

NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to Comment on Proposed Amendment of Article 5 (General Permit Provisions) of the New York City Health Code (Title 24 of the Rules of the City of New York)
- Date / Time:** May 23, 2013/2:00PM to 4:00PM
- Location:** New York City Department of Health and Mental Hygiene
Gotham Center, 14th Floor, Room 14-44
42-09 28th Street
Long Island City, NY 11101-4132
- Contact:** Rena Bryant
New York City Department of Health and Mental Hygiene
Board of Health
Secretary to the Board
Gotham Center, 14th Floor, WS 14-55, Box 31
Long Island City, NY 11101-4132
(347) 396-6071

Proposed Rule

The Department of Health and Mental Hygiene (“the Department”) is proposing that the Board of Health amend Article 5 of the Health Code as follows:

1. To add a new §5.04 to authorize the Department, after providing an opportunity to be heard, to padlock and seal any premises in which a business is operating without a permit required by the Health Code; and
2. To amend §5.05(d) to require that every applicant for a new or renewal permit issued by the Department provide the Department with an e-mail address for non-emergency communications.

Instructions

- You may pre-register to speak at the hearing by contacting Rena Bryant at the address or phone number above before May 23, 2013.
- The Department will also consider written comments that it receives about the proposed amendment. Written comments must be received by the Department on or before the date of the hearing. Written comments can be mailed to Rena Bryant at the address above. They may also be submitted by e-mail to resolutioncomments@health.nyc.gov or posted electronically (without attachments) at either <http://www.nyc.gov/html/doh/html/about/notice.shtml> or through NYC RULES at www.nyc.gov/nycrules.
- To request a sign language interpreter or any other form of reasonable accommodation for a disability at the hearing, please contact Rena Bryant at the phone number above by May 9, 2013.

- Copies of written comments and a transcript of oral comments received at the hearing will be available within a reasonable time after the hearing transcript becomes available, between the hours of 9:00 A.M. and 5:00 P.M. and at the contact address above.
- The Department’s general policy is to make written comments available for public viewing on the Internet. The comments it receives, including any personal information provided with the comment, will be posted without change to <http://www.nyc.gov/html/comment/comment.shtml>.

STATEMENT OF BASIS AND PURPOSE

Statutory authority

This amendment to the New York City Health Code (the “Health Code”) is issued in accordance with §§ 556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with the authority to regulate all matters affecting health in the City of New York. Sections 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters over which the Department has authority. Section 1043 of the Charter gives the Department rulemaking powers.

Basis and purpose of the changes

1. Adding a new §5.04 re: operation without a permit.

The Department requests that the Board amend Article 5 of the Health Code to add a new §5.04, authorizing the Department to padlock and seal premises where businesses are operating without required permits. The term permit, as defined in §5.03(b) of the Health Code, includes licenses and registrations.

Several times a year, the Department identifies businesses operating without the permits required by the Health Code. These businesses include swimming pools and spas, pet shops, food service establishments, animal shelters, animal grooming and kennel facilities and commercial stables. The Department regards such businesses, which are unregulated and uninspected, as nuisances, inherently dangerous to life or health. The definition of a nuisance and the Department’s authority to order the abatement of a nuisance derive from New York City Administrative Code (“Administrative Code”) §17-142 *et seq.*

Currently, if the Department identifies an unpermitted business and determines that the operators of the business are unwilling to obtain the necessary permit, it orders the operators of the business to cease and desist operation. The Department also orders the owners of the building in which the business is located to take whatever measures may be necessary to prohibit the operation of the unpermitted business on their property. If the business continues to operate without obtaining a necessary permit, the Department schedules a hearing at the City Office of Administrative Trials and Hearings (OATH) Tribunal, where the business operator and property owner may show cause why the Department should not padlock and seal the premises, pursuant to the Department’s nuisance abatement authority under Administrative Code §17-145.

The proposed amendment to Article 5 will codify this current practice in the Health Code, providing notice to businesses of the likely consequences of operating without necessary permits or in violation of orders to cease and desist operation, and enabling the Department to continue acting expeditiously to protect public health. This remedy will be utilized only when the Department has conducted a thorough investigation and has exhausted less stringent measures to obtain compliance with

permitting or other Health Code requirements, such as meetings, telephone calls or correspondence with the operator of an unpermitted business or the property owner.

2. Amending §5.05(d) re: requiring e-mail addresses for non-emergency communications.

Health Code §5.05(c) requires a permit application to contain all information required by the Department. In December 2011, as part of an extensive revision of Article 5 (“General Permit Provisions”) of the Health Code, §5.05(d) was amended to require permit applicants to provide in their applications for new and renewal permits an “[e]-mail address and other information to enable the Department to contact the permitted entity in an emergency.”

This addition was made in response to a comment received from the New York State Restaurant Association on earlier revisions to Article 81 (“Food Preparation and Food Establishments”) of the Health Code that stated:

We suggest that the Department develop a system to collect the email addresses of DOH permit holders, FSE owners and their agents. This system could be used [as] a vehicle for the DOH to disseminate important information regarding permit renewals, changes to the Health Code, public hearings and other important information.

The Department agrees with the New York State Restaurant Association that all permittees would benefit from e-mail notifications and should be required to provide e-mail addresses. Thus, the Department is proposing that the Board broaden Health Code §5.05(d) to allow the Department to collect and use e-mail addresses from all permittees to send them information about non-emergency matters, such as newsletters generally promoting food and environmental safety, proposed Health Code changes, and other issues of educational and technical interest to permittees in the many areas regulated by the Department. As required under applicable laws, the Department will continue to mail and personally serve letters denying issuance of new permits, Commissioner’s orders, notices of violation, and permit or license renewal applications; and will continue to publish proposed amendments to the Health Code.

E-mail is a medium that provides for the immediate and timely, but also cost-efficient, communication of educational materials, information on rule changes, and other important notices. Electronic communication conserves increasingly limited staff resources and saves considerable amounts of money in mailing and reproduction costs. Such communication aids the Department in protecting and promoting the health of all New Yorkers, and helps it foster productive working relationships with regulated businesses.

The Department’s Bureau of Child Care already uses electronic communication to notify permittees of proposed Health Code amendments as well as changes in policies, reporting requirements, and other information affecting a permittee’s operation of a child care service. The Bureau has required applicants for new and renewal child care service permits to provide “proof of the service’s ability to receive electronic communications” since September 2009, when the Board amended Article 47 of the Health Code. Health Code §§ 47.09(a) and (c) require e-mail addresses for the child care service’s education director and for one or more other persons designated by the service permittee to receive electronic communications from the Department.

Finally, the Department does not expect this proposed change to overly burden permittees and applicants for new permits. During the week of January 7, 2013, the Department surveyed applicants at the Citywide Licensing Center for Department restaurant permits and found that 57 of the 65 surveyed persons had an e-mail address; and that 49 had used both computers and mobile phones (n=39) to access e-mail for business communications during the past five days, or used either computers (n=5) or a mobile

phone (n=1) for the same purpose. Although several persons said they had no interest in obtaining an e-mail address, others said that they could obtain one if they needed it, knew that they would be able to set up a free e-mail account with an internet service provider, and could access their e-mail through family or friends or at nearby public libraries if they were required to have an e-mail address.

Accordingly, the Department requests that the Board amend §5.05(d) of the Health Code to clarify that communication other than emergency messages may be conveyed by e-mail to permitted entities.

Statement pursuant to Charter §1043. The proposed amendments were inadvertently omitted from the Department's FY 2013 Regulatory Agenda because the need for the amendments was not known at the time the Regulatory Agenda was promulgated.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the text below, unless otherwise specified or unless the context clearly indicates otherwise.

The resolution is as follows:

Matter to be deleted is in brackets []

New matter is underlined

RESOLVED, that Article 5 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be amended, to add a new §5.04 to be printed together with explanatory notes as follows:

§5.04 Operating without a permit; sanctions.

(a) Operation without a permit deemed a nuisance. Operating a business or conducting an activity regulated by the Health Code (“Code”) without the permit required by the Code is hereby declared a nuisance.

(1) No person may operate a business or conduct an activity regulated by the Code without the permit required by the Code.

(2) No person may allow the operation of a business or conducting of an activity regulated by the Code in any property owned by such person unless the person operating such business or conducting such activity has a permit required by the Code.

(b) Order to cease and desist. When the Department determines that a business or activity regulated by the Code is being operated or conducted without the permit required by the Code, the Commissioner or designee may order the person operating the business or conducting the activity to cease and desist from such business or activity. The Department may also order the person who owns the premises in which the business is operated or activity is conducted to take whatever action may be necessary to prohibit such business or activity from continuing on such premises.

(c) Sealing and padlocking. If the business or activity ordered to cease and desist continues without the required permit, the Commissioner or designee may, after providing a hearing at the City Office of Administrative Trials and Hearings (OATH) for the person operating such business or conducting such activity and the owner of the premises, take any measure authorized by the Code or other applicable law to enforce an order to cease and desist. Such measures may include, but are not limited to, ordering and arranging for the premises to be sealed and padlocked.

Notes: §5.04 was added to Article 5 by resolution adopted by the Board of Health on XXX to provide notice to persons operating a business or conducting an activity without a permit required by the Code, that such business or activity is deemed a nuisance and is subject to padlocking and sealing if the operators do not cease and desist from such business or activity.

RESOLVED, that §5.05 of Article 5 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be amended, to be printed together with explanatory notes as follows:

§5.05 Applications.

* * *

(d) *Application contents.* [The] In addition to the following information, the application shall be accompanied by such other information, evidence or documentation as the Department may require or as may be provided for in this Code or other applicable law enforced by the Department[, including but not limited to the following]. The application shall, at a minimum, include:

(1) The name, age, gender, residence and business address, and telephone numbers of the permittee, each member of partnership, limited liability company or group, and each officer of the corporation, as applicable.

(2) The ability of the permittee, or of its individual members or officers, to read and write English.

(3) To the extent that such information is relevant to the conduct of the business, trade, occupation or other activity under permit, information concerning the permittee, its individual members or officers, relating to education, training or experience, moral character, physical health, addiction to alcohol or habit-forming drugs, history of prior criminal conviction, including violations and offenses, history of mental illness, and record of insolvency or bankruptcy.

(4) Proof of current Workers' Compensation and Disability Benefits insurance coverage for all employees, or of a certificate of exemption filed with the Workers' Compensation Board.

(5) [E-mail address and other information to enable the Department to contact the permitted entity in an emergency.] The e-mail address of (i) the individual owner of the permitted business, (ii) the person

**NEW YORK CITY LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007
212-788-1087**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Padlocking of Premises Operating without Permit and E-mail Address Requirement for Permit Applicant

REFERENCE NUMBER: 2013 RG 011

RULEMAKING AGENCY: New York City Department of Health and Mental Hygiene

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: April 5, 2013

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION/ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Padlocking of Premises Operating without Permit and E-mail Address Requirement for Permit Applicant

REFERENCE NUMBER: DOHMH - 28

RULEMAKING AGENCY: Department of Health and Mental Hygiene

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Hunter Gradie
Mayor's Office of Operations

April 5, 2013
Date