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August 9, 2016

Via Overnight Federal Express

Gregory Hilton, Clerk
Court of Special Appeals
Courts of Appeals Building
361 Rowe Boulevard, Second Floor
Annapolis, Maryland 21401-1699

Re: *Costco Wholesale Corporation v. Montgomery County, Maryland, et al.*, No. 02450, September Term, 2015, In the Court of Special Appeals of Maryland

Dear Mr. Hilton:

Enclosed please find fifteen (15) copies of the "Brief of Appellee Stop Costco Gas Coalition" and fifteen (15) copies of "Brief of Appellee Kensington Heights Civic Association" that I am transmitting for filing in the above-referenced appeal. I also enclose two (2) original Certificate of Service for each of the aforesaid briefs.

Also, enclosed are copies of the front cover sheets of each Brief. Please date stamp those copies and return them in the enclosed, self-addressed, stamped envelope.

Your cooperation in this matter is sincerely appreciated.

Sincerely,

William J. Chen, Jr.

WJC:mml
Enclosures
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Patricia A. Harris, Esq.
Michael J. Goecke, Esq.
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IN THE

Court of Special Appeals of Maryland

SEPTEMBER TERM, 2015

No. 02450

COSTCO WHOLESALE CORPORATION.,

Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,

Appellees.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2016, two (2) copies of the "Brief of Appellee Stop Costco Gas Coalition" were emailed and mailed first class, postage prepaid, to each of the following:

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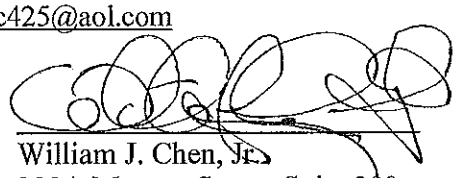

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IN THE

Court of Special Appeals of Maryland

SEPTEMBER TERM, 2015

No. 02450

COSTCO WHOLESALE CORPORATION.,

Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,

Appellees.

APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
(Gary E. Bair, Judge)

BRIEF OF APPELLEE STOP COSTCO GAS COALITION

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The Stop Costco Gas Coalition (the "Coalition") files its brief to address a limited number of issues; it adopts and incorporates the Briefs of Montgomery County and Kensington Heights Civic Association ("KHCA") on all other matters, including the Statement of the Case, Questions Presented, and Standard of Review.

INTRODUCTION

The Stop Costco Gas Coalition has consistently opposed the proposed 16 pump gas station based on its concern that adverse health effects would result from the proposed location 118 feet from residences, 875 feet from the County's school for medically fragile, developmentally delayed children, and 375 feet from a recreational area. The operational characteristics of this gas station are such that it will increase traffic congestion and create excessive vehicular idling in close proximity to those sites. That congestion and idling would produce airborne pollutants creating a serious adverse risk to the health of nearby neighborhood residents, visitors, and workers at the Westfield Wheaton Mall (the "Mall")

Costco, on the other hand, claimed that its modeling showed that emissions from the station would not exceed the levels set in the National Ambient Air Quality Standards ("NAAQS"). It argued in its closing briefs that the only "appropriate" standard for the Hearing Examiner to choose to apply would be the NAAQS. Costco's air quality emissions expert, Mr. Sullivan, repeatedly asserted that he needed an objective standard against which to measure the emissions he calculated and claimed that it would be "unfair" or "arbitrary" if such a standard were not delineated for him. Costco "urged" the Hearing Examiner to adopt the NAAQS as that applicable standard and argued that, if the

NAAQS were met, it had proven an absence of health effects because a) the NAAQS were designed to have an "adequate margin of safety," and b) its health expert, Dr. Kenneth Chase, had independently analyzed when health effects would occur and had concluded that exposures even above the NAAQS were still safe.

The Hearing Examiner rejected Costco's arguments, based on his review of the Opposition's evidence about the proper reading of the NAAQS as well as the additional information about health effects that the Opposition supplied that was not considered in setting the NAAQS. Although the Hearing Examiner treated the NAAQS as a valid tool, he found it was not the only relevant factor to be considered in applying the lens of Montgomery County's special exception standards to gas stations. (E67-68, E168).

On appeal, Costco now argues (Brief, pp. 12-24) that the Hearing Examiner and the Board had *no* discretion to consider any health-based evidence because, assertedly, Maryland has adopted the NAAQS as the only relevant standard for health issues related to gas stations and has preempted the County from following the mandates of its Special Exception ordinance, which require that it make its own independent judgment.

However, as the Circuit Court found, it was "pellucid" (E509) that the preemption argument was not raised explicitly below, nor was it raised by implication. As such, it cannot be considered now. While it is clear that Costco asserted the County *should* rely on the NAAQS, the difference between that argument and its current assertion that state law requires that the County *shall* look to *only* the NAAQS, is, in one sense, only a matter of a few letters, but that small change makes a dramatic legal difference. As Mark Twain

once said, "The difference between the *almost right* word and the *right* word is really a large matter, 'tis the difference between the lightning bug and the lightning." Costco pretends that it argued the lightning of preemption below, but, in fact, it asserted only the lightning bug of abuse of discretion. This brief will begin with the preemption issue and will then briefly delineate the evidence on health effects that the County found persuasive and that this Court may rely on in denying Costco's appeal.

STATEMENT OF FACTS

I. Evidence Presented Relating To Costco's Position On Use Of NAAQS

A. Use of the NAAQS Under The Clean Air Act

Initially, Costco's argument that the State's adoption of the NAAQS in its air quality regulations preempts any independent review of health issues in the County's zoning process misstates the nature and use of the NAAQS in general as well as its role in the request at issue here. The NAAQS are, as the name states, "ambient air" standards; *i.e.*, they are directed at setting limits on the overall levels of pollution in a given area. As stated in *Sierra Club v. EPA*, 705 F.3d 458, 460 (D.C. Cir. 2013),

> The Clean Air Act requires the EPA to set National Ambient Air Quality Standards ("NAAQS") for various harmful air pollutants at levels necessary to protect the public health and welfare. 42 U.S.C. §§ 7401, 7409. . . . States have primary responsibility for implementing the NAAQS, and must submit a state implementation plan ("SIP") specifying how the State will achieve and maintain compliance with the NAAQS. Id. § 7407(a).

After initially setting the overall standards, the Clean Air Act was amended seven years later to ensure that adding new emission sources would not unduly degrade existing air

quality that met the standards:

> In 1977, Congress amended the Act to add the Prevention of Significant Deterioration ("PSD") provisions "to protect the air quality . . . in areas where pollution was within the national ambient standards, while assuring economic growth consistent with such protection." *Environmental Defense Fund v. EPA*, 898 F.2d 183, 184 (D.C. Cir. 1990). When Congress enacted the PSD provisions, it established maximum allowable increases . . . also known as "increments" — for certain pollutants in § 163 of the Act. . . .
>
> The PSD provisions also establish requirements for preconstruction review and permitting of new or modified sources of air pollution, . . . which include acquiring a PSD permit for the facility. . . . [A]n owner or operator proposing to construct a new major emitting facility or modify an existing facility [must] demonstrate that emissions . . . will not cause or contribute to any violations of the increment more than once per year, or to any violation of the NAAQS ever.[1/]

Ibid. As Costco's emissions expert, Mr. Sullivan, made clear in the hearing (E675, E683-E684, E691-E694, E696, E815) the PSD process and its application of the NAAQS to a permitting process does not apply to every new emissions source but only to certain major sources (such as oil refineries, cement plants, or smelters). (*See* 40 CFR 52.21(b)(1)(I), Apx 3-5). Costco's brief agrees (p. 8, fn. 4) that gas stations are *not* one of those defined sources. The NAAQS, thus, do not, by their own terms, have any direct application to the County's permitting process for a gas station under a special exception request.

During the hearing, the Opposition (KHCA and the Coalition) attempted to discuss the PSD program in response to Costco's pointing to the NAAQS as a relevant standard for evaluating the station emissions, since the NAAQS are binding only within the federal permitting process. Costco, though, emphatically rejected that approach whenever it was

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[1/] *See also* excerpt describing PSD program from EPA website (Apx 1-2).

suggested. It presumably did so for two reasons: first, because even major new sources may not automatically pollute all the way up to the NAAQS level, but rather are limited to increasing levels by only an "increment" of the NAAQS; and second, because the permit process also always requires lengthy preconstruction monitoring at the site even for allegedly *de minimis* emissions. *Sierra Club*, 705 F.3d at 460, 467-68. Neither requirement was palatable to Costco; instead, it simply argued that it would be logical for the Hearing Examiner to adopt the NAAQS as a standard for gauging whether health effects would occur because the EPA had considered such effects in setting the NAAQS. (E612-E613, E616-E617, E669-E670).

The *Sierra Club* case dealt with a 2010 EPA rule that, *inter alia*, defined a "significant impact limit" below which new emissions would be considered *de minimis* and excludible from consideration. On appeal, however, that latter portion of the rule was vacated at *EPA*'s own request because it inadvertently took away the permitting agency's authority to "determine when it may be appropriate to conclude that even a *de minimis* impact will 'cause or contribute' to an air quality problem and to seek remedial action from the proposed new source." *Id.* at 463-64. Thus, the rule itself intended to grant states necessary flexibility to look at unusual situations when ruling on permits to which the NAAQS were directly applicable. Accordingly, if Maryland wanted the NAAQS to be applied to county zoning decisions on gas stations so as to automatically authorize approval of the stations without independent consideration of their health effects in a particular location, it would have to do more than just incorporate the NAAQS into state

law, because the NAAQS themselves do not impose such a rigid limit on the permitting agency's discretion.

B. Other Evidence on Maryland and Local Law

There were other times during the hearing when evidence was presented regarding the relationship among the NAAQS, State law, and the County zoning provisions. The Legislative Attorney's Memo analyzing ZTA 12-07 (which set a minimum buffer zone for "large" gas stations) (E1965, E1972) noted that the State issues permits for gas stations based solely on compliance with federal construction criteria for underground tanks and for vapor recovery and described the very limited scope of those permits:

> There is no absolute emission limit; the equipment required does not change with the size (amount of gas sold) at a station. Permits are issued without regard to land uses around the station or the proximity of those land uses. The [State] Administration requires evidence that the proposed station complies with local zoning requirements. In all other respects, zoning is beyond their jurisdiction. The issuance of a [State] permit does not mean that there are no health risks from gas vapors or idling cars.

(*See also* E683-E684, E691-E694). Those construction requirements, as Costco notes (Brief, p. 18), are set out in 40 C.F.R. Part 63 and implemented in Maryland through COMAR 26.11.13 and 26.11.24. Notably, those section numbers were not referenced during the hearing and are not in the Record Excerpts – nor are they even included in Costco's statutory appendix to its current brief. The only other State law provisions cited by Costco (Brief, p. 18) are COMAR 26.11.22 and COMAR 11.14.08 but they deal solely

with inspecting *vehicles* for compliance with required pollution control controls.[2/] While such controls will reduce vehicle emissions and improve air quality, they do not relate to licensing gas stations and nothing suggests that they are intended to affect, much less control, local zoning decisions on such licenses. Nor, again, were they cited to or included in the record of the hearing or Costco's appendix to its current brief.

The Opposition had also approached the State to determine its position on the station. A letter from the Maryland Department of the Environment was part of the record for ZTA 12-07. (E153, E1975). That letter noted that State regulations for gas stations were quite old and had not been updated despite the trend toward much larger stations. It also noted the numerous difficulties in modeling exposure and risk levels and advised that "if there is an opportunity to move a new source, particularly one that is related to mobile sources, away from heavily populated areas it would serve to minimize the potential for adding any risk to what already exists." The Memo further noted (E1975, fn. 22) that the state "believe[d] that a buffer around a gas station that expands with the size of a gas station is a good idea in general, [but] they are not in a position to defend any particular distance requirement."

Nowhere in that letter is there any assertion that the State had analyzed the issues regarding health effects from gasoline stations, much less that it had asserted exclusive

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[2/] For reference, abstracts for the regulations are included as Apx 14-21. The first, COMAR 26.11.13, appears to be irrelevant since it only applies to tanks of 40,000 gallons or more while Costco's tanks are only 30,000 gallons (E274). COMAR 26.11.24 deals with the vapor recovery systems used on pumps. COMAR 26.11.22 and COMAR 11.14.08 are the same regulation dealing with vehicle exhaust system.

control over siting of gas stations based on such concerns. Similarly, there is no evidence in the hearing record that the State ever asserted that it has laws or regulations preemptively controlling gas station placement on the basis of public health. (E691-E694). Indeed, Mr. Sullivan testified that he had sought to involve the State but that they "didn't want to get involved with that level of detail." (E694).

The Coalition also supported statewide legislation requiring minimum buffers for the siting of large gas stations. (E1086, E1088-E1089). While only mentioned briefly at the hearing, there is no record evidence that Costco asserted to either the legislature or the Hearing Examiner that those efforts were unnecessary because the State had already fully occupied the field of gas station siting requirements based on health concerns.

As noted by Judge Bair (E509), the word "preempt" never appears in the 9500 pages of hearing transcripts in this context. Nor does Costco use the terminology of "must," "shall," or "required" in arguing to the Hearing Examiner. Instead, it used words like "should" and "urge" and "appropriate" and "fair" – none of which are terms a lawyer uses when asserting that State law has already definitively resolved an issue. Indeed, the arguments on this subject were largely made not by Costco's lawyers but by its air quality expert who argued that it would be unfair and arbitrary for him to have to do his work without knowing what standard he must meet.[3/] (E61, E612-E613, E618, E669-E670).

[3/] While it might be necessary to know the standard in advance for a major source permit review, to judge what design and operational changes must be made to reduce actual emissions to allowed levels, Mr. Sullivan's approach here did not anticipate changing station operations. Instead, he wanted the standard set so he would know what changes

(continued...)

But, when asked point-blank if he believed it would be unacceptable for the fact finder to look beyond the NAAQS, Mr. Sullivan said that call was "up to the decision maker. I won't prejudge it." (E681). If Costco truly was arguing that State law legally preempted any independent analysis of the health issues, would it leave that argument to the *scientist* and not the *lawyer*? And why would Mr. Sullivan concede that the issue was up to the decision maker? Neither approach is compatible with Costco's current arguments.

Moreover, if Costco was making a purely legal argument, would it not have been made early and forcefully, through a motion *in limine*, for instance, to bar testimony on health effects? Instead, Costco had its health expert, Dr. Kenneth Chase, prepare two reports and spend more than a day on the witness stand explaining his own views about the health issues and opining that the NAAQS were too conservative. (E128-E135). To be sure, after the Hearing Examiner found that testimony largely unpersuasive, Costco has jettisoned any reliance thereon in order to promote its newly conceived preemption argument. But if Costco always believed that preemption applied, why did it eagerly join in litigating the very issue it now claims was already definitively determined by the State?

Similarly, Costco's brief to the Hearing Examiner contains *none* of the preemption cases to which it now devotes the majority of its argument. Instead it argued that, "In the absence of any objective local standards, it is appropriate . . . to measure the anticipated

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[3/](...continued)
he needed to make to his assumptions to ensure that his calculated values would meet that standard. Although that result-oriented approach may be allowed for efficiency purposes, it opens the work to skepticism. (E13-E15, E86-E91, E120, E612-E613, E618).

emissions from the Costco gas station against the only applicable and quantifiable standards, [the NAAQS]" and the Hearing Examiner "should" do so. It also affirmatively stated that "neither MDE nor EPA have jurisdiction over this matter." In its Reply Brief, Costco again asserts the NAAQS are the only "appropriate" standard, the Hearing Examiner "should" use them, and it would be "arbitrary and capricious" not to. (Apx 6-13). Yet, nowhere do those briefs assert that state law *requires* that he use those standards. Not surprisingly, then, there is no discussion of preemption in the Hearing Examiner's Report – yet Costco never contested that omission by a request for reconsideration or a timely request for oral argument before the Board of Appeals.

II. Evidence On Health Issues Arising From NO_2 And $PM_{2.5}$

A. Health Effects from NO_2 and $PM_{2.5}$ in General

Dr. Maria Jison and Dr. Patrick Breysse testified as experts on the adverse health effects of vehicle emission pollutants. That testimony and other evidence submitted by the Opposition with respect to those health effects is described by the Hearing Examiner in his report and is highlighted below. (E138-E51).

Exposure to either NO_2 or $PM_{2.5}$ creates adverse health effects, ranging from acute respiratory issues such as asthma attacks, to chronic injuries such as reduction in lung growth in children and low birth weight, to effects in the elderly such as premature mortality, respiratory illnesses such as chronic obstructive pulmonary disease, and cardiovascular diseases. Those diseases have serious consequences for the victims and their ability to function: 1 in 12 people and 1 in 11 children suffer from asthma and it

accounts for a quarter of all emergency room visits, resulting in 10 million outpatient visits and 479,000 hospitalizations each year. It is the third-ranking cause of hospital visits for children and the primary cause of chronic school absenteeism. (E139; E2299 (excerpts from 2008 EPA Integrated Science Assessment ("ISA") for 2010 NO_2 Rule); E1047-E1048; E2315 (excerpts from 2013 ISA for NO_2 Rule revisions), E1059-63).

B. Setting of National Ambient Air Quality Standards

The nature of those adverse health effects and their connections with NO_2 and $PM_{2.5}$ exposure are discussed in hundreds of peer-reviewed scientific studies over the last several decades. Those studies are reviewed periodically by the EPA as part of its duty under the Clean Air Act to set NAAQS for six pollutants (including NO_2 and $PM_{2.5}$) at levels expected to protect public health with a margin of safety. Although the definition of how a NAAQS is to be set has remained constant, the actual numerical standards have often been reduced as evidence of adverse health effects continues to emerge at ever-lower levels of exposure. (E62-E63). Indeed, while Costco was seeking permission for its gas station, the NAAQS for both PM 2.5 and NO_2 were tightened, based on scientific evidence showing harm occurring at levels below or not covered by prior standards. Initially, NO_2 was subject to an *annual* limit of 53 parts per billion ("ppb") or 100 micrograms per cubic meter ("$\mu g/m^3$"); on February 9, 2010, the EPA issued a new rule (the "NO_2 Rule") imposing a new *1-hour* limit of 100 ppb or 188 $\mu g/m^3$. (E2229-E2230). The EPA similarly issued a new rule on January 13, 2013 (the "$PM_{2.5}$ Rule"), reducing the annual limit for $PM_{2.5}$ from 15 $\mu g/m^3$ to 12 $\mu g/m^3$. (E2253, E2267-E2268).

The $PM_{2.5}$ Rule held that the new level was required since new evidence showing adverse health effects occurring *below* the level of the existing standard indicated that "the current suite of primary $PM_{2.5}$ standards is not sufficient, and thus not requisite, to protect public health with an adequate margin of safety, and that revision is needed to increase public health protection." (E2277-E2278). The $PM_{2.5}$ Rule also noted that in order for EPA to complete its review and analysis, it had to cut off review of new studies in mid-2009, even though the rule did not issue until three and a half years later. (E2261).

That review concluded (E2267) that:

> a *causal relationship* exists between both long and short-term exposures to $PM_{2.5}$ and premature mortality and cardiovascular effects and *a likely causal relationship* exists between long- and short-term $PM_{2.5}$ exposures and respiratory effects. Further, there is evidence *suggestive of a causal relationship* between long-term $PM_{2.5}$ exposures and other health effects, including developmental and reproductive effects (e.g., low birth weight, infant mortality) and carcinogenic, mutagenic, and genotoxic effects (e.g., lung cancer mortality). [Emphases added.]

The Rule noted that "it is unlikely that the estimated risks are over-stated, particularly for premature mortality related to long term $PM_{2.5}$ exposures; [indeed], the core risk estimates for this category of effects may well be biased low." (E2269 and fn. 35).

The NO_2 Rule also found a new standard was needed in that the annual limit, standing alone, was "not requisite to protect human health with an adequate margin of safety against adverse respiratory effects associated with short-term exposures." (E2238). The EPA concluded that the evidence available as of mid-2008 (the cut-off date for studies used in the NO_2 Rule (E2234)) indicated there was "*likely to be a causal*

relationship" for respiratory effects from short-term NO_2 exposures and that the evidence was *"suggestive of a causal relationship"* for adverse health effects from long-term exposure under the existing annual standard levels. (E2235-E2237). (Emphases added.)

The EPA is currently working on its next revision of the NO_2 standard. (E1059). In March 2014, a public hearing was held by the EPA's Clean Air Scientific Advisory Committee to review the Agency's November 2013 draft Integrated Science Assessment ("ISA"). The ISA reviewed dozens of studies that had been done since the mid-2008 cut-off date for the existing NO_2 Rule but, as of the end of the S-2863 hearing process, that report was still in draft form and could not be officially cited. (E2315). However, the materials used at that March 2014 hearing did not have that restriction and they noted that the draft evaluation now concluded that there was a *"causal relationship"* between short-term exposures and respiratory effects, and a "*likely to be causal relationship"* for cardiovascular effects and total mortality. For long-term exposures, the proposed findings would show a "*likely to be causal relationship* for respiratory effects," and evidence *"suggestive of a causal relationship* for cardiovascular effects; fertility, reproductive, and pregnancy effects; adverse birth outcomes; postnatal development; total mortality, and cancer." (E2519-E2521). (Emphases added).

Most studies the EPA reviews are epidemiological studies that start with existing population groups and analyze correlations between observed levels of pollution and health effects. Because the population size is large and effects can be measured over a long time period, such studies can often detect even subtle results of real-world

exposures. (E144, E1017-E1018). The EPA notes, though, that there are difficulties with such studies because the Clean Air Act requires it to set NAAQS on a "pollutant by pollutant" basis rather than by looking at the effect of the overall mix in "traffic-related pollution" ("TRP") that occurs in the real world. Because the pollutants tend to exist together, the EPA must try to parse out the degree to which a particular health effect derives from exposure to just one pollutant in order to set a level for exposure to that pollutant standing alone. (E2236 (NO_2); E2273-E2276, ($PM_{2.5}$)). Dr. Breysse, though, testified that mixed pollutants, such as the combination of $PM_{2.5}$ and NO_2 found in TRP, may have synergistic effects greater than those attributable to the pollutants standing alone. (E67, E1047-1048, E1018-E1019).

Drs. Jison and Breysse testified about their own review of some of the new studies emerging since the mid-2008 cut-off for the current NO_2 Rule as well as studies dealing with the effects of overall TRP. (E62-E63, E67). They also explained that, in using epidemiological studies to set standards, the EPA can, as a practical matter, only look at what occurs at existing exposure levels. If effects are seen down to the lowest observed level, it cannot be definitively determined if there is a real-world threshold *below* those existing levels at which effects will no longer be seen. (E997-E998, E1023-E1025). Thus, if the limit is 50 when existing levels range from 40 to 75, studies can examine whether there are straight-line correlations between exposures and effects down to that 40 level. If so, then a threshold for safe exposure must be below 40, but the EPA does not know how much lower it should be. If the EPA lowers the limit to 35 on the assumption

that this will provide a "margin of safety" below the observed effects level of 40, the range of actual exposures might then move down to 20 to 35 and studies can be done to see if there are still adverse health effects in that range. If so, then the EPA knows that the safe threshold has not yet been found and it must revise the NAAQS downward again as has occurred on numerous occasions.

Similarly, if a standard is set based on average, long-term exposures, that does not answer whether higher, short-term exposures might result in the same or different effects. Again, until studies are done of a particular fact pattern, no definitive conclusions can be reached about the form (*i.e.*, 1-hour, 24-hour, annual, etc.) or level of a standard. That was what occurred with respect to the NO_2 Rule, where the EPA originally set an annual exposure standard and later concluded it also needed a short-term standard.

C. New Studies and Studies on Mixed Pollutants

In short, the NAAQS at any given moment are a point on a dynamic continuum. The NAAQS review is supposed to take place every five years; in reality, due to their complexity and EPA's limited resources, the new standards have issued less frequently. (The NO_2 Rule, for instance, issued in 2010, but the current review is still ongoing and the new standard is not expected for some time.) Throughout this time frame, emission levels continue to change and new studies are published after the cut-off date, and are not considered in the new standard when it issues. Thus, the NAAQS can never reflect the most current knowledge. The Hearing Examiner concluded that it was his task to determine the most up-to-date facts relating to the application – not only with respect to

the ever-changing background levels Mr. Sullivan relied on but also as to the new data that emerged on health effects over the same period.[4/] In addition, he found it appropriate to look at the evidence about mixed pollutants that the EPA was not statutorily mandated to review, and assess how the totality of that evidence would affect his recommendation. (E62-E67, E 144, E163-E164).

In addition to those using the station, he also noted that persons using outdoor restaurant seating near the station would be exposed to the pollutants from the station. (E165). Moreover, shoppers in the Costco warehouse (directly adjacent to the station) could easily be there for an hour or more and would be breathing the same polluted air during that time. Mr. Sullivan conceded he had not analyzed indoor air quality in the warehouse but that it was reasonable to assume that ambient levels of NO_2 would be about the same inside the warehouse as outside. (E825, 845).

The Hearing Examiner's report noted the wide range of studies presented by the Opposition experts and lay witnesses and discussed some of them in more detail. (E138-E154). The discussion below will highlight a few studies that illustrate the evidence he relied upon in finding that Costco had failed to meet its burden to show a lack of adverse health effects, and, in particular, information that indicated that adverse effects could occur even where the observed pollutant levels were below the NAAQS.

[4/] As the KHCA brief notes (p. 21, fn.8), he agreed both sides should be allowed to present the most current evidence to ensure fundamental fairness in the Special Exception process.

Dr. Breysse testified about a number of such studies. (E1056-E1066, E2299-E2346). Exhibit 440 (E2299) is an extract from the EPA's 2008 analysis for the NO_2 Rule. It reviews a number of studies dealing with the NO_2's effect on lung growth among children in several communities in Southern California beginning in 1993. Those areas had 1-hour NO_2 exposures of 4.4 to 39 ppb (compared to the NAAQS limit of 100 ppb) and two-week $PM_{2.5}$ levels of about 6-28 $\mu g/m^3$.[5/] (E2299, E2302). The studies showed a clear pattern of decreased lung growth as pollutant levels increased across that range of exposures. But, the EPA noted (E2299-E2300, E2302-E2303) it could give only limited weight to such studies in setting an NO_2-only standard because the NO_2 effects were highly correlated with the $PM_{2.5}$ effects, and/or because the studies dealt with overall TRP rather than specific pollutants. (E148). Exhibit 441 (E2306) describes those studies in layperson's terms; it quotes lead researcher James Gauderman as stating that "We're seeing air pollution effects on all kids, not just sensitive subpopulations." An EPA official also indicated that the study "improved on earlier work by studying a mix of common pollutants rather than one . . . ." (E2307).

Exhibit 442 (E2309) was a follow-up study of those same Southern California areas that was published after the 2010 NO_2 Rule issued. That study correlated the onset of asthma with the varying levels of NO_2, $PM_{2.5}$, ozone, and total TRP levels in those

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[5/] There is no NAAQS for two-week $PM_{2.5}$ exposures. The 24-hour limit is currently 35 $\mu g/m^3$ and the annual standard limit is 12 $\mu g/m^3$; a two-week standard would fall somewhere between those two levels. Thus, most of these exposures would be below any extrapolation of the NAAQS for a two-week period.

communities. It found that the overall risk rose in a consistent pattern, more than doubling as annual NO_2 levels increased from 8.7-32.3 ppb (with a mean of only 20.4 ppb, which is well below the current annual NAAQS of 53 ppb), and as annual $PM_{2.5}$ levels rose from 6.3 to 23.7 $\mu g/m^{3,}$ compared to a current limit of 12 $\mu g/m^3$ and a prior level of 15 μg/m3. (E395, E398).

Exhibit 443/586 (E2486) was another new study, published in 2011, that analyzed the result of introducing E-ZPass in order to reduce idling and pollution at toll plazas. That change resulted in an estimated decrease of NO_2 levels of about 11 percent; shortly thereafter premature births within 2 kilometers of the toll plazas declined by 10.8 percent and babies with low birth weight declined by 11.8 percent. (E148, E2486-E2491).

Exhibit 447 (E2315) is an extract from the 2013 draft ISA report, including plots of study results showing increased odds of various adverse health outcomes from exposure to stated additional amounts of NO_2. (E2315, E2319, E2326-E2328). Both Drs. Jison and Breysse isolated a number of studies to examine from this report. Among them were Exhibit 448 (E149, E2331), which was a 2010 analysis of more than 90,000 emergency room visits that found that increases in the numbers of visits correlated with increases in NO_2 exposure (and other TRPs) on a given day. The range of pollution levels at which these effects were seen varied from 10 to 35 ppb of NO_2 for a 24-hour average exposure (*i.e.*, well below even the annual standard of 53 ppb, much less the 100 ppb for one-hour exposures) (E2335). The authors noted that the "associations were present at relatively low ambient concentrations, reinforcing the need for continued evaluation of

the [NAAQS] to ensure that the standards are sufficient to protect susceptible individuals." (E149, E2339). This study is specifically discussed in the EPA draft analysis as evidence that no threshold for adverse effects has been shown to exist as far down as the "relatively low" levels analyzed in the study. (E2325-E2326).

Exhibit 449 (E2341), published in July 2012, is the newest in a series of studies that has followed and measured the health of the same participants since 1974. This study found linear dose-response patterns for $PM_{2.5}$ effects and overall mortality levels during the entire time period covered by the series – even as pollution levels dropped from a starting point of between 12 and 40 $\mu g/m^3$ to final levels of between 8 and 12 $\mu g/m^3$ (*i.e.*, at or below the current NAAQS of 12 $\mu g/m^3$). (E149, E1064-E1066, E2343-E2344). The study found that the differences in the most recent *1-year* exposure levels of the test subjects (*i.e.*, at current levels that are at or below the NAAQS) gave the best statistical fit for mortality levels. (E149, E2345). This indicated that "health improvements can be expected almost immediately after a reduction in pollution" and "further public policy efforts that reduce fine particulate matter air pollution are likely to have continuing public health benefits." (E2345, E2346).

Finally, Exhibit 597 (E151, E2509), published in December 2013, is a simple, yet significant study, undertaken to consider if "contemporary ambient [pollution] levels that are in compliance with today's more stringent EPA standards affect lung function in the general population." (E2510). The study looked at measures of lung function in generally *healthy* adults the day after a "Code Yellow" air quality pollution day – *i.e.,* a

day with "moderate" air pollution that does *not* exceed the NAAQS. The EPA notes that such Code Yellow days are expected to raise only "a moderate health concern for a very small number of people who are unusually sensitive to air pollution." (E2510, E2511).

This study found that at those levels – which are, by definition, *below* the NAAQS – several measures of average lung capacity diminished among the *general populace* compared to after a Code Green day (reflecting good air quality). (E2511). While the average effects were relatively small,[6/] their magnitude could vary from person to person and they could trigger consequences leading to hospitalization and mortality in susceptible persons. The effects were consistently seen over many years even while ambient air pollution levels were dropping considerably. (E2511-E2512). That finding is of significance in that, currently, close to half of the days in the Washington, D.C., metropolitan area during the summer are Code Yellow (E153, E965-E967); the addition of the gas station could push even more days into that range in the local area.

Costco presented little to contradict these studies, and what it did provide from Dr. Chase was not accepted by the Hearing Examiner. (E130-E135, E162-E163). In its current brief, Costco does not place any weight on Dr. Chase's evidence, failing even to cite his testimony. As a result, the Opposition's studies and the weight accorded them by the Hearing Examiner stand unrebutted.

[6/] The average reduction for NO_2 was about 30 ml of lung capacity, about 1% of overall capacity. (E2512, Table 3) That amount compares to the changes of between 63 and 81 ml reported in Exhibit 440 as being significant reductions, in studies that looked at pollution exposure of several *years*, as compared to a single day. (E2303).

III. Evidence Relating To Students At Stephen Knolls School

The evidence relating to health effects at levels well below the current NAAQS is of particular significance in view of the proposed location for the station – less than 875 feet from the Stephen Knolls School, the County's school for its medically fragile and developmentally delayed children with special needs in the down-County area. (E169). Stephen Knolls students attend from all over the down-County area for 10½ months per year from age 3 until 21; it is the only educational option for these children. The school has approximately 100 students and 75 staff members, including 10 nurses (eight of whom are private, full-time nurses assigned to a single child each). The staff must deal with children having seizures, needing oxygen, or requiring medical monitoring. Typical days frequently involve various medical emergencies. In a typical year, one or two children die due to their physical impairments. (E142, E154-E160).

As described in the Hearing Examiner's report cited above, one parent testified that her son was developmentally disabled but relatively healthy, yet still got pneumonia almost every year. Another parent testified that her daughter had numerous physical and mental disabilities but her favorite activity is using the outside playground. She is very susceptible, though, to respiratory effects that snowball into more serious illnesses; because of her disabilities, being forced to enter the hospital is profoundly confusing and disturbing for her. Thus, the danger of increased emissions from the station could bar her from what she loves most. It was also noted that one of the activities for the more advanced children are visits to the Mall to practice their educational and social skills.

Those visits bring them much closer to the proposed station location and its emissions and would require them to compete with the added traffic in the vicinity of the proposed station in order to access the Mall.

These parents' testimony emphasized that this is not just a "sensitive" population, but, as Dr. Jison testified, and the Hearing Examiner found, a "hypersensitive" population that could not be protected adequately by the broad national limits in the NAAQS. Rather, the Hearing Examiner found, this population had to be accommodated through the nuanced mechanism of a special exception analysis. (E65-E66, E142, E162, E165).

ARGUMENT

I. The Zoning Code Does Not Contain Or Adopt A Specific Definition Of "Obnoxious Fumes" or Adverse Health Effects; There Is No Requirement Under State Law That The County Must Utilize The NAAQS Levels.

As noted above, Costco continuously argued that the Hearing Examiner *should* define the term "obnoxious fumes" under the Zoning Ordinance by applying only the NAAQS, in general, and Costco's inaccurate reading of the NO_2 Rule, in particular. However, Costco *never* argued that the County was *required* by state law to adopt a particular standard or that it was *preempted* from applying anything but the NAAQS.

In its memorandum, though, Costco devotes its primary attack (taking up 11 of the 15 pages devoted to the emissions and health issues) to its claim (Brief, p. 15) that "Maryland's adoption of the NAAQS standards is preemptive and precludes the Board from denying the Special Exception based on fears about air quality that complies with

those health-based standards." That attack is without merit for three reasons: 1) because this claim was never raised below, it may not be raised now; 2) even if it had been timely raised, Maryland's adoption of the NAAQS in its state law does not have preemptive force with respect to zoning provisions relating to health effects from a proposed gas station; and 3) in any event, as shown in the KHCA Brief, the County correctly applied the NAAQS.

A. Costco Did Not Raise This Argument Below; It May Not Do So For the First Time on Appeal.

It is black-letter law that an appellant may not rely in its appeal on an argument that was not presented to the agency below for its review and consideration. *Brodie v. Motor Vehicle Admin.*, 367 Md. 1, 3-4, 785 A.2d 747, 748-49 (2001). A court ordinarily "may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency. Stated differently, a . . . court will review an adjudicatory agency decision solely on the grounds relied upon by the agency." *Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123, 771 A.2d 1051 (2001). *See also, United Parcel v. People's Counsel*, 336 Md. 569, 585-87, 650 A.2d 226 (1994) and *Mossburg v. Montgomery County*, 329 Md. 494, 507-08, 620 A.2d 886 (1993). This principle applies as much to arguments based on law as on facts. In *Schwartz v. Md. Dep't of Natural Res.*, 385 Md. 534, 556, 870 A.2d 168 (2005) the court noted that, under *Brodie*, it would be improper for an appellate court to take up even a dispositive issue of law if it was not argued below.

The goal is to ensure that the agency has a fair chance to hear and react to the argument before the applicant resorts to the courts. Thus, if the issue was raised timely and the agency had the ability to respond to the objection, the complaining party need not repeatedly make the same point (*Concerned Citizens v. Constellation-Potomac, LLC,* 122 Md. App. 700, 751, 716 A.2d 353 (1998)), or if the agency could respond to the same objection when raised by a different party (*Meadowridge Indus. Ctr. v. Howard County*, 109 Md. App. 410, 420-23, 675 A.2d 138 (1996)) that, too, may be enough. But, at a minimum, the objection must be raised with sufficient clarity for the agency to recognize and respond to the issue; failure to do so bars the objector from having the issue heard by the courts. *Cicala v. Disability Review Board*, 288 Md. 254, 418 A.2d 205 (1980) (where employee requested "medical reports" and was aware that he had not received required Medical Review Committee report, but did not object to absence of report or request reconsideration, issue was not preserved for appeal.)

There is no question that this is a new argument. While arguments about how the County *should* analyze the public health issues are certainly related to this contention, they are clearly distinguishable from an assertion that the County is legally *preempted* from independently making health-related judgments. Had such an argument actually been advanced below, surely the word "preemption" would have crept in *somewhere* in the record or in Costco's briefs – but it is singularly absent from them. Nor is that argument made using other words – the relevant cases on preemption are never cited; the statutory provisions Costco now relies on to show preemption are conspicuously absent;

and there was no evidence presented that the State has ever asserted that it controls this issue or that it opposes the County's actions. In short, there is none of the evidence or arguments one would expect if Costco truly had argued this issue from the beginning. .

Indeed, Costco only points to one moment during the *37 days* of hearings where it claims that it asserted that Maryland law was preemptive, *i.e.*, in a few sentences during its closing arguments on the very last day. Although Costco did assert there that the NAAQS had the "force of law," it is clear, when those words are read in the context of Costco's briefs and its other statements made throughout the case (cited above, pp. 8-10) that Costco is merely saying that, since the NAAQS standards have a legally binding effect on *some* issue (*i.e.*, the federal standard for permitting major sources) they are the best rule for the Hearing Examiner to *choose* to utilize. Those words, though, are mixed with others such as "Costco went, we believe, *above and beyond what it is required to do*, and held itself to federal law standards" and "the [zoning] code . . . provides no measuring tool. . . . And so *in the absence of the code providing it*, the EPA is the standard that *should* be the measuring tool," and "even if *you decide* that you're going to apply a more strict standard than what the EPA applies in issuing permits, [we are still below the NAAQS.]" (E1366-E1367) (Emphases added.)

All of those statements fall squarely within Costco's standard argument during the hearing – that the Hearing Examiner *should* decide that compliance with the NAAQS would be enough to meet Costco's burden on adverse health effects. None are based on an articulated claim that Maryland state law conclusively removes the health effects issue

from his analysis. Those few ambiguous sentences are plainly not enough to indicate to the Hearing Examiner that a novel issue had purportedly been introduced at that extraordinarily late stage of the proceedings. And, certainly he never analyzed any such issue in his report – yet Costco never sought reconsideration from the Hearing Examiner nor did it ask to argue that issue before the Board of Appeal. The facts are, accordingly, clearly akin to those in *Cicala*, where the Court agreed the issue was not timely raised.

B. State Law Requirements Relating to the Use of the NAAQS Do Not Have Preemptive Force.

Costco cites a number of cases (Brief, pp. 15-21) in support of its claim that the State's adoption of the NAAQS in its state law divests the County of the right to independently analyze the public health issues in its zoning process. None are apposite. In each cases cited: *East Star, LLC v. County Comm'r*, 203 Md. App. 477, 38 A.3d 524 (2012); *Talbot County v. Skipper*, 329 Md. 481, 620 A.2d 880 (1993); *Soaring Vista Props. v. Board of County Comm'r*, 356 Md. 660, 741 A.2d 1110 (1999); *Day's Cove Reclamation Co. v. Queen Anne's County*, 146 Md. App. 469, 807 A.2d 156 (2002); *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. Pshp.*, 112 Md. App. 218, 684 A.2d 888 (1996); *Perdue Farms v. Haddar*, 109 Md. App. 582, 675 A.2d 577 (1996), and *Altadis U.S.A., Inc. v. Prince George's County,* 431 Md. 307, 65 A.3d 118 (2013), the State was the primary regulatory authority in deciding whether a particular operation (surface mining in *East Star*; sewage sludge application in *Talbot, Soaring Vista*, and *Perdue Farms*; rubble landfill in *Day's Cove*; approval of solid waste management plans

including incineration in *New Pulaski*, or licensing of cigarette vending machines in *Altadis*) would be allowed. While the state process in the land use cases may have allowed limited local participation, the local regulations in each instance ran directly contrary to explicit aspects of the State process, by barring what State law specifically allowed or by attempting to override the State's authority over its own permitting process. Indeed, in several cases, there was direct evidence of State opposition. *See, e.,g., Haddar* (testimony by State), *New Pulaski* (letter of opposition by State), and *Day's Cove* and *Skipper* (legislation was rejected that would have authorized county's actions). And, in *Altadis*, in a very comprehensive set of state regulations, there was only a single, limited, provision allowing local law to operate.

The fact patterns in those cases and the degree of State legislative control is in marked contrast to that here. As noted above, Costco has not pointed to any specific regulatory provision in State law that actually conflicts with the Hearing Examiner's analysis here or that cannot be complied with while also adhering to the County's authority. Nor has it even purported to describe any detailed pattern of State control and legislative direction over filling station placement or operations based on health concerns that could create some form of implied preemption. The very limited degree of State control that exists: basically requiring all stations – no matter how large or small, no matter how close to sensitive uses, and no matter the method of operation – to install tanks that will not leak, is a far cry from the comprehensive state laws existing in the cases above.

Rather, it is akin to the "limited" regulatory approach existing in *Ad + Soil, Inc. v. County Commissioners of Queen Anne's County*, 307 Md. 307, 513 A.2d 893 (1986) that was found not to have a preemptive effect – as compared to the later, more detailed scheme that was analyzed in *Skipper*. *See also, Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 38-44, 994 A.2d 842 (2010), noting the complementary roles for State permitting and local zoning requirements and discussing the Express Powers Act, which safeguards the rights of local planning and zoning. *See also, Holiday Point Marina Partners v. Anne Arundel County.*, 349 Md. 190, 707 A.2d 829 (1998) (state limit on shellfish harvesting near marinas did not preempt county regulation establishing buffer zone between marinas and shellfish beds even though both dealt with possible pollution from marina). And, *cf. Wash. Gas Light Co. v. Prince George's Council,* 2012 U.S. Dist. LEXIS 31798 (D. Md. 3/9/12) (court rejected argument that federal law governing natural gas facilities preempted county provisions on where facility could be located).

Certainly, the use of zoning provisions and special exceptions to govern the placement of potentially problematic or harmful uses to protect public health and safety is a quintessential aspect of normal zoning law. Its presence in the Montgomery County Zoning Ordinance long predates the Clean Air Act. It has been exercised by counties on uncounted occasions without being met with the claim that it somehow inherently intrudes on State authority unless there is a comprehensive regulation of the field by the State. No such regulation exists here; hence there is no preemption, conflict or otherwise.

Costco's argument – that the sheer volume of State law dealing with air quality proves there is a conflict with a county zoning ordinance that considers air quality issues in siting a facility – suffers from the same fallacy stated in *Holiday Point,* 349 Md. at 213:

> Holiday Point's characterization of the relevant "field" of legislation, however, is overly broad. It is similar to an argument that, because there is so much state legislation pertaining to the environment, all local legislation pertaining to the environment is impliedly preempted.

As Costco itself stated numerous times, there is no State law imposing emission standards on gas stations, nor are there any provisions that attempt to regulate where stations should be located to avoid public health consequences. The one-size-fits-all construction requirements are plainly not designed to ensure that every station protects public health. And, equally significantly, the State has *never* claimed preemption; to the contrary, it has largely disclaimed any interest – or ability – to decide these issues.

II. The County's Zoning Process Does Not Violate A Proper Application Of The NAAQS.

The Coalition incorporates by reference the other legal arguments made by the County and KHCA. The Coalition would only note a few specific points that it wishes to emphasize. First, as stated above, the presence of the Stephen Knolls School– within less than 900 feet of a station of this magnitude of operations with the volume of idling cars that Costco *concedes* will be present – distinguishes this requested special exception from any other station proposed heretofore in the County or likely to be proposed in the future. The NAAQS are, as the name states, *national* standards, applicable to air quality across the entire country. It cannot reasonably be assumed – as Dr. Jison testified and the

Hearing Examiner agreed (E165) – that no broadly applicable standard could be drafted in such detail as to be intended to preempt the ability of a county zoning process to take into account unique circumstances at a particular location. The NAAQS, in fact, disclaim any intent of trying to protect *everyone* – but, as noted in the *Sierra Club* case, there is nothing that suggests they were intended to bar local agencies from providing an extra level of safety. It would take far stronger evidence than Costco has presented to prove that the United States or Maryland intended to preclude Montgomery County from using its available permitting tools to protect its – literally – most vulnerable residents.

Second, there is equally no suggestion in the NAAQS that their use in the federal permitting process was intended to serve as a straitjacket that would preclude a locality from using its own methods to assess health effects from facilities that are not covered by the NAAQS permitting program, including by looking at new information since the latest iteration of the NAAQS or by considering the effects of TRP generally. The NAAQS were created under a particular statutory scheme to serve particular statutory goals. They can provide useful information for the related – but wholly separate – process used by the County to serve its own goals, but they do not serve to pretermit the entire discussion.

III. There Is Substantial Record Evidence Supporting The Finding That Costco Did Not Meet Its Burden To Show An Absence Of Adverse Health Effects.

Once the claim that the Hearing Examiner's analysis was preempted under State law is rejected, it is clear beyond peradventure that substantial evidence supports the Hearing Examiner's finding that Costco had not met its burden on the issue of adverse

health effects. As discussed in the KHCA brief, Costco could not convincingly show that the emission levels would not exceed the maximum limits set out in the NAAQS. And, even if Costco could have shown that, the Hearing Examiner properly relied on several other factors: the analysis in the NO_2 Rule that found adverse health effects at area-wide levels below the NAAQS; the similar results in new studies on NO_2 and $PM_{2.5}$ issuing after the current NAAQS; and studies on the synergistic effects of mixed pollutants that the NAAQS excluded. All of those are valid bases to find that Costco had not proven its case merely by relying on the conflicting evidence of emission levels it produced. That is especially true for a station proposed to be located near a uniquely vulnerable population. The County plainly had discretion – under the very broad authority in its Zoning Ordinance – to act prophylactically.

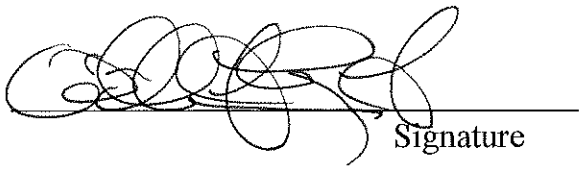
Finally, Costco's citation to *Exxon Mobil Corporation v Albright*, 433 Md. 303, 71 A.3d 30 (2013) is misplaced. That case dealt with whether civil plaintiffs had met their burden to show actual damages meriting compensation – a standard vastly different from that borne by Costco. Moreover, while those plaintiffs were required to show exposure in excess of the "action level" for the pollutant MTBE, that action level was set based on "aesthetic" concerns and *not* on health issues. To the contrary, the testimony suggested that health effects did not occur until levels 20,000 to 100,000 times higher than the action level. 433 Md. at 364-66, fnn. 60-62. By contrast here, the Opposition submitted studies showing health effects precisely in the range of the exposures to be seen here.

CONCLUSION

Accordingly, for the reasons stated here and in the briefs of the County and KHCA, the Coalition requests that this Court find that the Board of Appeals had substantial evidence to support its conclusions, that there were no errors of law, and that the petition for review of the Board's decision be denied.

CERTIFICATION OF WORD COUNT AND COMPLIANCE
WITH RULE 8-112

1. This brief contains 9011 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing and type size requirements stated in Rule 8-112.



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APPELLEE BRIEF APPENDIX

APPENDIX TABLE OF CONTENTS

EPA United States Environmental Protection Agency

New Source Review (NSR) Permitting

Prevention of Significant Deterioration Basic Information

What Does PSD Require?

Prevention of Significant Deterioration (PSD) applies to new major sources or major modifications at existing sources for pollutants where the area the source is located is in attainment or unclassifiable with the National Ambient Air Quality Standards (NAAQS). It requires the following:

1. installation of the "Best Available Control Technology" (BACT);
2. an air quality analysis;
3. an additional impacts analysis; and
4. public involvement.

What is PSD's Purpose?

PSD does not prevent sources from increasing emissions. Instead, PSD is designed to:

1. protect public health and welfare;
2. preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;
3. insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources; and
4. assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.

What is BACT?

BACT is an emissions limitation which is based on the maximum degree of control that can be achieve. It is a case-by-case decision that considers energy, environmental, and economic impact. BACT can be add-on control equipment or modification of the production processes or methods. This includes fuel cleaning or treatment and innovative fuel combustion techniques. BACT may be a design, equipment, work practice, or operational standard if imposition of an emissions standard is infeasible.

The RACT/BACT/LAER Clearinghouse (RBLC) database contains information on what has been required as BACT in air permits.

What is an Air Quality Analysis?

The main purpose of the air quality analysis is to demonstrate that new emissions emitted from a proposed major stationary source or major modification, in conjunction with other applicable emissions increases and decreases from existing sources, will not cause or contribute to a violation of any applicable NAAQS or PSD increment.

Generally, the analysis will involve (1) an assessment of existing air quality, which may include ambient monitoring data and air quality dispersion modeling results, and (2) predictions, using dispersion modeling, of ambient concentrations that will result from the applicant's proposed project and future growth associated with the project.

Class I areas are areas of special national or regional natural, scenic, recreational, or historic value for which the PSD regulations provide special protection. The Federal Land Manager (FLM), including the State or Indian governing body, where applicable, is responsible for defining specific Air Quality Related Values (AQRV's) for an area and for establishing the criteria to determine an adverse impact on the AQRV's. If a FLM determines that a source will adversely impact AQRV's in a Class I area, the FLM may recommend that the permitting agency deny issuance of the permit, even in cases where no applicable increments would be exceeded. However, the permitting authority makes the final decision to issue or deny the permit.

What is PSD Increment?

PSD increment is the amount of pollution an area is allowed to increase. PSD increments prevent the air quality in clean areas from deteriorating to the level set by the NAAQS. The NAAQS is a maximum allowable concentration "ceiling." A PSD increment, on the other hand, is the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant. The baseline concentration is defined for each pollutant and, in general, is the ambient concentration existing at the time that the first complete PSD permit application affecting the area is submitted. Significant deterioration is said to occur when the amount of new pollution would exceed the applicable PSD increment. It is important to note, however, that the air quality cannot deteriorate beyond the concentration allowed by the applicable NAAQS, even if not all of the PSD increment is consumed.

What Additional Impacts Analysis are Required?

The additional impacts analysis assesses the impacts of air, ground and water pollution on soils, vegetation, and visibility caused by any increase in emissions of any regulated pollutant from the source or modification under review, and from associated growth. Associated growth is industrial, commercial, and residential growth that will occur in the area due to the source.

40 CFR 52.21 - Prevention of significant deterioration of air quality.

eCFR (/cfr/text/40/52.21?qt-cfr_tabs=0#qt-cfr_tabs)

Authorities (U.S. Code) (/cfr/text/40/52.21?qt-cfr_tabs=1#qt-cfr_tabs)

Rulemaking (/cfr/text/40/52.21?qt-cfr_tabs=2#qt-cfr_tabs)

§ 52.21 Prevention of significant deterioration of air quality.

(a)

(1) ***Plan disapproval.*** The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD and FFF of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD and FFF of this part. Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) ***Applicability procedures.***

(i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements.

The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(*a*) through (*f*) of this section.

(a) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases - a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(b) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (i.e., the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(c) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(d) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(e) [Reserved]

(f) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(*c*) through (*d*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(v) For any major stationary source for a PAL for a regulated NSR pollutant, the major stationary source shall comply with the requirements under paragraph (aa) of this section.

(b) ***Definitions.*** For the purposes of this section:

(1)

(i) ***Major stationary source*** means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any regulated NSR pollutant: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants (with thermal dryers), primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants (which does not include ethanol production facilities that produce ethanol by natural fermentation included in NAICS codes 325193 or 312140), fossil-fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of a regulated NSR pollutant; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds or NOX shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY

PETITION OF COSTCO WHOLESALE CORPORATION
CASE NO. S-2863
OZAH NO. 13-12

APPLICANT'S CLOSING BRIEF

Applicant Costco Wholesale Corporation ("Costco") submits this brief in support of its petition for a special exception (the "Special Exception") to open and operate an automobile filing station at the Wheaton Westfield mall (the "Mall"). The Mall is owned and operated by Wheaton Plaza Regional Shopping Center, L.L.P., an affiliate of Westfield Corporation ("Westfield"). The proposed site of the gas station is a 36,800 square foot lease parcel in the southwest quadrant of the 75.21 acre Westfield Wheaton Mall Property (the "Site") (the Mall property is referred to as the "Mall parcel.")

I. INTRODUCTION

County Code, Section 59 (the "Zoning Ordinance") allows the gas station to be built at the proposed site so long as Costco establishes by a preponderance of the evidence that it has satisfied the relevant Zoning Ordinance requirements.[1]

A. The Costco gas station is appropriate for this location.

The Zoning Ordinance requires the Hearing Examiner to analyze an application for a special exception by looking at its inherent and non-inherent adverse effects. It is well known that land uses that require special exceptions -- by their very nature -- create some adverse

[1] Costco's compliance with the following Zoning Ordinance Sections is undisputed: 59-G-1.2.1(a)(1) and (7) and 59-G-2.06(b)(1),(2),(3),(4),(6),(7) and(8). Sections 59-G-2.06(b)(5)(9) and (10) are not applicable.

The Planning Board considered the fumes issue, and rejected Staff's conclusion and analysis, finding instead that the gas station will not create any non-inherent adverse effects:

> The majority of the Planning Board did not agree with the technical staff recommendation of denial, which was based on staff's conclusion that the Applicant did not provide enough evidence for staff to make the finding required by § 59-G-1.21(a)(8) that the proposed use will not have an adverse impact on the health of residents and workers in the area.

(Ex. 89 at 1) and agreed that

> satisfying the National Ambient Air Quality Standards (NAAQS), used by the Maryland Department of Environment and the Environmental Protection Agency regulating air quality in Maryland and the U.S., is sufficient to satisfy the findings of the special exception for the proposed gas station.

(Ex. 89 at 2).

2. The Hearing Examiner should apply the EPA's National Ambient Air Quality Standards.

The Zoning Ordinance does not identify what specific air quality levels -- or "fumes" -- are unacceptable, and neither Montgomery County nor the Maryland Department of Environment has any applicable quantifiable ambient air quality standards. Maryland, like all states, is free to adopt standards that are more stringent than the EPA standards, but it has *not* done so. In the absence of any objective local standards, it is appropriate (as the Planning Board did) to measure the anticipated emissions from the Costco gas station against the only applicable and quantifiable standards, *i.e.* the Environmental Protection Agency's National Ambient Air Quality Standards ("NAAQS").

The Clean Air Act requires the EPA to set NAAQS that protect the public health with an adequate margin of safety. (Tr. 6/17/14 at 188).[23] In addition, these standards are designed to

[23] The NAAQS are used to set acceptable air quality concentrations that protect public health and welfare with a reasonable margin of safety. Emission control standards for stationary and mobile sources are the means to ensure that the NAAQS are achieved and maintained. The NAAQS and emission controls are used to manage air quality from power plants, chemical manufacturing

protect even the most sensitive populations, such as those with asthma. (Tr. 6/17/13 at 188, 256). EPA reviews and updates the NAAQS every five years and the NAAQS process is strenuous and thorough, involving extensive input from the public, as well as the recommendations from stakeholders in environmental groups, industry, academia, and the Clean Air Scientific Advisory Committee ("CASAC"). The process allows EPA to establish standards based on recent and established scientific and medical literature.

The Clean Air Act also requires EPA to set the NAAQS so that they provide an "adequate margin of safety" to the general population. (*See* Ex. 424(c), the EPA's Final Rule on Carbon Monoxide, Federal Register Vol. 76, No. 169, Wednesday, August 31, 2011, at 54925). "The requirement that primary standards provide an adequate margin of safety was intended to address uncertainties associated with inconclusive scientific and technical information available at the time of standard setting. It was also intended to provide a reasonable degree of protection against hazards that research has not yet identified. *See Lead Industries Association v. EPA,* 647 F.2d 1130, 1154 (DC Cir. 1980) *cert. denied,* 449 U.S. 1042 (1980)." (Ex. 424(c) at 54295).

3. The gas station air quality impacts will be below the EPA NAAQS.

The Hearing Examiner also qualified Mr. Sullivan as an expert in meteorology, air quality and analysis, determining potential exposure to toxic chemicals and the monitoring of air quality and meteorology monitory. (Tr. 6/17/13 at 166). He and his company, Sullivan Environmental (collectively "Sullivan") performed extensive modeling and quality analysis at the proposed site. (Exs. 15(a); 86(f); 95(c); 125(a)(b); 174; 175; 189(b)(i)(ii); 196, 207(a); 249(c); 253(a)(b); 255; 274; 466; 473(a)(b)). Mr. Sullivan has nearly forty years' experience as an air quality meteorologist and has worked for both plaintiffs and defendants in environmental

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operations, iron and steel manufacturing, and many other industries that emit far more air pollutants than a gas station of any size.

6. Government Oversight.

The Opposition complains that Costco -- and in particular Sullivan --have failed to obtain governmental approval for their methodology, even though they well know that neither MDE nor EPA have jurisdiction over this matter. That is because the emissions from the gas station are not significant enough to require oversight at the state or federal level. Gas stations are regulated by technology-based requirements and are not based on dispersion modeling that require them to obtain air quality permits. In fact, the Opposition has tried repeatedly -- and unsuccessfully -- to have MDE and EPA participate in this process. The only result of these efforts were two letters signed by Angelo Bianca of MDE. Neither of those letters provide any basis to deny the Special Exception. (Exs. 90(b) and 372(a)).

7. High volume gasoline sales do not equate with significant levels of pollutants.

The volume of gas sold and the traffic levels associated with sales from a higher volume gas station do correlate to emissions, but the correlation is not a one-to-one ratio. Indeed, Mr. Sullivan testified about how Costco's use of state-of-the-art technology, such as the Arid Permeator, will significantly reduce the levels of emissions of this gas station's activities. In his slide show during direct testimony Slides 7 and 8 (on June 17, 2013), Mr. Sullivan compared emissions from the Costco gas station with historical emission levels from stations that sell much lower volumes of gasoline. (Tr. 6/17/13 at 197-201). He found that even if the Costco gas station sold 12 million gallons of gas, the resulting emissions would be comparable to 3 million gallons of sales in 2000 or 1.5 million gallons of sales in 1988. Contrary to Mr. Silverman's arguments, the projected emission levels from the Costco gas station are not unprecedented.

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY
PETITION OF COSTCO WHOLESALE CORPORATION
CASE NO. S-2863
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APPLICANT'S REPLY BRIEF

I. INTRODUCTION

Costco is seeking a special exception to build and operate a clean, safe, high-quality gas station to serve its members. Costco is a responsible operator, with an impeccable safety record, employing state-of-the-art technology. Costco's Tim Hurlocker testified that Costco has "safer gas stations than anybody in the U.S. and that has been our goal." (Tr. 5/23/13 at 126). Each day, over four thousand Costco shoppers visit the Mall property and become part of the general neighborhood. The gas station will accommodate their need for fuel by providing high quality gas at a low price. This is an undeniable benefit to Costco members, which include 92% of local businesses. Erich Brann testified that Costco "members are very loyal" and that they know Costco is "going to provide them with the highest quality product at the lowest possible price." (Tr. 4/26/13 at 84, 85). Costco's low prices may also benefit non-members by helping drive down prices at competing stations.

The special exception site for this gas station is highly compatible with the already existing uses in this thriving regional mall with 6000 parking spaces. The Mall is auto-dependent and surrounded by major arterials through which more than a hundred thousand cars pass each day. The site's new zoning designation is specifically designated to promote development along "auto-dominated corridors," and the Westfield Mall has public facilities to accommodate not only the gas station, but substantial additional development. The site is fully

at this particular site. In short, the Opposition's policy arguments fail to refute Costco's overwhelming evidence that the gas station will create *no* non-inherent adverse environmental effects.

VII. HEALTH ISSUES

A. The Hearing Examiner should measure potential health effects by the EPA NAAQS.

Section 59-G-1.21 (A) (8) requires the Hearing Examiner to determine that the proposed special exception "[w]ill not adversely affect the health, safety, security, morals, or general welfare of residents, visitors, or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone." Costco and its experts maintain that the NAAQS are the most appropriate standards to measure the adverse effects, if any, of the anticipated emissions from the proposed Costco gas station. The United States District Court for the District of Columbia analyzed the legislative history for the Clean Air Act and explained that "the goal of the air quality standards must be to ensure that the public is protected from 'adverse health effects.' " *See Lead Industries Association v. EPA,* 647 F.2d 1130, 1152 (DC Cir. 1980) *cert. denied,* 449 U.S. 1042 (1980) (citing S. Rep. No. 91-1196). "The Senate Report explains that the Administrator is to set standards which ensure that there is an *'absence of adverse effect.'* " *Id.* at 1153 (emphasis added). As a result, the EPA must not only account for known health effects, but must also "allow for an adequate margin of safety to protect against effects which have not yet been uncovered by research and effects whose medical significance is a matter of disagreement." *Id.* at 1154. By demonstrating compliance with the NAAQS, Costco has established that the proposed gas station will not adversely affect the health, safety or general welfare of the residents, visitors, or workers in the area.

The Opposition contends that the Hearing Examiner should apply a more restrictive standard than the NAAQS but does not specify what standard he should use, or how the Hearing Examiner would devise such a standard. While the Opposition's concerns about pollution may be sincere, they offer no viable standard by which to measure a non-inherent adverse effect. For example, Dr. Jison opines that she expects to see "some" adverse health effects caused by exposure to NO_2 that are below the EPA's 1-hour NAAQS, but concedes that she doesn't know when this will happen. "It's difficult to say what level . . . I can't say a specific level." (Tr. 2/25/14 at 67). As a last resort, the Opposition encourages the Hearing Examiner to "err on the side of caution" and simply recommend denial because "we don't know what we don't know." (Tr. 2/23/14 at 31).

B. It would be arbitrary and capricious to find a non-inherent adverse health effect for levels below the EPA NAAQS.

The Hearing Examiner repeatedly urged the Opposition to provide him with a viable, alternative standard that he could consider applying in this case, pointing out that it would be arbitrary and unfair to deny the special exception without finding that the gas station is likely to exceed any reliable air quality standard.

- "My concern is one I raised before, is how do I apply that information to this kind of situation, where they set a standard but there is evidence out there that there may be health effects below that standard? How do I apply that to this situation? (Tr. 1/10/14 at 237, 238).

- "We should not be in a position of creating our own standards to evaluate this. So we have to look at some objective source scientifically establishing this kind of standard. The logical place is the EPA standards. It is a little unfair to any applicant to have standards that are so loosey goosey that – they're not written by the EPA." (Tr. 1/10/14 at 244).

- "It's not as simple as just looking at the statue and saying well, we have to not allow it because there may be some health effects, and especially in this situation it seems to me, where the opposition is establishing that there is no bottom to this. So then there's no – if there's no bottom, there's no standard that you're

supplying to me that I can apply here. So I'm in a way, forced to the EPA standards, because you are telling me there is no gas station that can be allowed here because every gas station is going to create some pollution, right?" (Tr. 1/10/14 at 246).

- "How do I set a standard? You have not told me how to set the standard. Even taking into account site conditions and Stephen Knolls School, you still have not told me how to set the standard." (Tr. 2/25/14 at 28-30).

Although the Hearing Examiner repeatedly challenged the Opposition to address this fundamental problem, the Opposition never provided a credible or reasonable alternative standard to the EPA NAAQS. It would be arbitrary and capricious for the Hearing Examiner to invent and apply a new standard, especially when a federally mandated and well-vetted government sanctioned standard already exists. A standard that eliminates all risk is not and has never been the legal standard applicable to the special exception process.

The Opposition asks the Hearing Examiner to decide whether the EPA properly complied with federal law by setting NAAQS that protect the public health, including sensitive populations. This is neither necessary nor appropriate. As discussed above, the EPA is legally responsible to set NAAQS to protect the public health. In addition, neither Maryland nor Montgomery County has adopted stricter air quality standards, and the Opposition has not offered any other viable alternative. The EPA NAAQS are the only appropriate air quality standard to apply here.

The Hearing Examiner should also reject the Opposition's position that the EPA NAAQS do not adequately protect human health. Dr. Jison argues that there are peer-reviewed medical articles suggesting people may have adverse health effects even when exposed to levels of NO_2 that are below the EPA NAAQS. Dr. Jison's opinions are insufficient to invalidate the thorough rule-making process that led to the NAAQS, especially because she relies on many of the same materials that EPA relied on to set its standard. The EPA established the NAAQS based on the

26.11.13.00. Title 26 DEPARTMENT OF THE ENVIRONMENT Subtitle 11 AIR QUALITY **Chapter 13 Control of Gasoline and Volatile Organic Compound Storage and Handling** Authority: Environment Article,1-101, 1-404, 2-101?2-103, 2-301?2-303, 10-102, and 10-103, Annotated Code of Maryland

26.11.13.01. 01 Definitions.. A. In this chapter, the following terms have the meanings indicated.. B. Terms Defined.. 1) "Bulk gasoline plant" means a gasoline storage and distribution facility with a maximum daily throughput of 20,000 gallons (75,500 liters) or less which receives gasoline from bulk terminals, stores it in tanks, then dispenses the gasoline via trucks to local farms, businesses, and gasoline dispensing facilities.2) "Bulk gasoline terminal" means a gasoline

26.11.13.02. 02 Applicability and Exemptions.. A. A source which is subject to the provisions of this chapter is also subject to the provisions of any other chapter. However, when this chapter establishes an emission standard for a specific installation which differs from the general emission standard in COMAR 26.11.01?09, this chapter takes precedence.B. This chapter applies throughout the State. The NSPS requirements under 40 CFR Part 60, Subpart K (effective June 11, 1973)

26.11.13.03. 03 Large Storage Tanks.. A. Closed Top Tanks.. 1) Equipment Requirements. A person may not place or store gasoline or VOC having a TVP between 1.5 psia (10.3 kilonewton/square meter) and 11 psia (75.6 kilonewton/square meter) inclusive, in any closed top tank with a capacity of 40,000 gallons (151,400 liters) or greater unless the:a) Tank's gauging and sampling devices are gas tight except when in use; and. b) Tank is equipped with one of the following properly installed, operating

26.11.13.04. 04 Loading Operations.. A. Bulk Gasoline Terminals.. 1) Standards. The owner or operator of a bulk gasoline terminal shall:. a) Equip the loading system with a vapor control system designed to collect all vapors and control at least 90 percent of all vapors from the loading racks, and emissions from the loading rack may not exceed:i) 0.29 pound of VOC per 1,000 gallons (35 milligrams per liter) of gasoline or VOC loaded in Areas III and IV and Calvert, Cecil, Charles, and Freder

26.11.13.05. 05 Gasoline Leaks from Tank Trucks.. A. Equipment Standards. A person may not allow a gasoline tank truck to be filled or emptied unless the tank has been certified as capable of sustaining a pressure change of not more than 3 inches of water in 5 minutes when pressurized to a gauge pressure of 18 inches of water (4,479 kilonewtons/square meter) or evacuated to a gauge pressure of 6 inches of water (1,493 kilonewtons/square meter) during a test, according to the procedure referenced

26.11.13.06. 06 Plans for Compliance.. A person who is not in compliance with this chapter and owns or operates an installation located in Allegany, Caroline, Dorchester, Garrett, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Washington, Wicomico, or Worcester counties shall submit a Plan for Compliance for approval by the Department. The plan for compliance shall be

submitted not later than April 15, 1993, and include an expeditious schedule to achieve compliance not later than M

26.11.13.07. 07 Control of VOC Emissions from Portable Fuel Containers.. A. Definitions. In this regulation, the following terms have the meanings indicated:. 1) Distributor.. a) "Distributor" means a person to whom a portable fuel container or spout or both portable fuel container and spout is sold or supplied for the purpose of resale or distribution in commerce.b) "Distributor" does not include a manufacturer, retailer, or consumer.. 2) "Fuel" means all gasoline, gasoline-alcohol mix

26.11.13.08. 08 Control of VOC Emissions from Marine Vessel Loading.. A. Applicability.. 1) In Allegany, Caroline, Dorchester, Garrett, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Washington, Wicomico, or Worchester counties, the requirements in §B of this regulation apply to the transfer of VOCs from a stationary storage tank into a marine vessel if the total emissions from all marine vessel loading at the premises during a calendar year are equal to or2) In

26.11.13.9999. Administrative History Effective date: June 8, 1981 (8:9 Md. R. 800). Regulations .01B and .03B amended, .02C adopted, and .05F repealed effective August 16, 1983 (10:14 Md. R. 1262)Regulation .02C amended effective August 10, 1987 (14:14 Md. R. 1572). Regulation .04A amended effective August 10, 1987 (14:14 Md. R. 1572) ?. Chapter recodified from COMAR 10.18.13 to COMAR 26.11.13. Regulation .01B amended effective December 3, 1989 (16:21 Md. R. 2266) ?. Regulations .01?05 repeal

26.11.24.00. Title 26 DEPARTMENT OF THE ENVIRONMENT Subtitle 11 AIR QUALITY **Chapter 24 Vapor Recovery at Gasoline Dispensing Facilities** Authority: Environment Article, §1-101, 1-404, 2-101?2-103, 2-301?2-303, 10-102, and 10-103, Annotated Code of Maryland

26.11.24.01. 01 Definitions.. A. In this chapter, the following terms have the meanings indicated.. B. Terms Defined.. 1) "Approved Stage II vapor recovery system (approved system) means:. a) A properly installed Stage II vapor recovery system for which CARB issued an Executive Order certifying the system using procedures in effect in California before April 1, 2001; orb) A system approved by the Department that involves certification procedures comparable to or similar to the certification p

26.11.24.01-1. 01-1 Incorporation by Reference.. A. In this chapter, the following CARB approved test methods are incorporated by reference.. B. Test Methods Incorporated.. 1) Vapor Recovery Test Procedure TP-201.3 Determination of 2 Inch WC Static Pressure Performance of Vapor Recovery Systems of Dispensing Facilities, amended March 17, 1999.2) Vapor Recovery Test Procedure TP-201.5 Determination (By Volume Meter) of Air to Liquid Volume Ratio of Vapor Recovery Systems of Dispensing Facili

26.11.24.02. 02 Applicability, Exemptions, and Effective Date.. A. This chapter applies in Baltimore City and Anne Arundel, Baltimore, Calvert, Carroll, Cecil, Charles, Frederick, Harford, Howard, Montgomery, and Prince George's counties.B. A gasoline dispensing facility exempted under §C of this regulation is subject only to the record-keeping and reporting requirements of Regulation .07D of this chapter.C. The provisions of this chapter do not apply

26.11.24.03. 03 General Requirements.. A. New Gasoline Dispensing Facilities. An owner or operator of a new gasoline dispensing facility may not operate the gasoline dispensing facility unless it is equipped and operated with an approved system.A-1. Newly Constructed Gasoline Dispensing Facilities. Notwithstanding §A of this regulation, an owner or operator of a gasoline dispensing facility constructed on or after the effective date of this regulation may operate *the*

26.11.24.03-1. 03-1 Decommissioning of the Stage II Vapor Recovery System.. A. Notwithstanding Regulation .03A of this chapter, an owner or operator of a gasoline dispensing facility or system of gasoline dispensing facilities that installed approved Stage II vapor recovery systems:1) May decommission Stage II vapor recovery systems in accordance with §B of this regulation after October 1, 2016; or2) May decommission Stage II vapor recovery systems in

26.11.24.04. 04 Testing Requirements.. A. Testing Requirements for Stage II Stations. Except as provided in §E and F of this regulation, an owner or operator of a gasoline dispensing facility subject to this chapter which operates Stage II Vapor Recovery systems shall perform the following CARB-approved tests.1) A leak test in accordance with the Vapor Recovery Test Procedure TP-201.3 referenced in Regulation .01-1B(1) of this chapter;2) An air to liquid volume

26.11.24.05. 05 Inspection Requirements.. A. An operator subject to this chapter shall ensure that each approved system is inspected at least once each day of operation to verify that it is working properly.B. Except as provided in §C of this regulation, the Department shall consider an operator of a gasoline dispensing facility to be in violation of Regulation .03E of this chapter during any period of time that the facility is operated while there is defective equipment at the

26.11.24.05-1. 05-1 Inspections by a Certified Inspector.. A. Operator Requirements.. 1) A person that operates a gasoline dispensing facility or a gasoline storage tank with a vapor recovery system shall ensure that a certified inspector performs an inspection of each vapor recovery system.2) Each vapor recovery system shall be inspected by a certified inspector in accordance with the schedules set forth in COMAR 26.10.03.10.B. Inspection Requirements..

26.11.24.06. 06 Training Requirements for Operation and Maintenance of Approved Systems.. A. General. An operator shall ensure that:. 1) At least one employee at each facility subject to this regulation is trained in accordance with the requirements of §B of this regulation; and2) The trained employee assists in the training of each of the other employees at that facility who are involved in the operation or maintenance of the approved system.B. Approved Training Course

26.11.24.07. 07 Record-Keeping and Reporting Requirements.. A. An operator subject to this chapter shall create and maintain a record file at the facility.. B. The record file shall contain copies of all test reports, permits, violation notices, correspondence with the Department, equipment maintenance records, training records, and other information pertinent to the requirements of this chapter. Verification of training shall be maintained in the facility file.

26.11.24.08. 08 Instructional Signs.. A. An operator who is subject to this chapter shall place instructional signs in conspicuous locations at each gasoline dispenser.B. The instructional signs shall include:. 1) Instructions, with illustrations, on how to insert the nozzle, dispense gasoline, and how to remove the nozzle;2) A warning against attempts to continue refueling after automatic shut-off of the gasoline (that is, topping off) and3) The Department's toll-free

26.11.24.09. 09 Sanctions.. A. A person who violates any provision of this chapter is subject to the sanctions set forth in Environment Article, Title 2, Annotated Code of Maryland. Each day of violation constitutes a separate violation. These sanctions in the Annotated Code of Maryland include:1) Injunctive relief under Environment Article, §2-609;. 2) Judicial penalties up to $25,000 per violation under Environment Article, §2-610;. 3) Administrative penalties up to

26.11.24.9999. Administrative History Effective date: February 15, 1993 (20:3 Md. R. 260). Regulation .01B amended effective June 20, 1994 (21:12 Md. R. 1064) May 8, 1995 (22:9 Md. R. 647) April 15, 2002 (29:7 Md. R. 623) January 29, 2007 (34:2 Md. R. 139) November 23, 2015 (42:23 Md. R. 1435)Regulation .01-1 adopted effective April 15, 2002 (29:7 Md. R. 623). Regulation .01-1B amended effective November 23, 2015 (42:23 Md. R. 1435).

26.11.22.00. Title 26 DEPARTMENT OF THE ENVIRONMENT Subtitle 11 AIR QUALITY **Chapter 22 Vehicle Emissions Inspection** *These regulations have been jointly adopted by the Motor Vehicle Administration and the Department of the Environment. The regulations are found in COMAR 11.14.08 and will not be duplicated in Title 26. These regulations should be cited under COMAR 11.14.08.*

11.14.08.00. Title 11 DEPARTMENT OF TRANSPORTATION Subtitle 14 MOTOR VEHICLE ADMINISTRATION ? VEHICLE INSPECTIONS **Chapter 08 Vehicle Emissions Inspection Program Authority:** Transportation Article, §12-104(b) 23-202(a) and 23-207; Environment Article, §1-101, 1-404, 2-101?2-103, and 2-301?2-303; Annotated Code of Maryland

11.14.08.01. 01 Scope and Applicability.. A. Scope. The Vehicle Emissions Inspection Program requires all subject vehicles to be inspected biennially as scheduled by the Motor Vehicle Administration.B. Applicability.. 1) Unless exempt under Regulation .04 of this chapter, a vehicle is subject to the provisions of this chapter if it is:a) Titled and registered within the emissions inspection area;. b) Owned or leased by a federal, State, or local government, and

11.14.08.02. 02 Incorporation by Reference.. In this chapter, the following documents are incorporated by reference:. A. Clean Air Act, 42 U.S.C §7521, §7541, and §7545, January 3, 2006, as amended;. B. 40 CFR §85.1902(d) July 1, 2005, as amended;. C. 40 CFR §85.2207, July 1, 2007, as amended;. D. 40 CFR §85.2222, July 1, 2007, as amended;. E. 40 CFR §85.2231, July 1, 2007, as amended; and. F. 40 CFR Part 51, Subpart S, July 1, 2007, as amended..

11.14.08.03.htm 11.14.08.03. 03 Definitions.. A. In this chapter, the following terms have the meanings indicated.. B. Terms Defined.. 1) "Administration" means the Motor Vehicle Administration of the Maryland Department of Transportation.2) "ASE" means the National Institute for Automotive Service Excellence.. 3) "Audit" means a periodic quality assurance check, performed by the Administration or the Department, on equipment and personnel regulated under this chapter.

11.14.08.04.htm 11.14.08.04. 04 Exemptions.. A. The vehicles in §B of this regulation are exempt from the provisions of this chapter.. B. Exempt vehicles include the following vehicles:. 1) Before October 1, 2012, a qualified hybrid vehicle;. 2) A zero-emission vehicle;. 3) A fire or rescue apparatus or ambulance, owned or leased by a state or local government, by a rescue squad, or by a volunteer fire or ambulance company, registered as an emergency vehicle as

11.14.08.05.htm 11.14.08.05. 05 Schedule of the Program.. A. The owner of a nonexempt vehicle shall present the vehicle for a biennial inspection as scheduled by the Administration.B. Schedule for Vehicle Inspection.. 1) The Administration shall assign each vehicle required to be inspected a date of scheduled inspection for each inspection cycle, and shall send a notice to the vehicle owner approximately 8 weeks before the assigned date.2) A vehicle owner shall present

the vehicle for a scheduled inspection aft

11.14.08.06.htm 11.14.08.06. 06 Certificates.. A. General Requirements.. 1) During each inspection cycle, a vehicle inspected under this chapter shall be issued a certificate that indicates the inspection status of the vehicle for the inspection cycle.2) Except for a waiver certificate, which may only be issued by the contractor or the Administration, a certificate may be issued by the contractor, a fleet inspection station, or the Administration.3) For a vehicle inspected at a

11.14.08.07.htm 11.14.08.07. 07 Extensions.. A. The Administration may grant a time extension for a vehicle owner to comply with the requirements of this chapter. An extension may be granted only if the Administration determines that the vehicle owner has made good faith efforts to have the vehicle inspected or repaired and circumstances have developed which are beyond the reasonable control of the vehicle owner. An extension shall be of the shortest duration possible, as determined by the Administration.

11.14.08.08.htm 11.14.08.08. 08 Enforcement.. A. The requirements of this chapter relating to vehicle inspection shall be enforced by the Administration through the use of administrative sanctions in the form of:1) Suspension of vehicle registration;. 2) Denial of vehicle registration renewal; or. 3) Confiscation of the vehicle registration plates.. B. If the vehicle is not issued a pass certificate, a waiver certificate, or an extension on or before the date of scheduled inspection

11.14.08.09.htm 11.14.08.09. 09 Test Standards.. A. Idle Exhaust Emissions Test.. 1) A vehicle shall fail if sample dilution occurs.. 2) Hydrocarbon (HC) and carbon monoxide (CO) emissions may not exceed the following values:. a) Table 2. Gross vehicle weight less than or equal to 6,000 pounds.. Vehicle Model Year. HC (parts per million). CO (percent). i). 1977. 500. 6.00. ii). 1978. 430. 5.50. iii). 1979. 400. b) Table 3. Gross vehicle weight greater than 6,000 pounds but less than or equal to 10,000 pounds..

11.14.08.10.htm 11.14.08.10. 10 General Requirements for Inspection and Preparation for Inspection.. A. Emissions Related Recall. An inspector shall reject from inspection a vehicle which has not had repairs performed as required by an emissions-related recall notice, as specified in Regulation .05D of this chapter.B. Vehicle Preparation.. 1) Before vehicle inspection, the inspector shall visually check the vehicle for a condition which has potential to

11.14.08.11.htm 11.14.08.11. 11 Test Equipment and Test Procedures.. A. Idle Exhaust Emissions Test.. 1) Test Equipment. Idle exhaust emission test equipment shall be approved by the Administration and the Department.2) Test Procedures.. a) The inspector shall fail the vehicle if sample dilution occurs.. b) Except as provided in §A(2)a) of this regulation, the inspector shall conduct the idle exhaust emissions test in accordance with the procedures specified in 40 CFR Part 51,B. Catalytic Converter Ch

11.14.08.12.htm 11.14.08.12. 12 Failed Vehicle and Reinspection Procedures.. A. Failed Vehicle. The inspector shall refer the operator of a failed vehicle to the vehicle emissions

inspection program customer service representative for further information.B. Reinspection.. 1) The inspector shall reject from reinspection a vehicle:. a) For which the documentation required in Regulation .05E(2) of this chapter is not provided; or. b) Which had failed with an on-board diagnostics fault code related to the

11.14.08.13.htm 11.14.08.13. 13 Quality Assurance and Maintenance.. A. The Contractor shall develop, maintain, and modify as required by the Administration and the Department a comprehensive quality assurance and maintenance plan for vehicle emissions inspection stations and fleet inspection stations complying with the provisions of this chapter, and shall implement the quality assurance plan after approval of the plan by the Administration and the Department.

11.14.08.14.htm 11.14.08.14. 14 Vehicle Emissions Inspection Station.. A. General Requirements.. 1) The contractor shall operate each vehicle emissions inspection station with contractor personnel, with overall supervision by the Administration and the Department.2) The contractor shall make available to the Administration or the Department, as required, vehicle emissions inspection station equipment and personnel to perform quality assurance checks, program evaluation functions, and referee inspections.

11.14.08.15.htm 11.14.08.15. 15 Inspector Training and Performance Review.. A. Inspector Training.. 1) The contractor shall develop, maintain, and modify, as required by the Administration and the Department, an inspector training program to include both classroom and hands-on training, with provisions for initial and periodic in-service training.2) The contractor shall use the training program after the program has been approved by the Administration and the Department.3) The contractor shall p

11.14.08.16.htm 11.14.08.16. 16 Vehicle Data for Vehicle Repair Assistance.. A. The contractor shall issue a report containing information on test results of a vehicle which has failed an emissions inspection to an individual seeking to have repairs performed on the vehicle.B. The contractor shall:. 1) Make the report available electronically to vehicle owners, certified emissions repair facilities, and master certified emissions technicians; and2) Provide read-only, convenient, and standardized access..

11.14.08.17.htm 11.14.08.17. 17 Master Certified Emissions Technician.. A. Initial Application and Certification.. 1) To qualify for certification, an individual shall:. a) Successfully complete an orientation course approved by the Department;. b) Demonstrate 5 years of full-time employment experience as an automotive technician performing emissions-related repairs on on-road vehicles not powered by diesel fuel or electricity, except that an individual with 2 full years of full-time educati

11.14.08.18.htm 11.14.08.18. 18 Certified Emissions Repair Facility.. A. Initial Application and Certification.. 1) To qualify for certification, a person shall:. a) Submit an application to the Department;. b) Maintain a repair facility capable of making emissions-related adjustments and repairs;. c) Possess all required equipment as listed in §D of this regulation;. d) Pass an audit as

defined in §G of this regulation; and. e) Employ all required personnel as listed in §E of this

11.14.08.19.htm 11.14.08.19. 19 On-Highway Emissions Test.. A. General Requirements.. 1) For on-highway emissions tests, the Contractor shall measure vehicle exhaust emissions of hydrocarbons, carbon dioxide, carbon monoxide, and oxides of nitrogen emissions.2) The contractor shall conduct testing in each jurisdiction in the inspection area at least once each year, or as directed by the Administration and the Department, and shall test at least 0.5 percent of the affected vehicles in each jurisdiction.

11.14.08.20.htm 11.14.08.20. 20 Fleet Inspection Station.. A. Initial Application and Licensure.. 1) A fleet inspection station license authorizes the licensee to inspect those vehicles that are part of the fleet designated by the licensee.2) A person seeking licensure of an establishment as a fleet inspection station shall apply on forms provided by the Department.3) To qualify for licensure, an establishment shall comply with the following requirements:.

11.14.08.9999.htm 11.14.08.9999. Administrative History Effective date: August 17, 1981 (8:16 Md. R. 1366). Regulations .03B, .05?09, .11?16 amended effective September 26, 1983 (10:19 Md. R. 1691). Regulations .03B, .08C, D, .09C, .15, and .16 amended effective December 5, 1983 (10:24 Md. R. 2190). Regulations .02, .03, .05, .06, .08, .15, and .16 amended as an emergency provision effective January 25, 1989 (16:3 Md. R. 337) (Emergency provisions are temporary and not printed in COMAR)Regulations .01?16 repeal