

Solid Waste Incineration: U.S. District Court Addresses Challenge to Baltimore Ordinance



Walter Wright, Jr.

wwright@mwlaw.com

(501) 688.8839

04/06/2020

Co-Author: Austin Reed

The United States District Court for the District of Maryland (“Court”) addressed in a March 27th opinion a challenge to Baltimore’s regulation of solid waste incineration facilities in the city. See *Wheelabrator Baltimore, L.P., v. Mayor and City Council of Baltimore*, No. GLR-19-1264, 2020 WL 1491409 (D. Md. Mar. 27, 2020).

The bases for the challenge included alleged causes of action such as preemption and equal protection.

The initial suit was filed after the Baltimore City Council passed Ordinance 18-0306.

The Ordinance is known as the Baltimore Clean Air Act (“BCAA” or the “Ordinance”). The Ordinance limits permissible emissions of certain pollutants, requires Continuous Emissions Monitoring Systems (“CEMS”) for certain pollutants, mandates that CEMS must be continuously active at all times a facility is operational, imposes penalties for lapses in CEMS exceeding thirty minutes, and establishes criminal penalties for violations.

Two solid waste incineration facilities located in Baltimore—Wheelabrator and Curtis Bay—along with two non-profit trade associations and a trash removal company (collectively “Plaintiffs”) sued the City of Baltimore (the “City”) alleging federal preemption, state preemption, ultra vires, violation of Article XI-A of the Maryland Constitution, violations of substantive due process and equal protection under 42 U.S.C. § 1983, and violations of Articles 19 and 24 of the Maryland Declaration of Rights.

The City filed a motion to dismiss. The Plaintiffs filed a motion for summary judgment on their preemption claims, and the City filed a cross-motion for summary judgment.

The Court first addressed the summary judgment motions on preemption.

The Plaintiffs argued that the BCAA is conflict preempted by Maryland law. Maryland law was held to expressly authorize solid waste incinerators to operate in a manner prohibited by the BCAA.

Maryland’s Clean Air Act Title V permitting system allows facilities to emit certain levels of nitrogen oxides, sulfur dioxides, and mercury. The Ordinance sets much more stringent caps on those pollutants. It also requires CEMS for pollutants that are not required to be monitored under Maryland’s Title V permitting system. Further, the Ordinance imposes sanctions for monitoring gaps of more than 30 minutes. Maryland law provides gaps for certain repairs, checks, and adjustments to the monitoring systems.

The Ordinance's strict liability penalties made certain conduct unlawful despite the fact that it was allowed under state law.

The Court agreed with the Plaintiffs' contentions. It held that "the Ordinance is conflict preempted because it virtually invalidates the facilities' state-issued Title V permits." Accordingly, the Court granted the Plaintiffs' motion for summary judgment on the preemption claims.

The Court then addressed the City's motion to dismiss.

As to the ultra vires and violation of Article XI-A of the Maryland Constitution claims, the Plaintiffs' argument was that the BCAA impermissibly regulates conduct outside of Baltimore. However, the text of the BCAA made clear that it applies only to solid waste incinerators within the city. Thus, the Court dismissed those claims.

As to the equal protection claims, the City argued that the Plaintiffs "failed to overcome the presumption that the BCAA is rational." The BCAA did not involve a fundamental right, so it was subject only to rational basis review. The Court examined whether the Plaintiffs had negated every conceivable basis for the BCAA. It concluded that they had failed to do so. Accordingly, the Plaintiffs equal protection claims were dismissed.

The Plaintiffs' substantive due process claims suffered the same fate. A substantive due process claim regarding the BCAA required that Plaintiffs show that the BCAA is "arbitrary and irrational" or "unjustified by an circumstance or governmental interest." The Plaintiffs could not do so, and their substantive due process claims were dismissed.

The Court also dismissed the Plaintiffs' Article 19 claim. Article 19 grants injured persons the right to seek judicial redress. According to the Court, the "Plaintiffs have failed to identify how the City has denied them the opportunity to seek judicial redress of a wrong."

The Court granted the Plaintiffs partial motion for summary judgment, denied the City's partial motion for summary judgment, and granted in part and denied in part the City's motion to dismiss.

A copy of the Opinion can be downloaded [here](#).