EARTHJUSTICE

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
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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,

and the Maryland Department of the Environment ("MDE") to publish in the Maryland Register and enforce the Regulations for the Control of NOx Emissions from Coal-Fired Electric Generating Units, COMAR 26.11.38, which were adopted by MDE on January 16, 2015 (hereinafter "Adopted NOx Regulations"). MDE's adoption of the NOx 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 NOx 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 NOx 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 ("NOx"), which is a primary precursor to ozone pollution, the Adopted NOx 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 NOx Regulations would achieve the necessary reductions in ozone pollution by requiring the state's largest sources of NOx – 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 NOx 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 NOx 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

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).

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).[1]

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).[2] 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).[3] 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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[1] 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).

[2] 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.

[3] 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).

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 NOx Regulations

In accordance with its statutory authority,[4] MDE prepared a draft NOx Regulation in December 2013. After a series of stakeholder meetings over the ensuing months, MDE revised the draft, and then presented a proposed NOx 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_x) 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 NOx Emissions from Coal-Fired Electric Generating Units, by issuing a Notice of Final Action stating that the NOx Regulation "has been adopted" and identifying an effective date of February 2, 2015.[5] MDE sent the Notice of Final Action to the Division upon adopting the regulation on January 16th.[6] As a result, the Notice of Final Action for the NOx 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.[7]

The stated purpose of the Adopted NOx Regulations is "to establish new nitrogen oxides (NO_x) emission standards and additional monitoring and reporting requirements for coal-fired electric generating units in Maryland."[8] 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

[4] 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 NOx 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.
[5] *See* Notice of Final Action, *26.11.38 Control of NOx Emissions from Coal-Fired Electric Generating Units*, attached as Exhibit 5.
[6] Maryland Register, Transmittal Sheet - Final Action on Regulations (Jan. 16, 2015), attached as Exhibit 6.
[7] 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.
[8] 41:24 Md. R. 1449-54 (Dec. 1, 2014).

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.[9] 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.[10]

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.[11] 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.[12] 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.[13] 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,[14] 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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[9] 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).

[10] 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.

[11] EPA's Green Book, *available at*: http://www.epa.gov/oaqps001/greenbk/ancl html and the United States Census (2013).

[12] 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.

[13] Baltimore City Health Department: Asthma, *available at* http://health.baltimorecity.gov/node/454.

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

caps on NOx and, therefore, did not meaningfully constrain the daily or even hourly emissions that can cause significant ozone NAAQS violations.[15] 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 NOx emissions, and MDE has compiled data showing that many of Maryland's coal plants were not consistently operating their existing NOx controls. As a result, the most poorly controlled coal units in Maryland emit NOx at rates ten times higher than those of the best controlled coal plants,[16] and on peak ozone days the most poorly controlled units in Maryland have become the largest contributors of ozone precursors.[17] By reducing NOx emissions from these facilities, especially on the dates of highest energy demand and the highest potential for ozone formation, the Adopted NOx Regulations will have large ameliorative effects on air quality in Maryland.

IV. Maryland Law Requires Publication of the Adopted NOx 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 NOx 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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[15] MDE, A History of Power Plant Controls in Maryland: What Did We Learn? – Where Do We Go Next? Part 2 – NOx Issues (Oct. 21, 2013), at Slides 3, 6, *available at* http://www.mde.state.md.us/programs/regulations/air/Pages/StakeholderMeetings.aspx.

[16] EPA, Air Markets Program Database (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).

[17] Part 2 – NOx Issues at Slides 8-9, 26, 43, & 48.

adoption.[18] 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.

[18] 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").[19] 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.[20]

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[19] 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.").

[20] 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.

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.

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).

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

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.[21] 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.

[21] 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.

VI. Conclusion

As demonstrated above, the Division, Governor Hogan, and MDE failed to satisfy their legal duty to publish the Adopted NOx 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 NOx 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,

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Encl.