IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(NORTHERN DIVISION)

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

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MAYOR AND CITY COUNCIL OF BALTIMORE'S
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT
AND
OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

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Defendant, the Mayor and City Council of Baltimore (the "City of Baltimore" or the "City"), by its undersigned attorneys, moves for partial summary judgment in its favor, and opposes Plaintiffs' Motion for Partial Summary Judgment, and states as follows.

I. Introduction

This action concerns whether the City of Baltimore has the power to enact the Baltimore Clean Air Act ("BCAA") to regulate air pollution that is created in the City when trash from surrounding counties and States is shipped into the City and incinerated. Solid waste from the City and the surrounding counties, and medical waste from Maryland and other states, is trucked to the Plaintiffs' incinerators in downtown Baltimore. The incinerators turn the solid waste into thousands of tons of air pollution annually.

The residents and businesses of the surrounding counties and States derive health, economic, and environmental benefits from that arrangement. They do not have to dispose of their solid and medical waste in their own jurisdictions, and are spared from the resulting water, land, and air pollution. At the same time, the residents of Baltimore City suffer disproportionate health, economic, and environmental harm from the concentration of air pollution in the City. Wheelabrator and Curtis Bay earn tens of millions of dollars from that arrangement.

It is not equitable to transfer health, economic, and environmental harms from surrounding counties and states, and concentrate them in the City of Baltimore. But the BCAA does not prohibit that arrangement or prohibit all air pollution from incinerators in the City. No, the BCAA allows the arrangement to continue. It merely imposes, as expressly allowed by

federal and state law, more stringent air pollution limits and monitoring requirements, all of which can be achieved using available technology. Exhibits A through J attached hereto show that, contrary to Plaintiffs' assertions, the emissions limits and monitoring requirements in the BCAA are readily achievable with existing technology. What the Plaintiffs are really complaining about is that they will have to divert some of their profits to reducing air pollution in the City where they earn those profits.

The parties agreed to a schedule for preliminary motions to address what they agreed were purely legal questions. For all the pages of detailed and highly technical facts and opinions included in Plaintiffs' Partial Motion for Summary Judgment, Plaintiffs cannot escape the plain language of the Clean Air Act ("CAA") and § 2-104 of Title 2 of the Maryland Environment Article, both of which unambiguously state that the City may enact more stringent air pollution standards than those found in State and federal law. The CAA states 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. § 7416. Following the same principle, § 2-104 states that it "does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards," so long as the standards are not "less stringent than the standards set by the Department under this title." Md. Code Ann., Envir. § 2-104.

Given this clear statutory language, the only question relevant to the issue of preemption is whether the BCAA enacts more stringent pollution standards than those set forth in State and federal law. The answer to this question is simple and undisputed: the BCAA standards are more stringent. There are no other facts relevant or necessary for the disposition of this case. The

BCAA is authorized by State and federal law and the simplest means of disposing this dispute is granting the City's Motion to Dismiss.

In an effort to distract from this clear legal backdrop, Plaintiffs' Motion for Partial Summary Judgment goes far beyond purely legal arguments and includes pages of highly technical facts and opinions, which it asks the Court to judicially notice. Plaintiffs should not be allowed to bypass discovery on the pretext of filing a motion addressing purely legal issues, and then load that motion with disputed facts and opinions that require full discovery and a trial. This Court need not delve into this complex array of facts, both because they are irrelevant to the resolution of this case and because Plaintiffs' proffer of unsupported exhibits, facts, and opinions does not comply with Fed.R.Civ.P. 56(c)(1).

If the Court were to consider and take judicial notice of Plaintiffs' proffered exhibits, facts, and opinions, however, then Defendant requests the Court, pursuant to Fed.R.Civ.P. 56(d), to: (1) defer ruling on Plaintiffs' Motion for Partial Summary Judgment, and (2) enter a scheduling order to allow fact and expert discovery regarding the matters asserted by Plaintiffs. *See Jackson v. Sagal*, 370 F. Supp. 3d 592, 598 (D. Md. 2019)(summary judgment is inappropriate when the parties have not had an opportunity for reasonable discovery). This request is not interposed for delay. Exhibits A through J attached hereto show that, contrary to Plaintiffs' assertions, the emissions limits and monitoring requirements in the BCAA are readily achievable with existing technology. While the City is confident that this matter can be resolved on a purely legal basis and this Court need not consider the facts brought forward in Plaintiffs' Motion, it is equally confident that fact and expert discovery would reveal the Plaintiffs' claims of impossibility to be yet another example of industry seeking to save money by delaying environmental progress.

II. Defendant's Response to Plaintiffs' Statement of Undisputed Facts

Plaintiffs' motion for summary judgment concludes by asserting that:

> 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.

Pls.' Mot. at 35. That conclusion is not supported by Plaintiffs' Statement of Undisputed Facts, which offers more legal arguments and opinions than evidence.

To the extent there are factual assertions in Plaintiffs' Statement of Undisputed Facts, they are not supported by evidence meeting the requirements of Fed.R.Civ.P. 56(c)(1), and Defendant objects pursuant to Fed.R.Civ.P. 56(c)(2). None of Plaintiffs' exhibits are authenticated, none of their factual assertions are supported by affidavit, their citations to their own Complaint are not evidence, and many of their assertions involve technical opinions that could be offered, if at all, only by a qualified expert witness.

Plaintiffs assert that the Court may take judicial notice of the facts and exhibits in their motion pursuant to Fed. R. Evid. 201. That rule provides:

> (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) is generally known within the trial court's territorial jurisdiction; or
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

As set forth herein, Plaintiffs assert numerous facts that cannot be judicially noticed. The parties agreed to a schedule for preliminary motions to address what they agreed were purely legal questions. Plaintiff cannot simultaneously dispense with discovery so as to file a preliminary motion for partial summary judgment, and load that motion with disputed facts that require full discovery and trial.

Plaintiffs rely on administrative regulations from U.S. EPA and MDE in the "the highly technical fields of air pollution and solid waste management . . . ." Pls.' Mot. at 35. In effect, Plaintiffs are trying to make unnamed persons at EPA and MDE into undesignated expert witnesses. That EPA's and MDE's deliberations and conclusions in the regulatory and permitting process reached a less stringent result than the City's legislative process is not material because the City is entitled as a matter of law to enact more stringent air pollution standards. Even if EPA's and MDE's processes were material, however, the assertions that Plaintiffs have proffered are not competent evidence on which the Court could grant summary judgment, and even if they were competent evidence, they still would not entitle Plaintiffs to summary judgment, because MDE's administrative record contains facts that contradict Plaintiffs' factual assertions.

In particular, Plaintiffs cite COMAR 26.11.01, 26.11.08.08, and 26.11.08.08-2 throughout their motion. *See* Pls.' Mot. at 4-5, 7-9, 15, ¶¶ 1, 2, 4, 5, 17. MDE considered amendments to those regulations throughout 2017 and 2018, formally proposed them on August 17, 2018, and they became final on December 6, 2018. *See* Ex. D – Md. Reg. 45:17, at 809-814 (Aug. 17, 2018); Ex. F – Md. Reg. 45:24, at 1163 (Nov. 26, 2018). The administrative record for those amendments includes, among other things: (1) a meeting of the MDE Air Quality Control Advisory Council ("AQCAC"); (2) an MDE Technical Support Document and Appendices; (3)

MDE's Response to Comments for Public Hearing; and (4) MDE's Nitrogen Oxide Reasonably Available Control Technology State Implementation Plan. *See* Ex. B – AQCAC Agenda, Minutes, and Exhibits (Dec. 11, 2017); Ex. C – MDE Tech. Supp. Doc. (Aug. 14, 2018); Ex. E – MDE Response to Comments (Sept. 21, 2018); Ex. G – MDE NOx RACT State Implementation Plan (Jul 2, 2018); Pls.' Exs. I and J. The facts and conclusions in MDE's administrative record contradict Plaintiffs' assertions, and other administrative materials demonstrate that there are genuine disputes of material fact, and preclude the entry of summary judgment in favor of Plaintiffs.

P1 – P3.[1]

Plaintiffs assert that the Wheelabrator facility "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." *See* Pls.' Mot. at 4-5, ¶ 1.

Similarly, Plaintiffs assert that the Curtis Bay facility uses "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." *See* Pls.' Mot. at 5-6, ¶ 2.

Plaintiffs assert that federal and State laws "and their implementing regulations mandate the installation of certain types of air pollution control technology in the design and construction

[1] Plaintiffs' Statement of Undisputed Facts contains 17 paragraphs. These responses are organized accordingly, with "P1 – P3" representing Defendant's response to the assertions in Paragraphs 1, 2, and 3. Defendant's statement of undisputed facts is included within that response, and is numbered D1, D2, etc.

of the Facilities. Accordingly, the Wheelabrator 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." *See* Pls.' Mot. at 6-7, ¶ 3.

Defendant disputes those assertions.

D1. In footnote 1 to allegation P3, Plaintiffs incorrectly assert that "BACT" means Best Achievable Control Technology, but the Clean Air Act, 42 U.S.C. § 7479(3), defines BACT as best available control technology. The evidence demonstrates that Wheelabrator and Curtis Bay are not using the best available control technology.

D2. Wheelabrator and Curtis Bay both use SNCR to control NOx emissions. *See* Pls.' Mot. at 4-6, ¶¶ 1-2; Pls.' Ex. B at 4 of 52; Pls.' Ex. F at 4 of 58. According to MDE, SNCR is the "second-best" method of reducing NOx. *See* Ex. G at 23. According to MDE, the best available control technology for reducing NOx is selective catalytic reduction ("SCR"). *See* Ex. G at 23. Indeed, when Wheelabrator submitted comments in connection with the 2018 amendments to COMAR 26.11.01 *et seq*., it admitted that SCR is the Best Available Control Technology ("BACT") to control NOx, and that using SCR will yield the Lowest Achievable Emission Reduction ("LAER"). Ex. C – MDE Tech. Supp. Doc. at 030. Wheelabrator admitted that SCR can reduce NOx emissions to 50 ppm. *Id*. MDE's Technical Support Document for the 2018 amendment of COMAR 26.11.01, *et seq*., includes evidence submitted by other stakeholders that, consistent with Wheelabrator's admission, shows that a combination of Wheelabrator's existing SNCR technology, with the addition of SCR would allow NOx reductions up to 75%. *See* Ex. C – MDE TSD at 079-117.

D3. SCR is being used successfully at numerous coal-fired power plants, and at least one other waste-to-energy facility in the United States. The Palm Beach Renewable Energy

Facility No. 2 uses SCR and achieves NOx emissions of 30-31 ppm, lower than the 45 ppm standard imposed by the Ordinance. *See* Ex. A at 5, 12.

D4. Federal and State laws mandate pollution control technology, and although they might allow Plaintiffs' continued use of the second-rate technology currently installed at their facilities, they do not mandate the use of that technology as opposed to better technology. Federal and State laws set minimum standards for air pollution, but they do not prohibit using better technology.

D5. Wheelabrator's and Curtis Bay's pollution control technology fails to remove a considerable portion of their emissions, and the best available control technology can achieve considerably lower emissions. MDE, after conducting an incomplete cost benefit analysis, has allowed Wheelabrator and Curtis Bay to continue using SNCR. In allowing that, MDE's cost benefit analysis did not consider: (1) how much additional cost Wheelabrator and Curtis Bay would incur if they were required to achieve greater pollution reductions; (2) what fraction of their revenue the additional cost would represent; or (3) the health benefits that would result if Wheelabrator and Curtis Bay were required to achieve greater pollution reductions; or (4) the negative impact on human health that will result if Wheelabrator and Curtis Bay do not achieve such reductions.

D6. When the Mayor and City Council enacted the BCAA, they clearly were aware that new WTE facilities were using better equipment to achieve lower air pollution emissions, and were aware of the costs and benefits of reducing air pollution and respiratory illnesses. *See* Pls.' Exs. I & J. The BCAA does not require any further or additional cost-benefit analyses. The record establishes that the Mayor and City Council were correct when they concluded that the benefits of the City's stricter air pollution limits outweigh the costs of achieving them. First, the

evidence demonstrates that NOx emissions are harmful to human health and reducing them is correspondingly beneficial. In response to comments on the proposed amendments to COMAR 26.11.01 et seq., MDE found that:

> [R]educing air pollution in the State of Maryland will provide beneficial human health and environmental outcomes. Researchers have associated ground-level ozone exposure with adverse health effects in numerous toxicological, clinical and epidemiological studies. Reducing ozone concentrations is associated with significant human health benefits, including the avoidance of respiratory illnesses. NOx is an ozone precursor, and reducing NOx emissions will also reduce adverse health effects associated with nitrogen dioxide (NO2) exposure. These health benefits include fewer asthma attacks, hospital and emergency room visits, and lost work and school days.

Ex. E – MDE Response to Comments at 2-3 (Sept. 21, 2018). The administrative record for the 2018 amendments to COMAR 26.11.01, *et seq*., included empirical evidence submitted by stakeholders showing that the zip code most impacted by the Wheelabrator facility – 21230 – has significantly higher acute asthma rates (hospitalization and emergency department visits) than the average rates for all of Maryland. *See* Ex. C – MDE Tech. Supp. Doc. at 123-125. There will be a high cost imposed on the residents of Baltimore if the City is not allowed to impose lower NOx emissions limits on Wheelabrator and Curtis Bay.

D7. There may be a cost to Wheelabrator and Curtis Bay in meeting those stricter standards, but the record contains no evidence what it would be. When MDE amended COMAR 26.11.08.08, setting standards that allow Wheelabrator and Curtis Bay to continue using second-best NOx control technology, MDE noted that Wheelabrator did not make any specific capital cost information available. Ex. C at 008; Ex. D at 811. There is no capital cost, because Wheelabrator is continuing to use the same, second-rate NOx control technology. MDE found that the economic impact of amending COMAR 26.11.08.08 on Wheelabrator would be "a small

increase in operating costs," on the order of $150,000 to $200,000 per year. Ex. C at 008; Ex. D at 811.

D8. Wheelabrator asserts that its facility has the capacity to combust 2,250 tons per day. *See* Pls.' Mot. at 5, ¶ 1. Plaintiffs' exhibits show that, for 2019, Wheelabrator charges a tipping fee of $54.95 per ton. *See* Pls.' Ex. E, at Schedule 1. Wheelabrator asserts that its facility generates 60 megawatts of electricity. ¶ P-1. Plaintiffs' exhibits show that Wheelabrator charges approximately $66.90 per MWh for that electricity. *See* Pls.' Ex. E, Schedule 3. Using those amounts, Wheelabrator received annual revenues of greater than $80 million from its Baltimore incinerator:

Tipping fees: (2,250 tons/day) x ($54.95/ton) x (365 days) = $45,127,687.50/year

Electricity: (60 MW) x ($66.90/MWh) x (24 hrs/day) x (365 days) = $35,162,640/year

In short, MDE's new NOx standard requires Wheelabrator to spend approximately 0.2 percent of its annual revenues to make a minimal reduction in NOx emissions. Wheelabrator and Curtis Bay have proffered no evidence demonstrating what it would cost them to implement SCR, which is the best available NOx control technology. Every dollar that Wheelabrator and Curtis Bay save by continuing to use second-rate pollution controls corresponds to increased illness and health care costs in the surrounding community.

D9. Similarly, Plaintiffs have not offered any admissible evidence to support their contention that technology is not available to meet the BCAA's emission limits for mercury, sulfur dioxide, and dioxins/furans. Apart from using the SCR instead of SNCR, the Palm Beach Renewable Energy Facility No. 2 uses emissions control equipment similar to that used by Plaintiffs – consisting of powder activated carbon (PAC) injection, spray dryer absorber (SDA), pulse jet fabric filter (PJFF), and a gas-to-gas heat exchanger. *See* Ex. A at 5. The record

evidence demonstrates that actual emissions from the Palm Beach Renewable Energy Facility No. 2 are lower than all of the emissions limits set by the BCAA:

	BCAA Limit	Palm Beach No. 2 Actual Emissions Test
Mercury	15 µg/dscm	0.55 – 0.62 µg/dscm
Sulfur Dioxide	18 ppmvd	10 – 21 ppm
Dioxins/Furans	2.6 ng/dcsm	0.23 - 0.36 ng/dcsm
NOx	45 ppmvd	30-31ppm

See Ex. A at 12-13; Pls.' Ex. P at 5-6.

P4, P17b, P17c, P17d.

Defendant disputes Plaintiffs' characterization of the continuous emissions monitoring system ("CEMS") requirements of the BCAA, and disputes that such technology is not available.

D10. Plaintiffs concede that they are already conducting CEMS of NOx, SO_2, carbon monoxide, and carbon dioxide, so the only remaining dispute concerns whether CEMS is available for dioxins/furans, hydrochloric acid, hydrofluoric acid, particulate matter, volatile organic compounds, polycyclic aromatic hydrocarbons, and mercury and other metals (arsenic, etc.).

D11. Plaintiffs have proffered no competent evidence proving that such technology is not available, and the evidence demonstrates that such technology is available. *See, e.g.* Exs. H, I, and J. Moreover, those provisions allow considerable flexibility if, as Plaintiffs assert, technology is not yet available. For example, the prohibition on monitoring gaps greater than 30 minutes is in addition to the permitted sampling interval of up to one hour, or monthly for dioxins/furans if real-time monitors are not commercially available.

D12. Defendant does not dispute the assertion that violations of the BCAA are a strict liability crime. Plaintiffs have offered no reason why there should be a lower *scienter* standard for incinerator operators that fail to control and monitor the air pollution that they emit from

burning tens of thousands of tons of solid waste and medical waste in the middle of a densely populated city.

P5.

Plaintiffs assert that the BCAA "countermands" "current federal emission limits for existing WTEs." *See* Pls.' Mot. at 8, ¶ 5; Pls. Ex. G. Defendant disputes that assertion. Plaintiffs' assertion seems to be that, because U.S. EPA has issued Emissions Guidelines, such as 200 ppmvd for NOx, no State or political subdivision can promulgate more stringent standards. That is belied by the law and the record. The Title V permit program is part of 42 U.S.C. Chapter 85, as is 42 U.S.C. § 4216, which provides that:

> nothing **in this chapter** shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

(emphasis added). Nothing in the Title V statutes cited by Plaintiffs countermands the clear language of 42 U.S.C. § 7416, which expressly allows political subdivisions to adopt their own standards, so long as they are not less stringent than the federal standards.

D13. Maryland did not "countermand" federal law when it lowered NOx limits to 150 ppmvd (and lower next year), instead of 200 ppmvd. *See* COMAR 26.11.08.10; Ex. D at 813. Florida did not "countermand" federal law when it required Palm Beach Renewable Energy Facility No. 2 to achieve NOx emissions of <50 ppm. *See* Ex. A at 12. In the same way, the City's decision to limit NOx emissions to 45 ppmvd does not countermand federal law, because it is more stringent, not "less stringent."

P6.

Plaintiffs assert that the Title V operating permit program is "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*." Pls.' Mot. at 9, ¶ 6. Defendant disputes that assertion. There is simply no language anywhere in 42 U.S.C. § 7661, *et seq*., or anywhere else in the Clean Air Act, that supports Plaintiffs' assertion that all requirements, implicitly including any more stringent emissions standards adopted by a political subdivision, were to be combined into one Title V operating permit. If the statute contained such language, Plaintiffs would quote it with a citation.

P7.

This is a legal argument, not a factual assertion. Nothing in Md. Code Ann., Envir. § 2-302 limits the power of a political subdivision to adopt ordinances, rules, or regulations that set emissions standards or ambient air quality standards that are not less stringent than the standards adopted by MDE pursuant to Envir. § 2-302.

P8.

Plaintiffs assert that the Baltimore City Council passed resolutions requesting MDE to set a NOx limit for Wheelabrator no higher than 150 ppmvd. *See* Pls.' Mot. at 10, ¶ 8.

Defendant disputes that assertion.

D14. Plaintiffs omit material language in both resolutions. The first resolution requested MDE to set NOx limits "if at all possible, significantly lower than 150 ppm in order to provide maximum air quality benefits to residents of Baltimore." *See* Pls.' Ex. I at 3. The second resolution, passed after MDE had proposed the amendments to COMAR 26.11.08.10,

asked MDE "to set NOx emissions limits that are much stronger and more protective of health than the 150 and 145 ppm limits in the regulation . . ." *See* Pls.' Ex. J at 2. The resolution asked MDE "to set a NOx limit of 45 ppm . . . which is the limit that would likely be set for a new incinerator." *Id*. The City Council's description of the NOx limit that would be set for a new incinerator is correct. The Palm Beach Renewable Energy Facility No. 2 uses SCR, has a NOx permit limit of <50 ppm, and actually achieves NOx emissions of 30-31 ppm, lower than the standard imposed by the Ordinance. *See* Ex. A at 12-13; Pls.' Ex. P at 5-6.

P9.

Plaintiffs assert that they apply best available control technology for toxic air pollutants. *See* Pls.' Mot. at 11, ¶ 9.

Defendant disputes that assertion.

D15. The Palm Beach Renewable Energy Facility No. 2 achieves mercury and dioxin/furan emissions considerably lower than the standards imposed by the BCAA and considerably lower than the emissions achieved by Wheelabrator and Curtis Bay:

	BCAA Limit	Palm Beach No. 2 Actual Emissions Test
Mercury	15 µg/dscm	0.55 – 0.62 µg/dscm
Dioxins/Furans	2.6 ng/dcsm	0.23 - 0.36 ng/dcsm

See Ex. A at 12-13; Pls.' Ex. P at 5-6.

P10.

Plaintiffs assert that MDE issued Wheelabrator its current Title V permit on April 1, 2014. *See* Pls.' Mot. at 11, ¶ 10.

Defendant disputes that assertion.

D16. Wheelabrator's Operating Permit expired two months ago, on August 31, 2019. *See* Pls.' Ex. B at 1. The permit provides that upon expiration it remains in effect until a new permit is issued, provided that the permittee has submitted a timely and complete application for a new permit at least 12 months before the expiration date. *See* Pls.' Ex. B at 7. Plaintiffs have not proffered any evidence that Wheelabrator submitted a timely and complete application for a new permit on or before August 31, 2018. The record contains no evidence that Wheelabrator currently has a Title V operating permit.

P11.

Defendant does not dispute that Plaintiffs' Exhibit H is Curtis Bay's current Title V permit.

P12.

This purported "undisputed fact" consists of legal argument, citation to allegations in the pleadings that are not evidence, and Plaintiffs' characterization of the City's 122-page Solid Waste Management Plan, which speaks for itself.

P13.

Plaintiffs assert that the City has admitted that its solid waste management plan may not be amended legislatively. *See* Pls.' Mot. at 12-13, ¶ 13.

Defendant disputes this assertion.

D17. The 2010 Ordinance in question was intended to repeal then-existing City prohibitions on Curtis Bay's acceptance of medical waste from outside a 250-mile radius. A

letter opining that a solid waste ordinance is preempted by the solid waste management plan is not an admission that an air pollution ordinance also is preempted by the solid waste management plan. The BCAA does not legislatively amend the City's solid waste management plan. The BCAA imposes more stringent air pollution emissions standards, but surrounding counties, states, and businesses will remain free to ship their solid waste and medical waste to Wheelabrator and Curtis Bay.

P14 – P16.

Defendant has no basis to dispute the description of Plaintiffs' Exhibits L and M, because, under the parties' agreement to an accelerated preliminary motion schedule, there has been no discovery. Defendant notes that these assertions are not supported by evidence meeting the requirements of Fed.R.Civ.P. 56(c)(1). Defendant disputes Plaintiffs' incomplete characterization of the referenced Refuse Disposal Permits.

D18. Both RDPs provide that "[t] he permittee shall take all measures necessary to control pollution, health hazards or nuisances. This facility shall be operated and maintained in such a manner as to prevent air, land, or water pollution, public health hazards or nuisances." Pls.' Ex. L at 20 of 27; Pls.' Ex. M at 12 of 19. Likewise, both Refuse Disposal Permits provide that:

> 1. Nothing in this permit authorizes . . . the operation of this facility when it is not in conformance with the local solid waste management plan, or zoning or land use requirements. The issuance of this permit does not prevent any duly authorized local authority from taking action to enforce applicable zoning, planning and land use requirements, or provisions of the local solid waste management plan.
>
> 2. This permit may be suspended or revoked upon a final, unreviewable determination that the permittee lacks, or is in violation of, any . . . local approval necessary to conduct the activity authorized by this permit.

Pls.' Ex. L at 26 of 27; Pls.' Ex. M at 18 of 19.

P17.

Defendant disputes these assertions.

D19. There is simply no competent evidence that the requirements of the BCAA will force either facility to shut down permanently. Indeed, Plaintiffs do not assert that the BCAA would cause Curtis Bay to shut down permanently. The only legislative intent that can be discerned from the language of the BCAA is that the City intended to monitor and reduce air pollution from Wheelabrator and Curtis Bay. If the language of the prior resolutions is also considered, which is reasonable because they were passed unanimously by the same City Council, it is reasonable to conclude that the Mayor and City Council intended to reduce air pollution emissions to levels similar to what would be emitted by a new incinerator using the best available control technology.

D20. Plaintiffs have offered no evidence that the Mayor and City Council intended to shut down Wheelabrator. A footnote citation to internet media purporting to quote an individual legislator is not competent evidence of Councilman Reisinger's intent, let alone evidence that the Mayor and City Council intended to shut down Wheelabrator. *See Brock v. Pierce Cty.*, 476 U.S. 253, 263 (1986) ("statements by individual legislators should not be given controlling effect").

D21. Plaintiffs assert that the City acted "for political reasons," as if political accountably were a negative. The Mayor and City Council of Baltimore are elected by and answerable to the citizens of Baltimore, including the citizens who live in the 21230 zip code and are most affected by Wheelabrator. The State regulatory and permitting process is also political, and is far less accountable to any voters. On December 11, 2017, the MDE Air Quality Control

Advisory Council ("AQCAC") performed its statutory role of reviewing the proposed amendments to COMAR 26.11.08.08. *See* Ex. B; Md. Code Ann., Envir. §§ 2-202, 2-206. The AQCAC is more accountable to business interests, including the Plaintiffs, than it is to any voters. *See* Md. Code Ann., Envir. § 2-202. The AQCAC is chaired by one of two Chamber of Commerce representatives, and the other Chamber of Commerce member on the AQCAC is Todd Chason, an environmental attorney at the law firm representing Curtis Bay in this litigation. *See* Exs. B, K, & L. The AQCAC meeting at which the COMAR amendments were approved also was attended by Wheelabrator's registered lobbyist, Richard Tabuteau. *See* Exs. B & M. Mr. Chason and Mr. Tabuteau are capable and respected attorneys, but there is no evidence that their input into the regulatory process was more scientific or less political than Councilman Reisinger's. The Councilman has the added merit of having been elected to his position by the citizens of the city of Baltimore.

P17a.

Defendant disputes the assertion that no WTE facility in the entire country has limits as low as the limits in the BCAA.

D22. The assertion is not appropriate for judicial notice, and Plaintiffs have not provided the Court with a noticeable fact supported by evidence meeting the requirements of Fed.R.Civ.P. 56(c)(1).

D22. Second, evidence shows that actual emissions from the Palm Beach Renewable Energy Facility No. 2 are lower than all of the emissions limits set by the Ordinance:

	BCAA Limit	Palm Beach No. 2 Actual Emissions Test
Mercury	15 µg/dscm	0.55 – 0.62 µg/dscm
Sulfur Dioxide	18 ppmvd	10 – 21 ppm
Dioxins/Furans	2.6 ng/dcsm	0.23 - 0.36 ng/dcsm
NOx	45 ppmvd	30-31ppm

See Ex. A at 12-13; Pls.' Ex. P at 5-6. Notably, Curtis Bay admits in this paragraph that it can meet the BCAA's emissions limits for sulfur dioxide and dioxins/furans.

P17b-d.

[See above, at P4]

III. Argument

Plaintiffs' legal arguments are the same as those already made in their Opposition to the City's Motion to Dismiss, and they are incorrect for the same reasons set forth in the City's Motion to Dismiss and Reply, which are adopted by reference herein. As to the Clean Air Act, Plaintiffs devote only four sentences in briefing to an analysis of the CAA's savings clause, found in 42 U.S.C.§ 7401. In so doing, they fail to explain why this case does not turn on the provision, which explicitly permits Baltimore City's enactment of more stringent air pollution standards. As to State law, Plaintiffs continue with an imaginative re-write of § 2-104(b) of Title 2 of the Environment Article, arguing here that the City "**must** request that MDE" set more stringent standards. Pls.' Mot. at 2 (emphasis added). Once again, § 2-104 is clear:

> (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 (emphasis added). A clear reading of the statutory language reveals that Plaintiffs creatively delete the discretionary "may" from § 2-104(b) and replace it with "must." It speaks volumes that Plaintiffs need to delete and add statutory language to § 2-104 for their argument to have any basis.

As argued extensively in the City's Motion to Dismiss and Reply, the relevant statutory language explicitly recognizes local power to adopt more stringent air pollution standards. As such, the BCAA does not conflict with state or federal law or Plaintiffs' operating permits. The statutory framework allows cities to enact laws which provide their citizens greater protection from air pollutants than that provided by State and federal law. This is exactly what the City has done. The BCAA does not prohibit incinerators such as Wheelabrator and Curtis Bay from operating within City limits. It makes certain, however, that those incinerators devote sufficient resources to ensure that the citizens of Baltimore are protected from asthma and other health risks associated with the pollutants emitted daily by Wheelabrator and Curtis Bay.

IV. Conclusion

Wherefore, for the foregoing reasons, Plaintiffs' motion for partial summary judgment on Counts 1 through 5 of their Complaint should be denied, and Plaintiffs' Complaint should be dismissed with prejudice and without leave to amend.

Respectfully submitted,

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DEFENDANT'S EXHIBITS

A	J.B. Kitto, Jr., *et al*., World Class Technology for the Newest Waste-to-Energy Plant in the United States – Palm Beach Renewable Energy Facility No. 2 (Dec. 13, 2016)
B	MDE Air Quality Control Advisory Council – Agenda, Minutes, and Exhibits (Dec. 11, 2017)
C	MDE Technical Support Document for Amendments to COMAR 26.11.08 – Control of Incinerators (Aug. 14, 2018)
D	Md. Register 45:17 (Aug. 17, 2018)
E	MDE Response to Comments related to Amendments to COMAR 26.11.01 *et seq*. (Sept. 21, 2018)
F	Md. Register 45:24 (Nov. 26, 2018)
G	MDE NOx Reasonably Available Control Technology State Implementation Plan (July 2, 2018)
H	U.S. EPA "Mercury CEMS and Sorbent Trap System Certification Under New Rules" (Jan. 29, 2015)
I	Dr. Nenad Sarunac, "Evaluation and Comparison of . . . Methods for Measurement of Mercury, Heavy Metals, PM2.5 and PM10 Emissions from Fossil-Fired Power Plants" (Executive Summary) (Feb. 2007).
J	U.S. EPA Environmental Technology Verification Program – Dioxin Emission Monitoring Systems (Feb. 2007)
K	MDE Air Quality Control Advisory Council
L	Todd R. Chason, Gordon Feinblatt LLC
M	State Ethics Commission – Employer List (Nov. 15, 2018)