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Attn: Draft HVHF Regulations Comments  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-6510

Re: Comments on the High Volume Hydraulic Fracturing Proposed Regulations

Dear Department of Environmental Conservation:

The Washington Legal Foundation (WLF) thanks the DEC for the opportunity to comment on the potential legal significance of the proposed High Volume Hydraulic Fracturing (HVHF) Regulations. WLF is a national non-profit institution that advocates for free-market principles, limited and accountable government, and individual rights through litigation and the dissemination of legal publications. WLF believes that free enterprise leads to a more prosperous and peaceful society.

WLF shares the Department's and all stakeholders' concern for the environment, and supports science-driven policies to protect individuals from demonstrated harm. As a policy matter, hydraulic fracturing has been shown to be a potential economic boon to any locality, and the experience of other states, including that of neighbors Pennsylvania and Ohio, demonstrates that hydraulic fracturing can be safely pursued to great benefit. When hydraulic fracturing began in the Marcellus Shale in Pennsylvania in 2009, the process generated an estimated 44,000 jobs. Hydraulic fracturing in the Eagle Ford Shale in Texas created 47,000 jobs and nearly \$25 billion in tax revenue in 2011 alone. As a whole, the Marcellus Shale is estimated to have as much as 489 trillion cubic feet of natural gas, and could provide similar benefits to New York's economy.

What's more, natural gas is the cleanest of all fossil fuels, and can help lead to America's energy independence while providing low priced fuel to consumers. WLF believes that any deliberation on hydraulic fracturing must consider these benefits, and any resulting regulation should be measured, rational, and firmly rooted in science.

Given the important potential benefits of hydraulic fracturing, WLF urges the Department to come to a swift conclusion as to the safety of hydraulic fracturing in New York in order to provide regulatory certainty to permit holders and interested parties. After a protracted moratorium and several studies with no resolution, the ill effects of regulatory uncertainty have become apparent, as potential developers and investors have already been seen to leave the state due to the persisting doubt as to the future of hydraulic fracturing. In places like Tompkins County, there has been a noticeable increase in leases being left to expire. In New York as a whole, drilling permit applications have decreased by more than 50% since 2008. After numerous studies and opportunity for public comment, a quick conclusion on the matter is warranted.

WLF additionally wishes to comment on the legal impact of the regulations on various municipalities' attempts to ban hydraulic fracturing (reportedly totaling over 100 in the form of bans or moratoria). At least four lawsuits have been filed challenging these local bans in court. These attempts to circumvent the careful and considered state-level judgments on the appropriate path for hydraulic fracturing are expressly preempted by the state's Oil, Gas and Solution Mining Law (Oil and Gas Law). But importantly, and more relevant to this opportunity to submit comments, should the DEC enact the proposed regulations on hydraulic fracturing, the regulations would further implicitly preempt attempts by the municipalities to impose their own

regulations. WLF urges the DEC to include in the final regulations a provision expressly stating that municipalities are not empowered to impose regulations beyond those imposed by the DEC.

#### The Preemptive Effect of the HVHF Regulations

Local governments derive their power over home rule under Article IX of the New York Constitution, which grants them the authority to promulgate laws “relating to [their] property, affairs or government.” This power is explicitly limited to laws “not inconsistent” with the state constitution or general laws; inconsistent laws are preempted. Under state court precedent, preemption may be express or implied, and implied preemption may consist of either field preemption or conflict preemption. *See, e.g., Consol. Edison Co. v. Town of Red Hook*, 60 N.Y. 2d 99 (1983); *New York State Club Ass’n v. City of New York*, 69 N.Y. 2d 211 (1987).

Field preemption inheres where the Legislature demonstrates its intent to preempt a field through either a policy declaration or through “enacting a comprehensive and detailed regulatory scheme in a particular area.” 60 N.Y. 2d at 105. Here, the legislature passed the Oil and Gas Act in order to regulate the location and operation of oil wells at the state level. The legislature further authorized the DEC to enact subsequent regulations regarding oil and natural gas development. Pursuant to the authority granted to it by the Legislature, the Department—after a moratorium of nearly five years, several public hearings, the receipt of over 60,000 public comments, and the completion of economic, environmental, and public health studies—has made the careful and informed decision in its proposed regulations to permit hydraulic fracturing under certain conditions meant to mitigate any perceived risks.

These proposed regulations govern setbacks, wastewater disposal, chemical disclosures, alternative analysis and more. They are comprehensive in that they cover major perceived risks of hydraulic fracturing, and indeed propose costly requirements beyond what many scientists

believe is necessary to ensure safety. The proposed regulations have been revised since the initial comment period in an effort to respond to observed deficiencies, with new provisions included on waste disposal, and caps on financial security for well plugging and abandonment taken out. These judgments were not only political, but highly technical in nature. Thus, as in *Town of Red Hook*, the history and scope of the regulations evidence and effectuate the Legislature's intent to occupy the field of oil and gas regulation, "a desire that would be frustrated by laws such as [those at issue.]"

Nor has there been an explicit delegation of authority for municipalities to enact such bans. In fact, given that under the current regulations localities must only be notified of the location of drilling sites after the fact, the regulations explicitly discount the primacy of local governments with regard to oil and gas development. The policy that underlies the Oil and Gas Act—permitting oil and gas development in a manner that prevents waste, protects property owners, and protects the general welfare—would be undermined by the existence of conflicting regulations among localities. A patchwork of regulations would not only, as a policy matter, undermine regulatory certainty and discourage safe and efficient development of natural gas, it would, as a legal matter, intrude into a domain that the legislature has clearly occupied.

Further, should the proposed regulations be enacted, the localities' attempts to ban hydraulic fracturing would be invalid under the principle of conflict preemption. Conflict preemption occurs where a local ordinance conflicts with the laws *or* policy objectives of a state law. "Inconsistency is not limited to cases of express conflict between State and local laws. It has been found where local laws prohibit what would be permissible under State law, or impose 'prerequisite additional restrictions' on rights under State law so as to inhibit the operation of the State's general laws." 60 N.Y 2d 108 (internal citations omitted). Hydraulic fracturing bans or

moratoria necessarily conflict with the proposed regulations, which permit such activity under circumscribed circumstances. Plainly, such bans make illegal what is legal under state law. This conflict alone is enough to render the local bans preempted. These bans further “inhibit the operation of the State’s general laws” by impeding the permitting process provided for in the regulations.

While home rule is an important legal principle, the legislature has the authority to preempt this delegated power. Laws enacted at the local level cannot supersede legislation appropriately made at the state level, nor undercut the legislature’s intent to deliver a uniform solution to a state-wide problem. The local bans on hydraulic fracturing undermine the legislature’s stated goals of providing for efficient development and production of the state’s natural oil and gas resources. This is especially pernicious where there is no reasonable basis for doing so. The DEC’s regulations respond to environmental and health concerns, and the state’s own recently released report signals that hydraulic fracturing can be pursued with no detrimental effect on public health or safety.<sup>1</sup> The report concludes, “Significant adverse impacts on human health are not expected from routine HVHF.”<sup>2</sup>

In sum, once the DEC issues its regulations in final form, little doubt will remain that efforts by municipalities to regulate hydraulic fracturing are impliedly preempted, based both on field preemption (because the new regulations will “occupy the field”) and on conflict preemption (because municipalities’ hydraulic fracturing bans or moratoria are inconsistent with the balanced regulatory approach adopted by the legislature and the DEC). To avoid continued litigation regarding whether municipal regulation is impliedly preempted, WLF recommends that

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<sup>1</sup> <http://www.nytimes.com/2013/01/03/nyregion/hydrofracking-safe-says-ny-health-dept-analysis.html>

<sup>2</sup> <http://www.reuters.com/article/2013/01/03/us-usa-fracking-newyork-documents-idUSBRE9020RT20130103>

the proposed regulations be modified to state explicitly that municipal regulations are indeed preempted.

Conclusion

Hydraulic fracturing has safely occurred in the United States since the 1940s. Despite hydraulic fracturing's history of being safely applied, and scientific studies supporting hydraulic fracturing's safety, activists continue to perpetuate myths like hydraulic fracturing's relationship to seismic activity, the occurrence of water contaminations, the composition of hydraulic fracturing fluids, and the like. If policy is to be truly science-driven, rather than pursued on the basis of unverified activist claims and hyperbolic rhetoric, the DEC will heed the results of its own study and permit the development of shale gas. Further, it will do so swiftly, so that New York can regain its competitiveness with other states.

Respectfully submitted,

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