Circuit Court for Anne Arundel County
Case No. C-02-CV-15-001950

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2552

September Term, 2015

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PHYSICIANS FOR SOCIAL RESPONSIBILITY, CHESAPEAKE, INC., ET AL.

v.

LAWRENCE J. HOGAN, JR., ET AL.

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*Woodward,
Graeff,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Woodward, J.

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Filed: November 13, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

On January 16, 2015, the Maryland Department of the Environment ("MDE") adopted a regulation controlling nitrogen oxide emissions from coal-fired power plants (the "NOx Regulation") and submitted a notice of adoption of such regulation to the Division of State Documents ("Division") for publication in the Maryland Register ("Register"). Before the NOx Regulation was published in the Register, Lawrence J. Hogan, Jr. ("Governor Hogan") was sworn in as the Governor of Maryland on January 21, 2015. As one of his first official acts, Governor Hogan sent a letter to the Administrator of the Division directing (1) that all regulations that were scheduled for final publication on January 23, 2015, which included the NOx Regulation, not be published in the Register, and (2) that all state government agencies begin "a comprehensive review of all pending regulations."

Thereafter, appellants, Physicians for Social Responsibility, Chesapeake, Inc. and the Sierra Club Maryland Chapter filed a complaint against appellees, Governor Hogan, the Office of Secretary of State, the Division, and MDE, for a writ of mandamus and for declaratory and injunctive relief in the Circuit Court for Anne Arundel County, pursuant to the Maryland Environmental Standing Act ("MESA"), Maryland Code (1973, 2018 Repl. Vol.), § 1-501 *et seq.* of the Natural Resources Article ("N.R."). Appellants argued, *inter alia*, that appellees lacked the authority to withdraw the adopted NOx Regulation after the notice of adoption had been submitted to the Division, but before publication of such notice in the Register. The circuit court subsequently granted appellees' cross-motion for summary judgment, which led to this timely appeal.

Appellants present three questions for our review, which we have rephrased as follows:[1]

> 1. Does the Governor, or an executive branch agency, have the statutory authority to withdraw a regulation after it has been adopted by the agency and the notice of adoption has been submitted to the Division, but prior to publication of such notice in the Register?
>
> 2. Are [appellants] entitled to relief under MESA, or, alternatively, do they satisfy the requirements for common law standing?
>
> 3. Did MDE's promulgation of a materially different air quality regulation, whose emission standards are less stringent than those in the NOx Regulation, moot [appellants'] claims?

For the reasons discussed below, we conclude that under the relevant statutory provisions in Maryland, Governor Hogan had the authority to withdraw the NOx Regulation after its adoption by MDE and submission of the notice of adoption to the Division, but before publication of such notice in the Register. Accordingly, we shall affirm the circuit court's ruling on this ground. Because the withdrawal of the NOx Regulation prior to publication of the notice of adoption rendered the regulation ineffective, we need not address questions two and three.

## STATUTORY BACKGROUND

The Maryland Administrative Procedure Act ("APA"), Maryland Code (1984, 2014 Repl. Vol., 2019 Supp.), State Government ("S.G."), § 10-101 *et seq.*, was enacted by the General Assembly in 1957. 1957 Md. Laws, ch. 94. Like the federal Administrative

[1] We have only rephrased appellants' first question presented, which stated: "Did the NOx Regulation become final when it was adopted by MDE, such that the Division had a ministerial duty to publish the Regulation's notice of adoption?"

Procedure Act ("federal APA"),[2] which was adopted in 1946, the APA

> embodied the values of transparency, procedural regularity, and judicial review. To ensure transparency, the Act required the Secretary of State to compile, index, and publish all agency rules then in effect and to publish the text of all rules subsequently adopted. To ensure procedural regularity, the Act prescribed agency procedures for adopting rules and adjudicating contested cases. To ensure the availability of judicial review, the Act authorized two types of challenges to agency action. First, one could petition a circuit court for a declaratory judgment to determine the validity of a rule if it appeared "that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner." Second, a "party aggrieved" by a final decision in a contested case could petition the circuit court for review.

Edward A. Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. 196, 198–99 (1997) (footnotes omitted). Consequently, Maryland courts have stated that "[t]he purpose of the State APA is to provide a standard framework of fair and appropriate procedures for agencies that are responsible for both administration and adjudication of their respective statutes." *Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 136 (2002) (internal quotation marks and footnote omitted).

Under the APA, a regulation is defined as:

> [A] statement or an amendment or repeal of a statement that:
>
> (i) has general application;
> (ii) has future effect;
> (iii) is adopted by a unit to:
>
> 1. detail or carry out a law that the unit administers;
> 2. govern organization of the unit;
> 3. govern the procedure of the unit; or
> 4. govern practice before the unit; and
>
> (iv) is in any form, including:

[2] 5 U.S.C. §§ 551 *et seq.*

1. a guideline;
2. a rule;
3. a standard;
4. a statement of interpretation; or
5. a statement of policy.

S.G. § 10-101(h)(1).

The APA sets forth certain procedural requirements for the promulgation of regulations by executive branch agencies, "thereby establishing a process known as 'notice and comment' rulemaking." *Balfour Beatty Const. v. Maryland Dep't. of Gen. Servs.*, 220 Md. App. 334, 356 (2014); S.G. §§ 10-107 to 10-117. In general, the process of promulgating a regulation begins with an executive branch agency submitting a proposed regulation (1) to the Attorney General or unit counsel for approval as to legality, S.G. § 10-107, and (2) to the Department of Legislative Services and the General Assembly's Joint Committee on Administrative, Executive, and Legislative Review ("AELR Committee") for preliminary review.[3] S.G. § 10-110. Next, the agency must submit a "notice of the proposed adoption" with the text of the proposed regulation to the Division for publication in the Register. S.G. § 10-112(a)(2). Publication of the notice of the proposed regulation triggers a forty-five day review period by the AELR Committee, during which the agency must provide thirty days for public comment. S.G. § 10-111(a). After the forty-five day

[3] The submission to the Department of Legislative Services and to the AELR Committee for preliminary review shall be at least fifteen days before the date that the proposed regulation is submitted for publication in the Register. S.G. § 10-110(c)(1). The AELR Committee is not required to take any action with regard to a proposed regulation submitted to it for preliminary review. S.G. § 10-110(e).

review period, the agency may proceed with formal adoption if the AELR Committee does not extend the review period or otherwise oppose the regulation. *Id.*; S.G. § 10-111.1.

An agency, however, "may withdraw a proposed regulation at any time before its adoption[.]" S.G. § 10-116(a)(1). S.G. § 10-116(a) reads in full:

> (a) **In general-** A unit:
>
> > (1) may withdraw a proposed regulation at any time before its adoption; but
> >
> > (2) may not adopt the proposed regulation unless it is proposed anew and adopted in accordance with the requirements of §§ 10-111 and 10-112 of this subtitle.

Once the proposed regulation has been adopted, the agency "shall submit to the Administrator [of the Division] a notice of adoption, for publication in the Register." S.G. § 10-114(a).[4] A regulation becomes effective on the tenth calendar day after the notice of adoption is published in the Register, or on a later date that the notice sets. S.G. § 10-117(a)(1).[5] The Court of Appeals has stated that "[a] regulation is not effective until each

[4] The remainder of Section 10-114 reads as follows:

> (b) If the text of the adopted regulation is the same or substantially similar to the proposed regulation, the notice shall:
>
> > (1) state that the texts are the same or substantially similar;
> >
> > (2) cite the date of the Register in which the proposed regulation was published; and
> >
> > (3) show each change in the text with the symbols that the Administrator requires.

[5] S.G. § 10-117(a)(1) provides in full:

of those requirements has been met." *Massey v. Sec'y, Dep't of Pub. Safety & Corr. Servs.*, 389 Md. 496, 500 (2005) (citation omitted).

Relatedly, the State Documents Law, S.G. § 7-201 *et seq.*, was enacted in 1974 to

> assure[ ] greater transparency and procedural regularity in rulemaking by creating the Maryland Register and the Code of Maryland Regulations (COMAR). By mandating a uniform format for reporting all agency rulemaking activity in two centralized publications, the Act provides the public with ready access to the text of proposed, adopted, and[ ]existing regulations. Like their federal counterparts, the Maryland Register publishes notices of proposed and adopted regulations, and COMAR publishes a compilation of all regulations currently in effect.

Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. at 199–200 (footnotes omitted).

The State Documents Law charges the Administrator of the Division with the responsibility for the publication and distribution of the Register and the Code of Maryland Regulations. S.G. § 7-204(b). Pursuant to S.G. § 7-210, the Division generally must publish an issue of the Register at least once every two weeks. Each issue of the Register shall contain documents that have been submitted to the Division before the closing date and hour of that issue. S.G. § 7-206(a)(2). Such documents include notices of adoption. S.G. § 7-206(a)(2)(ix) ("An issue of the Register shall contain: . . . (2) the text of each of

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> (a)(1) Except as otherwise provided in subsection (b) of this section or in other law, the effective date of a regulation is:
>
> > (i) the 10th calendar day after notice of adoption is published in the Register; or
> >
> > (ii) a later date that the notice sets.

the following documents that has been submitted to the Division before the closing date and hour . . . . (ix) each other document that is required to be published in the Register[.]").

Critical to the instant appeal, however, S.G. § 7-215 provides:

> The Administrator may require a unit to reimburse the Division 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.

## FACTUAL BACKGROUND

At the center of this appeal is the NOx Regulation, a regulation MDE adopted to control nitrogen oxide emissions from coal-fired power plants. To address Maryland's ozone problem and satisfy the State's obligations under the federal Clean Air Act, MDE began the process of drafting the NOx Regulation in October 2013 by undertaking a robust and lengthy stakeholder process, in which appellants participated. After fifteen months of such process, MDE proposed the NOx Regulation on December 1, 2014. The proposed NOx Regulation was published in the Register.

The proposed regulation included two phases of emissions limits. Phase I, scheduled to begin on May 1, 2015, required that coal units operate their existing pollution controls to minimize nitrogen oxide emissions during each ozone season, which lasts from May 1 to September 30. Phase I also required all coal units in an owner's fleet to meet a system-wide emissions rate of 0.15 lbs/MMBtu, as measured on a 30-day rolling average, during each ozone season. Phase II required certain coal units to meet one of three options to further reduce emissions by June 1, 2020. An affected unit could either: (1) install and operate a Selective Catalytic Reduction ("SCR") control system and achieve an emissions

rate of 0.09 lbs/MMBtu, as measured on a 30-day rolling average during the ozone season, (2) switch fuel from coal to natural gas for the unit, or (3) permanently retire the unit. MDE opened a public comment period on the proposed NOx Regulation, and held a public hearing on January 7, 2015. MDE received numerous comments supporting the NOx Regulation, and the AELR Committee did not oppose the proposed regulation.

On January 16, 2015, in the final days of the administration of Governor Martin O'Malley, MDE adopted the NOx Regulation with nonsubstantive changes. That same day, MDE submitted a notice of adoption to the Division for publication in the Register, and the notice was set for publication on January 23, 2015. After his inauguration on January 21, 2015, Governor Hogan sent a letter on the same date to the Administrator of the Division directing him not to publish "all regulations that are scheduled for final publication on January 23, 2015," which included the NOx Regulation. (Emphasis omitted). Governor Hogan also advised the Administrator that he was directing "all agencies of [the] State government to begin a comprehensive review of all pending regulations." As directed, the Division did not publish the notice of adoption of the NOx Regulation. Consequently, Governor Hogan effectively withdrew the NOx Regulation after submission of the notice of adoption thereof to the Division but before its publication.

After the withdrawal of the NOx Regulation, MDE moved forward with new NOx regulations. First, MDE promulgated a regulation that implemented *verbatim* the Phase I requirements of the NOx Regulation ("Phase I Regulation"). The Phase I Regulation went through the normal rulemaking process, was adopted by MDE, and notice of adoption was published in the Register on August 21, 2015. MDE also promulgated a new NOx

regulation dealing with the Phase II requirements of the NOx Regulation ("Phase II Regulation"). The Phase II Regulation included the three options for compliance from the NOx Regulation, with an additional fourth option.[6] The Phase II Regulation also went through the normal rulemaking process, was adopted by MDE, and notice of adoption was published on November 30, 2015.

Meanwhile, on April 22, 2015, appellants sent a letter notifying appellees that they intended to file suit pursuant to MESA.[7] They also provided a copy of this notice letter to the Maryland Attorney General.

Appellants filed the instant suit against appellees on June 11, 2015, seeking mandamus and injunctive relief to force MDE to publish the NOx Regulation. They also sought a declaratory judgment that appellees' actions blocking publication of the NOx Regulation violated Maryland law. On August 7, 2015, appellants filed a motion for summary judgment. Thereafter, appellees filed an opposition to appellants' motion, as well as a cross-motion for summary judgment. When the notice of adoption for the Phase II Regulation was published on November 30, 2015, appellees moved to dismiss appellants'

[6] The fourth option allows affected units to choose between meeting a daily, 24-hour system-wide NOx emissions rate of 0.13 lbs/MMBtu, or a system-wide NOx emissions cap of 21 tons per day, during each day of the ozone season. When option four is chosen, an owner's fleet must also meet a lower thirty-day system-wide NOx emission rate beginning in 2016. That system-wide emission rate decreases in 2018, and again in 2020, to ultimately require a system-wide emissions limit of 0.09 lbs/MMBtu by June 1, 2020 (*i.e.* a rate comparable to SCR installation under option one at each unit in a system).

[7] Under MESA a person or group can bring and maintain an action for declaratory relief in certain environmental cases. N.R. § 1-503.

complaint as moot. After a hearing, the circuit court issued an order on January 14, 2016, denying appellants' motion for summary judgment and granting appellees' cross-motion for summary judgment based on three grounds: standing, mootness, and the merits.

First, the circuit court determined that appellants lacked standing under both MESA and the common law rules for standing. The court held that appellants lacked standing under MESA because the statutory provisions relied upon by appellants to establish their claim that appellees failed to carry out a non-discretionary, ministerial duty, S.G. §§ 10-101 to 10-139, were not environmental in nature as required by the statute.[8] Moreover, the court explained that the NOx Regulation was not an applicable environmental quality standard as required by MESA, N.R. § 1-503(b), because it was not published in the Register, and thus never became effective. In addition, the court held that appellants failed to establish common law standing, because they did "not present a claim regarding 'a property interest of its own- separate and distinct from its members' and 'some kind of special damage from such wrong differing in character and kind from that suffered by the general public.'"

Next, the circuit court concluded that appellants' requested relief, namely requiring appellees to promulgate and enforce the NOx Regulation, was moot, because MDE later

[8] MESA states that any person given standing "may bring and maintain an action for mandamus or equitable relief, including declaratory relief" against a State agency in two categories of cases, where the person alleges: (1) that the agency has failed to perform a nondiscretionary ministerial duty imposed upon it "under an environmental statute, ordinance, rule, regulation, or order" or (2) the agency has failed to enforce "an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State[.]" N.R. § 1-503(b).

promulgated new NOx regulations superseding the NOx Regulation.

Finally, regarding the merits of appellants' case, the circuit court stated the following in its order:

> In determining which reading of [S.G.] § 10-114 is more compelling, the Court considered the statute in its entirety, in conjunction with all other sections and legislative intention. In doing so, the Court finds that [S.G.] § 7-215, contemplating reimbursement for modifications and withdrawals of documents in the Register, infers that withdrawal of documents previously submitted to the Register is allowed by the statute. Further, the Court finds the federal [APA]'s position on the finality of regulations to be instructive as to the legislative intent of the Maryland [APA]. Finally, the Court finds that the interpretation of [S.G.] § 10-114 allowing withdrawal prior to publication and considering a regulation final only after publication, to be the most practical . . . . As such, the Court finds that the withdrawal was not the dereliction of a ministerial duty where mandamus, injunctive relief, or a declaratory judgment is appropriate.

(Citations omitted).

## STANDARD OF REVIEW

A trial court may grant a moving party's motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). Therefore, "[w]hether summary judgment was granted properly is a question of law" and is subject to *de novo* review on appeal. *George v. Baltimore Cty.*, 463 Md. 263, 272 (2019) (quotation omitted). Furthermore, "when a Circuit Court's denial of summary judgment turns on its interpretation of a statute – as opposed to a determination that facts are in dispute – that ruling rests on a question of law. We review the resolution of that legal question without deference to the trial court." *Bell v. Chance*, 460 Md. 28, 52

(2018). Here, the facts are undisputed, and the circuit court's interpretation of Maryland statutory law presents a purely legal issue that we review *de novo*.

## DISCUSSION

Appellants argue that the circuit court erred by ruling that Governor Hogan did not violate the APA and the State Documents Law by withdrawing the NOx regulation after notice of adoption was submitted to the Division, but before the publication thereof in the Register. Therefore, we must determine whether Governor Hogan had the authority to withdraw the NOx regulation under these circumstances.[9]

At the outset, we observe that the relevant provisions of the APA and the State Documents Law are silent on the authority of the Governor, or an executive branch agency, to withdraw a regulation adopted by that agency by withdrawing the notice of adoption after the notice has been submitted to the Division, but before publication thereof in the Register. These statutory provisions neither expressly allow nor expressly prohibit such withdrawal. Given that "[t]he statute is silent on the question . . . it is into this breach that the Court must step with a reasonable interpretation." *Papillo v. Pockets, Inc.*, 119 Md. App. 78, 83 (1997) (quotation omitted). To do so, we employ the oft-cited tools of statutory construction with the "primary goal" of "ascertain[ing] the purpose and intention of the

[9] In general, the Governor is not subject to the APA. S.G. § 10-203(a)(3)(i) (subtitle 2 of the APA, which provides for contested cases, does not apply to the Governor); *State v. Maryland State Family Child Care Ass'n*, 184 Md. App. 424, 440 (2009) (stating that subtitle 1 of the APA, which contains the rulemaking sections of the APA, "does not apply to the Governor"). Here, however, both appellants and appellees agree that, because Governor Hogan acted on behalf of or through the executive branch agencies when he stopped the publication of all notices of adoption, the Governor was subject to the APA.

General Assembly when they enacted the statutory provisions." *Town of Forest Heights v. Maryland-Nat'l Capital Park & Planning Comm'n*, 463 Md. 469, 478 (2019).

When interpreting a statutory scheme, "[w]e assume that the legislature's intent is expressed in the statutory language and thus our statutory interpretation focuses primarily on the language of the statute to determine the purpose and intent of the General Assembly." *Phillips v. State*, 451 Md. 180, 196 (2017). To begin the analysis, we look to the plain language of the statute, "giving it its natural and ordinary meaning." *Scriber v. State*, 437 Md. 399, 410 (2014) (quotation omitted). In examining the plain language, "[w]e read the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory." *Conaway v. State*, 464 Md. 505, 522–23 (2019) (quotation omitted). "[W]e 'neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute.'" *McCloud v. Dep't of State Police, Handgun Permit Review Bd.*, 426 Md. 473, 479–80 (2012) (quoting *Robinson v. Balt. Police Dep't.*, 424 Md. 41, 50 (2011)). We contextualize "the meaning and effect [of the words in the statute] in light of the setting, the objectives and purposes of the enactment under consideration." *Watts v. State*, 457 Md. 419, 430 (2018) (alteration in original) (citation omitted). Finally, "we view the relevant statutory scheme as a whole, rather than seizing on a single provision." *Conaway*, 464 Md. at 523. Thus, "[t]he meaning of the plainest language is controlled . . . by the context in which it appears." *Ingram v. State*, 461 Md. 650, 662 (2018) (quotation omitted).

In addition, "[t]wo statutory provisions concerning the same subject matter are considered to be *in pari materia* and must be interpreted accordingly." *Chen v. State*, 370

Md. 99, 106 (2002); *see Breitenbach v. N.B. Handy Co.*, 366 Md. 467, 481 (2001) ("[W]hen we are called upon to interpret two statutes that involve the same subject matter, have a common purpose, and form part of the same system, we read them *in pari materia* and construe them harmoniously[.]"). If we are able to reasonably decipher the statutory provisions at this point in the analysis, "we need not look beyond the statute's provisions and our analysis ends." *Ingram*, 461 Md. at 662 (quotation omitted). All the while, we must consider the consequences of our interpretation and avoid "absurd results." *See Conaway*, 464 Md. at 523 (stating that "absurd results in the interpretive analysis of a statute are to be shunned").

**A.**

Appellants argue that, once a regulation is adopted by an agency, the notice of the adoption must be published in the Register, and the regulation must take effect. At that point, according to appellants, an agency can modify or repeal the regulation only by going back through the rulemaking process. In support of their argument, appellants state:

> An agency can withdraw a proposed regulation "at any time before its adoption." SG § 10-116(a)(1). But "[a]fter adopting a regulation," the agency shall submit a "notice of adoption, for publication in the Register" to the Division. *Id.* § 10-114(a). And upon receiving that notice, the Division must publish it within a prescribed period of time: the Maryland Register "shall be published at least once every 2 weeks" and "shall contain" the documents specified in Section 7-206(a)(2), which include notices of adoption. *Id.* §§ 7-210(a), 7-206(a)(2)(ix), 10-114(a). This duty is ministerial; the Division has no discretion to withhold publication of an already-adopted regulation.

(Footnote omitted). Further, appellants assert that, "[a]lthough the APA expressly authorizes agencies to withdraw a proposed regulation before adoption, S.G. § 10-

116(a)(1), it lacks any provision permitting withdrawal of a regulation after adoption." Appellants thus conclude "that the Governor cannot order the withdrawal of a regulation after its adoption."

In response, appellees acknowledge that S.G. § 10-116(a)(1) "explicitly authorizes the withdrawal of a proposed regulation at any time 'before its adoption,'" but assert that

> this does not establish that, once a notice of adoption is submitted, the regulation must inexorably be published in the Register. While the APA grants express authorization for the withdrawal of a proposed regulation before adoption, it does not explicitly address whether a notice of adoption may be withdrawn before publication.

Appellees point to S.G. § 7-215 as a provision that contemplates the withdrawal of a document, such as a notice of adoption, after the closing date and before publication, because under S.G. § 7-215 "the Division has express authority to 'require a unit to reimburse [it] 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." (Emphasis added by appellees).

Appellees further argue that S.G. § 7-215 establishes that the Division does not have a non-discretionary, ministerial duty to include in the Register all documents submitted for publication, because the statutory scheme embodied in that provision "recognizes that some documents will be withdrawn or modified even after the closing date and hour of that issue." Appellees conclude that "[c]ontrary to [appellants'] flagship argument, therefore, the submission of a notice of adoption does not lead inexorably to publication in the Register." We agree with appellees.

As mentioned earlier, we begin our statutory interpretation by looking at the plain

language of the relevant statutory provisions, (1) "giving it its natural and ordinary meaning," *Scriber*, 437 Md. at 410 (quotation omitted), (2) "read[ing] the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory," *Conaway*, 464 Md. at 522–23 (quotation omitted), and (3) "neither add[ing] nor delet[ing] language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute." *McCloud*, 426 Md. at 480 (quotation omitted). In the instant case, the pivotal statutory provision, according to appellants, is S.G. § 10-116(a)(1), which expressly authorizes an agency to "withdraw a proposed regulation at anytime before its adoption." As correctly pointed out by appellees, however, S.G. § 10-116(a)(1) is silent as to an agency's authority to withdraw a regulation after notice of adoption is submitted to the Division, but before publication thereof. Appellants seek, in effect, to add language to S.G. § 10-116(a)(1) by use of a negative inference, namely, that because S.G. § 10-116(a)(1) expressly grants an agency the authority to withdraw a *proposed* regulation at any time, this Court should infer that an agency may *not* withdraw an *adopted* regulation after submission of a notice of adoption.[10]

In our view, appellants' negative inference is not warranted in this case. As indicated earlier, S.G. § 7-215 provides that the Administration of the Division may require an agency "*to reimburse the Division for the cost of a publication of a document* in an issue of the Register *if the [agency]* submits, *withdraws*, or changes *the document after the*

[10] Appellants buttress their negative inference argument by pointing to the requirements of (1) submission of a notice of adoption for publication under S.G. § 10-114(a), and (2) the publication of an issue of the Register every two weeks under S.G. § 7-210 that contains a notice of adoption under S.G. § 7-206(a)(2)(ix).

*closing date and hour of that issue*." (Emphasis added). For the italicized language above to have meaning, an agency must have the authority to withdraw a document after the closing date. Because, as conceded by appellants, a notice of adoption is a "document" under S.G. § 7-206(a)(2)(ix) that would be contained in an issue of the Register, it follows that an agency must have the authority to withdraw a notice of adoption after submission, but before publication, for there to be any reimbursement of the cost of publication of that document. Moreover, appellants' negative inference precluding an agency from withdrawing a notice of adoption after submission to the Division and before publication would render meaningless the language of S.G. § 7-215 permitting such withdrawal. Consequently, appellants' interpretation would add language to S.G. § 10-116(a)(1) that conflicts with the plain meaning of the language used in S.G. § 7-215 and that would render the language of S.G. § 7-215 meaningless when applied to notices of adoption. By contrast, appellees' interpretation would give full effect to the plain meaning of the language of S.G. §§ 10-116(a)(1) and 7-215 without adding any language to S.G. § 10-116(a)(1) or rendering meaningless certain language of S.G. § 7-215. Therefore, appellees' interpretation represents a harmonious construction of two statutes, the APA and the State Documents Law, that are *in pari materia*.

This Court's interpretation of S.G. §§ 10-116(a)(1) and 7-215 is consistent with the letter of advice dated December 12, 2014, from the Attorney General of Maryland, Office of Counsel to the General Assembly, to Senator David R. Brinkley. In that letter, Sandra Benson Brantley, Esq., Counsel to the General Assembly, wrote in relevant part:

Dear Senator Brinkley:

You asked for advice about the ability of the Governor or an agency to withdraw regulations during the window after the notice of adoption has been submitted to the Division of State Documents ["DSD"] for publication in the Maryland Register, but before the notice, in fact, is published. **As explained below, it is my view that the Governor or the agency Secretary whose agency adopted the regulations may withdraw the notice of adoption before publication and that by doing so, the regulations never go into effect.**

* * *

**Turning to your specific question, I could find no Maryland case law or previous opinion of the Attorney General addressing the ability of an agency or the Governor to withdraw a notice of adoption after its submission to the DSD but before publication of the notice so I can only predict how a reviewing court would interpret the law after weighing the arguments on each side.** One argument is that the use of the would "*shall*" in SG § 10-114, together with the language of SG § 10-116 that an agency "may withdraw a proposed regulation at any time *before* its adoption" means that once an agency submits a notice of adoption, it may not withdraw it and the DSD must publish it. In addition, for each Register issued, SG § 7-206(b)(1) directs the DSD Administrator to certify "that the issue contains all of the documents that have been submitted to the Division as of the closing date and hour of the issue." As a result, this argument goes, once an agency submits its notice of adoption, the regulation goes into effect ten days or later after publication. In that case, the regulation may be changed or rescinded only by following the procedures set out in the APA, including providing opportunity for public comment and legislative review. **In my view, however, the more reasonable and likely interpretation is that the agency that initially adopted the regulation and submitted the notice or the Governor, may withdraw its adoption if done so before publication of the notice of adoption, thereby preventing the proposal from going into effect.**

The statutory scheme clearly outlines the steps an agency must take to promulgate regulations. Merely because the General Assembly requires an agency to publish notice of its proposed and adopted regulations does not mean that the legislature intended to prevent the Executive Branch from withdrawing its regulations submitted after DSD's closing date but before they are published. *See Ashburn v. Anne Arundel Co.*, 306 Md. 617 (1986) (holding that the existence of a mandatory process regarding the handling of drunk drivers did not convert a discretionary decision about whether to detain

the driver into a ministerial duty to do so). In fact, **the General Assembly seems to have contemplated that an agency might change its mind after the closing date for submission of items for publication.**

**In 1983, the General Assembly amended the State Documents Law to authorize DSD to require agencies to reimburse it for costs incurred when the agency makes changes to submissions after the closing date.** Chapter 173, Laws of Maryland 1983. The provision, which has been slightly changed since its enactment largely due to Code Revision, now reads:

> The [DSD] Administrator may require a unit to reimburse the Division 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.

SG § 7-215. *See* Committee Report for Senate Bill 881 from the Senate Constitutional and Public Law Committee (explaining that, among other changes, the bill adds a new section that "[e]mpowers the administrator of the [D]ivision of State Documents to require an agency to reimburse the division for publication costs when the agency submits a document for publication in the register, or withdraws or changes a document, after the closing date and time established by the administrator . . ."). **Consequently, there is a strong argument that the General Assembly did not intend that once an agency submits a notice of adoption, it cannot withdraw the notice before it is published.** In other words, the "may withdraw . . . before adoption" language in § 10-116(a)(1) does not imply legislative intent that an agency may *not* withdraw a regulation *after* submission of a notice of adoption.

* * *

Based on the foregoing, it is my view that a Maryland court is likely to hold that, after the closing date for submission but before publication in the Register, an agency or a Governor may withdraw its notice of adoption of a regulation previously submitted by the agency. Moreover, if the notice of adoption is withdrawn and thus, not published, the proposed regulations do not take effect.

(Italics in original). (Bold emphasis added).

Appellants, nevertheless, contend that the above interpretation of the statute is

impermissible, because under the APA a regulation becomes final, and thus the rulemaking process comes to an end, when the regulation is "adopted" by the agency. Appellants point to the definition of a "regulation" in S.G. § 10-101(h)(1) as "a statement or an amendment or repeal of a statement that: (i) has general application; (ii) has future effect; [and] (iii) is adopted by" an agency. Appellants further cite to S.G. § 10-114(a), which provides that "[a]fter adopting a regulation, a[n] [agency] shall submit to the Administrator a notice of adoption, for publication in the Register." In other words, according to appellants, adoption of a regulation, rather than publication or its effective date, is "the moment when the regulation becomes final," and the only way to amend or repeal an adopted regulation is to go back through the rulemaking process. In the instant case, appellants claim that MDE "adopted" the final NOx Regulation when it submitted the notice of adoption to the Division on January 16, 2015, and as a result, Governor Hogan did not have the authority to withdraw such regulation on January 21, 2015.

Appellees respond that under the statutory scheme of the APA and the State Documents Law, publication, not adoption, is the culmination of the rulemaking process. Noting that the term "adoption" is nowhere defined in either statute, appellees point to S.G. § 10-117(a)(1), which provides that a regulation becomes effective on "the 10th calendar day after notice of adoption is published in the Register" or at a later date, if the notice sets such date. Moreover, according to appellees, under S.G. § 7-220 "[p]ublication of a document in the Code of Maryland Regulations or the Register creates a rebuttable presumption that: (1) the document: (i) was . . . adopted properly[.]" Appellees conclude that, "[r]egardless of when a regulation is 'adopted' or what 'adopted' means, a regulation

does not become final and go into effect until it is published in the Maryland Register." Again, we agree with appellees.

As correctly stated by appellants, a regulation is defined in the APA as a statement that "(i) has general application; (ii) has future effect; [and] (iii) is adopted by" an agency. S.G. § 10-101(h)(1). Although "adoption" is expressly made a key component of the rulemaking process, the only way for a regulation to have "general application" and "future effect" is to become effective and thus enforceable. A regulation becomes effective, in general, on "the 10th calendar day after notice of adoption is published in the Register." S.G. § 10-117(a)(1). Consequently, "publication," not "adoption" is the final step in the rulemaking process.

Moreover, in 1972, prior to the creation of the Register, the General Assembly expressed concern about "the problem of effective notification of the public of changes in the rules and regulations of the various executive departments." Legislative Council of Maryland, Report to the General Assembly of 1973, Rules and Regulations, Item No. 332. Specifically, the General Assembly was concerned with "the fact that some people affected by rule changes do not know of the change," and that "it is not until they have violated the provisions of the rule that many people learn of its existence." *Id.* The Chair of the AELR Committee identified as a possible remedy to such problem "the inception of a 'Federal Register' type of publication for the State." Committee on Administrative, Executive, and Legislative Review, Report of Legislative Council Meeting of Nov. 8, 1972, Item No. 332. That possible remedy became a reality in 1974 when the General Assembly enacted the State Documents Law, which, as previously indicated, created the Register. Appellants'

assertion that "adoption" is the final step in the rulemaking process is inconsistent with the legislative purpose of providing notice to the public through the publication of a notice of adoption in the Register. For, under appellants' theory, the final step in the creation of a regulation or an amendment thereto would occur at an undefined and unknown time, rather than at a time when the public is made aware of the adoption of a regulation and is given the opportunity to conform their conduct to such regulation. Therefore, we conclude that the language and legislative purpose of the statutes point to the date of publication of a notice of adoption in the Register under S.G. § 10-117(a)(1) as the culmination of the rulemaking process.

**B.**

Next, we shall apply the rule of statutory construction that requires us to consider the consequences of each interpretation so as to avoid "absurd results." *See Conaway*, 464 Md. at 523. Under appellants' interpretation of the statute, once a regulation is adopted, the agency must submit a notice of adoption to the Division, the Division must publish such notice in the Register, and the regulation must go into effect, even if the agency discovers an error or changes its mind about the regulation. According to appellants, the only way for the agency to modify or revoke the erroneous or unwanted regulation is to wait for publication and then proceed through a second rulemaking process. Critically, during the pendency of the second rulemaking process, the erroneous or unwanted regulation would remain in effect. This result would create confusion in the regulated community over compliance with the regulation during such time period and in the agency over the enforcement of the same. Moreover, there is a potential for unnecessary waste of

resources by the regulated community in taking steps to come into compliance with the regulation and the agency in addressing the enforcement issue.

By contrast, this Court's interpretation of the statutes would allow an erroneous or unwanted regulation to be withdrawn by the agency before publication, and thus before becoming effective, thereby eliminating any confusion or potential waste of resources in the regulated community and the agency. In addition, if an agency wishes to withdraw a notice of adoption prior to publication in order to make substantive changes to the regulation, the agency is still required to go through the formal rulemaking process, including the notice and comment procedures, before promulgating a new or amended regulation. *See* S.G. § 10-113. Consequently, this Court's interpretation is consistent with the purpose of the APA to provide transparency and procedural regularity in the rulemaking process. *See* Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. at 198 ("Maryland's 1957 APA, like its federal and state counterparts, embodied the values of transparency, procedural regularity, and judicial review."). Indeed, in the instant case, MDE followed the aforementioned rulemaking procedures to adopt the Phase I and Phase II Regulations after the Governor withdrew the notice of adoption of the NOx Regulation.

In sum, appellants' interpretation of the statute would produce "absurd results" by creating confusion and potential waste of resources in both the regulated community and the agency, while this Court's interpretation would avoid those "absurd results." Our interpretation is also consistent with the purpose of the APA to provide transparency and procedural regularity in the rulemaking process. *See id.*

**C.**

Finally, this Court's interpretation of the statutes is supported by the opinion of the United States Court of Appeals for the District of Columbia in *Kennecott Utah Copper Corp. v. U.S. Department of Interior*, 88 F.3d 1191 (D.C. Cir. 1996). There, the D.C. Circuit was faced with substantially the same issue as presented in the instant case—whether, under the federal APA and the Federal Register Act,[11] a regulation can be withdrawn prior to publication in the Federal Register.

In *Kennecott*, the Department of the Interior approved a final regulation ("1993 document") in mid-January 1993, which modified a 1991 proposed regulation. *Id.* at 1200. The 1993 document was sent to the Office of the Federal Register ("OFR") for publication. *Id.* The OFR received the 1993 document on January 19, 1993, the last day of the administration of President George H.W. Bush. *Id.* Upon the inauguration of President Bill Clinton on January 21, 1993, and prior to publication in the Federal Register, the new acting Assistant Secretary for Policy, Management and Budget directed OFR to withdraw the 1993 document. *Id.* at 1200–01. The 1993 document was not published by OFR. *Id.* at 1201. Several months later, the Department of the Interior reopened the public comment period for modifications regarding the proposed regulation from 1991, which resulted in the Department issuing a final regulation in 1994 ("1994 regulation"). *Id.*

Before the D.C. Circuit, Kennecott argued that under the Federal Register Act the OFR was required to publish the 1993 document. *Id.* at 1201, 1203. The Court first held

[11] 44 U.S.C. §§ 1501–11.

that under the federal APA, the 1993 document could be withdrawn because it had never been published and thus "never became a binding rule requiring repeal or modification." *Id.* at 1208. The Court then observed that Congress had not directly addressed the right of an agency to withdraw a regulation prior to publication under the Federal Register Act. *Id.* The Court concluded that allowing withdrawal of a regulation prior to publication was a reasonable interpretation of the statute, reasoning:

> Allowing agencies to withdraw documents during the relatively brief processing period is consistent with the statute's purpose—establishing an orderly process for filing and publishing government regulations. By permitting agencies to correct mistakes and even to withdraw regulations until virtually the last minute before public release, the government's approach helps assure that regulations appearing in the Federal Register are as correct as possible in both form and substance.

*Id.* at 1206.[12]

Appellants argue that reliance on the federal APA is misplaced because the APA and the federal APA are "materially different." According to appellants, the APA "defines a regulation in terms of whether an agency has adopted it, and identifies publication as a ministerial duty that occurs after adoption;" whereas, "the federal APA's definition of

[12] The D.C. Circuit goes on in *Kennecott* to state that its statutory interpretation "avoids the needless expense and effort of amending regulations through the public comment process when those corrections could have been made more easily before the documents' publication." 88 F.3d at 1206. Under the federal APA, agencies have greater flexibility to modify proposed rules, because a second round of notice and comment by the public is not required "if the adopted rule is a logical outgrowth of the proposed rule." Edward A. Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. 196, 205, 205 n. 60 (1997). By contrast, under the APA "if an agency wishes to adopt a regulation that differs 'substantively' from the proposed regulation, it must first propose the regulation anew and afford a further opportunity for public comment." *Id.* at 204; *see* S.G. § 10-113.

'rule' is not expressed in terms of adoption, and cases construing that statute conclude that the federal rulemaking process ends with publication in the Federal Register." (internal citation omitted). As explained above, publication of the notice of adoption is the culmination of the rulemaking process under the APA, not the adoption of a regulation, as argued by appellants. Similarly, under the federal APA, publication is the critical point in the rulemaking process, because without publication a regulation never becomes "a binding rule." *See Kennecott*, 88 F.3d at 1208.

Moreover, when the APA was adopted in 1957, Maryland lawmakers modeled the APA on the Model State APA adopted in 1946 by the National Conference of Commissioners on Uniform State Laws. Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. at 198 n.6. The 1946 Model State APA, in turn, incorporated "[a] number of general concepts embodied in the federal APA." Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 Va. L.Rev. 297, 303 (1986). Although the 1946 Model State APA and the federal APA "emanate from different sources, they did so at roughly the same time and, in a sense, come from a common stock, so it seems natural that they should bear at least a cousinly resemblance." *Id.* at 302 (quotation omitted). Thus, as previously stated, "Maryland's 1957 APA, like its federal and state counterparts, embodied the values of transparency, procedural regularity, and judicial review." Tomlinson, *The Maryland Administrative Procedure Act: Forty Years Old in 1997*, 56 Md. L.Rev. at 198. As both the APA and the federal APA evolved, differences certainly have emerged, but, where the rulemaking process culminates has not been one of them. In rulemaking, each act carries out its original purpose by requiring the

publication of regulations in the Register (transparency), and by finalizing the rulemaking process on the date of publication (procedural regularity).

## CONCLUSION

The APA and the State Documents Law are silent on the issue of whether the Governor, or an executive branch agency, has the authority to withdraw a regulation adopted by that agency by withdrawing the notice of adoption after the notice has been submitted to the Division, but before publication thereof in the Register. Neither statute expressly allows nor expressly prohibits such withdrawal. When the provisions of the statutes are read together to form a harmonious and comprehensive statutory scheme, we conclude that a reasonable interpretation of the statutes grants the Governor, or an executive branch agency, the authority to withdraw a notice of adoption of a regulation after submission to the Division, but before publication of such notice, and when such authority is exercised, the regulation never goes into effect. To adopt appellants' interpretation would violate the rules of statutory construction (1) by adding language prohibiting such authority to S.G. § 10-116(a)(1), which would conflict with the grant of such authority by the plain meaning of the language used in S.G. § 7-215 and would render the language of S.G. § 7-215 meaningless when applied to notices of adoption, and (2) by spawning confusion and potential waste of resources in both the regulated community and the agency when an erroneous or unwanted regulation goes into effect and a second rulemaking process is undertaken to revoke or replace such regulation. Finally, similar to the D.C. Circuit's interpretation of the federal APA in *Kennecott*, the culmination of the rulemaking process under the APA is the publication of the notice of adoption, not the

agency's adoption of a regulation. Accordingly, the circuit court did not err in granting appellees' cross motion for summary judgment.

**JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANTS.**