

**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-GLR

**Brief Amicus Curiae of the  
ENERGY JUSTICE NETWORK  
in support of  
MAYOR AND CITY COUNCIL OF BALTIMORE'S  
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO  
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Nidel & Nace, PLLC

/s/ Jonathan B. Nace  
Jonathan B. Nace, Esq., Bar No. 18246  
2201 Wisconsin Ave., NW  
Suite 200  
Washington, DC 20007  
202-780-5153  
jon@nidellaw.com  
*Counsel for Amici Curiae*

October 22, 2019

**TABLE OF AUTHORITIES**

**Cases**

*Allied Vending, Inc. v. City of Bowie*,  
332 Md. 279, 631 A.2d 77 (1993) .....9

*Bd. of Cty. Commissioners of Washington Cty. v. Perennial Solar, LLC*,  
2019 WL 3071755 (Md. July 15, 2019) .....9

*Blue Circle Cement, Inc. v. Bd. of Cty. Comm’rs of Cty. of Rogers*,  
27 F.3d 1499, 1508 (10th Cir. 1994) .....6

*City of Cleburne v. Cleburne Living Center*,  
473 U.S. 432, 440, 105 S.Ct.3249 (1985).....14

*C.J. Lucas Funeral Home, Inc. v. Borough of Kulpmont*,  
4:CV-07-02854:CV-07-0499, 2008 WL 114916848,  
(M.D. Pa. Mar. 27, 2008)..... 13-14

*Holt’s Cigar Co., Inc. v. City of Philadelphia*,  
608 Pa. 146, 153-54 (2011).....9

*International Paper v Ouellette*,  
479 U.S. 481, 494 (1987).....7

*Mayor & Council of Forest Heights v. Frank*,  
291 Md. 331, 338 (1981) .....7

*North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291,  
(4th Cir. 2010).....7

*United States v. City & Cty. of Denver*,  
100 F.3d 1509, 1512 (10th Cir. 1996) .....7

*United Tavern Owners v. School Dist.*,  
441 Pa. 274 (1971).....9

*W. Pa. Rest. Ass’n v. City of Pittsburgh*,  
366 Pa. 374, 380-81 (1951).....9

**Statutes**

Maryland Environment Code § 2-104 .....7, 10

**Other Sources**

“Air pollution and early deaths in the United States. Part I: Quantifying the impact of major sectors in 2005,” Atmospheric Environment, Nov 2013 ..... 1

“Asthma Capitals 2018,” Asthma and Allergy Foundation of America ..... 2

“Asthma in Maryland – 2012,” MD Department of Health and Mental Hygiene, Fig. 14-2..... 2

Baltimore City Health Department Memo to City Council re: Bill 17-0034R, Sept 21, 2017. .... 2

Baltimore City Health Department Memo to City Council re: Bill 18-0306, Jan. 30, 2019..... 2

Baltimore City Health Department website ..... 4

Continuous Emissions Monitoring real-time disclosure websites for four trash incinerators..... 4

Environmental Protection Agency 2017 National Emissions Inventory. .... 3

“Landfills are bad, but incinerators (with ash landfilling) are worse,” Energy Justice Network. 11

“Lead in the environment: No safe dose,” Harvard University excerpt of *The Lancet* (Sept. 11, 2010)..... 3

“Maryland fines Wheelabrator Baltimore \$77,500 for air pollution,” Baltimore Business Journal, Dec. 13, 2011. .... 4

“Medical Waste in Baltimore,” Energy Justice Network analysis of Maryland Department of the Environment medical waste data ..... 7

“Mercury Exposure and Children’s Health,” *Current Problems in Pediatric and Adolescent Health Care*, 2010 September; 40(8): 186–215..... 3

“No evidence of dioxin cancer threshold,” *Environmental Health Perspectives* 2003 Jul; 111(9): 1145–1147..... 3

Risk-Screening Environmental Indicators, U.S. Environmental Protection Agency..... 3

U.S. EPA Environmental Technology Verification Program ..... 4

Wevers M., De Fre R., “Underestimation in Dioxin Emission Inventories,” *Organohalogen Compounds*, Vol. 36 (1998)..... 4

Written Report of George D. Thurston Regarding the Public Health Impacts of Air Emissions from the Wheelabrator Facility, Nov. 20, 2017. .... 3

*Waste Not* issue #302..... 9

**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-GLR

**Brief Amicus Curiae of the  
ENERGY JUSTICE NETWORK  
in support of  
MAYOR AND CITY COUNCIL OF BALTIMORE'S  
CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO  
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

This brief *amicus curiae* is submitted by the Energy Justice Network (“Energy Justice”), a national project of Pennsylvania-based non-profit organization, Action Center, Inc., in support of the Defendant, Mayor and City Council of Baltimore (the “City”), and the legality of the Baltimore Clean Air Act (“BCAA”). Energy Justice advocated for the BCAA, which was adopted unanimously with broad community support from a coalition of 36 environmental, public health, civic, religious, labor, and social justice organizations.<sup>1</sup>

Baltimore has some of the most dangerous air to breathe in the nation. MIT researchers showed that Baltimore had the deadliest air in the nation in 2005.<sup>2</sup> According to EPA, in 2014, Baltimore was the nation’s 81st most air polluted locality (out of over 9,000) and the most

---

<sup>1</sup> The 36 groups that supported the Baltimore Clean Air Act as part of the Clean Air Baltimore Coalition are listed at [www.cleanairbmore.org/cleanairact/](http://www.cleanairbmore.org/cleanairact/)

<sup>2</sup> “Air pollution and early deaths in the United States. Part I: Quantifying the impact of major sectors in 2005,” Atmospheric Environment, Nov 2013. [www.sciencedirect.com/science/article/abs/pii/S1352231013004548](http://www.sciencedirect.com/science/article/abs/pii/S1352231013004548)

polluted city in Maryland. In 2018, the Asthma and Allergy Foundation of America ranked Baltimore as the 33rd worst asthma capital in the nation.<sup>3</sup> As the Baltimore City Health Department pointed out to City Council, the “state Department of Health and Mental Hygiene reports 12.4% of Baltimore City adults have asthma, four points higher than the statewide average. Moreover, 1 in 5 children under the age of 18 in Baltimore City suffer from asthma, double the national average.”<sup>4</sup> This is apparently based on the same state report that discusses health disparities, showing that black / African-American residents have five times the rate of hospitalization due to asthma as white residents do.<sup>5</sup> The City Health Department further points out that Wheelabrator Baltimore “is the City’s largest air polluter, contributing 36% of all industrial air pollution or three times the amount of the City’s next largest polluter,” and “is also the leading air polluter for mercury and lead, toxins that have a history of harming Baltimore citizens.”<sup>6</sup> The most recent EPA data just released for 2017 shows that Wheelabrator’s emissions have increased since 2014, and now account for 38% of the city’s total industrial air emissions. Not only is Wheelabrator the number one polluter overall, they rank first in industrial emissions of arsenic, cadmium, carbon monoxide, chromium (VI), hydrochloric acid, hydrofluoric acid, lead, mercury, nitrogen oxides, and sulfur dioxide, and are ranked second in particulate matter in the city. They’re also ranked number one in greenhouse gas emissions, more than three times as

---

<sup>3</sup> “Asthma Capitals 2018,” Asthma and Allergy Foundation of America, [www.aafa.org/media/2119/aafa-2018-asthma-capitals-report.pdf](http://www.aafa.org/media/2119/aafa-2018-asthma-capitals-report.pdf)

<sup>4</sup> Baltimore City Health Department Memo to City Council re: Bill 17-0034R, Sept 21, 2017. <https://baltimore.legistar.com/View.ashx?M=F&ID=5441899&GUID=27DC4AA3-D11A-4685-A67A-9BC2A1F62D2A>

<sup>5</sup> “Asthma in Maryland – 2012,” Maryland Department of Health and Mental Hygiene, Fig. 14-2. <https://phpa.health.maryland.gov/mch/Documents/Asthma%20in%20Maryland%202012.pdf>

<sup>6</sup> Baltimore City Health Department Memo to City Council re: Bill 18-0306, Jan. 30, 2019. <https://baltimore.legistar.com/View.ashx?M=F&ID=7008817&GUID=150D5B98-6D90-49A8-B74F-EF59844FF155>

bad as the city's landfill.<sup>7</sup> This is *with* all of their pollution controls. A 2017 study from the New York University School of Medicine found that just one pollutant (fine particulate matter) from Wheelabrator is causing \$55 million in annual health costs to residents in several states.<sup>8</sup>

There is no shortage of evidence on the health damage these chemicals are known to cause. Some chemicals known released by incinerators have no safe dose, including dioxins,<sup>9</sup> lead,<sup>10</sup> and mercury.<sup>11</sup> Dioxins – the most toxic man-made chemicals known to science – are so exquisitely toxic that EPA ranks their toxicity as 10,000 times worse than the second most toxic chemical, 28,000 times as toxic as PCBs, and 140,000 times as toxic as mercury.<sup>12</sup> Wheelabrator releases enough mercury annually since 2001, on average, to keep over 32,000 20-acre lakes so contaminated that the fish are unsafe to eat. Their nitrogen oxide emissions are equivalent to half of the cars or half of the trucks on the city's streets.<sup>13</sup>

While Plaintiffs insist that they're already strictly regulated, the fact is that only a few pollutants are monitored continuously, as Plaintiffs admit. (Pls.' Mot. for Partial Summ. J. ¶¶ 10-11.) Most are tested once per year by the facilities themselves under idealized operating conditions. If motorists were regulated the same way most smokestack pollutants are, people would be allowed to drive around all year with no speedometer, and a speed trap would be set once a year on the highways, preceded by signs warning "slow down, speed trap ahead," and the

---

<sup>7</sup> Environmental Protection Agency 2017 National Emissions Inventory. [www.epa.gov/air-emissions-inventories/2017-national-emissions-inventory-nei-data](http://www.epa.gov/air-emissions-inventories/2017-national-emissions-inventory-nei-data)

<sup>8</sup> Written Report of George D. Thurston Regarding the Public Health Impacts of Air Emissions from the Wheelabrator Facility, Nov. 20, 2017. [www.cbf.org/document-library/cbf-reports/thurston-wheelabrator-health-impacts-2017.pdf](http://www.cbf.org/document-library/cbf-reports/thurston-wheelabrator-health-impacts-2017.pdf)

<sup>9</sup> "No evidence of dioxin cancer threshold," *Environmental Health Perspectives* 2003 Jul; 111(9): 1145–1147. [www.ncbi.nlm.nih.gov/pmc/articles/PMC1241565/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1241565/)

<sup>10</sup> "Lead in the environment: No safe dose," Harvard University excerpt of *The Lancet* (Sept. 11, 2010). [www.hsph.harvard.edu/news/multimedia-article/lead/](http://www.hsph.harvard.edu/news/multimedia-article/lead/)

<sup>11</sup> "Mercury Exposure and Children's Health," *Current Problems in Pediatric and Adolescent Health Care*, 2010 September; 40(8): 186–215. [www.ncbi.nlm.nih.gov/pmc/articles/PMC3096006/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3096006/)

<sup>12</sup> Risk-Screening Environmental Indicators, U.S. Environmental Protection Agency. [www.epa.gov/rsei](http://www.epa.gov/rsei)

<sup>13</sup> See 2014 and 2017 EPA data on Wheelabrator Baltimore summarized at [www.cleanairemore.org/wheelabrator/](http://www.cleanairemore.org/wheelabrator/)

brother of the driver would be running the speed trap (the companies hire their own consultants to test). Wheelabrator was fined \$77,500 for failing their annual mercury test in 2010 (they previously had far higher mercury emissions in 2001 and 2006).<sup>14</sup> No one knows how many other times they're "speeding" the rest of the year because no one is looking. In Europe, where continuous sampling is used for dioxins, it's been shown that actual emissions are 32 to 52 times higher than sampling in the U.S. suggests based on testing for only six hours per year.<sup>15</sup>

The continuous emissions monitoring (CEMS) equipment exists and is commercially available, as we have confirmed with various vendors. In fact, the U.S. EPA tested and verified continuous monitors for dioxins (4 vendors) in 2006, mercury (13 devices) from 2001-2007, and a multi-metals monitor in 2002 capable of continuously monitoring all metals required under the BCAA.<sup>16</sup> CEMS for the other chemicals required to be continuously monitored have been commercially available for years, some in widespread use. In September, the Baltimore City Department of Health certified an Air Monitoring Contractor capable of meeting the BCAA requirements for independent installation of the required CEMS equipment.<sup>17</sup>

Online, real-time disclosure of CEMS data exists for at least four incinerators.<sup>18</sup>

The emissions standards set for four pollutants in the BCAA are not arbitrarily chosen, but are the better of the standards in place for the only two trash incinerators permitted and built

---

<sup>14</sup> "Maryland fines Wheelabrator Baltimore \$77,500 for air pollution," Baltimore Business Journal, Dec. 13, 2011. [www.bizjournals.com/baltimore/news/2011/12/13/maryland-fines-wheelabrator-baltimore.html](http://www.bizjournals.com/baltimore/news/2011/12/13/maryland-fines-wheelabrator-baltimore.html)

<sup>15</sup> Wevers M., De Fre R., "Underestimation in Dioxin Emission Inventories," Organohalogen Compounds, Vol. 36 (1998). [www.ejnet.org/toxics/cems/1998\\_DeFre\\_OrgComp98\\_Underest\\_Dioxin\\_Em\\_Inv\\_Amesa.pdf](http://www.ejnet.org/toxics/cems/1998_DeFre_OrgComp98_Underest_Dioxin_Em_Inv_Amesa.pdf) Related materials available at [www.ejnet.org/toxics/cems/dioxin.html](http://www.ejnet.org/toxics/cems/dioxin.html)

<sup>16</sup> U.S. EPA Environmental Technology Verification Program. <https://archive.epa.gov/nrmrl/archive-etv/web/html/vt-ams.html>

<sup>17</sup> Baltimore City Health Department website. <https://health.baltimorecity.gov/programs/baltimore-clean-air-act>

<sup>18</sup> See Covanta Montgomery (MD) [www.montgomerycountymd.gov/sws/facilities/rf/cem.html](http://www.montgomerycountymd.gov/sws/facilities/rf/cem.html), Covanta Fairfax (VA) [www.covanta.com/Our-Facilities/Covanta-Fairfax](http://www.covanta.com/Our-Facilities/Covanta-Fairfax), Durham-York Energy Center in Ontario, Canada [www.durhamyorkwaste.ca/EmissionsData/EmissionsData.aspx](http://www.durhamyorkwaste.ca/EmissionsData/EmissionsData.aspx), and Covanta Burnaby in Vancouver, BC, Canada [www.metrovancouver.org/services/solid-waste/wte-and-disposal/waste-to-energy-facility/reports/Pages/default.aspx](http://www.metrovancouver.org/services/solid-waste/wte-and-disposal/waste-to-energy-facility/reports/Pages/default.aspx)

in North America in the past decade: West Palm Beach Unit #2 in Florida, and the Durham-York Energy Center in Ontario. They are science-based standards currently being met by modern waste incinerators. The nitrogen oxide (NO<sub>x</sub>) standard of 45 ppm is from the West Palm Beach facility (currently operating) and is the same limit set in two permits issued by the Maryland Department of the Environment – one for a Wheelabrator incinerator that was proposed for Frederick, MD, and the other for the Energy Answers incinerator that was proposed for Baltimore (both never built due to community opposition). The standards for dioxins, mercury, and sulfur dioxide are based on the permit limits being met by the Durham-York Energy Center.

Much more could be said and documented on this topic, but there is no doubt that there is a sufficient rational basis for Baltimore City desiring to have modern real-time monitoring equipment and modern standards applied to waste incinerators in the city.

Regarding the Plaintiffs' causes of action, the City makes a strong case for the legality and constitutionality of the BCAA. Without repeating their well-argued defense, Energy Justice offers the following legal arguments for the Court's consideration:

### **1. Federal Clean Air Act Preemption**

Plaintiffs build their argument on the notion that the BCAA “is unconstitutional under federal conflict preemption because compliance with some of its provisions is a physical impossibility.” Mem. in Opp. to Def.'s Mot. to Dismiss at 5, ECF No. 34. As described above, all of the continuous emissions monitoring technology is commercially available (if not also tested and verified by EPA and in commercial use), the technology for real-time disclosure is currently being used on at least four other incinerators, and the air pollution controls necessary to meet the emissions limits are in place at both of the trash incinerators built in North America in the past decade. In 2000, new federal standards for dioxin caused the nation's oldest trash



incinerator (in Harrisburg, PA, operating since 1972, with the highest dioxin emissions of any source in North America) to have to close by mid-2002 or be rebuilt. The city chose to rebuild it and it now meets modern standards. It's not a matter of physical impossibility, but corporate willingness to bring old plants up to modern standards and technology.

Plaintiffs argue that “[t]he requirements of the Baltimore Clean Air Act conflict with the specific emissions limits and operating regulations set by EPA.” Compl. ¶ 87, ECF No. 1. It is not impossible to meet both the City standards (under the BCAA) and the state and federal standards, and is not a legal conflict so long as the stricter local requirements can be met concurrently with the minimums set by the state in accordance with federal and state law. Furthermore, Plaintiffs cite *Blue Circle Cement* to argue that “‘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,’ despite the existence of a savings clause allowing for stricter local regulations.” Pls.’ Opp. to Def.’s Mot. to Dismiss at 12. The City effectively argues that BCAA *further*s the purpose of the Clean Air Act by reducing air pollution. However, even if one entertains the “de facto total ban” thinking, the analogy from hazardous waste to municipal and medical waste does not apply. There are much more limited outlets for hazardous waste than there are for municipal and medical waste. Far from banning a waste management practice, there are numerous alternatives within the region. Within Baltimore’s own borders, the city’s publicly owned landfill is in process of an expansion (that was in the works for over five years, to handle the ash from Wheelabrator, well before BCAA was considered). This City projected that the expanded landfill would have adequate space through 2052, which is still achievable even if Wheelabrator closes, should the city put into practice their “zero waste” goals currently being studied. The city also hosts two other large medical waste facilities that do not use incineration,

and which have enough capacity to handle all that Curtis Bay Energy currently processes as they import trash from 20 states plus Canada and the District of Columbia.<sup>19</sup> Nonetheless, BCAA does not “prohibit[] activity which is expressly authorized,” as Plaintiffs claim (Compl. ¶ 88.), but requires that these old facilities come up to modern standards.

Finally, Plaintiffs reach to the *Ouellette* case<sup>20</sup> to argue that the “Fourth Circuit has emphatically endorsed the primacy of the federal scheme under the Clean Air Act despite the Act’s savings clause.” This involved a state using common law nuisance to try to regulate sources in another state. This was not a savings clause issue, and is not relevant to this case, which does not involve common law or an attempt by Baltimore to regulate beyond its borders.

## **2. State Conflict Preemption – Maryland Air Laws**

Plaintiffs continue to argue examples where a local law prohibits conduct explicitly permitted by a larger level of government, including cases on fortune-telling and a Denver hazardous waste site. *Mayor & Council of Forest Heights v. Frank*, 291 Md. 331, 338 (1981); *United States v. City & Cty. of Denver*, 100 F.3d 1509, 1512 (10th Cir. 1996). Both cases present actual conflicts, where compliance with both are impossible. That’s not the matter here.

To comply with Maryland Environment Code § 2-104, the BCAA must be as strict or stricter. There are two pollutants for which the limits in Curtis Bay Energy’s air permit are already stricter than those set in the BCAA. §8-117(A) of the BCAA specifies that if any state or federal standard or permit limit is more stringent than the BCAA’s limits, the more stringent limit applies. §8-117(B) has the City adopt these limits to be independently enforceable by the

---

<sup>19</sup> “Medical Waste in Baltimore,” Energy Justice Network analysis of Maryland Department of the Environment medical waste data, pp. 3-4 at: [www.cleanairbmore.org/uploads/MedicalWasteIncineration.pdf](http://www.cleanairbmore.org/uploads/MedicalWasteIncineration.pdf)

<sup>20</sup> *International Paper v Ouellette*, 479 U.S. 481, 494 (1987), cited in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010).

City. This language ensures that no legitimate claim can be made that the BCAA is weaker than state and federal law, and Plaintiffs have not yet made any such claim.

In their argument for conflict with state law, Plaintiffs point out (Compl. ¶ 52.) a new MDE rule where Wheelabrator is to submit a feasibility analysis for lowering NOx below the state's new standard, perhaps as low as the City's standard. This is no conflict, as the state is making Wheelabrator do what the City essentially makes them do as well. It's not a matter of whether it's possible to meet a stricter standard, but whether it's (financially) feasible to meet these more protective standards that the state normally requires of new trash incinerators.

Plaintiffs conflate "more stringent requirements" with "pervasive conflict." Compl. ¶ 54. The City's discussion of city vs. state minimum wages highlights a great example. If the city had a \$15/hour minimum wage, and the state's minimum wage is still at \$10.10, Plaintiffs are essentially arguing that the City's minimum wage "prohibits the conduct" of paying a worker \$12/hour as the state would allow. The City's minimum wage would not prohibit the conduct of employing people, and it would be absurd to interpret this to mean that the City's law is illegally in conflict with the state. The BCAA doesn't prohibit anything other than being more polluting and "driving without a speedometer" per our earlier analogy.

### **3. State Implied Preemption - Maryland Air Laws**

Plaintiffs and *Amici* take up a lot of space describing the existing regulatory regime, in efforts to make it seem all-encompassing and comprehensive, as if an implied (field) preemption analysis is appropriate in the presence of a savings clause. Plaintiffs cite only U.S. Supreme Court cases when arguing that "a savings clause for some local authority does not displace a conflict preemption analysis." Pls.' Opp. to Def.'s Mot. to Dismiss at 9. They provide no support for this interpretation applying to Maryland state preemption doctrine. Courts in other states,

such as Pennsylvania, clearly state that an implied preemption analysis is appropriate “when a statute is silent” on preemption, yet inappropriate in the face of express preemption or a savings clause. *W. Pa. Rest. Ass’n v. City of Pittsburgh*, 366 Pa. 374, 380-81 (1951); *United Tavern Owners v. School Dist.*, 441 Pa. 274 (1971); *Holt’s Cigar Co., Inc. v. City of Philadelphia*, 608 Pa. 146, 153-54 (2011). The notion that the current state and federal air regulation regime is pervasively comprehensive is contradicted by the fact that most pollutants are not measured most of the time, and that enforcement of any permit limits is not possible (except for three pollutants that are continuously monitored) outside of the 1-3 days per year when several hours of data are collected and purport to represent actual normal operation. This is an industry known to save waste they think burns cleaner to use on their annual stack test day.<sup>21</sup> It’s also well understood that emissions of some pollutants (especially dioxins) are higher during startup, shutdown, and malfunction times, and stack tests are not allowed to be conducted under such conditions.

Plaintiffs cite a solar case to argue field preemption, but admit that the law involved “did not provide concurrent legislative authority to any locality,” unlike Md. Code Enviro. §2-104 does. Pls.’ Opp. to Def.’s Mot. to Dismiss at 25, citing *Bd. of Cty. Commissioners of Washington Cty. v. Perennial Solar, LLC*, 2019 WL 3071755 (Md. July 15, 2019).

On the *Allied Vending* factors, addressed in the City’s Reply Mem. in Supp. of the Mayor & City Council of Baltimore’s Mot. to Dismiss at 18-19, ECF No. 38, we would add one point. One of the factors is “whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field.” The City states that “MDE has made no statement regarding local authority, either in support or opposition.” In fact, we were present at MDE’s 3/12/2018 Air Quality Control Advisory Council (AQCAC) meeting where Mr.

---

<sup>21</sup> Workers in the industry have affirmed that this is commonplace. One notorious example that has been documented is discussed in *Waste Not* issue #302: [www.americanhealthstudies.org/wastenot/wn302.htm](http://www.americanhealthstudies.org/wastenot/wn302.htm)

George (“Tad”) Aburn, Director of MDE’s Air & Radiation Management Administration, who oversees the AQCAC meetings and the state’s new nitrogen oxide (NOx) regulation for trash incinerators, stated that MDE structured the new NOx regulation with Baltimore in mind to be compatible with local government deciding if they want to set tighter standards.

#### **4. State Express Preemption – Maryland Air Laws**

Plaintiffs’ efforts to contort the plain language of Md. Code Envir. § 2-104 is creatively self-serving, but just incorrect. At least a dozen other states have similar language, intending the same – to empower local governments to have concurrent and overlapping authority to regulate air emissions with ordinances “no less stringent” than the state and federal minimums. The language in § 2-104(a)(2) prohibiting “less stringent” local air laws points in the same direction, strongly implying that local ordinance as strict or stricter are authorized, reinforcing the clear intent of § 2-104(a)(1). If any limitations were intended, and if all the City could do is ask the state for stricter state rules, this would have prohibited “less or more stringent” ordinances, or all ordinances on the topic. Plaintiffs point out that the City twice asked MDE for stricter NOx limits and pretend that the City got what they sought, ignoring the fact that the City’s resolutions asked for limits stronger than 150 ppm – ideally 45 ppm, as the City ultimately adopted – and was ignored by MDE in this request. Compl. ¶¶ 51 & 116.

#### **5. State Implied Preemption - Maryland Solid Waste Laws**

Plaintiffs claim that the BCAA “will divert over a hundred thousand tons per year of municipal solid waste to landfills in violation of the City’s Solid Waste Management Plan.” Compl. ¶ 2. It is not a violation of the plan to require an incinerator to meet newer standards or for waste to be diverted to another facility in the plan, such as the City’s own landfill.

#### **6. Ultra Vires**

Plaintiffs' arguments are redundant and are adequately refuted by the City.

#### **7. Maryland Constitution, Article XI-A, Impermissible General Law**

The City is generous when they state that “the idea that the BCAA is an impermissibly general law because it forces downwind jurisdictions to breath cleaner air borders on the ludicrous.” Plaintiffs argue that the BCAA “(i) dictates the nature and quality of air emissions and air quality far beyond the City’s jurisdiction; (ii) imposes management controls on the combustion of solid waste from numerous sources outside of the City; and (iii) imposes environmental harms and costs by diverting solid waste to locations outside of the City.” Compl. ¶ 142. Guilty as charged on the first two counts. Nothing wrong with those, legally or otherwise. For the record, 46% of the waste going to Wheelabrator is from outside of the City (40% of that is from Baltimore County). 94% of the waste going to Curtis Bay Energy is from outside of the City. These are 2017 figures from a state waste database provided to us from MDE. On the third count, the net benefit is positive. Incineration does not avoid landfills. For every 100 tons of waste burned 70-75% becomes water vapor and air pollutants and the other 25-30% becomes toxic ash that still goes to a landfill, making the landfill more toxic and dangerous. Life cycle analysis shows that incineration is worse than landfilling, and is specifically worse in terms of global warming, and emissions nitrogen oxides, acid gases, particulate matter, and toxic chemical pollution.<sup>22</sup> As the life cycle analysis for DC shows, even when having to truck waste four times as far (200 additional round-trip miles) to a landfill, transportation emissions were insignificant compared to those from the waste facilities themselves, negating Plaintiffs’ argument about how “closure of the Facilities would mean that greenhouse gas emissions will increase outside of Baltimore due to the waste being diverted to landfills in other cities, counties,

---

<sup>22</sup> “Landfills are bad, but incinerators (with ash landfilling) are worse,” Energy Justice Network. [www.energyjustice.net/files/incineration/incineration\\_vs\\_landfills.pdf](http://www.energyjustice.net/files/incineration/incineration_vs_landfills.pdf)

and states.” Pls.’ Opp. to Def.’s Mot. to Dismiss at 31. For the most part, waste would not be delivered outside of the city, though. Most of the waste burned at Wheelabrator is from the City, and would stay in the City, going to the Baltimore’s Quarantine Road Landfill. Most of the rest is from counties that have their own landfill, but are burning in Baltimore to save their own landfill space – a classic “not in my backyard” case of environmental racism. As for the medical waste, Baltimore City already has two other large medical waste processors using safer non-burn technologies (autoclaves). They have enough excess capacity to easily handle all of the waste burned at Curtis Bay Energy. For any pathological waste (body parts) or pharmaceutical waste that may be inappropriate for autoclaving, alkaline hydrolysis and activated carbon processes exist to safely handle these waste streams without combustion, vastly minimizing the environmental harms that Plaintiffs claim to be concerned about.

**8. Substantive Due Process – U.S. Constitution, 42 U.S.C. § 1983**

Plaintiffs raise the trucking argument again, as if the Act will result in closure of their incinerators and increased vehicle emissions sufficient to increase greenhouse gas emissions by more than the massive reduction that would occur if the incinerators indeed closed. Compl. ¶ 154. They are incorrect, as the sheer volume of greenhouse gas pollution (762,684 tons of CO<sub>2</sub> equivalents from Wheelabrator and 26,311 tons from Curtis Bay Energy in 2017, per EPA’s National Emissions Inventory) dwarfs any amount that could occur from trucking. They also claim (again) that the monitoring technology is not available from any vendor (Compl. ¶ 155.), even though the City has known of vendors providing this technology for over three years now, and has certified a vendor as an Air Monitoring Contractor in September 2019 for the Plaintiffs to use to comply with the BCAA. They also repeat the unfounded waste disposal capacity scare, which is disproved above. Compl. At 156.

On the legal substance, we recommend a look at a case out of the Borough of Kulpmont, Pennsylvania. In 2008, the Borough passed a local Air Pollution Control Ordinance that regulates crematories and medical waste incinerators in similar ways to the BCAA. It was challenged with five constitutional causes of action, including substantive due process and equal protection under § 1983. Judge Muir, for the Middle District of Pennsylvania, upheld the Ordinance and dismissed the challenge on summary judgment. On the substantive due process claims, the Court found that § 1983 “merely provides a remedy for the violation of a constitutional right where the violation was committed by a person acting under color of state law,” that the claim is essentially a “constitutional tort,” and that it is violated by executive action only when “it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense.” The court concluded that the Borough’s actions “were entirely reasonable” and that “no reasonable finder of fact could conclude that the Defendants’ actions may be properly characterized as arbitrary, or conscience shocking, in a constitutional sense.” *C.J. Lucas Funeral Home, Inc. v. Borough of Kulpmont*, 4:CV-07-02854:CV-07-0499, 2008 WL 114916848, at \*8-10 (M.D. Pa. Mar. 27, 2008).

**9. Equal Protection – U.S. Constitution, 42 U.S.C. § 1983**

The *Kulpmont* decision also looked at equal protection. In *Kulpmont*, no existing facilities and one proposed facility would have been regulated, and the ordinance was narrower, impacting just medical waste incinerators and crematories, yet the District Court found no equal protection violation. There is no need to be comprehensive in a local air ordinance, as implied by Plaintiffs’ complaint. Compl. ¶ 1. The court in *Kulpmont* found that in cases like this where no suspect class is involved, “the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state



interest,” citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct.3249 (1985). The *Kulpmont* court went on to say that, in cases where Plaintiffs claim to be a “class of one” (or two, in this case), courts must find that intentionally different treatment is “irrational and wholly arbitrary.” In dismissing the challenge and granting summary judgment for the Borough, the *Kulpmont* court found that “no rational trier of fact could find that the ordinance is irrational or wholly arbitrary.” *C.J. Lucas Funeral Home, Inc. v. Borough of Kulpmont*, 4:CV-07-02854:CV-07-0499, 2008 WL 114916848, at \*11-12 (M.D. Pa. Mar. 27, 2008).

#### **10. Maryland Declaration of Rights, Article 24**

We have nothing to add here, but to remind that protecting public health is a legitimate government purpose and that the BCAA is rationally related to that purpose.

#### **11. Maryland Declaration of Rights, Article 19**

Plaintiffs are incorrect when they state that the BCAA’s requirements are impossible to meet. Compl. ¶ 183. It may not be easily affordable, but that is not the same as “impossible.”

#### **Additional Relevant Information**

To benefit the Court in its decision, Energy Justice believes it is important to provide detail on Local Government Coalition for Renewable Energy (“Coalition”), which also submitted an amicus brief relevant to the parties’ summary judgment motions. The unincorporated “Coalition” is a thinly veiled front for Covanta, the largest incinerator corporation in the U.S., which is already represented in this case through their membership in Plaintiff, Energy Recovery Council (“ERC”). Of the 13 trash incinerators that these 11 local governments are involved with, every single owner and operator of those incinerators is a member of ERC and is thus already represented in this case.<sup>23</sup> All are publicly owned except for one (Marion County, OR, which is

---

<sup>23</sup> Energy Recovery Council membership. [www.energyrecoverycouncil.org/erc-members/](http://www.energyrecoverycouncil.org/erc-members/)

owned and operated by Covanta), and all of these public agencies that own incinerators are ERC members. Ten of the 12 are privately operated, and all of those by Covanta. Only Marion County, OR is not represented in this case via ERC, and they have no legitimate interest in this case. Moreover, ERC attested that they “know[] of no other corporation, unincorporated association, partnership, or other business entity, not a party to this case, who may have a ‘financial interest whatsoever in the outcome of the litigation.’” Pl. Energy Recovery Council’s Local Rule 103.3 Disclosure Statement, ECF No. 5. They clearly know Covanta and their public agency members. This affirms that the Coalition has no financial interest in this litigation. Finally, this “Coalition” raises many fact-based arguments that are readily disproved. Had we the space to go through their claims, we could easily provide documentation to counter their many falsehoods. Please note that, like this Coalition, and the industry’s trade association that currently calls themselves Energy Recovery Council, Covanta is also behind two of the information sources cited in the Coalition’s brief. The Center for American Progress receives \$50,000 to \$99,999 per year from Covanta,<sup>24</sup> and Columbia University’s “Earth Engineering Center” is simply a front for the incineration industry, akin to the tobacco science outfit for trash burners, supported by Wheelabrator and Covanta.<sup>25</sup>

Respectfully submitted,

Nidel & Nace, PLLC  
/s/ Jonathan B. Nace  
Jonathan B. Nace, Esq., Bar No. 18246  
2201 Wisconsin Ave., NW  
Suite 200  
Washington, DC 20007  
202-780-5153  
jon@nidellaw.com  
*Counsel for Amici Curiae*

October 22, 2019

---

<sup>24</sup> “Our Supporters,” Center for American Progress. [www.americanprogress.org/c3-our-supporters/](http://www.americanprogress.org/c3-our-supporters/)

<sup>25</sup> WTERT Sponsors. [www.seas.columbia.edu/earth/wtert/newwtert/sponsors/](http://www.seas.columbia.edu/earth/wtert/newwtert/sponsors/)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he has this 30th day of August, 2019 caused all counsel of record who have consented to electronic service to be served with a copy of the foregoing Brief Amici Curiae via the Court's CM/ECF system.

/s/ Jonathan B. Nace  
Jonathan B. Nace