May 20, 2015

Joseph M. Ferguson
740 N. Sedgwick Street, Suite 200
Chicago, IL 60654

Dear Mr. Ferguson:

This letter is in response to the Office of the Inspector General's (OIG) Advisory Concerning the Disposal of Non-Hazardous Waste from City Infrastructure Projects, dated April 22, 2015. The Chicago Department of Transportation (CDOT), the Department of Water Management (DWM), and the Chicago Department of Public Health (CDPH) have worked with the Department of Procurement Services (DPS) and the Department of Law (DOL) to review laws, policies, and practices related to the disposal of non-hazardous waste, and other management of non-hazardous debris, from City projects. Following is a response to the advisory report, including changes developed to address the suggestions provided by the OIG. We appreciate the OIG's work on this advisory report and the opportunity to respond to the issues it outlines.

The OIG's advisory report touches on two areas related to the disposal of non-hazardous waste: (1) enforcement of contract provisions for City infrastructure projects; and (2) enforcement of the Chicago Municipal Code (MCC). Each area is addressed in turn below, with cross-departmental coordination discussed in each section.

Enforcement of Contract Provisions

As is current practice, at the time of contract execution, each contractor will continue to complete the Contractor's Affidavit Regarding Removal of All Waste Materials and Identification of All Legal Dump Sites, which certifies the name, location, and other details regarding the sufficiency of the disposal site for the project. Going forward, the City will also require that an affidavit be submitted by each contractor with each invoice certifying that waste, whether hazardous or non-hazardous, has been disposed of in accordance with all applicable laws and regulations and in accordance with the terms of the contract.

With respect to the tracking of dump tickets, as is current practice, contractors will continue to submit to the City dump tickets for all hazardous waste, and a review of the manifests for such waste will be performed at contract closeout. The contractor is also responsible for maintaining dump tickets for non-hazardous waste, which will be subject to random review by the City. Going forward, the City will regularly perform random checks to ensure contractors are disposing of waste in accordance with their contracts. Each such check will include confirmation that the required affidavits have been received, a

randomized review of non-hazardous waste dump tickets and verification with the named disposal site. Documentation of these random checks will be maintained by the contracting department.

In cases where waste is not being disposed of in accordance with the contract, the contracting department will work with DPS and DOL as necessary to confirm non-compliance and seek cost recovery and any other remedies specified in the contract.

The contracting departments will also notify CDPH in cases where there is reason to believe that the MCC might have been violated, and CDPH will inform DWM and CDOT of MCC enforcement actions initiated by CDPH that may impact City contracts. This interdepartmental communication will further enhance enforcement of contractual and legal obligations.

In addition to the policies and procedures outlined above, resident engineers, program managers, and other departmental staff that oversee construction sites for the City will be retrained on contract requirements that relate to the disposal of waste. This training will ensure awareness and understanding of the terms of contracts being managed and the significance of those terms, including the impact of any relevant laws on the contracted activities.

Enforcement of the Chicago Municipal Code

CDPH takes, and at all times has taken, primary responsibility for enforcing the City's waste-handling and reprocessing ordinances. As part of its enforcement duty, CDPH evaluates potential enforcement actions on a case-by-case basis, taking account of the applicable laws and the facts, and consulting with DOL as needed.

Accordingly, in 2012, in addition to reporting to the OIG the incidents discussed in the advisory report, CDPH also evaluated the incidents for enforcement action. In part due to State-law considerations not addressed in the advisory report, CDPH determined that these incidents did not present strong enforcement cases for the City.

MCC § 11-4-1930 provides, in pertinent part:

> Except as otherwise provided in Section 11-4-1935, no reprocessable construction/ demolition material shall be sent to, received by, stored at or reprocessed at any location except at a facility properly zoned and for which a permit for a reprocessable construction/demolition material facility has been issued pursuant to this chapter. This section shall not be interpreted as a ban on the disposal of reprocessable construction/ demolition material in a properly zoned and permitted sanitary landfill or the receipt and transfer of such material at a properly zoned and permitted waste transfer facility.

The Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.* (Act), however, does not limit debris management options (with respect to certain uncontaminated debris, including uncontaminated reclaimed or other asphalt pavement) to reprocessing and disposal. Rather, pursuant to section 5/3.160(b) of the Act, these materials can legally be used in certain, specified ways and are not considered waste when used in those ways.

This is relevant because environmental-protection legislation at the local (home rule) level is subject to a requirement arising from Article XI (Environment), Section 1 of the Illinois Constitution.[1] According to the Illinois Supreme Court in *City of Chicago v. Pollution Control Board*, 59 Ill.2d 484 (1974):

> The State has legislated in this [environmental-protection] field by the adoption of the . . . Act, which did not express the intent that the State should exclusively occupy this field, but rather provided . . . that it is the obligation of the State Government "to encourage and assist local governments to adopt and implement environmental-protection programs consistent with this Act." We conclude therefore that a local governmental unit may legislate concurrently with the General Assembly on environmental control. However, as expressed by that portion of the constitutional proceedings referred to above, such legislation by a local government unit must conform with the minimum standards established by the legislature.

Id. at 489.

The Court later modified this holding, "substituting the words 'home rule' for the word 'local,' and the word 'uniform' for the word 'minimum' in the above-quoted portion of that opinion." *See County of Cook v. John Sexton Contractors Co.*, 75 Ill.2d 494, 514 (1979) (superseded by statute as to zoning ordinances, as stated in, e.g., *Village of Carpentersville v. Pollution Control Bd.*, 135 Ill.2d 463 (1990) ("[S]ection 39(c) of the Act (Ill.Rev.Stat.1987, ch. 111 1/2, par. 1039(c)) has been amended in a manner that makes clear that the Act no longer preempts local zoning ordinances.").

Accordingly, in *City of Evanston v. Create, Inc.*, 85 Ill.2d 101 (1981), the Court summarized the relationship between State and home rule environmental-protection laws as follows:

> In both [*City of Chicago v. Pollution Control Board* and *County of Cook v. John Sexton Contractors Co.*] the court found that the home rule unit could exercise concurrent power with the State legislature on environmental control. The court held, however,

[1] "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy." Ill. Const. 1970, art. XI, § 1.

> that the home rule power was limited in that any local legislation would have to conform with the uniform standard set by the General Assembly so as to allow the State to fulfill the mandate of article XI of the 1970 Constitution by providing "leadership and uniform standards with regard to pollution control."

Id. at 110.

In carrying out its role of enforcing environmental ordinances, therefore – and where the management of certain uncontaminated materials, including uncontaminated asphalt-pavement grindings, is concerned – CDPH takes account not only of the MCC but also of whether the use in question may be allowed by the Act. CDPH considers the facts of each case in evaluating the viability of any potential enforcement action.

CDPH remains committed to effectively enforcing the laws it administers, including pursuing all appropriate enforcement actions. As stated above, CDPH will work with DWM and CDOT to inform them of enforcement actions that CDPH has initiated concerning debris from City projects. CDPH is also exploring options, including the possibility of amending MCC § 11-4-1930, to better align with controlling State law and to facilitate appropriate, beneficial uses of uncontaminated construction/demolition materials, with appropriate safeguards.

Again, we appreciate the OIG's work on this advisory report and the opportunity to respond to the issues it outlines. We are available to further discuss or answer any questions you may have.

Sincerely,

Julia Morita, M.D.	Thomas H. Powers, P. E.	Rebekah Scheinfeld
Commissioner	Commissioner	Commissioner
Department of Public Health	Department of Water Management	Department of Transportation

Cc: Lisa Schrader, Chief of Staff, Mayor's Office
Stephen Patton, Corporation Counsel, Law Department