

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

PHYSICIANS FOR SOCIAL RESPONSIBILITY,
CHESAPEAKE, INC.; and SIERRA CLUB
MARYLAND CHAPTER,

Plaintiffs,

Civil Action No. _____

v.

LAWRENCE J. HOGAN, JR., in his official capacity as
the Governor of Maryland; OFFICE OF THE
SECRETARY OF STATE, DIVISION OF STATE
DOCUMENTS; and the MARYLAND DEPARTMENT
OF THE ENVIRONMENT,

Defendants.

**COMPLAINT FOR WRIT OF MANDAMUS AND FOR
DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. Through this Complaint, Plaintiffs challenge the actions of the Governor of Maryland and the Division of State Documents, who have unlawfully thwarted an air quality regulation for coal-fired power plants. This regulation, which was adopted by the Maryland Department of the Environment (“MDE”) on January 16, 2015, will protect Marylanders from the harmful effects of ozone pollution.

2. Maryland residents are consistently exposed to some of the highest ozone levels in the United States. This ozone pollution harms human health, and it acutely affects sensitive populations such as children, asthmatics, and the elderly. Ozone, which is commonly referred to as “smog,” forms when nitrogen oxides (“NOx”) chemically react with volatile organic compounds (“VOCs”) in the presence of heat and sunlight.

3. Coal-fired power plants are among Maryland’s largest individual sources of NOx, and are a major contributor to the State’s ozone problem. According to MDE, these plants “have accounted for more than 80 percent of the State’s power plant NOx emissions.”¹

4. To address Maryland’s ozone problem, and to satisfy its obligations under the federal Clean Air Act, MDE undertook a robust and lengthy stakeholder process to develop a new regulation to control NOx emissions from coal plants. The resulting proposal garnered the support of virtually all of the stakeholders, including a company that owns three of the coal plants that would be subject to the NOx standards.

5. Following the stakeholder process, as well as the formal process for promulgating regulations under the Maryland Administrative Procedure Act (“APA”), MDE adopted its proposal as a final regulation on January 16, 2015. On that date, MDE issued a notice of

¹ MDE, Technical Support Document for COMAR 26.11.38 - Control of NOx Emissions from Coal-Fired Electric Generating Units at 22 (Dec. 3, 2014) (hereinafter, “TSD”).

adoption, which established new Regulations .01-.06 under COMAR 26.11.38 (hereinafter, the “NOx Regulation”).² The NOx Regulation will significantly reduce NOx emissions from coal-fired power plants, benefiting the health of millions of Marylanders.

6. On January 16, 2015, immediately following its adoption of the NOx Regulation, MDE submitted its notice of adoption to the Division of State Documents (“Division”) for publication in the Maryland Register.

7. Upon receiving MDE’s notice, the Division had a mandatory duty to timely publish that notice in the Maryland Register. Md. Code, State Gov’t § 7-206(a)(2). This duty is ministerial; the Division has no discretion to withhold or delay publication of an agency’s notice of adoption. Consequently, the notice of adoption should have been published in the next available issue of the Maryland Register, and the NOx Regulation should have taken effect ten days later. *See id.* § 10-117(a).

8. This well-established process for publishing adopted regulations broke down on January 21, 2015. On that day, shortly before the Maryland Register’s January 23rd issue was printed, Governor Lawrence Hogan ordered that several final, adopted regulations – including the NOx Regulation – not be published in the Maryland Register. Today, more than four months later, the Division still has not complied with its nondiscretionary, ministerial duty to publish the notice of adoption for the NOx Regulation.

9. The Division’s failure to perform its duty, and the Governor’s interference with the publication of an already-adopted regulation, violate Maryland law and threaten harm to Maryland’s public health and environment. If the NOx Regulation is not enforced, Marylanders will continue to suffer from higher ozone levels, which will continue to harm their health. Put

² MDE’s Notice of Final Action, reflecting its adoption of the NOx Regulation, is attached to this complaint as Exhibit A. The proposed regulation, which was adopted with non-substantive changes, is attached as Exhibit B.

simply, enforcement of the NOx Regulation is critical to the long-term health of Maryland residents.

10. Plaintiffs are non-profit organizations that represent a broad coalition of concerned Maryland residents and Maryland's public health community. Plaintiffs and their members will be harmed if the NOx Regulation does not go into effect. Plaintiffs therefore seek a writ of mandamus ordering the Division to promptly publish the NOx Regulation's notice of adoption, and ordering the Governor to withdraw his letter blocking that publication. In the alternative, Plaintiffs seek injunctive relief against the Defendants to ensure publication of the notice of adoption. Plaintiffs also seek a declaratory judgment that the Governor's actions, and the Division's failure to act, violate Maryland law.

JURISDICTION AND VENUE

11. This Court has jurisdiction pursuant to Sections 1-501, 3-403, and 3-8B-01 of the Courts and Judicial Proceedings Article of the Maryland Code. This Court also has jurisdiction under the Maryland Environmental Standing Act ("MESA"), because Defendants failed "to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation, or order," and failed "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). Further, this Court has jurisdiction over Plaintiffs' mandamus claims under its inherent judicial authority "to review and correct actions by an administrative agency which are arbitrary, illegal, capricious or unreasonable." *Harvey v. Marshall*, 389 Md. 243, 275, 884 A.2d 1171, 1190 (Md. 2005) (citations omitted).

12. This Court has venue under Section 1-505(a) of MESA because Defendants' actions, and failures to act, have occurred and are occurring in Anne Arundel County. Md. Code, Nat. Res. § 1-505(a). Alternatively, venue is proper pursuant to Section 6-201(a) of the Courts and Judicial Proceedings Article.

PARTIES

13. Physicians for Social Responsibility, Chesapeake, Inc. ("Chesapeake PSR") is dedicated to creating a healthy, just, and peaceful world for both the present and future generations. Among other efforts, Chesapeake PSR uses its medical and public health expertise to work to slow, stop, and reverse global warming and the toxic degradation of the environment. Chesapeake PSR, which has approximately 300 members, actively participated in MDE's stakeholder process for developing the NOx Regulation, including attending public meetings and submitting multiple rounds of written comments to the agency. As an entity incorporated under the laws of the State of Maryland, and a legal entity doing business in the State, Chesapeake PSR has standing to bring this action pursuant to Md. Code, Nat. Res. §§ 1-501(b), 1-503(a)(3).

14. 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 NOx Regulation, including attending all public meetings and submitting multiple rounds of

written comments to the agency. As part of the Sierra Club, a legal entity doing business in the State, the Maryland Chapter of the Sierra Club has standing to bring this action pursuant to Md. Code, Nat. Res. §§ 1-501(b), 1-503(a)(3).

15. Defendant Lawrence J. Hogan, Jr., is sued in his official capacity as the Governor of Maryland. The Governor is responsible for following and executing the laws of the State of Maryland. The Governor's executive responsibilities include the obligation to not interfere with the performance of a state agency's ministerial duties prescribed by law.

16. Defendant Division of State Documents is a state agency within the Maryland Office of the Secretary of State. Md. Code, State Gov't § 7-202. The Division is responsible for compiling, editing, and publishing the Maryland Register and the Code of Maryland Regulations. *Id.* § 7-204.

17. Defendant Maryland Department of the Environment is a state agency. MDE is responsible for protecting and preserving the State's air, water, and land resources, and safeguarding Marylanders' public health. This Complaint does not assert a specific cause of action against MDE. Rather, MDE has been joined as a Defendant in this action because its absence could "impair or impede [its] ability to protect a claimed interest relating to the subject of the action." Md. Rules, § 2-211(a)(2).

18. Plaintiffs' members live, work, travel, recreate, and conduct other activities in areas that suffer from ozone pollution. Plaintiffs and their members are affected by poor air quality resulting from excessive NOx emissions from Maryland's coal-fired power plants, and Plaintiffs have a strong interest in ensuring that their members breathe the cleanest air possible. By preventing publication of the NOx Regulation, Defendants' acts and omissions harm Plaintiffs' members by prolonging air quality conditions that adversely affect them and endanger

their health and welfare, and by subjecting them to additional amounts of harmful air pollution that would be reduced if the NOx Regulation were allowed to take effect. Plaintiffs and their members also have a substantial interest in ensuring that the Governor and the Division comply with Maryland law, including the State's environmental laws and the APA. Accordingly, the interests of Plaintiffs and their members have been and will continue to be harmed by Defendants' actions thwarting implementation of the NOx Regulation.

19. Moreover, Plaintiffs and their members are, and will continue to be, personally and specifically affected by the Defendants' actions in a manner that is different from that suffered by the public generally. Plaintiffs have invested substantial time and resources in advocating for a strong, health-protective regulation, and they have a specific interest in ensuring that the NOx Regulation is implemented. By thwarting this regulation, Defendants have acutely harmed Plaintiffs' interests.

LEGAL FRAMEWORK

Maryland's Process for Promulgating Regulations

20. Under Maryland law, a "regulation" is defined as a "statement or an 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).

21. The process for promulgating a regulation is governed primarily by the Maryland Administrative Procedure Act ("APA"), and by related statutory provisions that outline the Division's responsibilities. *See generally id.* §§ 10-101 *et seq.* (APA); *id.* §§ 7-201 *et seq.* (Division of State Documents). 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.

22. The formal process for promulgating a regulation generally begins when an agency submits the proposed regulation to the Joint Committee on Administrative, Executive, and Legislative Review (“AELR Committee”) for preliminary review. Md. Code, State Gov’t § 10-110(c)(1). The agency then submits the proposed regulation, along with a “notice of the proposed adoption,” to the Division for publication in the Maryland 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).

23. When a proposed regulation is published in the Register, this triggers a 45-day review period, during which the AELR Committee may review the regulation. *Id.* § 10-111(a)(1)(ii). In reviewing a proposed regulation, the AELR Committee 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).

24. During the 45-day review period, the promulgating agency must also provide a public comment period of at least 30 days. *Id.* § 10-111(a)(3).

25. If the AELR 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)(3). An agency “may withdraw a proposed regulation at any time before its adoption.” *Id.* § 10-116.

26. While the APA does not specifically define the term “adoption,” it provides that “[a]fter adopting a regulation,” an agency must submit a “notice of adoption, for publication in the Register” to the Division. *Id.* § 10-114(a). These notices, which are commonly entitled “Notice of Final Action,” indicate the title, citation, and date of adoption of the previously-published proposed regulation.

27. Upon receiving an agency’s notice of adoption, the Division has a ministerial duty to publish that notice in the Maryland Register within a prescribed period of time. *Id.* §§ 7-206(a)(2), 7-206(a)(2)(ix), 10-114(a). If a notice is submitted prior to the closing date for a given issue of the Maryland Register, the Division must publish the notice in that issue.

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

Maryland Environmental Standing Act

29. The General Assembly enacted the Maryland Environmental Standing Act (“MESA”) because it found “that the natural resources and the scenic beauty of the State of Maryland are in danger of irreparable harm occasioned by the use and exploitation of the physical environment,” and “that improper use and exploitation constitute an invasion of the right of every resident of Maryland to an environment free from pollution to the extent possible.” Md. Code, Nat. Res. § 1-502. The Assembly concluded “that the courts of the State of Maryland are an appropriate forum for seeking the protection of the environment and that an unreasonably strict procedural definition of ‘standing to sue’ in environmental matters is not in the public interest.” *Id.*

30. MESA broadly confers standing on parties to bring actions that seek “the protection of the environment.” *Id.* Specifically, MESA permits such actions to be brought by

“[a]ny other person, regardless of whether he possesses a special interest different from that possessed generally by the residents of Maryland, or whether substantial personal or property damage to him is threatened.” *Id.*, § 1-503(a)(3).

31. Under MESA, a party with standing “may bring and maintain an action for mandamus or equitable relief, including declaratory relief against any officer or agency of the State . . . for failure on the part of the officer or agency of the State . . . to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute, ordinance, rule, regulation, or order, or for their 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” *Id.*, § 1-503(b).

32. MESA contains a pre-suit notice requirement. Before a private party can bring an action under MESA, the plaintiff must provide “a sufficient written notice of the alleged condition, activity, or failure to the agency of the State . . . responsible for initiating or instituting some official action as a result of the alleged condition, activity, or failure.” *Id.*, § 1-505(b). The notice must be delivered to the defendant agency, with a copy to the Attorney General, at least 30 days before filing suit.

BACKGROUND

Clean Air Act

33. The federal Clean Air Act establishes a comprehensive scheme “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). The Act directs the United States Environmental Protection Agency (“EPA”) to establish national ambient air quality standards for pollutants considered to be harmful to human health, such as ozone. *See id.*

§§ 7401 *et seq.* A core aim of the Clean Air Act is to bring all communities in the country into compliance with these standards through permanent and enforceable emission reductions and then keep them in compliance.

34. After establishing the national ambient air quality standard for a given pollutant, EPA designates regions around the country according to their compliance with that standard. *Id.* § 7407(d)(1). Areas that do not meet the standard are designated as “nonattainment.” *See id.* § 7407(d)(1)(A)(i). For some pollutants, such as ozone, EPA sub-categorizes nonattainment areas based on the degree to which they fall beneath the standard. Thus, “marginal” nonattainment areas are relatively close to meeting the standard, “moderate” nonattainment areas are further out of compliance, and so forth.

35. If an area is designated as nonattainment, the state must develop a plan to bring that area into compliance with the Clean Air Act standards. The plan must, among other things, “provide for the implementation of all reasonably available control measures as expeditiously as practicable,” and provide for “such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology [RACT].” *Id.* § 7502(c)(1). Thus, the Clean Air Act directs states to establish RACT-based emission limits for stationary sources, such as coal plants.

36. If an area receives a moderate (or higher) nonattainment designation for ozone, that state must establish a RACT-based limit for NO_x emissions. *Id.* § 7511a(b)(2). The requirement to establish a RACT-based limit for NO_x emissions also applies to states, such as Maryland, that are located within the Ozone Transport Region. *See id.* §§ 7511c(b)(1)(B), 7511a(f); *see also* 57 Fed. Reg. 55620, 55622 (Nov. 25, 1992). The Ozone Transport Region, which includes 11 states and the D.C. metropolitan area, was established in recognition of the

fact that emissions from other states can contribute to ozone pollution within the states of this Region.

Ozone Pollution in Maryland

37. Ozone, while necessary in the upper atmosphere to block ultraviolet radiation from the sun, is a corrosive air pollutant that is harmful to humans and other living organisms at lower elevations.

38. Ground-level ozone, commonly referred to as smog, forms when NO_x reacts with volatile organic compounds (“VOCs”) in the presence of heat and sunlight. Although NO_x originates from many sources, coal-fired power plants are among the largest individual sources of NO_x emissions within the State of Maryland.

39. Exposure to ozone can cause a number of acute and chronic health effects. Ozone inflames the lungs and can leave people gasping for breath. It has been linked with emergency room visits, hospitalizations, and premature deaths. Studies have shown that exposure to ozone increases the risk of heart attacks and hospital admission for other cardiovascular conditions, and increases the risk of low birth weight in babies.

40. Certain groups are especially vulnerable to ozone exposure, such as children, the elderly, and those suffering from lung diseases. Studies have linked ozone to increases in school absences. Exposure to ozone has been correlated with an increased risk of death for those suffering from cardiopulmonary conditions. People suffering from asthma are particularly affected because ozone can trigger asthma attacks, and because the reduced lung function caused by ozone disproportionately affects asthma sufferers.

41. In 2008, recognizing that existing standards did not adequately protect public health, EPA strengthened the national ambient air quality standards for ozone pollution. *See* 73

Fed. Reg. 16436 (Mar. 27, 2008). These standards establish that ozone levels must remain at or below 75 parts per billion (“ppb”), averaged over an 8-hour period, to protect public health and welfare. *Id.* at 16511-14.

42. Since EPA’s issuance of the 2008 standards, evidence has continued to mount that even those improved standards do not adequately protect public health. Consequently, EPA has proposed lowering the current 75-ppb ozone standard to a more health-protective standard in range of 65-70 ppb. 79 Fed. Reg. 75234, 75396-97 (Dec. 17, 2014). Pursuant to a federal court order, EPA must issue a final decision on this proposal no later than October 1, 2015.

43. Marylanders are consistently exposed to some of the highest ozone levels in the Eastern United States. Ozone levels throughout much of Maryland have exceeded the 2008 ozone standards. As MDE explained last fall, “Maryland’s ozone problem is amongst the worst in the Country.”³ MDE has recognized that “[e]xposure to ground level ozone is a serious public health issue linked to asthma, many other respiratory problems and early mortality,” and that “[c]hildren are particularly sensitive.” *Id.*

44. In 2012, following its promulgation of the 2008 ozone standards, EPA determined which areas around the country were not meeting those standards. The Baltimore area – including Baltimore City, Anne Arundel County, Baltimore County, Carroll County, Harford County, and Howard County – received a designation of “moderate” nonattainment. 77 Fed. Reg. 30088, 30127 (May 21, 2012). Six other counties – Calvert County, Charles County, Frederick County, Montgomery County, Prince George’s County, and Cecil County – were designated as “marginal” nonattainment. *Id.* Altogether, 88% of Marylanders – more than five

³ MDE, *COMAR 26.11.38 Control of NO_x Emissions from Coal-Fired Electric Generating Units: An Update to AQCAC*, Oct. 6, 2014, at 6 (attached to TSD, Appendix A) (hereinafter, “Oct. 2014 Update”). Note: the date of this document is mislabeled as 10/17/14.

million people – live in areas that were designated as nonattainment under the 2008 ozone standards.⁴

45. EPA recently determined that the Baltimore area is meeting the 2008 ozone standards. 80 Fed. Reg. 30941 (June 2, 2015). However, if EPA adopts its current proposal to lower the ozone standards to 70 ppb (or lower), EPA’s own data indicates that the Baltimore area would no longer be in attainment.

NOx Emissions from Coal-Fired Power Plants

46. Although VOC and NOx are both ozone precursors, in the Eastern United States NOx is “the limiting precursor to ozone.” TSD at 26. Consequently, reducing NOx emissions “provide[s] a greater benefit in reducing ozone levels in Maryland.” *Id.*

47. Maryland’s seven coal plants, which encompass 14 coal-fired generating units, account for more than 80% of NOx emissions from power plants in the State. TSD at 22.

48. The effectiveness of NOx pollution controls at Maryland’s coal plants vary significantly across the fleet. Less than half of the coal fleet is equipped with selective catalytic reduction (“SCR”), which is the most effective control equipment for reducing NOx emissions. The remaining units have selective non-catalytic reduction (“SNCR”) or similar controls, which are much less effective than SCR.⁵ The most poorly-controlled coal units in Maryland emit NOx at rates ten times higher than the emission rates of the best-controlled units.⁶

⁴ EPA, Green Book, available at: <http://www.epa.gov/oaqps001/greenbk/ancl.html> (last visited June 10, 2015); United States Census Bureau, American FactFinder, 2014 population estimates, available at <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited June 10, 2015).

⁵ There is one coal-fired unit which does not have SCR, but which emits NOx at rates that are roughly comparable to SCR-level rates due to a different boiler design. This unit is addressed separately in the NOx Regulation. Ex. B, COMAR 26.11.38.03(D).

⁶ See, e.g., EPA, Air Markets Program Database (ampd.epa.gov/ampd/) (Crane Units 1 & 2 and Wagner Unit 2 frequently emit at rates exceeding 0.35 lb/MMBtu, while Morgantown Unit 1 achieves emission rates below 0.035 lb/MMBtu) (last visited June 9, 2015).

49. The high NO_x emissions resulting from the SNCR units are particularly acute during the ozone season, which runs from May 1 to September 30 each year.

50. MDE has found that although the SNCR units “operated less than units equipped with advanced NO_x controls [*i.e.*, SCRs],” these SNCR units “often operated on high temperature days when electricity demand is highest (‘peak days’).” TSD at 11. These high temperature days are also the days “most conducive to ozone formation.” *Id.* On peak ozone days, the most poorly-controlled coal units are the largest contributors of ozone precursors in Maryland. Consequently, reducing NO_x emissions from these facilities will significantly improve Maryland’s air quality. As MDE has emphasized, “Maryland has reached a point where continued NO_x reductions will result in greater ozone reductions than has been seen in the past.” TSD at 27.

Development of the NO_x Regulation

51. MDE’s development of the NO_x Regulation was prompted by EPA’s designation of the Baltimore area as moderate nonattainment under the 2008 ozone standards. This designation triggered the Clean Air Act’s reasonably available control technology, or RACT, requirement: because NO_x is an ozone precursor, Maryland must submit a plan to EPA that includes RACT limits for major NO_x sources. 42 U.S.C. § 7502(c)(1). Moreover, because Maryland is within the Ozone Transport Region, MDE is required to submit a RACT plan to EPA regardless of the Baltimore area’s designation. The deadline for submitting this plan to EPA was July 20, 2014. *See* 80 Fed. Reg. 12264, 12266, 12282, 12295 (Mar. 6, 2015).

52. In October 2013 – more than a year before it formally proposed the NO_x Regulation – MDE launched a robust stakeholder process to solicit input from the owners of the coal-fired power plants, the public health community, and other stakeholders. Throughout this

process, MDE held multiple stakeholder meetings. In December 2013, MDE released a draft regulation and sought written comments on the draft. Comments were received from the plant owners, environmental and public health organizations, a state senator, and more than 2000 members of the public.

53. On September 8, 2014, following an additional eight months of regulation development and stakeholder process, MDE submitted a draft of the NO_x regulation to Maryland's Air Quality Control Advisory Council ("Advisory Council"), a council representing a broad spectrum of stakeholders that advises MDE on draft air regulations. At the meeting, the Advisory Council heard testimony supporting the draft regulation from a wide range of stakeholders, including health professionals, the environmental community, the faith community, and affected citizens. The Council also heard testimony from the plant owners, who urged additional time for refinement of the regulation. Recognizing the need to quickly finalize the regulation, as well as the plant owners' desire for additional time, the Advisory Council voted unanimously for MDE to move forward with its proposed adoption process and proposed schedule, with the condition that MDE report back within one month on any refinements to the regulation.

54. During that month, MDE held additional stakeholder meetings at which it made changes to the regulation. MDE loosened the NO_x emission limits for several coal units. MDE also extended the compliance date for Phase II of the regulation – when the units that currently lack advanced controls would need to achieve deeper emission reductions – from 2018 to 2020. MDE agreed to this extension “to insure that companies had ample time to modernize the older less efficient units in their fleet.” Oct. 2014 Update at 7. MDE stressed that this “extension . . . was a major compromise intended to give companies time to modernize their older units and

avoid shutdowns.” *Id.* With these modifications, the draft regulation received the support of all of the stakeholders except for one plant owner. MDE brought the revised regulation back to the Advisory Council on October 6, 2014, where it passed unanimously.

55. Following this lengthy stakeholder process, MDE submitted the proposed regulation to the AELR Committee for preliminary review. Subsequently, on December 1, 2014, the proposed regulation was published in the Maryland Register. 41:24 Md. R. 1449-54 (Dec. 1, 2014). MDE opened a public comment period on the proposed regulation, 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.

56. On January 16, 2015, MDE adopted the final NO_x Regulation. *See* Ex. A (Notice of Final Action).

57. The NO_x Regulation establishes two sets of emission limits for Maryland’s coal plants, to be phased in over a five-year period. Under Phase I, which was scheduled to begin on May 1, 2015, coal units are required to operate their existing NO_x emissions controls during the ozone season, and the owners of the two main coal fleets are required to meet a fleet-wide NO_x emission rate. *See* Ex. B, COMAR 26.11.38.03.⁷

58. Phase II, which would “drive deeper peak day reductions in NO_x emissions from power plants,” is designed “to prevent continuing [ozone] nonattainment and protect public health.” TSD at 31, 14. Under Phase II, scheduled to begin on June 1, 2020, each of the coal units will be required to meet a NO_x emission rate that is consistent with the installation and operation of SCR, the state-of-the-art technology for controlling NO_x emissions. For those units that currently lack advanced emission controls, the plant owners will have the option to either (a)

⁷ This Complaint cites to the proposed regulation because MDE’s Notice of Final Action does not reproduce the text of the NO_x Regulation.

install SCR controls; (b) repower the unit to natural gas, a fuel source that creates fewer NOx emissions; or (c) retire the unit. Ex. B, COMAR 26.11.38.04. According to MDE, Phase II could reduce NOx emissions by as much as 36% – “an expected reduction of 17 tons per day.” TSD at 24; *see also* 41:24 Md. R. 1450.

59. MDE has recognized the significant public health benefits of this regulation. As it explained in issuing the proposed regulation, the NOx Regulation “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.” 41:24 Md. R. 1451; *see also* TSD at 7 (noting “health benefits includ[ing] fewer asthma attacks, hospital and emergency room visits, lost work and school days, and lower premature mortality”). In addition to its public health impacts, the NOx Regulation benefits the Chesapeake Bay by reducing “the amount of nitrogen entering the Bay each year.” TSD at 7-8.

60. MDE has specifically noted the importance of the NOx Regulation’s Phase II reductions, which were “designed to prevent continuing nonattainment and protect public health, given [EPA’s] proposed new more stringent ozone standard.” TSD at 14. As the agency explained, “[t]he phased reductions in the regulation will reduce emissions significantly and help Maryland protect public health and meet current and future standards.” Oct. 2014 Update at 6.

61. After adopting the NOx Regulation on January 16, 2015, MDE prepared a notice of adoption. *See* Ex. A; *see generally* Md. Code, State Gov’t § 10-114(a). MDE submitted this notice, entitled “Notice of Final Action,” to the Division that same day. *See* Ex. C (copy of MDE’s January 16, 2015 transmittal sheet).

62. Upon receiving the notice, the Division had a mandatory duty to publish it in the next available issue of the Maryland Register. If the Division had properly discharged that duty, the NOx Regulation would have taken effect in February 2015 – ten days after its publication in the Register. *See* Md. Code, State Gov't § 10-117(a).

The Governor and Division Block the NOx Regulation

63. The NOx Regulation should have been published in the Maryland Register more than four months ago. But the Regulation has still not been published, because the Governor has unlawfully thwarted its implementation.

64. On January 21, 2015, the Governor directed the Division not to publish several final regulations in the Maryland Register – including the NOx Regulation. *See* Ex. D. Disregarding its ministerial duty to publish the NOx Regulation, the Division followed the Governor's directive and pulled the notice of adoption from the Maryland Register. To date, the Division has still not satisfied its duty to publish that notice.

65. Over the following months, Maryland's public health community, including Sierra Club and Chesapeake PSR, and numerous Maryland residents have repeatedly urged the Governor to allow the NOx Regulation to be published. Despite these efforts, the Governor has not relented from his decision to block the Regulation.

66. Earlier this year, the Governor's intransigence resulted in MDE undertaking an emergency rulemaking. As explained above, the Phase I standards in the NOx Regulation were scheduled to take effect on May 1, 2015 – the start of this year's ozone season. But because the Governor has blocked the NOx Regulation, Maryland's coal plants could have operated without employing their existing pollution controls. Faced with an emergency of the Governor's creation, MDE announced on April 17, 2015, that it would enact an emergency regulation in

order to implement the Phase I controls. The emergency regulation is set to expire on October 26, 2015, and MDE has started a rulemaking process aimed at enacting these Phase I controls for future ozone seasons. Meanwhile, the NOx Regulation – including the Phase II standards which are critical to reducing ozone levels over the long run – continues to languish. Until this Regulation is published, and the State begins to enforce it, Marylanders will face unnecessary harm from excessive NOx emissions and the resulting ozone pollution. Prompt implementation of the NOx Regulation is also important for the coal plant owners, who will need to begin planning for the Phase II regulations well before the June 1, 2020 effective date.

67. On April 22, 2015, Plaintiffs sent a letter to the Defendants notifying them that Plaintiffs intended to bring suit against them pursuant to MESA. *See* Md. Code, Nat. Res. § 1-505(b); Ex E (copy of notice letter).⁸ Plaintiffs also provided a copy of this notice letter to the Attorney General. The Defendants, and the Attorney General, received this letter on April 24, 2015. Because more than 30 days have passed since delivery of this letter, Plaintiffs have satisfied the pre-suit notice requirements of MESA.

68. Because the Division had a nondiscretionary ministerial duty to publish the NOx Regulation and its notice of adoption, and because that duty was created by MDE's adoption of this environmental regulation, Plaintiffs seek a writ of mandamus under MESA directing the Division to publish that notice. Md. Code, Nat. Res. § 1-503(b). Likewise, because the Governor is interfering with the Division's nondiscretionary ministerial duty, and is "fail[ing] to enforce an applicable environmental quality standard for the protection of the air," *id.*, Plaintiffs seek a writ of mandamus against the Governor. Plaintiffs also seek injunctive and declaratory relief against both Defendants.

⁸ Plaintiffs' notice letter included nine separate attachments. For the sake of brevity, only the letter itself is reproduced in Ex. E. Several of the attachments, however, have been reproduced in other exhibits attached to this Complaint. *See* Exs. A, C, D.

CLAIMS FOR RELIEF

FIRST CAUSE OF ACTION

(Writ of Mandamus Against the Division)

69. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

70. MDE adopted the NOx Regulation on January 16, 2015. MDE submitted its notice of adoption, termed a “Notice of Final Action,” to the Division on the same day.

71. Because MDE submitted the NOx Regulation’s notice of adoption to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

72. The Division failed to publish the NOx Regulation’s notice of adoption within the time period prescribed by state law. To date, the Division has not published that notice in the Maryland Register.

73. MDE’s submission of the NOx Regulation’s notice of adoption triggered the Division’s nondiscretionary ministerial duty to timely publish that notice. Plaintiffs have a clear right to publication of the NOx Regulation’s notice of adoption pursuant to MESA. Md. Code, Nat. Res. § 1-503(b).

74. Additionally, Plaintiffs have a clear right to publication of the NOx Regulation’s notice of adoption because the Division’s failure affects and harms Plaintiffs in a manner different from that suffered by the public generally. Because Plaintiffs have specific, direct interests in the NOx Regulation’s implementation, Plaintiffs have a right to enforce the Division’s performance of its ministerial duty.

75. Plaintiffs have no other adequate remedy to ensure that the already-adopted NOx Regulation is enforced.

76. Because the Division has failed to perform a nondiscretionary ministerial duty, and because Plaintiffs are entitled to performance of that duty, the Court should issue a writ of mandamus ordering the Division to promptly publish the NOx Regulation's notice of adoption in the Maryland Register.

SECOND CAUSE OF ACTION
(Writ of Mandamus Against the Governor)

77. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

78. MDE adopted the NOx Regulation on January 16, 2015. The agency submitted its notice of adoption, termed a "Notice of Final Action," to the Division on the same day.

79. Because MDE submitted the NOx Regulation's notice of adoption to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

80. By ordering the Division to remove the NOx Regulation's notice of adoption from the Maryland Register, the Governor unlawfully interfered with the Division's performance of a nondiscretionary ministerial duty imposed upon it by an environmental regulation. The Governor's action was unlawful, arbitrary, capricious, and unreasonable. Plaintiffs have a clear right to publication of the NOx Regulation's notice of adoption pursuant to MESA. Md. Code, Nat. Res. § 1-503(b).

81. By refusing to enforce the NOx Regulation, the Governor is "fail[ing] to enforce an applicable environmental quality standard for the protection of the air" *Id.* Plaintiffs have a clear right to enforcement of the NOx Regulation pursuant to MESA. *Id.*

82. Additionally, Plaintiffs have a clear right to enforcement of the NOx Regulation because they are affected and harmed by the Governor's unlawful acts in a manner that is different from that suffered by the public generally. Because Plaintiffs have specific, direct interests in the NOx Regulation's implementation, Plaintiffs have a right to enforcement of the NOx Regulation.

83. Plaintiffs have no other adequate remedy to ensure that the already-adopted NOx Regulation is enforced.

84. Because the Governor is "fail[ing] to enforce an applicable environmental quality standard for the protection of the air," *id.*, and unlawfully interfering with the performance of a nondiscretionary ministerial duty imposed upon the Division by an environmental regulation, *id.*; and because Plaintiffs are entitled to enforcement of the NOx Regulation, the Court should issue a writ of mandamus ordering the Governor to withdraw his directive prohibiting publication of the NOx Regulation.

THIRD CAUSE OF ACTION
(Declaratory Judgment Against the Division)

85. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

86. Plaintiffs seek a declaration from this Court pursuant to MESA and the Maryland Uniform Declaratory Judgment Act. Md. Code, Nat. Res. § 1-503(b); Courts & Jud. Proc., §§ 3-401 to -415.

87. There exists a case and controversy between Plaintiffs and the Division, which is ripe for adjudication.

88. MDE adopted the NOx Regulation on January 16, 2015. MDE submitted its notice of adoption, termed a "Notice of Final Action," to the Division on the same day.

89. Because MDE submitted the NOx Regulation's notice of adoption to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

90. The Division failed to publish the NOx Regulation's notice of adoption within the time period prescribed by state law. To date, the Division has not published that notice in the Maryland Register.

91. Plaintiffs seek a declaration that, by failing to timely publish the NOx Regulation's notice of adoption, the Division has failed "to perform a nondiscretionary ministerial duty imposed upon [it]" by an environmental regulation. Md. Code, Nat. Res. § 1-503(b).

92. Plaintiffs also seek a declaration that, by failing to timely publish the NOx Regulation's notice of adoption, the Division has violated Section 7-206(a)(2) of the State Government Article.

93. Accordingly, Plaintiffs seek a declaration from this Court that (a) the Division's failure to publish the NOx Regulation's notice of adoption violates MESA and the State Government Article, and (b) the Division is continuing to violate these statutory requirements.

FOURTH CAUSE OF ACTION
(Declaratory Judgment Against the Governor)

94. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

95. Plaintiffs seek a declaration from this Court pursuant to MESA and the Maryland Uniform Declaratory Judgment Act. Md. Code, Nat. Res. § 1-503(b); Courts & Jud. Proc., §§ 3-401 to -415.

96. There exists a case and controversy between Plaintiffs and the Governor, which is ripe for adjudication.

97. MDE adopted the NOx Regulation on January 16, 2015. The agency submitted its notice of adoption, termed a “Notice of Final Action,” to the Division on the same day.

98. Because MDE submitted the NOx Regulation’s notice of adoption to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

99. By ordering the NOx Regulation’s notice of adoption to be removed from the Maryland Register, the Governor unlawfully interfered with the performance of a nondiscretionary ministerial duty imposed upon the Division by an environmental regulation. Md. Code, Nat. Res. § 1-503(b). Accordingly, Plaintiffs seek a declaration from this Court that (a) the Governor’s interference violated the MESA and the State Government Article, and (b) the Governor is continuing to violate these statutory requirements.

100. By refusing to enforce the NOx Regulation, the Governor is “fail[ing] to enforce an applicable environmental quality standard for the protection of the air.” *Id.* Accordingly, Plaintiffs seek a declaration from this Court that (a) the Governor’s failure to enforce the NOx Regulation violates MESA, and (b) the Governor is continuing to violate this statutory requirement.

FIFTH CAUSE OF ACTION
(Injunction Against the Division)

101. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

102. MDE adopted the NOx Regulation on January 16, 2015. MDE submitted its notice of adoption, termed a “Notice of Final Action,” to the Division on the same day.

103. Because MDE submitted the NOx Regulation's notice of adoption to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

104. The Division failed to publish the NOx Regulation's notice of adoption within the time period prescribed by state law. To date, the Division has not published that notice in the Maryland Register.

105. By failing to timely publish the NOx Regulation's notice of adoption, the Division has failed "to perform a nondiscretionary ministerial duty imposed upon [it]" by an environmental regulation. Md. Code, Nat. Res. § 1-503(b). Pursuant to MESA, the Court should issue an injunction directing the Division to promptly publish the notice of adoption.

106. Alternatively, the Court should issue an injunction directing the Division to promptly publish the notice of adoption because Plaintiffs and their members have been, and will continue to be, irreparably harmed by the Division's failure to do so.

SIXTH CAUSE OF ACTION
(Injunction Against the Governor)

107. Plaintiffs restate and incorporate by reference the allegations set forth in paragraphs 1-68 of this Complaint.

108. MDE adopted the NOx Regulation on January 16, 2015. MDE submitted its notice of adoption, termed a "Notice of Final Action," to the Division on the same day.

109. Because MDE submitted the NOx Regulation's Notice of Final Action to the Division, the Division was legally required to publish that notice in the next available issue of the Maryland Register.

110. By ordering the Division to remove the NOx Regulation's notice of adoption from the Maryland Register, the Governor unlawfully interfered with the Division's performance of a

nondiscretionary ministerial duty. Md. Code, Nat. Res. § 1-503(b). Accordingly, pursuant to MESA, the Court should enjoin the Governor from interfering with the Division's publication of the NOx Regulation's notice of adoption.

111. Alternatively, the Court should issue an injunction prohibiting the Governor from interfering with publication of the NOx Regulation's notice of adoption because Plaintiffs have been, and will continue to be, irreparably harmed by the Governor's action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a writ of mandamus that orders the Division of State Documents to promptly publish the NOx Regulation's notice of adoption in the Maryland Register.
2. Issue a writ of mandamus that orders the Governor to withdraw his directive prohibiting publication of the NOx Regulation's notice of adoption in the Maryland Register.
3. Declare that the Division's failure to timely publish the NOx Regulation's notice of adoption violates MESA and the State Government Article.
4. Declare that the Governor's interference with the Division's publication of the NOx Regulation's notice of adoption, and the Governor's failure to enforce the NOx Regulation, violate MESA and the State Government Article.
5. Issue an injunction directing the Division to promptly publish the NOx Regulation's notice of adoption.
6. Issue an injunction that prohibits the Governor from interfering with publication of the NOx Regulation's notice of adoption.

7. Award Plaintiffs costs of litigation, including any reasonable attorneys' fee authorized by applicable law; and

8. Grant Plaintiffs such other relief as the Court may deem just and proper.

June 11, 2015

Respectfully submitted,



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