Comments of SETF on Proposed Rules for Construction/Demolition Facilities

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[Warning: External email]

Please find attached comments submitted on behalf of the Southeast Environmental Task Force on the Proposed Rules for Construction/Demolition Facilities. As indicated in the comments, they are supported by the Chicago EJ Network and NRDC, and SETF in turn supports comments submitted by NRDC and CEJN.

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November 1, 2021

City of Chicago
Chicago Department of Public Health

Re: Public Comment on the Proposed Rules for Reprocessable Construction/Demolition Material Facilities

Submitted via e-mail to: envcomments@cityofchicago.org

We write on behalf of the Southeast Environmental Task Force ("SETF") to comment on the Proposed Rules for Reprocessable Construction/Demolition Material Facilities, noticed by the Chicago Department of Public Health in September 2021 ("Proposed Rules"). These comments are supported by and should be read in conjunction with comments submitted by Natural Resources Defense Council ("NRDC") and the Greater Chicago Legal Clinic on behalf of the Chicago Environmental Justice Network ("CEJN"). The comments submitted by NRDC and CEJN are also supported by SETF and incorporated by reference herein.

SETF and its members are deeply concerned by the threats posed to the health and well-being of Southeast Side residents – as well as the residents of other affected Chicago communities – from both existing and proposed Reprocessable Construction/Demolition Material Facilities ("C/D Facilities" or "Rock Crushing Facilities").

As set out in detail in the comments submitted by NRDC and CEJN, all of the current or proposed Rock Crushing Facilities that would be regulated by the Proposed Rules are located or planned to be located in Environmental Justice communities. As CDPH has recognized in recent statements, including in its introduction of the Proposed Rules to community organizations on September 28, 2021, protection of Environmental Justice communities from the environmental threats posed by C/D Facilities is a necessary element of the broader need to protect these communities from the grossly disproportionate share of the health and environmental burdens they bear from the location of heavy industries in their neighborhoods and the cumulative health effects these industries continue to impose on Environmental Justice community residents.

These comments focus on the legal authorities of CDPH to adopt rules that fully address the risks C/D Facilities present and support the modifications to the Proposed Rules included in the comments submitted by NRDC and CEJN.

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I. Home Rule Authority

A. As a Home Rule Jurisdiction, Chicago Has Broad Authority to Promulgate Rules that Protect Residents' Health and Well-Being.

The City of Chicago is a home rule jurisdiction under the Illinois Constitution. The Illinois Constitution provides broad home rule authority: a home rule unit may "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the *protection of public health, safety, morals and welfare;* to license; to tax; and to incur debt." Ill. Const. 1970, art. VII, § 6(a) (emphasis added).

The Illinois Constitution also states that these powers "shall be construed liberally" to afford broad regulatory discretion for home rule jurisdictions. Ill. Const. 1970, art. VII, § 6(m). The Illinois Constitution requires the legislature to state expressly when it wants to limit home rule authority. Ill. Const. 1970, art. VII, § 6(h). In the absence of the legislature acting expressly to deny home rule authority, home rule units may regulate concurrently with the state government. Ill. Const. 1970, art. VII, § 6(i). Because the Illinois legislature has not acted expressly to preempt or preclude local environmental regulation by home rule units, based on the plain language of the Constitution alone, Chicago has the authority to regulate environmental issues to protect its residents.

Courts have interpreted Illinois's grant of home rule authority broadly. Indeed, in *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, the Illinois Supreme Court explained that "[h]ome rule is based on the assumption that municipalities should be allowed to address problems with solutions tailored to their local needs."[1] *See also, Chicago v. StubHub, Inc.*, 2011 Ill. 111127, ¶ 22 n.22 ("If a subject pertains to local government and affairs, and the legislature has not expressly preempted home rule, municipalities may exercise their power.").

Consequently, when adopting rules, the City of Chicago has broad authority to prioritize the health and welfare of its residents and, as explained below, it has exercised that authority to authorize CDPH to adopt rules necessary to protect fully its residents from the hazards of Rock Crushing Facilities.

B. To Protect Public Health, the City of Chicago Has Empowered CDPH to Impose Stringent Conditions on Rock Crushing Facilities.

The City of Chicago, through ordinances, rules, and regulations, has empowered CDPH to stringently regulate industrial activities. The Chicago Municipal Code establishes an extensive and pervasive set of requirements to protect the environment and human health and safety, including with respect to air pollution, water pollution, hazardous materials, wastes, and recycling. Taken together, the intent is clear:

[1] *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 Ill. 110505, ¶ 29 (emphasis added).

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protection of the City's environment and its residents. *See* 2-112-070(a) ("The Commissioner is authorized to issue rules necessary or proper for the administration or enforcement of health ordinances, including but not limited to . . . the administration or enforcement of environmental ordinances."); 2-112-110(b)(1) (The Commissioner of Public Health shall have the power and duty to "supervise the execution of and implement all laws, ordinances, and rules pertaining to environmental protection and control as provided in Chapter 11-4 of the Municipal Code of Chicago.").

Chapter 11-4 of the Municipal Code covers "Environmental Protection and Control," and within Chapter 11-4, Article XIV addresses "Reprocessable Construction/Demolition Material." Beyond the explicit provisions set out in Article XIV, the Municipal Code provides authority to CDPH to enforce, clarify, and *expand* upon Article XIV's provisions. *See* 11-4-1905(5) ("The commissioner of health may promulgate such rules and regulations as necessary to implement the provisions of this section."); 11-4-1930(B)(10) (a permit application shall include—in addition to other listed items—"Any further information deemed necessary by the commissioner."); 11-4-1930(C)(3) (no permit shall be granted unless "[i]n the determination of the commissioner, the facility will not have an adverse impact on the public health and safety."); 11-4-1930(C)(4) (no permit shall be granted unless "[t]he commissioner determines that the facility has adequate pollution control measures."); 11-4-1935(b) ("The commissioner is authorized to adopt rules and regulations setting forth application requirements and standards and conditions for the location and operation of construction site reprocessing activities, and to require applicants for and operators of such activities to provide such information as the commissioner deems necessary to effectuate the purposes of this section. Such rules and regulations shall include those standards and conditions *necessary to protect the environment, public health and safety and avoid nuisances, and may also include such other requirements as the commissioner deems necessary and appropriate to carry out this section* . . . .") (emphasis added); 11-4-2000(E) (requiring Rock Crushing Facilities to "employ measures and/or devices approved by the department of health to prevent the emission of dust."); 11-4-2000(H)(6) ("The maximum amounts of reprocessable construction/demolition material and incidental debris that an owner and/or operator may maintain or store at a facility may be prescribed by the commissioner in rules and regulations.").

The intent of the Municipal Code is clear: CDPH is instructed to regulate Rock Crushing Facilities to the extent necessary to safeguard the health and welfare of Chicago's residents.

C. CDPH Has the Authority to Regulate Other Facilities Similar to the Sources Covered by the Proposed Rules.

As explained in more detail in comments submitted by NRDC, while the Proposed Rules and regulation of Rock Crushing Facilities are welcomed, the Proposed Rules are not sufficient to encompass the full range of similar industrial activities, some of which pose almost identical environmental harms. Such activities include, for example, front-end/original construction, aggregate and concrete manufacture, and slag grinding. It is critical that CDPH is mindful of the full scope of that in promulgating the Proposed Rules

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and in evaluating the effects of the environmental harms caused by both rock crushing and similar operations.

CDPH's authority to address all of these activities is made clear in the expansive powers granted throughout Chapter 11-4 of the Municipal Code. *See* 11-4-600 – 11-4-810, the "Air Pollution Control Ordinance"; 11-4-1410 – 11-4-1460 "Pollution of Waters"; *see also* 11-4-760(e) ("The commissioner is authorized to promulgate additional rules and regulations for the proper management of any substance or material that may become airborne or be scattered by the wind."); and 11-4-770 ("The commissioner shall have jurisdiction and authority over the sources of any matter, material or substance likely to be scattered by the wind or susceptible to becoming airborne or a contributing factor to air pollution and shall have authority to issue an emergency or non-emergency cessation order or an emergency or non-emergency abatement order in accordance with the provisions of section 11-4-025 of this Code to any person who caused the windborne nuisance, and to instigate prosecutions for violations of any provision of this chapter or any other chapter of this Code relating to the eradication or control of matter susceptible to being windborne. For the purpose of minimizing air pollution, the commissioner may prescribe, by rules and regulation, reasonable, specific operating and maintenance practices for buildings, structures, premises, open areas, automobiles and/or truck parking and sales lots, private roadways, rights-of-way, storage piles of materials, yards, vessels, vehicles, construction, sandblasting, alteration, building, demolition or wrecking operations and any other enterprise which has or involves any matter, material or substance susceptible to being windborne and for the handling, transportation, disposition or other operation with respect to any material subject to being windborne.").

We urge CDPH in promulgating the Proposed Rules to exercise its full authority to protect residents from all of the environmental harms posed by both rock crushing and other similar industrial operations.

II. Nuisance Authority

A. Under Both the Municipal Code and the City's Nuisance Laws, CDPH Is Empowered to Quash Anticipated Nuisances, Including from Industrial Activities Like Rock Crushing Facilities.

In Illinois, all municipalities—not just home rule jurisdictions—have the authority to prohibit nuisances. 11 ILCS 65/11-60-2 ("The corporate authorities of each municipality may define, prevent, and abate nuisances."). That authority extends beyond nuisance abatement, allowing municipalities to forestall anticipated nuisances. *See, e.g., Vill. Of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1 (1981); *Whipple v. Vill. of N. Utica*, 2017 Il. App. 3d 150547 (2017). Indeed, Illinois courts have also held that a municipality has a duty to prevent a known nuisance. *Weiss v. Chicago*, 23 Ill. App. 2d 280, 282–83 (1st Dist. 1959) ("A municipal corporation is required to exercise care to keep its streets and alleys in a reasonably safe condition for the use of persons using them, who are themselves in the exercise of ordinary care for their safety . . . and *this includes anticipation of dangers which are ordinarily and reasonably to be expected*.") (emphasis added); *Shapiro v. Chicago*, 308 Ill. App. 613 (1941); *Roumbos v. Chicago*, 332 Ill. 70 (1928).

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Likewise, the Chicago Municipal Code repeatedly emphasizes CDPH's authority to *prevent*—and not just remedy—nuisances. For instance, Article XIV of the Municipal Code—specifically addressing Rock Crushing Facilities—authorizes CDPH "to adopt rules and regulations setting forth application requirements and standards and conditions for the location and operation of construction site reprocessing activities . . . to protect the environment, public health and safety and *avoid nuisances*." 11-4-1935(b) (emphasis added).

Such authority is given often and repeatedly throughout the Municipal Code. For instance, the City of Chicago explicitly prohibits nuisances caused by businesses. *See* Chicago Municipal Code 7-28-080 ("No substance, matter, or thing of any kind whatever, which shall be dangerous or detrimental to health, shall be allowed to exist in connection with any business, or be used therein . . . and no nuisance shall be permitted to exist in connection with any business . . . ."). Likewise, under the heading "Conditions detrimental to health – Public nuisance," the Code provides:

> No building, vehicle, structure, receptacle, yard, lot, premises, or part thereof, shall be made, used, kept, maintained, or operated in the city if such use, keeping, maintaining, or operating shall be the occasion of any nuisance, or shall be dangerous to life or detrimental to health.
>
> Every building or structure constructed or maintained in violation of the building provisions of this Code, or which is in an unsanitary condition, or in an unsafe or dangerous condition, or which in any manner endangers health or safety of any person or persons, is hereby declared to be a public nuisance.

Chicago Municipal Code 7-28-060.

Under the Code, "nuisance" is defined broadly:

> In all cases where no provision is herein made defining what are nuisances and how the same may be removed, abated, or prevented, in addition to what may be declared such herein, these offenses which are known to the common law of the land and the statutes of Illinois as nuisances may, in case the same exist within the city limits or within one mile thereof, be treated as such, and proceeded against as is provided in this Code, or in accordance with any other provision of law.

7-28-030 (Common law and statutory nuisances).

Thus, even a nuisance that is not explicitly described in the Code may be prevented by the Commissioner. *See Vill. Of Wilsonville v. SCA Services, Inc.*, 86 Ill. 2d 1 (1981); *Whipple v. Vill. of N. Utica*, 2017 lll. App (3d) 150547.

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The Proposed Rules explicitly recognize that Rock Crushing Facilities may cause a public nuisance: "these facilities can be significant sources of dust and contaminated storm and process water discharges with the potential to harm human health and the environment, and *cause a public nuisance* or adversely impact the surrounding area or surrounding users." Proposed Rules, Precatory Clauses (emphasis added).

We urge CDPH to exercise this broad authority to prevent nuisances to expand the Proposed Rules to more fully account for all of the likely harms to residents' health and safety posed by the location of Rock Crushing Facilities, particularly in neighborhoods that are already being subjected to disproportionate and cumulative burdens.[2] CDPH's nuisance authority and responsibilities also extend to facilities that handle construction material more generally, a category of facilities impacting environmental justice communities that CDPH must regulate, as set forth in NRDC's comments on the Proposed Rules.

III. Consideration of Compliance History

The Proposed Rules lack any provision for consideration of an applicant's or facility's history of compliance with environmental regulations in CDPH's decision whether to grant a C/D Facility permit or permit renewal. This shortcoming should be addressed in the final rules. As the recent and ongoing problematic review of the permit application for a Large Recycling Facility permit by RMG/General Iron has made clear, a company's or facility's history of compliance or noncompliance with environmental regulations is critical to evaluating the likely health and environmental impacts of a proposed or renewed/reapproved facility. Authority to take compliance history into account in issuing or renewing a permit for a C/D Facility is clear in the Municipal Code. *See* 11-4-670 (a) (Standards for the issuance of annual certificate of operation) ("The commissioner shall not issue or renew a certificate of operation unless the applicant has certified that it is in compliance with the following standards. The applicant must (1) operate in a manner that is not detrimental to public health or safety, or to the environment; (2) comply

[2] For example, and as more fully set out in Comments submitted by NRDC, the Proposed Rules fails to address a significant threat to public health posed by short- and long-term exposure of residents to tailpipe emissions from vehicles that will drive everyday through their neighborhoods to service the facility. We urge CDPH to include in the Proposed Rules a requirement for assessing the air quality impacts of emissions from new truck traffic that will move through local communities to access a rock crushing facility. On a weekly basis, these operations will attract a large number of trucks carrying construction materials. Irrespective of whether CDPH can directly regulate tailpipe emissions from these mobile sources, it is CDPH's responsibility to assess the cumulative, short- and long-term impacts of these emissions to determine if they will cause or contribute to unhealthy air quality for nearby residents. This is especially true because of evidence suggesting traffic proximity and diesel emission exposure are already key risk drivers for nearby communities. These trucks and their cumulative emissions will be a new, permanent source of air pollution in nearby residential neighborhoods, both when they come to and go from a Rock Crushing Facility using local roadways. These impacts will be compounded if trucks idle at or near the facility or at the many traffic stopping points they will encounter as they move to and from the facility on local, public roads. Failure to assess these impacts in the Proposed Rules will undermine the purpose of protecting health when determining whether to permit a Rock Crushing Facility in a community.

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with all substantive standards of Part C of this article or any regulation promulgated pursuant to this article.").

Accordingly, we urge CDPH to modify the Proposed Rules to encompass consideration of a company's or facility's history of compliance with all applicable environmental regulations – including Federal, State and City regulations – in determining whether a C/D Facility permit should be granted.

For the reasons above and for the reasons set out in the comments submitted by NRDC and CEJN, we urge that CDPH modify the Proposed Rules to include the recommended provisions necessary to protect communities from the full range of harms that might emanate from C/D Facilities.

Respectfully submitted,
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