CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

February 26, 2013

The Honorable President and Members
 of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 13-0190 – Wastewater from Hydraulic Fracturing

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 13-0190 for form and legal sufficiency. The bill would prohibit the storage, treatment, discharge or disposal of backflow or wastewater from hydraulic fracturing.

The City Council has the power to "provide for the preservation of the health of all persons within the City," "to prevent and remove nuisances" and to "pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City." *See* City Charter, Art. II, §§11, 47.

Regulating this type of wastewater does not appear to be preempted by state or federal law. *See* 42 U.S.C. §300f *et seq.* (known as the federal Safe Drinking Water Act); *see also* United States Environmental Protection Agency (visited February 6, 2013), http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm>; *see also* 40 CFR 144.1, *et. seq.*; 145.1 *et. seq.*; 147.1050 *et. seq.*; COMAR 26.08.01, *et. seq.* However, the issue has garnered national and state-wide attention, with Maryland convening a task force on the issue pursuant to Executive Order 01.01.2011.11. That task force issued a preliminary report available on the internet. *See* Marcellus Shale Safe Drilling Initiative Study http://www.mde.state.md.us/programs/Land/mining/marcellus/Documents/Meetings/Marcellus _Shale_Report_Part_I_Dec_2011.pdf (visited February 22, 2013).

Additionally, several bills are before the 2013 Maryland General Assembly concerning this topic. *See* SB 513/HB 341 (Environment - Hydraulic Fracturing Wastewater - Prohibited Acts); SB601/HB 1274 (Maryland Hydraulic Fracturing Moratorium and Right to Know Act of 2013), SB 514/ HB 337 (Natural Gas – Hydraulic Fracturing – Prohibition). If any of these bills are enacted, it is possible that the City could be preempted from legislating in this area. Specifically, if Senate Bill 513/House Bill 341 is enacted without significant amendment, it

would directly preempt the City as it would address the specific subject of wastewater from hydraulic fracturing. Nevertheless, since state and federal laws do not currently cover the disposal of waste from hydraulic fracturing, this bill is not currently preempted.

Although courts have held that the Commerce Clause limits a state or city's ability to pass some laws, they also recognize that "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *Medical Waste Associates Ltd. Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148, 150 (4th Cir. 1992)(*citing City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 623-23 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Board of Trustees of Employees' Retirement System of City of Baltimore v. Mayor and City Council of Baltimore*, 317 Md. 72, 141 (1989)(citation omitted).

The Law Department approves this bill for form and legal sufficiency.

Very truly yours,

Hilary Ruley
Assistant Solicitor

cc: George Nilson, City Solicitor
        Angela C. Gibson, Mayor's Legislative Liaison
        Elena DiPietro, Chief Solicitor
        Victor Tervala, Assistant Solicitor