IN THE UNITED STATES DISTRICT COURTFOR THE DISTRICT OF MARYLAND
(Northern Division)

WHEELABRATOR BALTIMORE, L.P., ET AL.	*	
Plaintiffs,	*	
V.	*	
	*	**CIVIL NO. 1:19-cv-01264-GLR**
MAYOR AND CITY COUNCIL OF BALTIMORE,	*	
Defendant.	*	

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REPLY MEMORANDUM IN SUPPORT OF THE MAYOR AND CITY COUNCIL OF BALTIMORE'S MOTION TO DISMISS

Defendant, the Mayor and City Council of Baltimore (the "City"), by its undersigned counsel, respectfully submits this reply memorandum of law in support of its Motion to Dismiss Plaintiffs' Complaint.

____________/s/________________
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Introduction

Wheelabrator Baltimore ("Wheelabrator") and the Curtis Bay Medical Waste Incineration Facility ("Curtis Bay"), both located in south Baltimore, together burn more than 2,000 tons of regional waste every day. Both facilities are over twenty-five years old, and each day their stacks emit Carbon Monoxide, Nitrogen Oxides, Sulphur Dioxides, and various other substances recognized as harmful pollutants by the Environmental Protection Agency ("EPA"). Due to the threat that these pollutants pose to public health, the EPA has a stated public policy goal of reducing emissions from incinerators. The City of Baltimore shares this goal. Dense residential neighborhoods such as Cherry Hill, Westport, Pigtown, and Federal Hill are all less than a mile from the Wheelabrator facility, which on average burns 2,100 tons of waste a day, much of which originates from surrounding counties. The intent of the Baltimore Clean Air Act ("BCAA") is to protect the residents of these neighborhoods, and the City as a whole, by ensuring that the constant stream of pollutants emitted by incinerators such as Wheelabrator and Curtis Bay are limited to the fullest extent possible.

The City's power to legislate in the interest of these residents is codified in the federal Clean Air Act ("CAA") and Title 2, § 2-104 of the Maryland Environment Article. The statutory language is clear: the CAA states that air pollution control "is the primary responsibility of States and local governments," and that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce . . . any standard or limitation respecting emissions of air pollutants . . . except . . . [a standard] which is less stringent than the standard or limitation" in the CAA. 42 U.S.C. § 7401(a)(3); 42 U.S.C. § 7416. The City interprets this language to mean what it says: that political subdivisions may adopt more stringent standards respecting emissions of air pollutants. In contrast, Plaintiffs interpret the CAA to mean exactly the opposite—that Baltimore is precluded from adopting more stringent emissions standards.

The parties' dispute over § 2-104 follows the same pattern. Following the same principle as the CAA, § 2-104(a) states that "[e]xcept as provided in this section, this title does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards." Md. Code Ann., Envir. § 2-104(a)(1). The only limitation in the section, contained in § 2-104(a)(2), is that "a political subdivision may not adopt any ordinance . . . that sets an emission standard . . . less stringent than the standards set by the Department under this title." *Id.* In addition, § 2-104(b) provides that a political subdivision, at its discretion, "**may ask** the Department to adopt rules and regulations that set more restrictive emission standards." *Id.*at § 2-104(b)(emphasis added). By its unambiguous terms, this language gives Baltimore City a choice: it may adopt ordinances setting more strict emissions standards, or it "may ask" that MDE set such standards. *Id.*

Plaintiffs interpret this same language to mean that the City may **never** adopt an ordinance setting more stringent emission standards, and "may only" ask that MDE adopt such a standard. Pls. Br. at 2. Plaintiffs' sole support for this argument is in their re-writing of § 2-104(b). To suit their purposes, Plaintiffs add "only" after "may," thereby transforming § 2-104(b) into an express limitation that prohibits municipalities from adopting emissions ordinances. In Plaintiffs' rewriting, § 2-104(b) now directly contradicts and renders meaningless § 2-104(a), which explicitly recognizes the power of cities to adopt such ordinances. Plaintiffs contend that this creative rewriting of the statute is necessary because it "harmonizes" the law. Pls. Br. at 17.

As Plaintiffs have consistently argued, and as the briefing for this Motion has demonstrated, issues of preemption are pure issues of law. No facts can be brought to bear which would assist the resolution of this dispute over the meaning and import of the relevant

statutory language. In addition, there is no admissible evidence that could prove that the passage of legislation limiting the emission of harmful pollutants in dense urban areas is a wholly irrational act. The most efficient method of resolving this matter is therefore deciding this Motion before turning to the Parties' Cross-Motions for Summary Judgment. Rather than examining the issues of fact brought forward in summary judgment, the City respectfully requests that this Court simply interpret the plain language of the controlling statutes and grant judgment in favor of City.

Argument

I. The Fourth Circuit Recognizes Local Authority to Pass More Stringent Emissions Standards

Plaintiffs acknowledge, as they must, that the plain language of the CAA's savings clause states that it does not "preclude or deny the right of any state or political subdivision" from adopting more stringent emission standards. 42 U.S.C. § 7416. Despite the clarity of this language, Plaintiffs argue that Congress intended to prohibit states and localities from adopting stricter emission standards. Plaintiffs build their argument on a foundation of cases that do not involve the CAA and which do not analyze a savings clause even remotely comparable to the one at play here. Plaintiffs also ignore the fact that the Maryland emissions levels to which they frequently cite are themselves more stringent than the CAA. Perhaps most important, the one Fourth Circuit opinion Plaintiffs cite that discusses the CAA savings clause relevant here **expressly authorizes** more stringent state and local government regulation of emissions.

Plaintiffs rely heavily on *North Carolina ex rel. Cooper v. Tennessee Valley Authority,* 615 F.3d 291 (4th Cir. 2010), in which the Fourth Circuit examined two distinct savings clauses in the CAA. Plaintiffs focus on the court's discussion of § 7604 of the CAA, which states that "[n]othing in this section shall restrict any right which any person (or class of persons) may have

under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e). Although this savings clause has no relevance to this case and is entirely distinct from the "less stringent" language found in § 7416, Plaintiffs use the court's analysis of § 7604 to argue that the "Fourth Circuit has emphatically enforced the primacy of the federal scheme under the Clean Air Act despite the Act's savings clause." Pls. Br. at 10.

What Plaintiffs seem to have missed is the *TVA* court's discussion of the CAA § 7416—the savings clause relevant here. Discussing North Carolina's actions in contrast to the Tennessee Valley Authority, the Court noted:

> Unlike TVA, power plants in North Carolina historically had not put sufficient controls on their emissions, choosing instead to purchase emissions allowances under an EPA cap and trade program implemented by Congress in 1990 to address acid rain . . . **As a result, North Carolina decided to implement more stringent controls on in-state coal-fired plants as a matter of state law, as it is allowed to do under the Clean Air Act. *See* 42 U.S.C. § 7416**. It passed the North Carolina Clean Smokestacks Act, N.C. Gen.Stat. § 143–215.107D, which requires investor-owned public utilities that operate coal-fired generating units to **reduce their emissions of NO x and SO 2 to levels even lower than those specified in EPA regulations promulgated pursuant to the Clean Air Act.** N.C. Gen.Stat. § 143–215.107D(b)–(e).

TVA, 615 F.3d at 297 (emphasis added). As such, the one relevant Fourth Circuit opinion that Plaintiffs cite directly opposes their argument. The Fourth Circuit has interpreted the plain language of §7416 to allow for state and local laws that set more stringent standards than those found in the CAA. As North Carolina did in *TVA*, Baltimore City has enacted more stringent regulations regarding NOx and So2 levels. And as the *TVA* court made clear, the City "acted as it is allowed to do under the Clean Air Act." *Id.*

Perhaps aware of the weakness of their position under the relevant law, the remainder of Plaintiff's CAA arguments rely upon cases that do not analyze the CAA.[1] For example, two cases relied upon by Plaintiffs, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) and *Farina v Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010), do not analyze either the CAA or a savings clause with analogous language to § 7416. *Geier* analyzes the National Traffic and Motor Vehicle Safety Act of 1966 ("NTMVA"). *Geier*, 529 U.S. at 864. The NTMVA does not deal with air pollution or emissions, and does not contain a "less stringent" savings clause. Instead, the NTMVA states that compliance with a safety standard in the act "does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k) (1988 ed.). The *Geier* Court found that the action at issue did not fall within the savings clause, most notably because the clause did not set minimum standards, as the CAA does. *Geier*, 529 U.S. at 874. *Farina* similarly did not involve the CAA, instead analyzing the Telecommunications Act of 1996, and a general savings clause stating that "this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." *Farina*, 625 F.3d at 130.

As *Geier* and *Farina* do not deal with the CAA or a savings clause analogous to the one at issue here, their only relevance is in the general proposition that "where the federal regulatory scheme reflects a careful balancing, savings provisions should not be given broad effect." *Id. at* 131. The City does not ask this Court to give the § 7416 savings provision broad effect. The City simply asks that this Court construe the savings clause consistent with Fourth Circuit

[1] The only other case cited by Plaintiffs that deals with the §7416 of the CAA is *Clean Air Markets Grp. v. Pataki*, 338 F.3d 82, 89 (2d Cir. 2003). There, the Court found that the savings clause was not applicable because the law in question, passed by New York State, "does not set requirements for air pollution control or abatement within New York, but, rather, attempts to 'control emissions in another state.'" *Id*. As such, *Pataki* has no bearing on this case.

precedent and in accordance with its express and unambiguous language, which recognizes local authority to pass more stringent emissions standards.

Plaintiffs next turn to a Tenth Circuit case, *Blue Circle Cement, Inc. v. Bd. Of Cty. Comm'rs of Cty. Of Rogers*, 27 F 3d 1499 (10th Cir. 1994), another opinion that does not involve the CAA. *Blue Circle Cement* instead analyzes the Resource Conservation and Recovery Act ("RCRA"), which contains a savings clause stating that states and localities are not barred from "imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." 42 U.S.C.A. § 6929. The *Blue Circle Cement* court analyzed whether an ordinance that required a local permit for an industrial waste disposal/recycling/treatment site was preempted by RCRA. On the preemption issue, the Court held that summary judgment should not have been granted in favor of the county, because there were material factual disputes regarding whether local concerns were substantial enough to justify local restrictions of an activity permitted under RCRA. The Court further found that there was sufficient evidence to suggest that the ordinance hindered "RCRA's objective to encourage resource recovery and recycling," and concluded that the RCRA savings clause "does not vest in such authorities the power to ban outright important activities that RCRA is designed to promote—including recycling hazardous waste." *Blue Circle Cement*, 27 F.3d at 1506, 1509.

Blue Circle Cement concerned a local ban on a practice encouraged by RCRA; it does not have any application here because, rather than hindering CAA objectives, the BCAA **furthers** the goals that the CAA is intended to promote. As already noted, this Court has found that "the philosophy of the [Clean Air] Act is not to displace but to encourage state, local and interstate action to abate air pollution." *United States v. Bishop Processing Co.*, 287 F. Supp 624, 636 (D. Md. 1968). The CAA's primary objective is "the reduction or elimination, through any

measures, of the amount of pollutants produced or created at the source." 42 U.S.C. § 7401(a)(3). Plaintiffs fail to explain how an ordinance which reduces the amount of pollutants at the source is contrary to the principles of an act which codifies that exact objective in its text.

In contrast to Plaintiffs, the City bases its argument on the plain text of the CAA and a number of cases which interpret § 7416 consistent with the City's position. In *Her Majesty The Queen In Right of the Province of Ontario v. City of Detroit*, for example, the Sixth Circuit, consistent with the Fourth Circuit, found that "the CAA displaces state law only to the extent that state law is not as strict as emission limitations established in the federal statute." 874 F.2d 332, 342 (6th Cir. 1989). In response, Plaintiffs note that *Province of Ontario* addressed preemption in the context of federal question removal jurisdiction, but fail to articulate how this detracts from the court's clear conclusion that the CAA does not preempt the Michigan Environmental Protection Act. Pls. Br. at 13.

The City also cites to *Rhode Island Cogeneration Assocs. v. City of E. Providence*, where the court found that the CAA "does not prevent states or local governments from enacting standards more stringent than those contained in the federal laws and regulations." 728 F. Supp 828, 833 n. 11(D.R.I 1990). In response, Plaintiffs simply note that the *Rhode Island* court found preemption on state law grounds, ignoring the language that makes clear that Plaintiffs' cause of action under the CAA is meritless. Pls. Br. at 13.

Plaintiffs ultimately fall back on the argument that "the CAA does not confer any rights on a local government, as suggested by the City." *Id.* The City acknowledged, however, that "although the CAA does not empower Baltimore City to regulate air pollution, neither does it prohibit the City from doing so." Defs. Br. at 11. It is State law, discussed *infra*, which recognizes local authority to pass emissions ordinances. To prevail on Count I, Plaintiffs have

the burden of demonstrating that the CAA preempts the City from enacting and enforcing the BCAA. Plaintiffs have failed to meet this burden. As such, the City asks that this Court dismiss Count I of Plaintiffs' Complaint.

II. Maryland Law Permits Localities to More Stringently Regulate Emissions

A. The Environment Article Does not Limit Local Power to Regulate Emissions

The Court of Appeals of Maryland has made clear that to determine legislative intent, "we look first to the language of the statute, giving it its natural and ordinary meaning." *Maryland-Nat'l Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 182, 909 A.2d 694, 699 (2006)(citations and quotations omitted). It is at this first step at "which the search for legislative intent begins, and ordinarily ends." *Id.* When this language is clear, the court "need not look beyond the statutory language to determine the Legislature's intent." *Id.* Only when the language is ambiguous would a court consider not only the literal meaning of the words, but also "their meaning and effect in light of the setting, the objective and purpose" of the statute. *Id.*

As is most common in statutory construction, an analysis of Title 2 of the Environment Article, § 2-104 begins and ends with the plain language of the statute. For clarity, the full Section reads as follows:

> (a)(1) Except as provided in this section, this title does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards.
>
> (2) A political subdivision may not adopt any ordinance, rule, or regulation that sets an emission standard or ambient air quality standard less stringent than the standards set by the Department under this title.
>
> (b) The governing body of any political subdivision may ask the Department to adopt rules and regulations that set more restrictive emission standards or ambient air quality standards in that political subdivision.

Md. Code Ann., Envir. § 2-104.

The language of the Section is so clear that little explanation is needed. Section 2-104(a)(1) makes clear that "except as provided in this section," Title 2 as a whole "does not limit the power of a political subdivision to adopt ordinances . . . that set emission standards . . ." *Id.* The only limitation in the Section is found in the next clause, § 2-104(a)(2), which provides that a "political subdivision may not adopt any ordinance" setting a less stringent standard that those set by the State. *Id.* Section 2-104(b)(2) then goes on to state that a subdivision, at its discretion, "may ask the Department" to set a more restrictive standard. *Id.*

The City has two options under Section § 2-104: it may adopt emissions standards more stringent than those adopted by the State, or it may, at its discretion, request that the State set such standards. While no reported[2] case in Maryland has interpreted this language—likely because it contains so little ambiguity—the Maryland Law Encyclopedia also reads § 2-104 by its plain language, noting that:

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[2] *But see In re Petition of: Costco Wholesale Corp.*, No. 404629-V, 2015 WL 13766922, at *3 (Cir.Ct. Mont. Cty., Dec. 18, 2015), *aff'd, Costco Wholesale Corp. v. Montgomery Cty.*, No. 2450, SEPT.TERM,2015, 2018 WL 1747920, at *1 (Md. App. Apr. 11, 2018):

> [A]ssuming arguendo the preemption argument is properly before the Court, it has no merit. Petitioner relies primarily on three cases in support of its argument, *East Star v. County Commissioners*, 203 Md. App. 477 (2012), *Days Cove Reclamation Co. v. Queen Anne's County* 146 Md. App. 469 (2002), and *Talbot County v. Skipper*, 329 Md. 481 (1993). In each of these cases, it was found that the comprehensive nature of state regulations regarding landfills, mining, and sewage preempted administrative agencies from applying or enacting alternative standards. However, a review of Title 2 of the Environment Article, Md. Ann. Code ("Ambient Air Quality Control") demonstrates that the State law in this instance is not as comprehensive as, those analyzed in the cases cited by Petitioner. Here, the applicable statute makes specific reference to local zoning authority and explicitly allows local governments to adopt their own ordinances, rules, or regulations that set emissions or ambient air quality standards. Md. Code Ann., Envir. § 2-104, § 2-301(b).

> The power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards, is not limited by statute. A political subdivision may not, however, adopt any ordinance, rule, or regulation that sets an emission standard or ambient air quality standard less stringent than the standards set by the Department under the statutory scheme.

9 M.L.E. Environmental Regulation; Pollution Control § 10. As such, State law does not limit the City in its ability to pass an ordinance such as the BCAA, which regulates emissions more stringently than State law.

Plaintiffs begin their analysis of § 2-104 by looking at several sections of Title 2 which do not mention or deal with local authority. Plaintiffs note that § 2-302 provides that "unless a political subdivision requests a more restrictive standard," if ambient air quality standards are met in an air quality control area, MDE "shall set emission standards for that area based on the goal of achieving emission levels that are not more restrictive than necessary to attain and maintain" the air quality in that area. Md. Code Ann. Envir. § 2-302. Plaintiffs use this language to argue that "only MDE possesses the authority to set air emissions standards in Maryland." Pls. Br. at 16. It is unclear where Plaintiffs read this in the statute. While § 2-302 does dictate the extent of **State** power to regulate emissions, it does not address or limit in any way **local** power to do the same. If the Maryland legislature had intended for § 2-302 to prohibit localities from enacting more stringent emissions ordinances, the legislature would have simply written that restriction into the text.

This strategic re-writing of the plain text of the Environment Article continues through Plaintiffs' analysis of § 2-104. There, Plaintiffs contrive to find "three express limitations" on local power. Pls. Br. at 16. Plaintiffs' first "express limitation" is found in § 2-104(a)(1), a clause which states that "this title does not limit the power of a political subdivision to adopt ordinances." Md. Code Ann. Envir. § 2-104(a). Taking the statutory language "does not limit"

to function as an "express limitation" is indicative of Plaintiffs' strained and confusing method of statutory interpretation. More important, however, Plaintiffs take the language in § 2-104(b), which states that a subdivision "may ask the Department to adopt rules and regulations that set more restrictive emission," to function as a limitation meaning that a subdivision "may only" make such a request and cannot adopt more restrictive ordinances. Pls. Br. at 14.

This interpretation is contrary to the plain text of the statute. Section 2-104(b) does not contain the word "only." There is nothing in the language of the sub-section to suggest that the legislature intended that § 2-104(b) be the **only** method of enacting more stringent emissions controls. Indeed, in the immediately preceding sub-section the legislature stated that its intent was to "not limit the power of a political subdivision." *Id.* at § 2-104(a). It defies common sense and the basic rules of statutory interpretation to suggest that the legislature would state that "[e]xcept as provided in this section, this title does not limit the power of a political subdivision to adopt [emissions] ordinances," when the legislature's intent was to impose a **blanket prohibition** on local adoption of emissions ordinances. *Id.* As such, the City asks that this Court reject Plaintiffs muddled and contradictory interpretation of § 2-104.

B. Under the Plain Language of Section 2-104 and the CAA, the Ordinance does not Conflict with Plaintiffs' Permits

Plaintiffs' efforts to rewrite § 2-104 are understandable, as a clear reading of the statute defeats Plaintiffs' arguments regarding the BCAA's conflict with MDE regulations and Plaintiffs' operating permits. The City does not dispute that the State has enacted its own air pollution framework, including regulation of some of the same pollutants regulated by the BCAA. The City also does not dispute that the state has issued Title V permits to Wheelabrator and Curtis Bay which set certain emissions limits. Section 2-104, however, makes clear that local passage of an ordinance setting more stringent emissions standards **does not conflict** with

any part of Title 2 of the Maryland Environment Article, which regulates all aspects of Ambient Air Quality Control, including permitting. Plaintiffs cite to *E. Star, LLC v. Cty. Comm'rs of Queen Anne's Cty*., 203 Md. App. 477, 38 A.3d 524 (2012) and *Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 435 A.2d 425 (1981) to argue that local ordinances cannot regulate the same matter as the State, and cannot prohibit activity authorized by State law. Neither of these cases involve a savings clause, however, that expressly states that more stringent ordinances are not prohibited by the state law. Plaintiffs' case in this respect hinges on their misguided interpretation of § 2-104. Under a plain reading of the statute, the BCAA does not conflict with Plaintiffs' permits. As such, Plaintiffs fail to make a claim for conflict preemption.

C. Maryland Law Expressly Authorizes Local Air Pollution Control

Plaintiffs cite extensively to various Maryland laws and regulations relating to solid waste management. The Court of Appeals of Maryland has found, however, that state action in the field of solid waste does not preclude local regulation of pollution emanating from solid waste facilities, especially when localities regulate in the interest of public health. Moreover, the regulatory schemes addressing solid waste and air pollution are entirely distinct. Maryland solid waste laws cannot occupy the field of air pollution, which is regulated by its own Title in the Environment Article—a Title which expressly authorizes the passage of emissions controls such as the BCAA.

1. Maryland Jurisprudence Recognizes Local Authority to Regulate Solid Waste Emissions

In its brief, the City pointed the Court to *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 994 A.2d 842 (2010), which found that local regulation of a rubble landfill was not preempted by state occupation of the field of solid waste. The court based its decision in part on the finding that the locality acted out of concern for the "impact of the use [of the landfill] on

neighboring properties due to emissions from the site." *Id.* at 40. Plaintiffs dismiss the case as irrelevant, but in so doing fail to contend with a Maryland Court of Appeals decision holding that localities may regulate solid waste facilities, even when those facilities are subject to solid waste management plans and state permitting. Further, the regulation in *Md. Reclamation Assocs.* was found to be lawful in part because it was designed to accomplish the same goal as the BCAA: to mitigate the effects of emissions on public health. While it is apparent why Plaintiffs may want to ignore authority holding that localities may regulate solid waste facilities to mitigate the impact of emissions, *Md. Reclamation Assocs.* cannot be reasonably construed as irrelevant to the disposition of this case.

Plaintiffs further ignore the clear boundaries that *Md. Reclamation Assocs.* drew around the field of solid waste. In a prior Court of Special Appeals case, *Mayor & City Council of Baltimore v. New Pulaski Co. P'ship*, 112 Md. App. 218, 684 A.2d 888 (1996), the court found that state statutory scheme regulating solid waste management "preempt[s] by implication the City's enactment of the Moratorium banning solid waste incinerators." *Id.* at 227. The Court of Appeals in *Md. Reclamation Assocs.* made clear, however, that the preemptive effects of Maryland's solid waste laws were limited. The court rejected plaintiff's argument that Harford County's regulation of solid waste entities was preempted under *New Pulaski*, holding that "the regulation at issue here is less restrictive than a categorical ban and thus, ***New Pulaski's* reasoning does not apply**." *Md. Reclamation Assocs.*, 414 Md. at 44, 994 A.2d at 868 (emphasis added). The BCAA is similarly less restrictive than a complete ban and therefore is not preempted by Maryland's solid waste statutory scheme.

2. The BCAA Regulates Air Pollution, not Solid Waste

The holdings in *Md. Reclamation Assocs.* and *New Pulaski* are consistent with Maryland's statutory framework, in which the fields of solid waste and air pollution are separate and distinct. Solid Waste and Air Pollution are governed by two discrete statutory schemes. Ambient Air Quality Control is governed by Title 2 of the Environment Article; Solid Waste is governed by Title 9. As the City stated in its Motion, this distinction is made clear by the issuance to Wheelabrator and Curtis Bay of both refuse disposal permits **and** Part 70 Operating Permits pursuant to the CAA and Maryland Environment Article, Title 2. The BCAA controls only air pollution. It does not regulate the volume of material accepted at incinerators. It does not deal with training of personnel, sanitation, fire control, access to the facility, or any of the other requirements Plaintiffs note in the solid waste laws. Pls Br. at 22. In short, the BCAA does not intrude in any way on Plaintiffs' refuse disposal permits or Maryland solid waste laws. The BCAA regulates only air pollution, so the preemption analysis should go no further than Title 2. And Title 2 makes clear that it does not prevent the City from passing more stringent emissions ordinances.

3. The Allied Vending Factors all Favor the City

As Plaintiffs note, when analyzing the issue of preemption, Maryland courts may also consider the "secondary" factors enunciated in *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 631 A.2d 77 (1993). As the legislature has made clear in § 2-104 that the state statutory scheme does not preclude the City from passing the BCAA, it is unnecessary to delve into a five-factor test to resolve this case. Even when considering the *Allied Vending* factors, however, each favors the City:

- *Whether local laws existed prior to the enactment of state laws governing the same subject matter.* As noted in the City's opening brief, Baltimore City has been

regulating air pollution since at least 1905. The state did not enter the field of air pollution until 1963, and has explicitly carved out space for a local authorities to pass more stringent standards ever since.

- *Whether the state laws provide for pervasive administrative regulation.* While there is a statutory scheme relating to air pollution, it recognizes local authority to enact more stringent ordinances.

- *Whether the local ordinance regulates an area in which some local control has traditionally been allowed.* Local authority in the air pollution arena has been recognized in every iteration of Maryland's environmental statutory scheme. In addition, there is a long-standing tradition of allowing localities to regulate more stringently than state law, particularly in the field of pollutants and public health. *See infra* Section III.

- *Whether the state law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local ordinances.* Concurrent authority is expressly provided for in § 2-104.

- *Whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field.* MDE has made no statement regarding local authority, either in support or opposition.

- *Whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation.* The field has been addressed by Title 2 of the Environment Code, which recognizes and preserves local power to pass more stringent local ordinances.

- *Whether a two-tiered regulatory process existing if local laws were not pre-empted would engender chaos and confusion.* Plaintiffs have pled no facts and made no argument to support their position that chaos or confusion would result from the City exercising its police power to more stringently regulate the emission of pollutants.

III. The BCAA Falls Squarely Within Baltimore City's Police Powers

As stated in some detail in the City's Motion, Article II of the Baltimore City Charter empowers the City to pass ordinances relating to the general welfare and public health. The City has been exercising this power to regulate pollutants since at least 1905, when it passed an ordinance prohibiting the emission of "dense or black smoke" from a "chimney or smokestack." Balt. City Ordinance No. 217 (Mar. 6, 1905). Across the state, localities frequently exercise their power and right to regulate pollution in the interest of public health. Harford County has

exercised this power to regulate solid waste entities to protect the public from emissions, an act upheld by the Maryland Court of Appeals. *Md. Reclamation Assocs.*, 414 Md. at 40, 994 A.2d at 865. Montgomery County has legislated in the interest of public health by restricting the use of certain pesticides, an act upheld by the Court of Special Appeals in an opinion noting that "the State has not prohibited local governments from regulating pesticides," and as such, "the citizens of Montgomery County are not powerless to restrict the use of certain toxins . . . which pose risks to public health and the environment*." Montgomery Cty. v. Complete Lawn Care, Inc.*, 240 Md. App. 664, 709, 207 A.3d 695, 722, cert. denied sub nom. *Goodman v. Montgomery Co.*, 464 Md. 585, 212 A.3d 395 (2019).

The *Montgomery Cty*. decision is consistent with longstanding Maryland law as it relates to local authority. In *City of Baltimore v. Sitnick*, 254 Md. 303, 317, 255 A.2d 376, 382 (1969), the Court of Appeals made clear that "unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation." *Id.* As a result, it is well established in Maryland that "[m]unicipalities are free to provide for additional standards and safeguards in harmony with concurrent state legislation." *Mayor & Aldermen of City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 393, 396 A.2d 1080, 1086 (1979). The rational for this rule is that the needs of urban areas, "by reason of the density of population, or other circumstances, are more extensive and urgent than those of the general public in the same particulars." *Rossberg v. State*, 111 Md. 394, 74 A. 581, 584 (1909). It is this principle that is codified in § 2-104, which recognizes that dense urban areas may need to regulate pollutants more stringently than more sparsely populated areas.

Here, the general public law not only does not contain "an express denial" of the City's ability to act, it expressly states that *it does not prevent the City from acting* in the field of pollution control, so long as the standards adopted are more stringent. *Sitnick*, 254 Md. at 317, 255 A.2d at 382; Md. Code Ann. Envir. § 2-302. Despite this clear statutory guidance Plaintiffs take a position diametrically opposed to the holding in *Montgomery Cty.*, arguing that the City is powerless to protect the public health of its citizens through the use of more stringent pollution controls. The City respectfully asks this Court to rule, consistent with the Maryland statutory scheme and jurisprudence, that the BCAA is a valid exercise of local power.

IV. The BCAA is a Permissible Local Law

The BCAA, by its express terms, is limited in operation to the City of Baltimore. It controls only the emissions of incinerators operating within City limits. Moreover, the City is acting pursuant to a statutory scheme stating that expressly preserves the right of local authorities to regulate in the arena of pollution control. Plaintiffs argue that the BCAA is impermissibly general because it "imposes Baltimore's views on air pollution and emissions on all downwind jurisdictions." Pls. Br. at 31. Yet this is the exact power granted to the City under Maryland statutes and jurisprudence. Moreover, the idea that the BCAA is an impermissibly general law because it forces downwind jurisdictions to breath cleaner air borders on the ludicrous. If the movement of air were enough to make an ordinance general, all local regulation of air pollution would necessarily be impermissibly general, rendering the local control recognized in *Md. Reclamation Assocs.*, *Montgomery Cty.*, and§ 2-104 meaningless. As such, the City asks the Court to dismiss Plaintiffs' Count VII.

V. Plaintiffs Have not Overcome the BCAA's Presumption of Rationality

The parties agree that "[t]o survive a motion to dismiss for failure to state a claim, a plaintiff must allege facts sufficient to overcome the presumption of rationality that applies to government classifications." *Giarratano v. Johnson*, 521 F.3d 298, 304 (4th Cir. 2008). Plaintiffs in their opposition cite four allegations in their Complaint that they claim overcome this burden.

First, Plaintiffs allege that the "act is an irrational measure" and "the City lacks any scientific or other justification for further regulating the subject matter of comprehensive federal and state air quality management legislation." Plaintiffs do not address, however, the holding in *Giarrantano* that constitutionally sound statutes "'may be based on rational speculation unsupported by any evidence or empirical data.'" *Giarratano*, 521 F.3d at 303 (quoting *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). A lack of scientific study does not render a law irrational. Further, Plaintiffs acknowledge in their Complaint that the substances regulated by the BCAA are recognized by the EPA as harmful pollutants that require strict regulation, and that the trend in regulation has been towards stricter emission standards. Compl. at ¶ 49-55. Plaintiffs do not, and cannot, plead any facts demonstrating why the City of Baltimore following this trend in order to protect the health of its citizens is an irrational act.

Second, Plaintiffs allege that the act "has a disparate impact" on the two entities. Plaintiffs allege no facts demonstrating that the act disparately impacts Wheelabrator or Curtis Bay. Virtually any lawful regulation will have disparate impact of some kind because it is the nature of regulations to be targeted at particular problems or activities. Simply saying that it has disparate impact has no legal consequence. Third, Plaintiffs allege that the Ordinance was specifically intended to "shut down Wheelabrator." As addressed in the City's Motion, however,

a mere "allegation that the City acted out of animosity" towards a plaintiff "is insufficient to defeat the City policy's presumed rationality." *Wroblewski v. City of Washburn*, 965 F.2d 452, 460 (7th Cir. 1992).[3]

Fourth, Plaintiffs allege that the act regulates emissions more stringently than state or federal law. As stated, *supra*, however, both Maryland law and the CAA recognize local authority to regulate more stringently. And again, Plaintiffs' own Complaint acknowledges that the trend has been towards more stringent emissions standards both at the state level and federally. Compl. at ¶ 49-55. Plaintiffs therefore ask this Court to enter this complex debate and draw lines on behalf of the legislature, a request the Supreme Court has recognized is improper. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)("restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing.").

Baltimore City has a clear and rational interest in minimizing air pollution. It is well recognized that where an ordinance advances this goal, it has a rational basis and a due process claim must fail. *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control Dist.*, 644 F.3d 934, 943 (9th Cir. 2011)("Here, Jensen admits that the Rules serve the legitimate governmental interest in minimizing air pollution from diesel engines. Accordingly, we hold that Jensen's substantive due process claim fails.")(citations and quotations omitted). As such, the City asks that this Court dismiss Counts VII-XI of Plaintiffs Complaint.

[3] Plaintiffs have asked this Court to enter the hazardous territory of conflating the statement of a single legislator with an impermissible purpose of enacting an otherwise constitutional ordinance. *United States v. O'Brien*, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682, 20 L. Ed. 2d 672 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter."). The Supreme Court has held that assessing such motives may be appropriate to aid in **interpreting** a statute but held that such statements must not be used to **invalidate** a statute. *United States v. O'Brien*, 391 U.S. 367, 383–84, 88 S. Ct. 1673, 1682–83, 20 L. Ed. 2d 672 (1968). This is a case in which Plaintiffs seek to have the BCAA overturned, and therefore " . . . the existence of any alleged illicit legislative motive for enacting [a law] is not a proper subject of judicial inquiry." *Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty.*, 788 F. Supp. 2d 431, 440 (D. Md. 2011), *aff'd sub nom. Kensington Volunteer Fire Dep't, Inc. v. Montgomery Cty., Md.*, 684 F.3d 462 (4th Cir. 2012).

Conclusion

For all the foregoing reasons, this Court should dismiss the Plaintiffs' Complaint with prejudice and without leave to amend.

Respectfully submitted:

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