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January 5, 2017

The Honorable Roger Manno
Maryland General Assembly
102 James Senate Office Building
Annapolis, Maryland 21401

The Honorable Samuel I. Rosenberg
Maryland General Assembly
365 House Office Bldg.
Annapolis, Maryland 21401

Dear Senator Manno and Delegate Rosenberg:

In your capacities as Chairs of the Joint Committee on Administrative, Executive, and Legislative Review ("AELR"), you asked for advice about proposed regulations from the Maryland Department of the Environment ("MDE"), 43 Md. Reg. 1293 (Nov. 14, 2016). The regulations propose updated standards to govern oil and gas drilling, including hydraulic fracturing. You asked "whether MDE's regulations, and current statute, would preempt a local government from prohibiting hydraulic fracturing in their jurisdiction." As explained in more detail below, while State law and the proposed regulations implicitly preempt local laws in certain aspects of hydraulic fracturing, the statutes and proposed regulations provide local government concurrent jurisdiction with regard to several other aspects of hydraulic fracturing, including zoning. Thus, it is my view that a local government may be able to ban hydraulic fracturing in that jurisdiction, depending on the particular language of the local law at issue. A court would analyze the exact language of any challenged local law to determine whether it regulates some aspect of hydraulic fracturing that is preempted by State law. I will explain further below.

State preemption of local law "is grounded upon the authority of the General Assembly to reserve for itself exclusive dominion over an entire field of legislative concern." *Ad+Soil, Inc. v. County Commissioners*, 307 Md. 307, 324 (1986). Legislative intent to preempt is manifested in three ways: expressly, by conflict, or impliedly. The General Assembly indicates its express intent to preempt local law by enacting an explicit preemption clause specifying the effect of a State law on local measures. *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512 (2004). Courts have found preemption by conflict where the legislature's intent to displace local law is shown through "a verbal conflict" – when the State law prohibits what the local measure permits or *vice versa* – or through a "functional conflict" – when the impact of the local law interferes with the State law's function. *See Mayor of Baltimore v. Hart*, 395 Md. 394, 407-9 (2006); *see also Coalition for Open Doors v.*

Annapolis Lodge No. 622, 333 Md. 359, 380 n. 39 (1994); 89 *Opinions of the Attorney General* 195 (2004) (county's trapping laws, while within its power to pass "fish and game laws," were preempted by conflicting State law).

Additionally, courts have determined that preemption is implied when "local law [d]eals with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied[.]" *Talbot County v. Skipper*, 329 Md. 481, 488 (1993) (citations and quotations omitted). Yet the fact that the General Assembly has legislated on a particular subject does not invariably preempt all local regulation in that field. "[D]ual regulatory processes may co-exist when the county's regulation does not conflict with the State's regulation." 96 *Opinions of the Attorney General* 139, 145 (2011) (citing *Maryland Reclamation Associates v. Harford County*, 414 Md. 1, 40 (2010) (holding that State waste disposal permitting process complemented, rather than preempted, the county's planning and zoning role). The "comprehensiveness with which the General Assembly has legislated the field" is the "primary indicia" of an "intent by the State to occupy the entire field..." *Id.* Several secondary factors may also be applied, including "whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field." *Allied Vending v. City of Bowie*, 332 Md. 279, 299, 631 A.2d 77 (1993) (citation and internal quotation marks omitted).

In 2015, the General Assembly prohibited MDE from issuing any hydraulic fracturing permits until October 1, 2017 for several reasons. See Chapters 480, 481, Laws of Maryland 2015. First, MDE's oil and gas regulations were written prior to the use of high-volume hydraulic fracturing and had not been revised since 1993. Moreover, the current regulations apply to all gas wells in Maryland and are not specific to the practice of hydraulic fracturing. Finally, the current regulations are incompatible in some regards with modern industry practices. Thus, the 2015 legislation requires MDE to adopt regulations "to provide for the hydraulic fracturing of a well for the exploration or production of natural gas in the State." Environment Article ("EN"), 14-107.1(b). The legislative intent of the 2015 bill was for the new regulations to be in place before any hydraulic fracturing permit would be issued.¹

Current State statutory law provides that a permit is required to "drill any well for the exploration, production, or underground storage of gas or oil in the State ..." EN § 14-104(a). Moreover, an applicant must submit to MDE an environmental assessment. EN § 14-104(b). MDE must deny a permit if the proposed operation "poses a substantial threat to public safety or a risk of significant adverse environmental impact ..." EN § 14-108. If the agency grants a permit, MDE "may place in a permit conditions which the Department deems

¹ MDE has not issued any permits to date for gas exploration or production from the Marcellus Shale. The form of hydraulic fracturing that is now used in Marcellus Shale in other states was not developed until the 1990s. It appears that hydraulic fracturing of Marcellus Shale was not contemplated until approximately 2005.

reasonable and appropriate to assure that the operation shall fully comply with the requirements of this subtitle, and provide for public safety and the protection of the State's natural resources." EN § 14-110. An applicant that wants to extract gas from the Marcellus Shale may also be required to apply for a number of other State and local permits.

Nothing in the State law or proposed regulations expressly prohibit local legislation in the oil and gas field. Furthermore, State law requires MDE to deny a permit, among other reasons, if "[t]he applicant has failed to receive applicable permits or approvals for the operation from all State and local regulatory units responsible for air and water pollution, sediment control, and zoning." EN § 14-108(3).² This is an indication that the General Assembly intended to give State and local government concurrent jurisdiction in some aspects of oil and gas drilling, hydraulic fracturing. At the same time, a local government may not enact a local law that conflicts with the State law. Therefore, it is possible that some aspects of hydraulic fracturing could be preempted by State law. See *East Star, LLC v. County Comm'n's of Queen Anne's Co.*, 203 Md. App. 477 (2012) (recognizing that the General Assembly withheld the broad police power from code counties but granted them the authority to exercise it in discrete areas). In *East Star*, the court determined that a local zoning ordinance prohibiting major extraction operations from exceeding 20 acres, other than by expansion in 20-acre increments, was preempted by the State's surface mining laws. Consequently, whether a local law is preempted by the State laws and regulations governing hydraulic fracturing must be determined by examining the specific local law at issue. Notwithstanding, it is my view that it may be possible, under current law as well as the proposed regulations, for a local government to ban hydraulic fracturing in that jurisdiction.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly

² The proposed regulations, like the current regulations, contemplate several areas for local government regulation. See, e.g., proposed COMAR 29.19.07A (requiring that use of explosives in seismic operations must "comply with all applicable local, State, and federal laws and regulations that control the handling or detonation of explosive materials"); COMAR 29.19.13B(4) (requiring applicants to submit proposed comprehensive development plan to specified local agencies); COMAR 29.19.14B(11) and (15) (stating that permit applicant must submit to MDE "[w]ritten approval by the local planning and zoning authority that all local planning and zoning requirements, if any, have been met" and "[a] statement listing all other federal, State, county, and local permits and approvals required, and the status of each").