

ROGER MANNO
Legislative District 19
Montgomery County



James Senate Office Building
11 Bladen Street, Room 102
Annapolis, Maryland 21401
410-841-3151 • 301-858-3151
800-492-7122 Ext. 3151
Fax 410-841-3740 • 301-858-3740
Roger.Manno@senate.state.md.us

Budget and Taxation Committee
Health and Human Services Subcommittee
Pensions Subcommittee

Chair

Joint Committee on Administrative,
Executive, and Legislative Review

Chair

Spending Affordability Committee

Joint Committee on Federal Relations

Joint Committee on Pensions

Vice Chair

Montgomery County Delegation

THE SENATE OF MARYLAND
ANNAPOLIS, MARYLAND 21401

April 27, 2015

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

Re: Emergency/Proposed Regulations
DLS Control No. 15-051
Control of NOx Emissions from Coal-Fired Electric Generating Units: COMAR
26.11.38.01-.05

Dear Secretary Grumbles:

Thank you for your submission on April 17, 2015, of the emergency/proposed regulations (DLS Control No. 15-051, COMAR 26.11.38.01-.05) regarding the control of nitrogen oxides (NOx) emissions from coal-fired electric generating units. As Senate Chair of the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee), I have had an opportunity to review these regulations. With great apprehension and despite the unresolved legal and procedural issues discussed below, I will vote to support the emergency/proposed regulations because I understand the exigency of having these requirements in effect for the upcoming ozone season.

As you are aware, the Maryland Department of the Environment submitted similar NOx regulations to the AELR Committee on November 3, 2014 (DLS Control No. 14-327), that were then published in the Maryland Register on December 1, 2014 (41:24 Md. R. 1449-54). After waiting the requisite 45 days from this publication date¹, former Secretary of the Department Robert Summers adopted the NOx regulations on January 16, 2015, and subsequently submitted a notice of adoption to the Division of State Documents, as required under § 10-114(a) of the State Government Article. While Governor Hogan withdrew the notice of adoption on January 21, 2015, thus preventing the notice from being published in the Maryland Register, the NOx regulations were already adopted by the Department and remain in effect.

¹ Section 10-111(a)(1) of the State Government Article prohibits a unit from adopting a proposed regulation until after submission of the proposed regulation to AELR and at least 45 days after its first publication in the Maryland Register.

The Honorable Benjamin H. Grumbles
April 27, 2015
Page Two

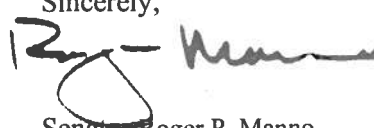
The Administrative Procedure Act (APA) defines a “regulation” as “...a statement...that...is *adopted* by a unit...” (§ 10-101(g) of the State Government Article) (emphasis added). A regulation is not defined by its date of publication, but rather by its date of adoption. Therefore, adoption occurs when a regulation becomes effective, not when the regulation is published, and thus the regulations published on December 1, 2014, went into effect when adopted by Secretary Summers on January 16, 2015.

Since the NOx regulations published on December 1, 2014 have been adopted, any changes to these regulations should be properly made through the regulatory process set out in Subtitle 1 of the APA.² I bring this to your attention because it is my opinion that the text of the emergency/proposed regulations that the Department submitted to AELR on April 17, 2015 is inaccurate. Specifically, the emergency/proposed regulations do not include the text of COMAR 26.11.38.04 dealing with additional NOx emission control requirements beginning June 1, 2020. If it is the Department’s intent to repeal COMAR 26.11.38.04, the text of the regulation should be included in the document with brackets around the text to be repealed so that the public is notified as to the changes being made. Additionally, the notice provision before the text of the emergency/proposed regulations states that the Department is introducing “new regulations” for the control of NOx emissions from coal-fired electric generating units, and immediately before the text of the emergency/proposed regulations is the statement “all new matter.” Arguably, neither of these statements is accurate since these regulations are already in effect.

The AELR Committee is currently polling on these emergency/proposed regulations, as the Committee understands the exigency with which to move forward with NOx regulations. Furthermore, it is my understanding that this matter is the subject of pending litigation, which, if resolved in a manner consistent with the positions stated herein, would render the adoption of these emergency/proposed regulations duplicative in nature and technically inaccurate. Therefore, I would strongly encourage the Department to avoid any legal or procedural challenges, and instead, withdraw these emergency/proposed regulations. If, however, the Department chooses to amend the current regulations, it should resubmit regulations addressing these concerns.

I am happy to discuss these issues and concerns in more detail should that become necessary. I look forward to assisting the Department in this process, and I appreciate our ongoing work together.

Thank you for your attention to this matter.

Sincerely,

Senator Roger P. Manno

² Section 10-101(g) of the State Government Article includes “an amendment or repeal of a statement” in the definition of “regulation”. Under § 10-110(c), a unit must submit a proposed regulation to AELR 15 days before submittal of the regulation for printing to the Maryland Register.