulations, which are plainly environmental. Md. Code, Nat. Res. § 1-503(b). As such, Sierra Club and PSR’s noticed legal action to require that the Adopted NOx Regulations be published and allowed to take effect fits within the first category of claims for which MESA establishes standing.

The noticed legal action also fits within the second category of claims under MESA, which applies to an officer or agency’s “failure to enforce an applicable environmental quality standard for the protection of the air . . . .” Md. Code, Nat. Res. § 1-503(b). There can be no

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dispute that the Adopted NOx Regulations are an “environmental quality standard for the protection of the air.” That the Governor and MDE are failing to enforce such standard is made clear by the fact that they withdrew the Adopted NOx Regulations before they could be published. It is also made clear by MDE’s April 17, 2015 proposal to use emergency rulemaking procedures under the Maryland APA to promulgate a regulation that would implement only Phase I of the Adopted NOx Regulations only during the 2015 ozone season. By proposing to use an emergency rulemaking to temporarily implement only a portion of the regulations that have already been finalized and adopted, it is clear that the Governor and MDE are ignoring, rather than enforcing, the Adopted NOx Regulations.<sup>21</sup> As such, Sierra Club and PSR’s noticed legal action to require that the Adopted NOx Regulations be published and treated as having force and effect also fits within the second category of claims for which MESA establishes standing.

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<sup>21</sup> MDE’s April 17, 2015 emergency regulatory proposal to implement Phase I of the Adopted NOx Regulations during the 2015 ozone season does not obviate the legal or public health necessity of publishing the Adopted NOx Regulations in full. For one thing, the emergency regulations, which have not yet been finalized, would be temporary and, therefore, would provide no certainty that necessary NOx emission reductions would occur after 2015. In addition, those emergency regulations would not implement the more protective Phase II standards in the Adopted NOx Regulations which are necessary for fully addressing the serious ozone pollution problems in Maryland. Finally, MDE cannot abrogate the fully promulgated Adopted NOx Regulations through an emergency rulemaking but, instead, would need to implement an entirely new regulatory process, including with opportunity for public comment, if the agency desired to attempt to eliminate or significantly modify the Adopted NOx Regulations.



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## **VI. Conclusion**

As demonstrated above, the Division, Governor Hogan, and MDE failed to satisfy their legal duty to publish the Adopted NO<sub>x</sub> Regulations and treat them as having force and effect. Unless the unlawful withdrawal of the adopted regulations is reversed so that the regulations are published and treated as having force and effect, Sierra Club and PSR intend on or after thirty days after the date of this notice letter to file suit for mandamus, declaratory relief, and equitable relief to require that the Adopted NO<sub>x</sub> Regulations be published and enforced. Sierra Club and PSR, however, would certainly prefer to avoid litigation regarding this matter if possible and, therefore, are more than willing to discuss any of the points raised in this letter at your convenience.

Respectfully Submitted,

Susan Stevens Miller  
Michael Soules  
Earthjustice  
1625 Massachusetts Ave. NW, Suite 702  
Washington, D.C. 20036  
(202) 667-4500  
smiller@earthjustice.org  
msoules@earthjustice.org

Shannon Fisk  
Managing Attorney, Coal Program  
Earthjustice  
1617 John F. Kennedy Blvd., Suite 1675  
Philadelphia, PA 19103  
(215) 717-4522  
sfisk@earthjustice.org

cc: Robert F. Scholz, Chief Legal Counsel, Office of the Governor  
Steven R. Johnson, Principal Counsel, Maryland Department of the Environment  
Legal Counsel, Office of the Secretary of State

Encl.