IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

WHEELABRATOR BALTIMORE, L.P. et al., *Plaintiffs*, v. MAYOR AND CITY COUNCIL OF BALTIMORE, *Defendant.*	Civil Action No. 1:19-cv-01264

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES AND REGULATIONS

STATE STATUTES AND REGULATIONS

LOCAL LAW

FEDERAL CASES

STATE CASES

LEGISLATIVE MATERIALS

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, Plaintiffs have operated their facilities subject to comprehensive air and solid waste regulations under federal and Maryland laws that the City of Baltimore ("City") now seeks to override with its Ordinance 18-0306 ("Ordinance"). The Ordinance takes aim at two facilities – Wheelabrator Baltimore's waste-to-energy facility and Curtis Bay's medical waste incinerator (collectively, the "Facilities") – by imposing an extraordinary and unprecedented combination of requirements that the sponsor of the Ordinance stated were designed to close the Facilities. The Ordinance flouts over fifty years of federal and state primacy in establishing and implementing a uniform system to protect the public health through the prevention and control of air pollution, imposes technically infeasible monitoring and reporting obligations, and levies strict liability criminal penalties for activities that have been affirmatively licensed and approved by the U.S. Environmental Protection Agency ("EPA") and the state of Maryland under the federal Clean Air Act ("CAA") and Maryland air laws. The Ordinance also conflicts with Maryland's Solid Waste Management Act by forcing the Facilities to either heavily modify their physical plants and pollution control devices – which were reviewed and approved by the Maryland Department of the Environment ("MDE") – or shut down, undermining the state's comprehensive scheme for waste management. The Ordinance is invalid and cannot stand under either federal conflict preemption or express, implied, or conflict preemption under state law.

Federal conflict preemption bars the Ordinance because its requirements interfere with and are an obstacle to the CAA's purpose and structure. A fundamental purpose of the CAA is "to protect and enhance the quality of the nation's air resources in order to promote the public health and welfare while also promoting the productive capacity of its population." 42 U.S.C. § 7401(b)(1). Congress passed the CAA and its amendments to provide comprehensive and uniform standards governing air quality and air pollution control. The Ordinance conflicts with the

standards and processes established under the CAA by imposing the City's own requirements and emission limits. The conflict created by the Ordinance circumvents the CAA's Title V operating permit program, federal and state air regulations under CAA Sections 111 and 129 that apply specifically to waste-to-energy and medical waste incinerators, and the State Implementation Plan ("SIP") program (Section 110) that governs the establishment and enforcement of emission limits calculated to meet EPA-designated National Ambient Air Quality Standards ("NAAQS"). Moreover, the Ordinance impedes the Facilities' ability to operate by prohibiting lawfully permitted activities under threat of criminal sanction. Because the Ordinance works against the purposes, methods, and policy choices reflected in the CAA's regulatory scheme, it is invalid under federal conflict preemption.

Maryland law also preempts the Ordinance. The Ordinance runs counter to the express provisions of Section 2-104 of the Maryland Environment Article, which directs that if a political subdivision would like more stringent limits or standards it must request that MDE – the state agency responsible for implementing and enforcing federal and state air laws – adopt a regulation that imposes the more restrictive limits or standards. The City has recognized and followed Maryland's comprehensive regulation of air quality for years and as recently as 2018 relied on MDE's authority to address any concerns related to air quality or air pollution control at the Wheelabrator Baltimore facility. The Ordinance departs from this authorized process in an unprecedented manner to encroach on the state's occupation of the field.

In addition, Maryland's comprehensive program of air pollution control implemented under the CAA and corresponding state law fully occupies the field, and thus impliedly preempts the Ordinance. Maryland has adopted comprehensive air pollution regulations to regulate every aspect of air quality. Through its SIP and MDE's issuance and enforcement of Title V air permits

that set specific emission levels and technical requirements, Maryland law dictates how emissions sources must operate in the state. The Ordinance impermissibly encroaches on the state's occupation of the field.

The Ordinance is also impliedly preempted because Maryland law systematically regulates the field of solid waste management, including the two Facilities, which process up to 2,250 tons of municipal waste per day and 150 tons of medical waste per day. Maryland's solid waste laws and regulations (1) set forth the requirements for waste-to-energy permitting, (2) manage the treatment and disposal of solid and medical waste, and (3) mandate the creation of and requirements for implementing the Solid Waste Management Plan ("SWMP") that Baltimore City and every county in Maryland must submit to MDE for approval. These requirements specifically govern the waste disposed of at the Facilities. The City's Ordinance is a blatant end run around the SWMP approval process because it fundamentally changes the means by which the City disposes of its waste, disregarding the statutorily prescribed process. The City's Department of Public Works acknowledged that the Wheelabrator Baltimore facility must shut down at least for an indeterminate period to perform the retrofits necessary to attempt to meet the Ordinance's requirements, and could be forced to shut down permanently. This means the City would have to decide how to redirect disposal of 200,000 tons of solid waste per year that MDE believed would occur at the Wheelabrator Baltimore facility when it approved the City's SWMP.

The Ordinance is also invalid under state law conflict preemption because it prohibits conduct affirmatively authorized by Maryland air laws and regulations, including the Facilities' duly issued permits. The Ordinance's emission limits prohibit emissions for certain pollutants beyond specified thresholds that contradict the limits that have already been permitted and authorized by the state under MDE-issued Title V permits. Similarly, the Ordinance's Continuous

Emissions Monitoring Systems ("CEMS") requirements effectively prohibit monitoring and reporting practices that have already been evaluated and approved by the state as appropriately protective of the public. The Ordinance's combination of monitoring and compliance requirements, and extraordinary emission limits, conflicts with Maryland's detailed air program, and overrides the Facilities' Title V permits.

Plaintiffs now seek partial summary judgment on Counts 1 through 5 of the Complaint because there are no material facts in dispute, and the Ordinance is preempted by federal and state law.

STATEMENT OF UNDISPUTED FACTS

1. **The Wheelabrator Baltimore ("WB") Facility.** The WB facility is an existing large waste-to-energy ("WTE") facility subject to federal and state regulation under 40 C.F.R. § 60, subpart Cb, implemented through COMAR 26.11.08.08. The WB facility, located at 1801 Annapolis Road, Baltimore, was constructed and began operating in 1985. Permitting for the construction of the WB facility began in 1982 pursuant to Northeast Maryland Waste Disposal Authority ("Waste Disposal Authority" or "Authority") contracts with Baltimore and WB for the specific purpose of processing waste from the City and surrounding counties to produce energy, finding that "it is in the public interest … to provide for the economies of scale and opportunities for resource recovery which can be achieved through a regional solid waste disposal facility." *See* Exhibit A, Baltimore County's 1982 Subdivision User Contract at 1, ¶ B. WB is the only WTE facility operating in the City, and consists of three combustor units. *See* Exhibit B at 4, WB's Title V Permit. Each unit is equipped with a selective non-catalytic reduction ("SNCR") system to reduce nitrogen oxides emissions, a slaked lime slurry spray dryer absorber system to control acid gas emissions such as sulfur dioxide, a powdered activated carbon injection system for enhancing mercury and dioxin/furan removal, and a high efficiency electrostatic precipitator ("ESP") to remove particulate

matter and trace metals from the exhaust streams. *Id*. Each stack is equipped with a continuous opacity monitoring system ("COMS") for monitoring visible emissions and CEMS for monitoring nitrogen oxides, sulfur dioxides, and carbon monoxide, as well as oxygen and carbon dioxide. *Id*. The WB facility's three combustor units are each able to combust 750 tons per day of municipal solid waste, yielding a facility-wide capacity of 2,250 tons per day. *Id*. The WB facility receives solid waste from homes and businesses in Baltimore pursuant to the terms of a Waste Disposal Agreement with the Authority, and the Authority's Subdivision User Contract with the City. *See* Exhibit C, WB Waste Disposal Agreement, dated June 22, 2011; Exhibit D, Baltimore City's 2011 Subdivision User Contract, dated June 22, 2011. A portion of the City's solid waste that does not go to the WB facility is disposed of at the City-owned Quarantine Road Landfill. *See* Exhibit E, Baltimore City's Solid Waste Management Plan. WB also receives waste from surrounding counties and private contractors. *Id*. The City's SWMP estimates that the WB facility reduces the volume of landfill space that the debris would otherwise occupy by up to 90 percent. *Id*. The WB facility produces 510,000 pounds of steam per hour. A portion of that steam is distributed through the City's steam heating loop and sent through power turbines than can produce 60 megawatts, or enough to power 68,000 homes. *Id*.

2. **The Curtis Bay ("CB") Facility.** The CB facility is an existing hospital, medical, and infectious waste incinerator ("HMIWI") subject to federal and state regulation by 40 C.F.R. § 60, subpart Ce, implemented through COMAR 26.11.08.08-2. The CB facility is located at 3200 Hawkins Point Road, Baltimore, and began operating in 1991. It is the only HMIWI facility that is currently operating in Maryland and receives waste originating in the City, the state of Maryland, and elsewhere in the region. The CB facility is permitted to incinerate a maximum total of 150 tons of medical waste per day. *See* Exhibit F at 4, CB's Title V Permit. Its two incinerator units

share a common stack, and each unit has its own pollution controls. *Id*. Each incinerator is equipped with secondary and tertiary combustion chambers, a heat recovery boiler, SNCR for control of nitrogen oxides, a dry injection acid gas scrubber, a powdered activated carbon injection system for mercury control, and a fabric filter for dioxins/furans emissions control. *Id*. The stack is equipped with a COMS for monitoring visibility and CEMS for monitoring carbon monoxide, hydrogen chloride, nitrogen oxides, and oxygen content in stack exhaust gases. *Id*.

3. **The Clean Air Act's Comprehensive Federal and State Regulatory Framework.** A key goal of the CAA is to "encourage and promote reasonable federal, state, and local governmental actions, *consistent with [its] provisions*, for pollution prevention." 42 U.S.C. § 7401(c) (emphasis added). Within this scheme of cooperative federalism, state and local actions must not be inconsistent with the CAA, which creates a comprehensive, interrelated and interlocking series of federal and state air pollution control regulations for all sources of air pollution in the United States, including, of particular relevance here, WTE and HMIWI facilities. Maryland has followed the federal lead by promulgating its own air pollution regulations for WTE and HMIWI facilities consistent with the CAA. The CAA requires EPA to set NAAQS, health-based standards for outdoor air for specified "criteria" air pollutants at levels that are protective of public health within an adequate margin of safety. 42 U.S.C. § 7409. States must then prepare SIPs designed to meet these NAAQS and submit the plans to EPA for approval. 42 U.S.C. § 7410. Once a NAAQS is set, EPA designates geographic areas or air quality regions as "attainment" or "nonattainment" based on their compliance with the standards. 42 U.S.C. § 7409. Prior to construction, major stationary sources are required to obtain permits which meet either Prevention of Significant Deterioration ("PSD") requirements in attainment areas or Nonattainment New Source Review ("NNSR") requirements in non-attainment areas. 42 U.S.C. § 7470, *et seq*.; 42 U.S.C. § 7501, *et seq*.

These provisions and their implementing regulations mandate the installation of certain types of air pollution control technology[1] in the design and construction of the Facilities. Accordingly, the WB facility's air pollution controls incorporated BACT for pollutants in the Baltimore area that were in attainment and LAER for pollutants that were in nonattainment.

4. **The Clean Air Act's Continuous Emission Monitoring Systems Regulations.** The CAA requires EPA to issue regulations requiring CEMS, which measure actual emission levels from facilities like WB and CB, assess the performance of emission control devices, and verify compliance with specific requirements. *See* 40 C.F.R. § 60, subparts Cb and Ce. Before CEMS may be utilized for solid waste incineration units, EPA must first validate the monitoring system. *See* 42 U.S.C. § 7429(c); 40 C.F.R. § 60.13. CEMS are required for WTE and HMIWI facilities to monitor nitrogen oxides, sulfur dioxide, hydrogen chloride, and carbon monoxide, and therefore for these pollutants, EPA has validated monitoring systems for solid waste incineration units. *See* 40 C.F.R. § 60, subparts Cb and Ce. Federal and state regulations account for necessary downtime to perform repairs, calibration checks, and additional adjustments on CEMS equipment. *See* 40 C.F.R. § 60.38b; 40 C.F.R. § 60.58b; 40 C.F.R. § 60.37e(d); 40 C.F.R. § 60.57c(e); COMAR 26.11.08.08; 26.11.08.08-2B(5). For WTE, the rules specify that valid emissions data should be obtained for a minimum of 90 percent of operational hours per calendar quarter, and 95 percent of operational hours per calendar year that WTE facilities are combusting solid waste. For HMIWI facilities, valid emissions data is required for a minimum of 75 percent of operational hours per day and for 90 percent of HMIWI facilities' operating days per calendar quarter that such a facility is combusting medical waste. *Id.*

[1] Under the PSD regulations, major sources must install Best Achievable Control Technology ("BACT"), 42 U.S.C. § 7479, while under the NNSR regulations, major sources must install pollution controls reflecting the Lowest Achievable Emission Rate ("LAER"), *i.e.*, the lowest achievable emission rate at any comparable facility in the country. 42 U.S.C. § 7501.

5. **Section 111 and Section 129 of the 1990 Clean Air Act Amendments.** The CAA requires EPA to issue national Emission Guidelines ("EG") for categories of air pollution, such as the Facilities, under Section 111 to ensure all sources minimize emissions and help attain and maintain air quality standards. 42 U.S.C. § 7411. States must then issue regulations implementing the EG. *Id*. In 1990, Congress passed sweeping amendments to the CAA, significantly increasing the scope and stringency of air pollution controls for WTE and HMIWI facilities. Congress added a new Section 129 which required that EPA supplement Section 111 by promulgating EG for WTE and HMIWI facilities, reflecting the maximum achievable control technology ("MACT") for nine specific pollutants that EPA deemed to be of most concern for solid waste combustion facilities. States were then required to implement their own regulations, subject to EPA approval. *See* 42 U.S.C. § 7429.[2] EPA issued such regulations for WTE and HMIWI facilities in 1995 and 1997, respectively, which incorporated the MACT requirements. 60 FR 65387; 62 FR 48348. Maryland issued regulations implementing the EG in 1997 and 2000. COMAR 26.11.08.08; 26.11.08.08-2.

In May of 2006, EPA revised the EG for existing WTEs. These revisions made the regulations more stringent for certain pollutants, and tightened requirements for the minimum amount of time that CEMS must be online. The current federal emission limits for existing WTEs – and the provisions of the Ordinance that countermand them – are set forth in Table 1.[3] Maryland incorporated these EPA amendments verbatim in October 2007, and the revised standards became

[2] CAA Section 129 also instructs EPA to review and, if appropriate, revise the EG every five years as necessary to ensure that the emission levels after the installation of pollution controls required to meet the EG provide an "adequate margin of safety" to protect public health. 42 U.S.C. §§ 7409, 7429.

[3] *See* Exhibit G, showing current federal emission limits for WTE facilities like WB. Current federal emission limits for existing HMIWI facilities like CB are set forth in Table 2, Exhibit H. Tables 1 and 2 are also included in the Complaint at Paragraphs 54 and 63, respectively.

effective on April 28, 2009. COMAR 26.11.08.08; Exhibit G. EPA considers WTE facilities a "key part of the non-hazardous waste management hierarchy."[4]

In 2008, EPA proposed new and revised EG for existing HMIWI facilities to implement a more stringent MACT standard. 73 FR 72962; Exhibit H. The revised EG incorporated a new MACT standard derived from the performance of the most efficient HMIWI facilities based on emissions monitoring data submitted by regulated sources following implementation of the initial 1997 standard, as well as the existence of new technologies and process improvements at existing HMIWI facilities. *Id*. The revised 2008 EG were formally adopted in the final federal rules on May 13, 2013. 78 FR 28051. Maryland adopted EG for HMIWI facilities that are identical to the 2013 federal rules. COMAR 26.11.08.08-2; Exhibit H.

6. **The Clean Air Act "Title V" Operating Permit Program.** Congress created the "Title V" operating permit program as part of the 1990 CAA Amendments, designed to ensure that all federal and state air pollution emission limits and monitoring, recordkeeping, and reporting requirements were combined into one operating permit that is subject to public, state, and EPA review. *See* 42 U.S.C. § 7661, *et seq*. EPA approved Maryland's Title V interim regulations in 1996, and final regulations in 2003. 68 FR 1974. Title V requires facilities like WB and CB to obtain an operating permit, operate in compliance with that permit, and certify at least annually compliance or noncompliance with all permit requirements. *See* 40 C.F.R. § 70, *et seq*; COMAR 26.11.03, *et seq*. MDE issues all Title V permits to WTE and HMIWI facilities in Maryland. *Id*.

7. **Maryland Air Laws and MDE's Authority.** Maryland's General Assembly vests MDE with "jurisdiction over emissions into the air and ambient air quality" and for "monitoring ambient air

[4] *See* Energy Recovery from the Combustion of Municipal Solid Waste, U.S. Environmental Protection Agency, (last accessed August 19, 2019), https://www.epa.gov/smm/energy-recovery-combustion-municipal-solid-waste-msw.

quality in this State." Md. Code Ann. Envir. § 2-103(b)(1)-(2). It grants MDE the authority to "adopt rules and regulations for the control of air pollution in this State, including testing, monitoring, recordkeeping, and reporting requirements," Md. Code Ann. Envir. § 2-301(a), and directs MDE to "adopt rules and regulations that set emission standards and ambient air quality standards" for the state. Md. Code Ann. Envir. § 2-302(b). MDE must set emission standards "based on the goal of achieving emission levels that are not more restrictive than necessary to attain and maintain the ambient air quality standards" except where "a political subdivision requests a more restrictive standard under § 2-104." Md. Code Ann. Envir. § 2-302(d)(1), 2-302(d)(2)(i). As shown above, MDE has promulgated regulations for WTE and HMIWI consistent with this authority.

8. **Baltimore City's Prior Requests for MDE to Set More Stringent Emission Standards.** Prior to passing the Ordinance in 2019, the City complied with the directive in Section 2-104(b) by requesting that MDE set more stringent emission standards for the WB facility. *See* Exhibit I, Baltimore City Council Resolution 17-0034R; Exhibit J, Baltimore City Council Resolution 18-0101R; Complaint ¶¶ 51-53. On July 11, 2017, the Baltimore City Council passed Resolution 17-0034R, which requested that MDE set a nitrogen oxides emission limit of no higher than 150 ppmvd for the WB facility. *See* Exhibit I. On December 6, 2018, MDE adopted a final rule for inclusion in its SIP reducing the WB facility's nitrogen oxides emission limit to 150 ppmvd effective May 1, 2019, and further reducing the limit to 145 ppmvd effective May 1, 2020. COMAR 26.11.08.10. MDE's final rule also requires that no later than January 1, 2020, WB submit to MDE a feasibility analysis for the additional control of nitrogen oxide emissions, and propose with it new nitrogen oxides limits based on the results of the feasibility analysis. COMAR 26.11.08.10.E. On September 17, 2018, the Baltimore City Council passed Resolution 18-0101R,

which requested that MDE "require a rigorous analysis" of the WB feasibility study that is due January 2020, and "fully evaluate the technical feasibility" of installing certain control technology at WB "regardless of cost or whether the technology has been used in other retrofits." *See* Exhibit J; Complaint ¶ 51.

9. **Maryland's Air Toxics Program.** Maryland adopted toxic air pollutant regulations in 1988. COMAR 26.11.15, *et seq*. These regulations require stationary sources like the Facilities to quantify emissions of toxic air pollutants, apply BACT for toxics, and demonstrate that impacts from those emissions will not adversely affect public health by meeting a specific health risk-based ambient air quality standard for each pollutant. *Id*. WB and CB comply with these standards and submit updated toxic air pollutant compliance demonstrations as necessary or when requested by MDE.

10. **WB's Title V Permit**. The WB facility is subject to Maryland's Title V operating permit program. *See* COMAR 26.11.03, *et seq*. MDE issued WB its first Title V permit on November 5, 2001 and its current permit on April 1, 2014. *See* Exhibit B. The WB facility's Title V permit incorporated all applicable CAA and state requirements for nitrogen oxides, sulfur dioxides, mercury, and dioxin/furans, among other regulated pollutants. *Id*. The Title V permit also requires CEMS monitoring for nitrogen oxides, sulfur dioxides, and carbon monoxide, plus COMS for opacity. *Id*.; *see also* Exhibit G.

11. **CB's Title V Permit**. The CB facility is subject to Maryland's Title V operating permit program. *See* COMAR 26.11.03, *et seq*. MDE issued CB its first Title V permit in 2003 and its current permit on May 1, 2019. *See* Exhibit F. The CB facility's Title V permit establishes emission limits for nitrogen oxides, sulfur dioxides, mercury, and dioxin/furans, among other regulated

pollutants. *Id*. The CB Title V permit also includes CEMS requirements for nitrogen oxides, carbon monoxide, and hydrogen chloride. *Id*.; *see also* Exhibit H.[5]

12. **Maryland's Solid Waste Management Plan.** Numerous statutes and regulations govern solid waste management in Maryland. *See* Md. Code Ann. Envir. §§ 9-204 – 9-229, 9-501 – 9-521; Md. Nat. Res. Code § 3-901 *et seq*.; COMAR 26.03.03; COMAR 26.04.07.01 – COMAR 26.04.07.27 (collectively, the "Solid Waste Laws"); *see also* Complaint ¶¶ 69-78. MDE requires that municipalities, including Baltimore City and Baltimore County, prepare and submit for approval a SWMP. *See* COMAR 26.03.03. MDE approved the City's current SWMP on March 24, 2016. It covers the ten-year period from 2013–2023. *See* Exhibit E. The City's SWMP expressly states that solid waste is "governed by federal and state laws that regulate local practices to protect public health and welfare." *Id*. at ¶ 1.3. Baltimore represented to MDE that the WB facility "has obtained and operates in compliance with necessary City, State, and federal permits," that "[e]missions from the electrostatic precipitators equipped smokestacks are monitored by the MDE," and that the "anticipated service life of the plant is over 20 years." *Id*. at ¶ 3.4.1.

13. **Baltimore Admits that Its SWMP May Not Be Amended Legislatively.** In 2010, the City passed Zoning Bill 09-0400 to repeal certain geographic restrictions on the acceptance of waste by the CB facility. In a memorandum to the City Council, the City Solicitor provided its legal analysis of the proposed legislation, observing that: "City laws imposing geographic limits on waste acceptance qualify the provisions of the existing SWMP, in effect amending the plan legislatively." *See* Exhibit K, Memorandum Regarding City Council Bill 09-0400, City of Baltimore Department of Law, p. 4, dated December 9, 2009. The Solicitor concluded that "[t]his action is preempted by

[5] Title V requires the Facilities to obtain an operating permit, operate in compliance with that permit, and certify at least annually its compliance or noncompliance with all permit requirements. See 40 C.F.R. § 70.6; Exhibits B and F.

the State's occupation of the field of solid waste management and prohibited by state law which requires revisions to the SWMP to be approved by MDE." *Id.*

14. **Maryland's Renewable Portfolio Standard.** The WB facility is a Tier 1 renewable resource under Maryland's Renewable Portfolio Standard. *See* Md. Code Ann. Pub. Util. § 7-701, *et seq.*; Complaint ¶ 28.

15. **WB's Refuse Disposal Permit.** The WB facility also operates under an MDE-issued Refuse Disposal Permit ("RDP"). *See* Exhibit L, WB's RDP. WB's RDP was issued on March 3, 2017 and is valid for 5 years, expiring March 2, 2022. *Id*. The RDP requires the facility to be "operated and maintained in such a manner as to prevent air, land, or water pollution, public health hazards or nuisances." *Id*. The RDP vests MDE with the right to approve of all pollution control devices installed at the WB facility: "All pollution control and ground and surface water monitoring systems (including stormwater management and sediment control systems) shall be installed in accordance with the manufacturer's recommendations and plans and specifications approved by the Department [MDE]." *Id*. MDE also "reserves the right to restrict the volume of material accepted at [the] facility upon a determination that … conditions which are prejudicial to quality of the environment or the public health, safety, or comfort have occurred or are likely to occur." *Id*.

16. **CB's Refuse Disposal Permit.** The CB facility operates under an MDE-issued medical waste incineration RDP. *See* Exhibit M, CB's RDP. The RDP was issued on June 13, 2017 and expires on June 12, 2022. *Id*. The RDP permits the CB facility to accept 62,050 tons of medical waste per year. *Id*. The RDP authorizes CB to accept for incineration medical wastes as well as over-the-counter and prescription pharmaceuticals preventing those pharmaceuticals from entering municipal waste streams through flushing or landfilling. *Id*. The RDP vests MDE with the right to

approve of all pollution control devices installed at the CB facility: "All pollution control and ground and surface water monitoring systems (including stormwater management and sediment control systems) shall be installed in accordance with the manufacturer's recommendations and plans and specifications approved by the Department [MDE]." *Id*. The RDP obligates CB to report any damage to the facility's pollution monitoring or control devices to MDE and MDE may specify the timeframe for completing necessary repairs. *Id*. Further, MDE "reserves the right to restrict the volume of material accepted at this facility upon a determination that nuisance conditions, harborage of disease vectors, fugitive dust, blowing litter, or other conditions which are prejudicial to the quality of the environment or the public health, safety, or comfort have occurred or are likely to occur." *Id*.

17. **The Ordinance.** Ordinance 18-0306 was introduced in the Baltimore City Council on November 19, 2018. The legislation's sponsor, Baltimore City Councilman Edward Reisinger, stated that the Ordinance is specifically intended to "shut down Wheelabrator" and declared that "[Wheelabrator]'s got to be closed."[6] Baltimore's Department of Public Works also acknowledged that the WB facility must shut down at least for an indeterminate period to perform the retrofits necessary to attempt to meet the Ordinance's requirements, and could be forced to shut down permanently. *See* Exhibit N, Baltimore City's DPW Memorandum to Baltimore City Council, dated January 28, 2019.[7] Mayor Catherine Pugh approved and signed the Ordinance into law on March 7, 2019. *See* Exhibit P, Baltimore City Health Code § 8-110, *et seq*. The Facilities are commercial solid waste incinerators as defined by § 8-111(C) of the Ordinance. The Ordinance

[6] Peter O'Dowd, *Baltimore's Burning Question: What To Do With Its Trash Incinerator*, (Apr. 25, 2019) https://www.wbur.org/hereandnow/2019/04/25/baltimore-waste-incinerator-garbage.

[7] *See also* Exhibit O, Baltimore City's DPW Fiscal Analysis of Possible Impacts of City Council Bill 18-0306, dated February 2019 (explaining solid waste disposal issues and significant costs associated with the WB facility's closure).

imposes requirements that materially differ from and are at odds with federal and state requirements. *See* Exhibits G and H. Specifically:

a. For WB, the Ordinance's limits for nitrogen oxides, sulfur dioxides, and mercury are substantially lower than the federal or state WTE regulations or the limits in WB's Title V permit. *Compare* Exhibit P at § 8-116 *with* 40 C.F.R. § 60, subpart Cb; COMAR 26.11.08.08; *See also* Exhibit B at 45-46; Exhibit G. No WTE facility in EPA's RACT/BACT/LAER Clearinghouse, which covers the entire country, has limits as low as the limits in the Ordinance.[8] For CB, the Ordinance's limits for nitrogen oxides and mercury are also lower than the federal or state HMIWI regulations or the limits in CB's Title V permit. *Compare* Exhibit P at § 8-116 *with* 40 C.F.R. § 60, subpart Ce; COMAR 26.11.08.08-2; *see also* Exhibit F at 31; Exhibit H.

b. The Ordinance requires CEMS for pollutants not required to be monitored by federal or state law, or the Facilities' Title V permits, and for which EPA has promulgated no performance specifications and has not validated CEMS for utilization on solid waste incineration units. This includes hydrofluoric acid, volatile organic compounds, polycyclic aromatic hydrocarbons, and trace metals. *Compare* Exhibit P at § 8-114 *with* 40 C.F.R. § 60, subparts Cb and Ce; COMAR 26.11.08.08; COMAR 26.11.08.08-2; 42 U.S.C. § 7429(c); *see also* Exhibits B, F, G, and H.

c. The Ordinance requires that CEMS be operational at all times that the facility is functioning, without accounting for any requisite downtime for maintenance and upkeep, and categorizes data gaps of more than 30 minutes as violations. By contrast, federal and state regulations and permits specify that valid emissions data should be obtained for minimum periods of time to account for downtime and maintenance. *Compare* Exhibit P at § 8-115 *with* 40 C.F.R. § 60.38b; 40 C.F.R. § 60.58b; 40 C.F.R. § 60.37e(d); 40 C.F.R. § 60.57c(e); COMAR 26.11.08.08; COMAR 26.11.08.08-2B(5).

d. The Ordinance imposes strict liability criminal penalties for any violation of its requirements as compared to the CAA and Maryland air laws which only provide for such penalties in cases of knowing violations of requirements. *Compare* Exhibit P at § 8-125 *with* 42 U.S.C. § 7413(c); Md. Code Ann. Envir. § 2-609.1.

STANDARD OF REVIEW

Under Rule 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

[8] The RACT/BACT/LAER Clearinghouse is a permit database that includes data submitted by all 50 states on over 200 different air pollutants and 1,000 industrial processes. RACT, or Reasonably Available Control Technology, is required on existing sources in areas that are not meeting NAAQS. BACT is required on major new or modified sources in attainment areas; LAER is required on major new or modified sources in non-attainment areas. SOF ¶ 3.

See Celotex Corp. v. Catrett, 477 U.S. 317, 322–324 (1986); *see also Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 848 F.3d 235, 238 (4th Cir. 2017). A federal preemption claim presents a question of law suitable for disposition via summary judgment. *See Lescs v. William R. Hughes, Inc.*, 168 F.3d 482, 484 (4th Cir. 1999) ("Because this appeal of summary judgment hinges on determining whether federal law preempts state law claims, an issue of material fact appropriate for trial can arise only if the claim presented is not legally preempted"); *Dominion Transmission, Inc. v. Town of Myersville Town Council*, 982 F. Supp. 2d 570, 576 (D. Md. 2013) ("[W]hen a case presents a pure question of law as to federal preemption, the case should be resolved at the summary judgment stage"). The same applies to preemption claims raised under state law. *See, e.g., Bd. of Cty. Commissioners of Washington Cty. v. Perennial Solar, LLC*, 196 A.3d 933, 936 (Md. Ct. Spec. App. 2018) ("This case presents questions of both preemption and jurisdiction. Both are questions of law …"), *aff'd*, --- A.3d ---, 2019 WL 3071755 (Md. July 15, 2019).

ARGUMENT

The Baltimore Ordinance is preempted by federal and state law. The Supremacy Clause of the U.S. Constitution establishes that "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018). The same is true of state law supremacy over local law. *See Worton Creek Marina, LLC v. Claggett*, 850 A.2d 1169, 1176 (2004) ("Under Maryland law, State law may preempt local law in one of three ways: (1) preemption by conflict, (2) express preemption, or (3) implied preemption").

I. The Federal Clean Air Act Preempts the Ordinance

Federal conflict preemption arises, and a subsidiary state or local law is invalid, when (1) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or (2) when a state or local law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

Congress." *Hines v. Davidowitz*, 312 U.S. 52 (1941). A local law stands as an obstacle when it "interferes with the *methods* by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (emphasis added) (internal quotation marks omitted); *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 830 (4th Cir. 2010) (affirming dismissal of plaintiff's claims on obstacle preemption grounds where claims undermined "primary purposes" of the National Flood Insurance Act). Where conflict preemption is alleged based on the obstacle presented by local law to the federal purpose and objective of a competing statute, "[w]hat constitutes a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) (finding state order governing power utilities preempted as an obstacle to the Federal Power Act's goal of incentivizing new generation sources). In determining whether a local law "stands as an obstacle" to the full implementation of a federal law, saying that the ultimate goal of both the federal and local law is the same will not save the local law from invalidation on preemption grounds. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

A. The Baltimore Ordinance is an obstacle to the purposes and objectives of the Clean Air Act.

The Ordinance directly conflicts with and serves as an obstacle to Congress' purposes, objectives and policy choices in the CAA, which created a regulatory scheme "that reflects the extensive application of scientific expertise and that has set in motion reliance interests and expectations on the part of those states and enterprises that have complied with its requirements." *See North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 301 (4th Cir. 2010) (hereafter, "*TVA*"). The Fourth Circuit's *TVA* opinion, which emphasized the primacy of the CAA over state efforts to impose stricter standards, is controlling here. In *TVA*, North Carolina sought

to impose specific emissions limits for pollutants including sulfur dioxide, nitrogen oxides, ozone, and particulate matter on out-of-state coal plants that conflicted with federal standards and permits. *Id*. at 297-298. The court analyzed the practical effects of having multiple and conflicting emission standards, and rejected North Carolina's nuisance lawsuit seeking to set state emission standards that differed from those established by the federal government because they would undermine the regulatory and permitting framework of the CAA. *Id*. at 301-304. Baltimore's enactment of its own set of air pollution controls for the Facilities similarly undermines the federal framework and is preempted by conflict. As Judge Wilkinson wrote for the unanimous *TVA* panel, "it is difficult to understand how an activity expressly permitted and extensively regulated by both federal and state government could somehow constitute" a criminal and civil violation of local law. *Id.* at 296.

Courts have repeatedly held that where state or local laws countermand the purposes and objectives of a federal law, the subsidiary law is preempted by conflict. For example, in *Clean Air Markets Group v. Pataki*, 338 F.3d 82, 86-87 (2d Cir. 2003), the Second Circuit found that New York's Air Pollution Migration Law, which limited sales of emission allowances to upwind states, was preempted under Title IV of the CAA, as it was in "actual conflict" with Congress' selected method of controlling sulfur dioxide emissions. Likewise, the Eighth Circuit found that North Dakota's water-quality standards were preempted because they conflicted with the U.S. Army Corps of Engineers' authority under the Clean Water Act and Flood Control Act of 1994, and because "allowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA." *In re Operation of the Mo. River Sys. Litig*, 418 F.3d 915, 920 (8th Cir. 2005). The Tenth Circuit has similarly found that the Comprehensive Environmental Response, Compensation, and Liability Act's ("CERCLA") comprehensive scheme preempted New Mexico's efforts to collect natural resource damages, as

such state suits "would seriously disrupt CERCLA's principle aim of cleaning up hazardous wastes." *New Mexico v. Gen. Elec*., 467 F.3d 1223, 1248 (10th Cir. 2006). When confronted with a local ordinance that barred a cement kiln from burning hazardous wastes as a fuel, the Tenth Circuit ordered the district court to weigh carefully whether the local ordinance was legitimately targeted at an environmental problem or was a "sham." *Blue Circle Cement, Inc. v. Bd. of County Comm*., 27 F.3d 1499, 1508 (10th Cir. 1994). The court held that, under the Resource Conservation and Recovery Act, "ordinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by [federal law] will ordinarily be preempted." *Id*.

A local law also cannot interfere with the methods by which the CAA was designed to reach its goals of regulating emissions and protecting air quality. *See TVA* at 301 (state law nuisance claims preempted because they interfered with the methods by which the CAA was designed to reach its goal of implementing uniform emissions regulation); *Pataki*, 338 F.3d at 87 (state air pollution mitigation law created an actual conflict with the CAA by interfering with the method set forth by the CAA for regulating emissions). Here, the Ordinance dictates how the Facilities will measure air emissions and what those emissions can be when the CAA has already set forth these requirements. The emission limits and other requirements of the Ordinance directly conflict with the emission limits and provisions in the CAA, EPA's regulations, and the Facilities' Title V operating permits, including:

- The Ordinance sets lower emission limits for nitrogen oxides, sulfur dioxides, and mercuryfor the WB facility. *Compare* Exhibit P at § 8-116 *with* Exhibit G. The Ordinance sets more stringent emission limits for nitrogen oxides and mercury for the CB facility. *See* Exhibit P at § 8-116 *with* Exhibit H.

- The Ordinance enlarges the number of air pollutants for which the Facilities must employ CEMS, despite the fact that there are no EPA-approved CEMS technologies available and no EPA-validated monitoring systems for those pollutants at solid waste incineration units. *Compare* Exhibit P at § 8-114 *with* Exhibits G and H.

- The Ordinance requires CEMS for monitoring pollutants that have no emission limits in the Ordinance. *Compare* Exhibit P at § 8-114 *with* § 8-116.

- The Ordinance imposes a physically impossible standard that CEMS be operational at all times that the facility is functioning, without an adequate allowance for down time (for testing, calibration, etc.), rendering the Facilities' compliance with the CEMS terms in their Title V permits a civil and criminal violation under the Ordinance. *See* Exhibit P at § 8-115; SOF ¶¶ 4, 6.[9]

- The Ordinance ignores the different overlapping technological standards in federal and state air laws, *e.g.*, BACT, LAER, MACT. These varying standards governing the applicable control technologies for specific sources constitute a core and inseparable part of the regulatory approach implemented in the CAA.

- The Ordinance imposes strict liability criminal penalties for any violation of its requirements whereas the CAA establishes a "knowing" criminal *mens rea*. *Compare* Exhibit P at § 8-125 *with* 42 U.S.C. § 7413(c).

Further, the Ordinance usurps EPA's authority to review and approve regulatory changes related to or affecting NAAQS and Maryland's SIP. States do not have unilateral authority to modify their SIPs without going through the EPA review and approval processes. *See Ala. Envtl. Council v. EPA*, 711 F.3d 1277 (11th Cir. 2013) (under the CAA, "[o]nce approved, a SIP may not be unilaterally modified either by the state or the EPA"; rather, the CAA "provide[s] cooperative processes for modifying a SIP…"). Here, the City's unilateral enactment of emissions standards undermines Maryland's SIP, without state involvement or oversight and without going through the statutorily-prescribed EPA review and approval process.

B. The Clean Air Act's savings clause does not extend to Baltimore's conflicting Ordinance.

[9] A quintessential example of conflict preemption due to physical impossibility is found in *United States v. City and County of Denver.* Denver's city and county zoning ordinances directly conflicted with a CERCLA remedial order issued by the EPA; the remedial order required on-site solidification of contaminated soils, but Denver's zoning ordinances prohibited the owner from maintaining hazardous waste in areas zoned for industrial use. The owner could not obey both the EPA's remedial order and the cease and desist order issued by Denver. The district court and the Tenth Circuit found that CERCLA therefore preempted the zoning ordinances because they were in actual conflict with the remedial order issued by the EPA and it was impossible to comply with both federal and local law. *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996).

The CAA savings clause provides no authority for the City to pass the Ordinance.[10] The Supreme Court has repeatedly held that a savings clause for some local authority does not excuse a local law from a conflict preemption analysis. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-872 (2000); *United States v. Locke*, 529 U.S. 89, 106 (2000); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001). Courts narrowly interpret savings clauses where a local law conflicts with a federal statute. Indeed, the Fourth Circuit has expressly declined to apply the CAA's savings clause where doing so would undermine the primacy of its regulatory scheme. *See TVA*, 615 F.3d at 301, 304; *see also Blue Circle Cement, Inc*, 27 F.3d at 1508 (reversing summary judgment where local law frustrated the structure and purpose of the Resource Conservation and Recovery Act, despite a savings clause similar to the CAA's).

II. Maryland Air Laws Preempt the Ordinance

Maryland state law may preempt local law in one of three ways: (1) preemption by conflict, (2) express preemption, or (3) implied preemption. *Perennial Solar*, 2019 WL 3071755, at *4 (citing *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307, 311 (2013), *Talbot County v. Skipper*, 329 Md. 481, 487-488 (1993) *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 297-298 (1993)). Here, the Ordinance is invalid under all three types of preemption. It imposes unprecedented restrictions on air emissions, monitoring, and permits and is at odds with the provisions of the City's SWMP and the Facilities' RDPs.

A. The City may not amend the state-established emissions limits.

State law expressly preempts local law when the General Assembly "prohibits local legislation in a field by specific language in a statute." *Worton Creek Marina, LLC*, 381 Md. at 512, n.6; *East Star v. County Comm'r of Queen Anne's County*, 203 Md. App. 477, 485 (2012).

[10] *See* 42 U.S.C. § 7416; 42 U.S.C. § 7429 (h)(1); *see also* Pls' Memo in Opposition to Mot. to Dismiss, Dkt. No. 34 at 9-12.

The General Assembly established that "[MDE] has jurisdiction over emissions and ambient air quality in th[e] State." Md. Code Ann. Envir. § 2-103(b). The legislature granted MDE the authority to adopt regulations "for the control of air pollution in this State, including testing, monitoring, record keeping, and reporting requirements." Md. Code Ann. Envir. § 2-301. The General Assembly also directed MDE – not localities – to "adopt rules and regulations that set emission standards and ambient air quality standards" for Maryland. Md. Code Ann. Envir. § 2-302(b). Critically, § 2-302(d) provides that MDE must set emission standards "based on the goal of achieving emission levels that are not more restrictive than necessary to attain and maintain the ambient air quality standards" [11] except where "*a political subdivision requests a more restrictive standard under § 2-104.*" Md. Code Ann. Envir. § 2-302(d)(1), 2-302(d)(2)(i). (emphasis added). Consequently, only MDE possesses the authority to set air emission standards in Maryland, either as required by statute, or in response to a local government request for a more restrictive standard.

Section 2-104 recognizes *three* express limitations on a local authority's power, one in each subsection. First, subsection 2-104(a)(1) "does not limit the power" of (nor does it grant power to) a local government that it otherwise possesses. While this subsection "does not limit" the locality's power, it also does not supplant other limitations on a locality's power, *e.g.*, limits to its police power. That power is circumscribed by the language "Except as provided in this section," which is important because the other two express limitations in § 2-104 are such restrictions. Second, subsection 2-104(a)(2) prohibits the imposition of emission standards or ambient air quality standards less stringent than state law, but does not authorize imposing more stringent standards. Third, subsection 2-104(b) provides that if a political subdivision desires the adoption of more

[11] This limitation means that even MDE does not possess unilateral authority to set more stringent standards for attainment areas. The General Assembly withheld from MDE the very authority that Baltimore assumes for itself in the Ordinance.

stringent limits or standards, its recourse is to ask MDE "to adopt rules and regulations that set more restrictive emission standards or ambient air quality standards in that subdivision."

The City followed this statutory framework in 2017 when it requested that MDE set a more stringent nitrogen oxides emission limit for the WB facility. SOF ¶ 8. The City acted illegally, however, when it made an end run around the statute's limitations to pass the Ordinance. In sum, if the City desires to adopt a regulation of its own (for political reasons or to provide an additional enforcement mechanism) that is the same as an MDE regulation, it may do so, but if it wishes more restrictive regulation, it can only request that MDE do so under subsection 2-104(b).

B. Maryland law occupies the field of air pollution control, impliedly preempting the Ordinance.

The Ordinance is also impliedly preempted by Maryland's air laws because it "deal[s] with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Skipper*, 329 Md. at 488 (quoting *Cty. Council for Montgomery Cty. v. Montgomery Ass'n, Inc.*, 274 Md. 52, 59 (1975)). "[T]he primary indicia of a legislative purpose to pre-empt an entire field of law is the comprehensiveness with which the General Assembly has legislated the field." *Allied Vending*, 332 Md. at 299 (quoting *Skipper*, 329 Md. at 488).

1. MDE comprehensively regulates air pollution.

Maryland has enacted its own air pollution control statutes consistent with the CAA's framework, and MDE has promulgated corresponding regulations, including those specifically pertaining to WTE and HMIWI facilities. SOF ¶¶ 3-11; *see also* Complaint ¶¶ 36, 41-42, 49-50, 58-62. These comprehensive regulations demonstrate that the state has occupied the field, preempting the Ordinance. There is no plausible argument that MDE's regulation of air quality and pollution is not comprehensive.

2. Maryland's pervasive regulation of air pollution impliedly preempts the Ordinance.

Maryland's air program is as comprehensive as other state programs the Maryland Court of Appeals has found to occupy the field. The Court of Appeals recently held that a state statute granting the Public Service Commission general regulatory powers over generating stations, including solar energy generating systems, preempted local authority with respect to the location and construction of the systems. *See Perennial Solar*, 2019 WL 3071755. It considered the duties and authority delegated to the state commission by the General Assembly and found that the statute manifested a purpose to create an all-encompassing scheme of solar energy regulation, addressed all regulatory matters associated with the approval and operation of generating stations, and did not provide concurrent legislative authority to any locality. *Id*. at *5, 12, 15.[12]

In *Allied Vending*, the court held that Maryland's program of regulation and licensing of cigarette vending machines is sufficiently comprehensive to preempt local attempts to restrict the placement of such machines in locations inaccessible to minors. 332 Md. at 301. Maryland law requires a vendor to obtain licenses for each cigarette vending machine and to provide the address where each machine will be located. *Id.* at 289-290. State law governs the scope of the licenses, requires recordkeeping, and regulates how cigarettes are packaged and displayed. *Id.* at 291. After reviewing Maryland's scheme, the court held that the local ordinances were impliedly preempted

[12] At least one federal court has invalidated a local ordinance as impliedly preempted by state air laws. In *Rhode Island Cogeneration Assocs. v. City of East Providence*, 728 F. Supp. 828, 839, (D.R.I. 1990), the court held that a local ordinance banning commercial use of coal was impliedly preempted because the ordinance effectively nullified the state's licensing procedure. *Id.* at 838-839. Although the court noted the overlapping goals between the state and local government to protect against potential air pollution, the court held that the language throughout the state's air laws and regulations indicated the legislature's intention to maintain primacy over all aspects of air pollution control. *Id.* at 837. The state air law "[did] not leave gaps to be filled by local governments. It anticipate[d] individualized decisions on all sources of air pollution, decisions that will take into account local, regional, and statewide concerns." *Id.* Similarly here, Maryland's air laws have expressly limited local decision-making on air pollution to requests to MDE for implementing more stringent standards. *See* Md. Code Ann Envir. § 2-104(b).

because state regulation of the field of cigarette vending is sufficiently comprehensive to manifest an intent to prevent local regulation in the same area. *Id.* at 300.

In a similar case, the Court of Appeals held that Maryland's sewage sludge management program impliedly preempted a county ordinance that required a landowner to record information in county land records before applying sewage sludge to his land. *Skipper*, 329 Md. at 482-483. The court held that Maryland law regulating sewage sludge utilization imposes a comprehensive permitting requirement, and gives MDE the authority to inspect sewage sludge facilities. *Id*. at 489-490. Based on the state program, the court held that the "statutory provisions manifest the general legislative purpose to create an all-encompassing state scheme of sewage sludge regulation" and impliedly preempt local regulation in the field. *Id*. at 491-492. Likewise, in *Altadis*, the Court of Appeals held that state law occupies the field of tobacco product packaging and sales, and impliedly preempts local regulation of cigar sales because of the State's detailed licensing recordkeeping requirements. 431 Md. at 308.

Maryland's air regulatory program is as comprehensive, if not more, than the Maryland schemes for regulating the solar energy generation systems, cigarette vending machines, sewage sludge, and cigar sales at issue in *Perennial Solar, Allied Vending*, *Skipper,* and *Altadis*, respectively. Because the state comprehensively regulates air pollution control, the Ordinance is impliedly preempted.

3. <u>The *Allied Vending* "secondary factors" confirm the Ordinance is impliedly preempted.</u>

While the comprehensiveness of state regulation is the primary indicator of implied preemption, Maryland courts have also considered seven "secondary" factors related to history, policy, and other issues bearing on the state/local relationship. *Allied Vending*, 332 Md. at 299-300. These factors, listed below, weigh heavily in favor of preemption by Maryland's air laws:

1) *Whether local laws existed prior to the enactment of state laws governing the same subject matter*. The City has never regulated solid waste combustors. Prior to its requests of MDE in 2017 and 2018 (as provided in § 2-104) that MDE set more stringent emission standards for the WB facility, the City has not previously passed a local law setting emission limits or monitoring requirements for the Facilities. SOF ¶ 8.

2) *Whether the state laws provide for pervasive administrative regulation*. Maryland's air laws are pervasive. As described above, Maryland law provides for pervasive regulation of air quality by MDE, which operates a detailed program of air pollution control in coordination with EPA. That program includes the establishing and implementing of Maryland's SIP to meet the federally mandated NAAQS and oversight of CAA Title V permitting for all applicable facilities in the state. SOF ¶¶ 3, 6, 10-11; Complaint ¶¶ 37, 41.

3) *Whether the local ordinance regulates an area in which some local control has traditionally been allowed*. Local governments have not been authorized under the CAA or Maryland law to regulate air emissions.

4) *Whether the state law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local ordinances*. Maryland law grants MDE "jurisdiction over emissions into the air and ambient air quality," with no concurrent local authority. Md. Code Ann. Envir. § 2-103(b). A local government's role with respect to setting air emission limits and ambient air quality standards more restrictive than the standards set by MDE is limited to requesting that MDE adopt different standards for that locality. Md. Code Ann. Envir. § 2-104(b).

5) *Whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field*. MDE recognizes that it is responsible for reviewing

local government requests made pursuant to Section 2-104 to adopt more stringent emission standards. Md. Code Ann. Envir. § 2-104(b).

6) *Whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation*. Maryland's General Assembly expressly addressed all aspects of air quality and air pollution control and vested broad authority in MDE to develop, impose, and enforce regulations in this area. *See* Md. Code Ann. Envir. § 2-101, *et seq*.

7) *Whether a two-tiered regulatory process existing if local laws were not pre-empted would engender chaos and confusion*. The Ordinance, if allowed, would trigger an inconsistent patchwork of emission standards across the state that would undoubtedly "engender chaos and confusion." *See, e.g., Allied Vending*, 332 Md. at 303.

C. The Ordinance is invalid under conflict preemption because it prohibits conduct permitted by state law and the Facilities' permits.

The Maryland Court of Appeals has long held that "ordinances which assume directly or indirectly … to prohibit acts permitted by statute or constitution, are under the familiar rule for validity of ordinances uniformly declared to be null and void." *Heubeck v. City of Baltimore*, 205 Md. 203, 208 (1954); *see also Skipper*, 329 Md. at 487 n.4 (a "local ordinance is pre-empted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law"). A local law may conflict with a state law in other respects and cause it to be preempted, even though the local law does not specifically permit or prohibit an act prohibited or permitted by the state. *See Montgomery County Bd. of Realtors v. Montgomery County*, 287 Md. 101, 411 A.2d 97 (1980) (local tax ordinance preempted because it was in direct conflict with a State statute regulating the same matter). Conflict preemption is codified in Maryland law, which allows counties to adopt ordinances "only to the

extent … not preempted or in conflict with public general law." Md. Code Ann. Local Gov't § 10-206(b). Maryland localities simply cannot exercise their police power in a manner inconsistent with state law.

The conflict here is clear. The Ordinance prohibits conduct that has been affirmatively authorized under state law and a duly issued permit and makes state-authorized activity into a criminal offense. *See* Exhibit P at § 8-125(a).[13] For example, MDE issued the WB facility a Title V permit authorizing nitrogen oxides emissions of no greater than 205 ppmvd, *see* Exhibit B at 45, however, the Ordinance limits nitrogen oxides emissions to a maximum of 45 ppmvd on a 24-hour block average and 40 ppmvd on a 12-month rolling average. *See* Exhibit P. MDE even promulgated a regulation that applies specifically and exclusively to nitrogen oxides emissions from the WB facility, setting the nitrogen oxides limit at 145 ppmvd by May 1, 2020, a level that is prohibited under the Ordinance. *See* COMAR 26.11.08.10. This means that WB facility's nitrogen oxides emissions of, for instance, 100 ppmvd would be well below the applicable limits in the MDE regulations and the Title V permit, but would violate the Ordinance, subjecting the facility to civil and criminal enforcement penalties and sanctions. The WB facility's Title V permit also requires CEMS monitoring for nitrogen oxides, sulfur dioxides, and carbon monoxide, plus a COMS to ensure compliance with opacity requirements. *See* Exhibit B at 45-46. In conflict with the Title V permit, the Ordinance requires the use of CEMS that are not validated by EPA for solid waste incineration units (as compared with validated CEMS required in the Title V permit), and that a facility's CEMS be operational at all times that the facility is functioning (*i.e.*, 100 percent of the time), imposing sanctions for gaps in monitoring of more than thirty minutes. *See* Exhibit P

[13] The Act's criminal provision states that "Any person who violates any provision of this Part II, or of a rule or regulation adopted under this Part II, is guilty of a misdemeanor and, on conviction, is subject to fine of not more than $1,000 or imprisonment for not more than 90 days." Exhibit P at § 8-125(a).

at § 8-115. This requirement contradicts the federal and state rules that factor in necessary downtime including repairs, calibration checks, and adjustments to the monitoring systems to ensure their accuracy. SOF ¶ 4.[14]

Maryland courts have invalidated local ordinances under conflict preemption where the ordinances regulated the same matter already regulated by the State. In *Perdue Farms Inc. v. Hadder*, the court invalidated a local ordinance prohibiting water spray exceeding 20 mg/L of nitrogen as "impermissibly second guessing MDE," which allowed such activity subject to different state law limits. 109 Md. App. 582 (1996). Similarly, in *East Star, LLC*, the court held that a local ordinance limiting mining activity was invalid under conflict preemption because it "place[d] additional and incompatible restrictions on surface mining operations than those imposed by State law." 203 Md. App. at 493-494. The ordinance provided, among other things, that the maximum area disturbed by any major extraction could not exceed 20 acres at any time. *Id.* at 494. The court held that this requirement directly conflicted with Maryland regulations that "specifically provide[] that MDE shall determine the area of maximum disturbance after considering various factors." *Id.* The court also found the ordinance's requirement that any previously disturbed area be reclaimed before any expansion of mining acreage was "incompatible" with Maryland law, which "only requires reclamation activities to be completed promptly …." *Id.*

Like the local laws in *Perdue Farms* and *East Star*, the Ordinance regulates an area already regulated by the State, second-guesses MDE and imposes requirements incompatible with the

[14] Under federal and state regulations applicable to the WB facility, valid emissions data must be obtained for a minimum of 90 percent of operational hours per calendar quarter, and 95 percent of operational hours per calendar year that the facility is combusting municipal solid waste. *See* 40 C.F.R. § 60.38b; 40 C.F.R. § 60.58b; COMAR 26.11.08.08.

state-issued Title V permit and related regulations.[15] The Ordinance cannot override MDE's prior determinations regarding appropriate emissions standards and monitoring requirements for the Facilities as set forth in the applicable regulations and Title V permits.

Here, the City ignores the well-reasoned and scientifically-backed framework set forth by EPA and MDE by contravening the authority expressly granted to the Facilities in their Title V permits. As the Court of Appeals has held, "a political subdivision may not prohibit what the State by general public law has permitted." *Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 338 (1981). The plaintiffs in *Frank* brought an action seeking a declaratory judgment that a municipal ordinance prohibiting fortune-telling was in direct conflict with a county-issued fortune-telling license. *Id*. at 332-334. The court found that the ordinances were preempted by conflict because they prohibited conduct explicitly permitted under the County license, which permitted the licensees to engage in the practice of fortune-telling at a specified location. *Id*. at 338-339. Similarly here, the City second guesses MDE's licensing decisions in the air pollution arena and prohibits the operation of the Facilities in contravention of state law and their Title V permits. The Ordinance cannot stand under Maryland conflict preemption law.

III. Maryland Solid Waste Laws Preempt the Ordinance

The Ordinance is also impliedly preempted because it intrudes into the field occupied entirely by the Maryland Solid Waste Laws. *See Skipper*, 329 Md. at 488; *Allied Vending*, 332 Md. at 299.

[15] The Sixth Circuit has also found a local ordinance regulating the location of air pollution emission sources and solid waste incinerators in a city to be preempted by conflict with state law. *See Southeastern Oakland Cty. Resource Recovery Auth. v. City of Madison Heights*, 5 F.3d 166 (6th Cir. 1993).

A. MDE comprehensively regulates solid waste management.

Maryland has created an all-inclusive regulatory program of solid waste management. Section I of the Complaint sets forth how MDE's regulations control the permitting, construction, and operation of any refuse disposal system, including WTE and HMIWI facilities in the state. SOF ¶ 12; *see also* Md. Code Ann. Envir. §§ 9-204 – 9-229, 9-501 – 9-521; Md. Nat. Res. Code § 3-901 *et seq*.; COMAR 26.03.03; COMAR 26.04.07.01 – COMAR 26.04.07.27; Complaint ¶¶ 69-78. MDE's regulations governing review and approval of SWMPs were promulgated to provide for consistent and comprehensive planning throughout the state. *See* COMAR 26.03.01.02(A). MDE expressly retains control over any changes to a SWMP or the operation of a permitted solid waste disposal facility, prohibiting SWMP revisions that do not first go through notice and public hearing followed by MDE review and approval. *See* COMAR 26.03.03.05(C); COMAR 26.04.07.25. The Ordinance is intended to shut down the Facilities, erasing them from the City's MDE-approved SWMP. The City may not limit (or eliminate) the Facilities' disposal capacity without MDE approval.

The Ordinance is not the City's first law aimed at regulating incinerators that has been preempted by Maryland solid waste law. *See Mayor & City Council of Baltimore v. New Pulaski Co. P'ship*, 112 Md. App. 218, 233 (1996) (Baltimore's moratorium on the siting of new incinerators was impliedly preempted because it amounted to a local "veto" of the state's comprehensive solid waste management plan approval process). The court in *New Pulaski* held that "the two statutory schemes under Title 9, Subtitles 2 and 5 indicate an intent of the General Assembly comprehensively to occupy the field of solid waste management." *Id*. at 231. Subsequent to *New Pulaski*, the City admitted, and it is undisputed, that the state has occupied the field of solid waste management. SOF ¶ 13.

MDE regulates solid waste management facilities through RDPs, and regulates the solid waste planning functions of localities through SWMPs. SOF ¶¶ 12, 15-16. The permits vest MDE with the authority to approve of all pollution control devices installed at the Facilities, and MDE expressly reserves the authority to restrict the volume of material the Facilities accept. Md. Code Ann. Envir. § 9-204. The Solid Waste Laws specifically mandate the establishment of, requirements for, and implementation of SWMPs for Maryland counties and cities. SOF ¶ 12.

The WB facility is recognized as a regional refuse disposal facility that manages the solid waste from neighboring counties and the City. The Waste Disposal Authority was created to oversee the management of waste disposal on a regional basis. *See* Md. Code Ann. Envir. §§ 3-902, 3-903. All refuse disposal systems are required to operate under a MDE-issued RDP. Importantly, the WB facility is part of the Waste Disposal Authority's regional solid waste management scheme. SOF ¶ 1; Complaint ¶ 25; *see also* Md. Code Ann. Envir. § 3-903 (creating the Authority as "a public instrumentality of the State of Maryland" for the purpose of establishing a "waste disposal region" for the collection and disposal of solid waste in participating counties);[16] *id*. at § 3-902 (explaining, among the purposes of the Authority, that "it is essential that provision be made for the efficient collection and disposal of waste on a regional basis … and for the generation of energy and the recovery of useable resources form such waste to the extent practicable").[17]

[16] The Waste Disposal Authority is also specifically recognized in Maryland's EPA-approved SIP. *See* 40 C.F.R. 52.1070(d).

[17] The WB facility is a Tier 1 renewable resource under Maryland's Renewable Portfolio Standard, making it eligible to receive and accumulate renewable energy credits in Maryland. *See* Md. Code Ann. Pub. Util. § 7-701, *et seq*; SOF ¶ 15; Complaint ¶ 28. The General Assembly found that the benefit from renewable energy resources such as the WB Facility include long-term decreased emissions and a healthier environment. Md. Code Ann. Pub. Util. § 7-702(b)(1). During its most recent term, the General Assembly rejected three different bills that would have revoked the WB facility's Tier 1 status, underscoring the important role that the WB facility plays in the state's existing comprehensive solid waste scheme. *See* Clean Energy Jobs, S.B. 516, Md. Gen. Assemb. (2019); Clean Energy Jobs, H.B 1158, Md. Gen. Assemb. (2019); Public Utilities - Renewable Energy Portfolio Standard - Tier 1 Sources, H.B. 961, Md. Gen. Assemb. (2019).

The City's SWMP expressly states that solid waste is "governed by federal and state laws that regulate local practices to protect public health and welfare." Exhibit E at ¶ 1.3. The Court of Special Appeals has underscored state primacy in solid waste facility permitting and management. *Holmes v. Maryland Reclamation Assocs*., 90 Md. App. 120, 149 (1992) (intent of the statutory scheme was "to reserve to MDE the specific subject matter governing the decision to issue permits to solid waste management facilities and to relegate to counties a restricted role in planning"). Further, *Holmes* held that "the [political subdivision's] role in developing a [SWMP] is limited, and closely supervised by MDE." *Id*. at 150. The City has admitted the limits on its ability to "qualify the provisions of the existing SWMP, in effect amending the plan legislatively." SOF ¶ 13; Exhibit K; Complaint ¶ 77. The City Solicitor has recognized "the State's occupation of the field of solid waste management … which requires revisions to the SWMP to be approved by MDE." *Id*.

In the *Days Cove* trilogy of cases,[18] the Court of Special Appeals explained that once a local government has fulfilled its statutorily-defined planning and zoning role in the solid waste permit application process, the power to issue SWMPs thereafter falls solely to MDE. *See Days Cove III*, 200 Md. App. at 258-260; *Days Cove I*, 122 Md. App. at 523-526. The court held that, once the local government's role in the SWMP and zoning process has ended, the local government cannot act to invalidate a site's compliance with local requirements because such action would breach "the permit power that is specifically reserved for the State." *Days Cove III*, 200 Md. App. at 258 (quoting *Days Cove I*, 122 Md. App. at 526). After the County has fulfilled its obligations under the specific role provided to it by the Solid Waste Laws, *i.e.*, its role in planning and zoning

[18] The Days Cove dispute resulted in three reported decisions in Maryland. *County Com'rs of Queen Anne's County v. Days Cove Reclamation Co*., 122 Md. App. 505 (1998) ("*Days Cove I*"); *Days Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469 (2002) ("*Days Cove II*"); *MDE v. Days Cove Reclamation*, 200 Md. App. 256, 260 (2011) ("*Days Cove III*").

for new facilities, "[t]he facility's fate is the province of MDE." *Days Cove I*, 122 Md. App. at 525.

B. Maryland's solid waste laws impliedly preempt the Ordinance.

Maryland's solid waste management law by providing state primacy over local government waste disposal planning and waste disposal facility permitting is the same type of broad scheme to those Maryland regulations found to be preempted in *Perennial Solar*, *Allied Vending, Skipper,* and *Altadis*. As with Maryland's air laws, applying the seven *Allied Vending* "secondary" factors, also establishes that Maryland's Solid Waste Laws preempt the Ordinance:

1) The City has never regulated solid waste combustors and the City has affirmatively repealed one previous attempt to impose geographic restrictions on the acceptance of waste at the CB facility. SOF ¶ 13.

2) Maryland's regulation of solid waste management through MDE's control over permitting, construction, and operation of all refuse disposal systems in Maryland as well as through MDE overseeing the creation and implementation of SWMPs required of every Maryland county and city, is pervasive. SOF ¶ 12.

3) The Authority contracted with the WB facility "for the efficient collection and disposal of waste on a regional basis," Md. Code Ann. Envir. § 3-902, which is beyond local control.

4) The Solid Waste Laws do not provide legislative authority to local jurisdictions and make it clear that the General Assembly intended MDE to retain ultimate authority. *See New Pulaski*, 112 Md. App. at 230 (the court "[did] not believe that the State intended to vest the localities with legislative authority. To the contrary, the statute illustrates that even when the State has mandated local involvement … it provides detailed regulations on the contents of the plans and retains authority to veto or require modification of the plans.") (citing Md. Code Ann. Envir. §§ 9-503, 9-507; COMAR 26.03.03).

5) MDE has not recognized local authority to act in the field of solid waste management except through implementation of MDE-approved SWMPs, and MDE retains authority over any revisions to a SWMP. SOF ¶¶ 12-13; COMAR 26.03.03.05(C).

6) The City's SWMP and the Facilities' RDPs exist as a direct result of state legislation. SOF ¶¶ 12, 15-16.

7) The Ordinance would render moot MDE's SWMP approval process by fundamentally altering the means by which the City disposes of its waste without going through the statutorily prescribed process subject to MDE approval, opening the door for other localities to follow suit by amending their approved SWMPs through local ordinances on a whim.

CONCLUSION

The City's Ordinance reversed the considered judgments of Congress, EPA, the Maryland General Assembly, and MDE regarding the appropriate emission standards and controls for these complex Facilities. EPA and MDE regulations in the highly technical fields of air pollution and solid waste regulation best achieve the purposes of balancing public health and costs while maintaining regulatory predictability for important infrastructure like Wheelabrator Baltimore and Curtis Bay that serve the entire region with essential services. Currently, both facilities will have to shut down by the fall of 2020 based on the Ordinance's edicts, causing a severe disruption in regional solid waste services. The federal and state framework already requires the "best" and "maximum achievable" controls (BACT and MACT), and the "lowest achievable" emissions (LAER) for the Facilities. The Ordinance renders the Facilities' compliance with these scientifically-based and carefully crafted regulations criminal and civil violations. Accordingly, the basis for preemption could not be clearer. The Court should reaffirm federal and state primacy in air and solid waste law at its earliest opportunity by declaring the Ordinance invalid and enjoining its enforcement.

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Respectfully submitted,

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INDEX OF EXHIBITS