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

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| 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**
**REPLY IN SUPPORT OF CROSS-MOTION**
**FOR PARTIAL SUMMARY JUDGMENT**

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## I. INTRODUCTION

Plaintiffs' Reply and Opposition (ECF 44) sets out to convince this Court that this dispute "presents pure issues of law that do not require discovery" and requires "only the interpretation of federal and state waste and air laws." The City fully agrees with this statement. Yet Plaintiffs' arguments move far beyond issues of statutory interpretation (for which no discovery is required), and delve into disputed, complex, and technical issues of fact and expert opinion. The City does not agree that the necessity, health benefits, availability, effectiveness, and cost of air pollution controls and monitoring equipment are legal questions, or that they are proper issues for summary judgment.

Exhibit Q to Plaintiffs' Reply is a 104-page collection and summary of purported expert opinions and anonymous reports that Plaintiffs commissioned in August 2019 or earlier,[1] a month before Plaintiffs received the City's Cross-Motion for Summary Judgment. The opinions proffered in Exhibit Q do not meet the requirements of Fed.R.Civ.P. 26(a)(2), and the City has not had the opportunity to conduct expert discovery as permitted by Rule 26(a)(4). The crux of Plaintiffs' argument is that the more stringent air pollution standards of the Baltimore Clean Air Act ("BCAA") are not allowed, because federal and State laws do not mean what they say, and also are not needed because, as reflected in Exhibit Q: (1) asthma and other respiratory illnesses are caused by City residents' poverty, not Plaintiffs' air pollution (ECF 44-1 at 6); (2) as existing facilities, Plaintiffs can never be required to install new air pollution equipment, regardless of whether new, more effective technology becomes available (ECF 44 at 19); and (3) the BCAA is a disguised moratorium because it will force Plaintiffs to shut down, either temporarily to install

[1] *See, e.g.*, ECF 44-1 at 5 of 104, n.1,2.

new equipment, or permanently because equipment is purportedly unavailable or too expensive (ECF 35-1, at 7, 9, 20, 41, ECF 44, at 11, 35, 40).

Regarding the alleged shutdown, Plaintiffs ask the Court to consider and decide, without competent evidence: (1) whether the engineering required by the Ordinance would require Plaintiffs' facilities to temporarily shut down (ECF 44 at 4); (2) how long the facilities would need to shut down (*id.*); (3) the amount of fuel burned by trucks transporting waste in the event of a shutdown (*id.* at 33); and (4) the hypothetical and speculative "stresses on the regional solid waste management system" in the event of a shutdown. (*Id.* at 33.) Plaintiffs also ask the Court to decide, again without competent evidence, questions such as whether the Ordinance is founded on proper science (*id.* at 25), and "the availability of CEMS technology, performance specifications, test methods, or other validation procedures for specific compounds, including hydrofluoric acid, polycyclic aromatic hydrocarbons, or trace metals." (*Id.* at 16). This list of factual assertions is not exhaustive.[2]

The assertions and opinions offered by Plaintiffs and their experts cannot provide a basis for summary judgment at this procedural juncture, because they are disputed factual issues, not legal questions. The briefing schedule that the City agreed to did not contemplate replacing a normal fact and expert discovery schedule with trial by affidavit and anonymous expert reports. Questions concerning the necessity, benefits, availability, effectiveness, and cost of air pollution controls and monitoring equipment are factual questions and are not proper for summary judgment when there has been no fact or expert discovery.

[2] These factual assertions are made both in Plaintiffs' Motion for Partial Summary Judgment and in Plaintiffs' Opposition to the City's Motion. *See, e.g.*, Plaintiffs' MFSJ at 14 (WB facility must shut down), 30 (BCAA not based in science), 19 (availability of CEMS technology).

Plaintiffs cannot have it both ways. If this case presents only issues of law, as the City has consistently maintained, then none of these facts or expert opinions are material to its disposition. If the facts and opinions underpinning Plaintiffs' arguments are material, then Plaintiffs have failed to submit the necessary expert testimony to support their Motion or oppose the City's. Moreover, the City disputes all of the unsupported facts that Plaintiffs have submitted. At a minimum, if the Court were to consider these facts, additional discovery would be needed to fully investigate the relevant environmental science, to accurately analyze the engineering required by the BCAA to determine whether the ordinance would in fact require the facilities to shut down, and if so for how long, and to fully research the availability and feasibility of the CEMS technology for hydrofluoric acid, polycyclic aromatic hydrocarbons, or trace metals.

It is not necessary, however, for the Court to send the parties down this path. Although the positions taken by Plaintiffs are contradictory, the City is in full agreement with Plaintiffs' initial statement that these are "pure questions of law," requiring no factual analysis. The only analysis this Court must undertake is a clear reading of the Clean Air Act and Title 2 of the Maryland Environment Article. More specifically, the Court need only consider the savings clauses in these statutes, which specifically authorize the passage of more stringent local emissions standards such as the BCAA.

The preemption analysis is clear and simple: there is nothing in state or federal law that expressly preempts the City's Ordinance, and the only statutes relevant to the disposition of this case specifically state that they do not preempt more stringent local air pollution controls. Under this statutory framework, there is only one relevant, undisputed fact: that the BCAA enacts more stringent standards than those found in the CAA or State law. It is this simple analysis which

Plaintiffs seek to obscure with twelve pages of assertions, declarations, and discussions regarding complex engineering and the monitoring of polycyclic aromatic hydrocarbons. The City therefore asks that this Court grant its Motion for Partial Summary Judgment.

## II. DISPUTED FACTS

### A. Evidentiary Objections Under Rule 56

The City objected to Plaintiffs' proffered facts in precisely the manner contemplated by Fed.R.Civ.P. 56, which provides:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

The documents proffered by Plaintiffs are not "materials in the record," because at this early procedural juncture there is no record: there have been no interrogatory answers, admissions, stipulations, expert reports, or depositions. Likewise, Plaintiffs' bald factual assertions were not supported by "materials in the record" and have not been subjected to cross-examination.

Plaintiffs cite *Williams v. Silver Spring Volunteer Fire Dep't*, 86 F. Supp. 3d 398 (D. Md. 2015) for the proposition that the 2010 amendments to Rule 56 eliminated the requirement for authentication, but *Williams* makes no such holding:

> Thus, instead of "a clear, bright-line rule ('all documents must be authenticated')," Rule 56(c)(2) now prescribes a "multi-step process by which a proponent may submit evidence, subject to objection by the opponent and an opportunity for the proponent to either authenticate the document or propose a method to doing so at trial." . . . . Now, when the opposing party—here, the Fire Department, objects on admissibility

> grounds, "[t]he burden is on the proponent [,] [Williams][,] to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed.R.Civ.P. 56, Adv. Cmte. Notes, 2010 Amendments. Here, Williams has satisfied this burden by establishing the admissibility of the disputed exhibits.

*Williams*, 86 F.Supp.3d at 407. Plaintiffs have failed to establish that the documents submitted in support of their partial motion for summary judgment would be permissible if presented at trial, and therefore must not be considered at this stage.

**B. Disputed Facts**

As set forth above in Sections I and II.A, it would be premature for the Court to consider or decide the complex factual issues that Plaintiffs are trying in inject into this action. The early briefing schedule was intended to focus on purely legal questions and did not contemplate replacing discovery with affidavits, and Rule 56 allows the use of "materials in the record," not anonymous expert reports that are disclosed for the first time in a reply memorandum after three months of briefing. For those reasons, the City will respond only briefly to some of the factual assertions made in Plaintiffs' Reply.

*1. Wheelabrator's Expired Permit*

Wheelabrator's Part 70 permit expired on August 31, 2019, and the permit expressly provided that the "Permittee shall submit a completed application for renewal . . . at least 12 months before the expiration of the permit." (ECF 35-3, at 2, 8.) *See* 40 C.F.R. § 70.5; COMAR 26.11.03.02B(3)(b) (MDE may require a Part 70 permit renewal application to be submitted twelve months before an existing permit expires). Plaintiffs have proffered no evidence that Wheelabrator submitted a timely application to renew its Title 70 permit, pointing instead to an MDE website (ECF 44, at 22 n.10), which simply lists Wheelabrator's permit as having an expiration date of August 31, 2019. Instead, Plaintiffs offer the affidavit of Timothy Porter, a

33-year Wheelabrator employee who, from his job description as "Director of Air Quality Management," was the person responsible for ensuring that Wheelabrator submitted a timely and complete renewal application. (ECF 44-1 at 2.) Mr. Porter asserts that "Wheelabrator **in 2019** applied for a renewal of its Title V permit." (ECF 44-1, at 10) (emphasis added). In other words, the earliest that Wheelabrator submitted the renewal application was January 1, 2019, only eight months before the expiration date. Wheelabrator has admitted that it has actual knowledge that it did not submit a timely and complete renewal application.

The consequence of failing to submit a timely renewal application before a Title 70 permit expires is expressly set forth in federal and State law. "The expiration of a Part 70 permit for a source terminates the right of the owner or operator to operate the source unless a **timely** and complete renewal application has been submitted." COMAR 26.11.03.13.B(2) (emphasis added). Likewise, 42 U.S.C. § 7661b(d) provides that "if an applicant has submitted a **timely** and complete application for a permit required by this subchapter (including renewals), but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this chapter, unless the delay in final action was due to the failure of the applicant timely to submit information required or requested to process the application." (emphasis added). *See also,* U*.S. v. Murphy Oil USA, Inc.,* 143 F. Supp. 2d 1054, 1075 (W.D. Wis. 2001) (timely application for renewal of Part 70 permit extended the expiration date of its modified permit, pending the department's final determination whether to renew the permit); *Little v. Louisville Gas & Elec. Co.*, 2017 WL 603294, at *3 (W.D. Ky. Feb. 14, 2017) (applicant did not operate without Part 70 permit, because renewal application was timely and complete).

In a similar context, an expired water pollution discharge permit was held not to have been automatically extended, because the renewal application – although complete – was not

timely. *See, Louisiana Envtl. Action Network v. LWC Mgmt. Co. Inc.*, 619 F. Supp. 2d 258, 261 (W.D. La. 2007). In *Louisiana Envtl. Action Network*, a citizen's suit under the Clean Water Act, the Court granted summary judgment in favor of the plaintiff, holding that the defendant violated the Clean Water Act for 889 days by discharging pollutants without a permit:

> The Court finds that Defendants' renewal application did not extend the effectiveness of the Permit and, therefore, the Permit expired on June 30, 2004. An expired permit is extended if the permittee submits a timely and complete renewal application; these requirements are clearly stated in the conjunctive. *See* La. Admin. Code tit. 33.IX, § 2501(D)(2)-(E). Therefore, the LDEQ's determination that Defendants' application was "complete" does not constitute approval to submit an untimely renewal application. Defendants have offered no other evidence that they specifically requested or received approval from the LDEQ. Whether explicit approval is necessary is an issue of first impression; however, the Court concludes that it is required because only renewal applications submitted within the 180–day deadline are *automatically* extended.

*Id.* at 261 (emphasis in original).

Plaintiffs tout the thoroughness and supremacy of the federal and State regulatory and permitting system, but that system has allowed Wheelabrator to operate without a valid permit for 75 days and counting.

*2. Plaintiffs could meet the City's more stringent standards, but they <u>have chosen not to use the best available control technology.</u>*

In their August 23rd Motion for Partial Summary Judgment, Plaintiffs asserted that "[t]he federal and state framework already requires the 'best' and 'maximum achievable' controls (BACT and MACT), and the 'lowest achievable' emissions (LAER) for the Facilities." (ECF 35-1, at 41 of 44.) As the City proved, selective catalytic reduction is the best available control technology to reduce NOx pollution, but Wheelabrator and Curtis Bay are using non-catalytic reduction, which is the second-best NOx control technology. (ECF 39, at 9; ECF 39-3, at 29-31; ECF 39-9, at 26.) The City's evidence caused Plaintiffs to backpedal in their Reply, asserting that they are existing facilities, and only new facilities are subject to emission limits based on

BACT and LAER. (ECF 44 at 19.) On the issue of whether they are using Best Available Control Technology and achieving the Lowest Achievable Emissions Reductions, Plaintiffs have taken contradictory positions in the space of two months.

For other pollutants, even without installing new technology, Wheelabrator and Curtis Bay have asserted that, at least some of the time, they are already meeting or exceeding at least some of the BCAA's standards. (ECF 35-3 at 72-73; ECF 35-7 at 31.)

None of that is legally material, because the City is legally entitled to enact more stringent standards, even if that means requiring existing facilities to implement control technology that federal standards only require for new facilities.

*3. The Palm Beach Incinerator demonstrates that the City's more stringent standards can be met using available technology.*

The City proffered evidence that a trash incinerator in Palm Beach, Florida is able to meet all of the City's more stringent emissions standards with existing technology (ECF 39-1, at 13). In response, as described above in Section II.B.2, Plaintiffs abandoned their claim that they are using the best available control technology. Plaintiffs also asserted that the Palm Beach test data were only a "snapshot of emissions at one point in time" (ECF 44, at 16 of 46), when in fact, the Palm Beach test data reflected a continuous, 30-day acceptance test. (ECF 39-1, at 13.) Wheelabrator's permit, in contrast, is actually based on "snapshot" stack tests that Plaintiffs deride as the product of an incompetent regulatory authority. (ECF 35-3 at 66 of 89.) The City agrees with Plaintiffs that "snapshot" testing is inadequate, which is why the BCAA requires continuous emissions monitoring.

*4. Continuous Emissions Monitoring Systems as defined in the BCAA are available.*

Plaintiffs assert that CEMS are not available, but they continue to ignore the flexible provisions of the BCAA on this issue. The BCAA provides that "continuous" monitoring

effectively means sampling and analyzing emissions at "frequent intervals," once per minute or hour, or once per month for dioxins. *See* Balt. City Code, Health § 8-111(d). Plaintiffs can meet those requirements with their existing sampling methods; they merely need to do it more frequently than the annual "snapshot" samples that they are currently required to collect and analyze. (ECF 35-3 at .6-46.)

## III. ARGUMENT

A preemption analysis in this case requires the Court to look no further than the plain language of the relevant statutes. The federal and state air pollution statutes expressly allow political subdivisions to enact more stringent emissions standards, and there is nothing in Maryland's solid waste management statute that prohibits a political subdivision from enacting more stringent air pollution emissions standards.

### A. The CAA Broadly Allows More Stringent Local Emissions Standards

Plaintiffs repeatedly make the argument that a savings clause does not preclude a federal preemption analysis, or "displace the application of conflict preemption principles." (ECF 44 at 2, 18, 35.) The City agrees. What Plaintiffs have failed to articulate, however, is how and why this analysis does not begin and end with a reading of 42 U.S.C § 7416, which 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. *Id.* This short and simple analysis is exactly what occurred in *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, where the Fourth Circuit, in one sentence, disposed of the central issue in this case, finding that "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." 615 F.3d 291, 297 (4th Cir. 2010). The City's position is not that § 7416 displaces a preemption analysis. The City's position is this analysis is uncomplicated: the BCAA cannot conflict with the CAA because the CAA explicitly authorizes local passage of more stringent air pollution measures.[3]

Plaintiffs next attempt to rewrite the CAA such that the statute, while explicitly allowing more stringent local air control measures, simultaneously prohibits the local imposition of "new source" standards on existing plants. Plaintiffs fail to point to the Section in the CAA that includes this prohibition, because none exists. The CAA states that "**nothing in this chapter** shall preclude or deny the right of any State or political subdivision" to "adopt or enforce" more stringent air control measures. 42 U.S.C. § 7416 (emphasis added). The term "nothing in this chapter" makes it abundantly clear that the new facility vs. existing facility distinction that exists in Sections 111/129 of the CAA does not preclude or deny the right of a locality to adopt more stringent measures, up to and including requiring facilities to use modern technology to reduce the emission of harmful pollutants. Plaintiffs' argument is directly contrary to the express terms of the CAA: by its own plain language **nothing** in the statute prohibits the City from adopting emissions standards, so long as they are more stringent.

The only case that Plaintiffs cite in this respect is *U.S. v. Westvaco Corp,* which strays even further afield than the majority of cases cited by Plaintiffs, in that *Westvaco* is not a preemption case and includes no preemption analysis. 675 F.Supp.2d 524 (D. Md. 2009). Nor

[3] The City responds in more detail to Plaintiffs' federal preemption arguments in pages 7-12 of its Reply in support of its Motion to Dismiss. In sum, none of the cases cited by Plaintiffs involve the local adoption of more stringent air pollution standards, most do not involve the CAA, and none hold that more stringent local standards conflict with the CAA. The City, in contrast, has cited *Cooper* and *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989), both of which expressly state that more stringent local measures are not preempted by the CAA.

does *Westvaco* involve the local adoption of a more stringent air control measure. The *Westvaco* court instead considered whether Westvaco, a pulp and paper facility, was subject to the CAA's "best available control technology" obligations by virtue of modifications to two power boilers. *Id.* at 524. Plaintiffs cite *Westvaco* for the proposition that "existing facilities have vested rights that are constitutionally protected." (ECF 44 at 12.) Yet *Westvaco* includes no discussion or holding regarding "vested rights" or "constitutional protections." Instead, the opinion finds the opposite: that "the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards . . ." *Westvaco,* 675 F.Supp.2d at 527. As such, nothing in *Westvaco* supports the argument that Congress intended the CAA to prohibit localities from adopting more stringent standards that would require the use of modern technology to lower emissions.

**B. Maryland Law Allows Local Regulation of Air Emissions**

The State-law preemption analysis is as clear and simple as the Federal analysis, for the same reasons. As discussed extensively in earlier briefing, § 2-104 of Title 2 the Environment Article 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 emissions standards or ambient air quality standards." Md. Code Ann., Envir. § 2-104. The only "limitation" in § 2-104 is found in § 2-104(a)(2), which prohibits the adoption of less stringent standards. Section 2-104(b) goes on to state that a subdivision, at its discretion, "may ask" the Department to adopt more restrictive standards. *Id.* Under this plain language, the only "limitation" found in § 2-104 is the prohibition on local adoption of less stringent measures. Plaintiffs once again attempt to transform the discretionary "may ask" in § 2-104(b) into a "limitation," a reading that defies common sense and the plain text of the statute.

If the Maryland legislature intended to impose a blanket prohibition on the adoption of local air control measures, it would not have stated the **exact opposite**: that its intent was to "not limit the power of a local subdivision to adopt ordinances . . . that set emission standards." *Id.* This basic, common sense interpretation is consistent with every secondary source and legal opinion that has considered this question.[4] In contrast, Plaintiffs have no legal authority to support their interpretation, other than to point to sections of Title 2 which detail the scope of State authority in this area. The City does not dispute that the State has the ability to control air emissions. It is just as clear, however, that § 2-104 grants localities a similar authority, so long as more stringent standards are adopted.

Finally, in regards to Plaintiffs' operating permits, Plaintiffs once again mischaracterize the City's position, stating that the City believes that § 2-104 "somehow renders a conflict preemption analysis moot." (ECF 44 at 28.) Section 2-104 does not render the preemption analysis moot. Section 2-104 makes the preemption analysis simple. Title 2 specifically states

[4] The Maryland Law Encyclopedia states that: **"[t]he 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 (emphasis added).

In addition, the only Maryland case considering this question found that "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)." *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)(emphasis added).

that it does not prohibit the adoption of more stringent local ordinances. As such, a more stringent local ordinance cannot conflict with Title 2. It is not an accident that the City, as Plaintiffs note, devoted "two sentences" to this issue. *Id.* It is an uncomplicated question with an uncomplicated answer. All of the pages of briefing, facts, and expert opinions put forth by Plaintiffs cannot obscure this simple truth: the BCAA does not conflict with Title 2.

**C. Maryland Solid Waste Laws do not Preempt an Air Emissions Ordinance**

Maryland solid waste laws cannot preempt the BCAA because the BCAA does not regulate solid waste. The BCAA regulates air emissions. By its express terms, the BCAA does not seek to shut down Plaintiffs' incinerators or change the amount of waste the incinerators process. The BCAA is confined only to air emissions. A plain reading of the ordinance demonstrates that the City's intent was to keep its current trash disposal framework and solid waste management plan ("SWMP") intact, while limiting the harmful pollutants emitted by Plaintiffs. As the BCAA is confined to air emissions, the analysis is confined to Title 2 of the Environment Article, which does not prohibit such measures.

Maryland courts have considered exactly this incidence, where a locality regulates a solid waste entity in the interest of local health and safety, in *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 39, 994 A.2d 842, 864 (2010). The court there considered local regulation of a landfill which was subject to the County's solid waste management plan. The court concluded that the regulation "was not a determination that the site was inconsistent with the Harford County solid waste management plan." *Id.* at 865. Instead, the court found that the County was acting purely out of concern for local health and safety, such as "the impact of the use on neighboring properties due to emissions from the site" and "danger to children," among other reasons. *Id.* For this reason, the court determined the local action valid. As in *Harford*

*County*, the BCAA was not a determination that the facilities are inconsistent with the City's waste management plan, and the BCAA does not alter that solid waste management plan. The City is simply acting to preserve the health and safety of its residents by ensuring that the facilities minimize the amount of pollution they emit.

As Plaintiffs cannot ignore the fact that *Harford County* allows localities to regulate solid waste entities for the benefit of public health, they instead argue that the ordinance is impermissible because it has not formalistically been labeled a zoning measure. It is the intent and effect of the ordinance, however, that determines its validity, and in this respect the BCAA falls directly into the reservation of local authority recognized in *Harford County*. And just as important, the City here is acting in a space—local regulation of air emissions—specifically reserved for it by the Maryland legislature in Title 2 of the Environment Article. Plaintiffs have pointed to no authority stating that solid waste laws supersede this statutory reservation of local authority.

Plaintiffs seek to void the BCAA in its entirety by asserting that it imposes a total ban or moratorium, but the plain language of the BCAA shows that it is not intended to, and does not in fact, impose a total ban or moratorium on large incinerators. If the Court looks beyond the plain language of the BCAA, the legislative history of the BCAA indicates that the City Council was aware that other incinerators are capable of meeting the BCAA's more stringent standards. If Plaintiffs shut down rather than implementing such technology, that choice does not mean that the BCAA imposed a moratorium. Indeed, even without installing new technology, Wheelabrator and Curtis Bay have asserted that, at least some of the time, they are already meeting or exceeding at least some of the BCAA's standards. (ECF 35-3 at 72-73; ECF 35-7 at 31.) Even if the Court were to conclude that one or both of the Plaintiffs could not comply with

a specific emissions limit or monitoring requirement in the BCAA, and that the inability to comply rendered the requirement invalid as to that Plaintiff, that would not render the entire BCAA invalid. *See* Balt City Code, Health § 8-126 ("All provisions of this Part II are severable.").

## IV. CONCLUSION

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

Respectfully submitted,

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