

NEW YORK CITY
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
ENVIRONMENTAL CONTROL BOARD

BOARD MEETING

Training Room 143, 12th Floor
100 Church Street, New York, New York

October 17, 2019

9:39 A.M. to 10:21 A.M.

October 17, 2019

MEMBERS PRESENT:

Michael Burns - Dept. of Buildings (DOB)

Joseph Gregory - New York City Fire Department (FDNY)

Madelynn Liguori, Esq. - Dept. of Sanitation (DSNY)

**Jorge Martinez, Esq. - Dept. of Health & Mental Hygiene
(DOHMH)**

Ryan Nemoylen - New York City Police Dept. (NYPD)

**Russell Pecunies, Esq. - Dept. of Environmental Protection
(DEP)**

Tom Shpetner, Esq. - Appointed Member

Doug Swann - Appointed Member

Jarrold Whittington - Appointed Member

ALSO PRESENT:

Rachel Amar - Special Assistant to Commissioner, OATH

**Kelly Corso, Esq. - Assistant Commissioner for Hearings
Division Adjudications, OATH**

Nicholas Dietz, Esq. - Assistant General Counsel, OATH

Timothy Jones, Esq. - Assistant General Counsel, OATH

Richard J. LaPlant - Office of Management and Budget (OMB)

Maggie Nieves - Public Affairs Associate, OATH

**Tynia Richard, Esq. - Acting Commissioner/Chief
Administrative Law Judge, OATH**

**Peter Schulman, Esq. - Assistant Director for Appeals,
OATH**

Frances Shine - Secretary to the Board, OATH

**Amy Slifka, Esq. - Deputy Commissioner/Hearings Division,
OATH**

Olga Statz, Esq. - Acting General Counsel, OATH

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2 (The board meeting commenced at 9:39
3 A.M.)

4 TYNIA RICHARD, ESQ., CHAIR, ACTING
5 COMMISSIONER/CHIEF ADMINISTRATIVE LAW JUDGE: So
6 I'd like to call the meeting to order. We have
7 the minutes on first, but I do want to, as a
8 preliminary matter, introduce the new board
9 member, Jarrod Whittingham.

10 JARROD WHITTINGTON, APPOINTED MEMBER:
11 Whittington.

12 MS. RICHARD: Oh Whittington, I'm sorry.
13 As Mr. Whittington is the newest member, he's
14 been appointed by the Mayor to be the Board's
15 Senior Associate of Acoustics or Noise
16 Specialist. We're very happy to have him here.

17 His background and experience will prove
18 invaluable in helping the Board discuss and
19 adjudicate noise complaints. He holds a master's
20 degree in Building Science with a concentration
21 in Architectural Acoustics from Rensselaer
22 Polytechnic Institute and a Bachelor of Science
23 in Communication, concentration in Audio
24 Production.

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2 For more than 13 years, he has provided
3 consulting services to architects, engineers,
4 developers, property owners in New York. And
5 prior to that, performed similar services in
6 Ohio. His work has included developing solutions
7 to provide privacy and acoustically sensitive
8 spaces, such as offices and hotels, controlling
9 environmental noise, mechanical noise and
10 vibrations, as well as working with acoustics of
11 performance spaces. He plays guitar, bass
12 guitar, and has composed music for documentary
13 short films. His wife works for the New York
14 Library for the Performing Arts at Lincoln
15 Center, and their 22-year old daughter currently
16 lives and works in Los Angeles. Welcome.

17 MR. WHITTINGTON: Thank you. Glad to be
18 here.

19 MS. RICHARD: The Board is very
20 appreciative to have you here for a number of
21 reasons, not the least of which is to share
22 workload, so we will talk with you about that in
23 more detail later.

24 So alright. So we're beginning with the

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2 minutes. And so, I'll ask if there's a motion to
3 adopt the minutes for the June meeting. And if
4 not, if there's some --

5 TOM SHPETNER, ESQ., APPOINTED MEMBER:

6 Well, I have an issue with that because --

7 MS. RICHARD: -- if you'd like to
8 discuss.

9 MR. SHPETNER: -- they never really have
10 been distributed electronically. We don't have a
11 record of that.

12 MS. RICHARD: No, they were distributed
13 --

14 MR. SHPETNER: Electronic?

15 MS. RICHARD: -- electronically the day
16 after the last meeting.

17 MR. SHPETNER: Right after, oh, right.

18 MS. RICHARD: August 23rd.

19 MR. SHPETNER: Oh, I'm sorry. Okay.

20 So --

21 MS. RICHARD: Yeah.

22 MR. SHPETNER: Yeah. No.

23 [unintelligible] [00:02:27].

24 MS. RICHARD: Okay. So is there a

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2 motion to adopt? Okay. Alright. And a vote to
3 approve. Alright. Unanimous vote. Thank you.

4 So for the next set, is there a motion
5 to adopt the minutes for the August 22nd meeting?
6 Is that a question or a motion?

7 MR. SHPETNER: Motion.

8 MS. RICHARD: Motion, okay. Great.
9 Alright. Vote to approve? You, yes, yeah, you
10 don't have -- you don't vote because you can
11 abstain. Thank you. Alright. So unanimous with
12 one abstention on both of those, yeah.

13 Alright. So the next thing on the
14 agenda. We have --

15 NICHOLAS DIETZ, ESQ., ASSISTANT GENERAL
16 COUNSEL, OATH: I guess that's me.

17 MS. RICHARD: Actually, I'm going to ask
18 if we could skip the third item for now and move
19 to request for cease and desist orders?

20 MR. RUSSELL PECUNIES, ESQ., DEPARTMENT
21 OF ENVIRONMENTAL PROTECTION (DEP): Sure.

22 MS. RICHARD: Mr. Pecunies.

23 MR. PECUNIES: Okay, good morning. My
24 name is Russell Pecunies, and I am the

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2 representative of the Department of Environmental
3 Protection on the Board. This month DEP is
4 requesting that the Board issue 48 cease and
5 desist orders related to failure to install
6 backflow prevention devices.

7 In each of these cases, the Department
8 has inspected the premises and determined that
9 the installation of a backflow prevention device
10 is required and has issued Commissioner's order
11 to the building owner requiring the installation
12 of said devices. And when that order has not
13 been complied with in each of these 48 cases, the
14 Department has issued a summons to the property
15 owner citing them for failing to install the
16 required backflow prevention devices and they
17 have been adjudicated in violation, either by
18 hearing or through default. And in each of these
19 48 cases, the building owner still currently has
20 not complied with the order to install backflow
21 prevention devices.

22 So at this point, regarding each of
23 these 48 locations, DEP is asking the Board to
24 issue an order to cease and desist.

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2 MS. RICHARD: Okay. So are there any
3 questions? Is there a motion to approve? Okay.
4 And all in favor. One, two, three, four, five,
5 six, seven, eight. Okay. Thank you.

6 MR. PECUNIES: In addition, DEP's Bureau
7 of Wastewater Treatment is asking the Board to
8 issue an order to cease and desist in the matter
9 of Water Lilies Food Incorporated, which is
10 located in Astoria, I believe, at 45-10 19th
11 Avenue. This is a large commercial food
12 preparation facility. It is not a restaurant.
13 DEP began enforcement at this location back in
14 July of 2014. And if you read the long and
15 tortuous history of this, which goes on for five
16 pages, DEP has been back and forth with this
17 location over and over again, over the past five
18 years. They have been issued a huge number of
19 summonses, 66 summonses, I believe, for failing
20 to comply with various Commissioner's orders
21 requiring them to install and maintain the
22 appropriately sized required grease interceptors.
23 Apparently, they have been continuously
24 representing over this whole period that they are

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2 planning on moving their facility out of New York
3 City, but they have still never done so. And
4 they still have not complied with the
5 Commissioner's orders.

6 And at this point, and I'm not sure that
7 I can speak for the Bureau as far as why they've
8 been so patient with these people, but
9 apparently, it has finally reached the point in
10 August, they continue to represent their interest
11 in achieving compliance. They continue to claim
12 that they're going to be moving outside the City,
13 and neither one of these things happens. And so
14 finally, they have come to the point where they
15 are requesting that the Board issue a cease and
16 desist order requiring them to come into
17 compliance with the Commissioner's orders that
18 have been issued over this whole period of time
19 regarding their failure to comply with grease
20 interceptor requirements.

21 MS. RICHARD: Any questions about Water
22 Lilies? Okay. Is there a motion to approve?
23 Okay. All in favor? Okay. Looks like a unan-,
24 are you voting in favor? Okay. Alright. It's

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2 unanimous vote.

3 MR. PECUNIES: Alright. Thank you.

4 MS. RICHARD: Can go I go back? Just
5 before -- I think that before you finish, we had
6 eight votes in favor on the first vote. Were
7 there any opposed? Were there any abstentions?

8 MR. SHPETNER: Maybe Jorge missed the
9 vote.

10 JORGE MARTINEZ, ESQ., DEPARTMENT OF
11 HEALTH & MENTAL HYGIENE (DOHMH): I missed the
12 vote.

13 MS. RICHARD: You missed the vote.
14 Okay. So we had one absent.

15 MR. SHPETNER: He didn't vote, maybe
16 that's what happened?

17 MS. RICHARD: Okay.

18 MR. SHPETNER: That's why your number is
19 off.

20 MS. RICHARD: And one abstention. Okay.

21 MR. DIETZ: For both of the Minutes, the
22 June and August Minutes.

23 MS. RICHARD: Okay. Alright, so we have
24 presealing reports by Kelly Corso.

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2 KELLY CORSO, ESQ., ASSISTANT

3 COMMISSIONER FOR HEARINGS DIVISION ADJUDICATIONS,

4 OATH: Good morning. I'm Kelly Corso, Assistant

5 Commissioner for Adjudications with the Hearings

6 Division, and we have eight presealing reports

7 this morning for the Board. Six of them --

8 excuse me -- have to do with backflow violations

9 and all of those cases the hearing officers have

10 determined that based on the evidence of

11 compliance that respondents have provided at the

12 hearings, that no further action should be taken

13 with respect to those six cases.

14 The other two cases are noise code

15 cases. One involves noise from a respondent's

16 water pump, and the other involves noise from a

17 respondent's air conditioner. And in both of

18 those cases, the respondents brought in evidence

19 to show that they have started work to come into

20 compliance with the noise code. And based on

21 that evidence and the recommendations at those

22 hearings, the hearing officers recommended no

23 sealing of the equipment provided that DEP's

24 initial reinspection and inspections for a period

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2 of 180 days show no violations.

3 MS. RICHARD: Okay.

4 MS. CORSO: And that's it.

5 MS. RICHARD: Alright. Any questions
6 about the noise order backflow cases? Okay. Is
7 there a motion to approve? Okay. And all in
8 favor? Alright. That's unanimous vote. Okay.
9 Thank you.

10 Alright. So we can go back to item --

11 UNIDENTIFIED FEMALE: 2.

12 MS. RICHARD: -- 2 -- no, item 3. Or
13 it's 2 on there, yeah. It's 2. Okay. Final
14 rule presentation.

15 MR. DIETZ: Hello, I'm Nicholas Dietz.
16 I'm Assistant General Counsel at OATH. Today
17 we're presenting the Final Rule repealing OATH's
18 Hazardous Materials Penalty Schedule. This is
19 the rule that was proposed and approved on August
20 22nd. It's being coordinated with DEP, in that
21 DEP new hazardous materials penalty schedule will
22 now be serving the role that OATH's, our current
23 HazMat penalty schedule will no longer be
24 serving.

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2 The proposed rule was published in the
3 City Record on August 8th. A public hearing was
4 held on September 10th, and we did not receive
5 any public comment. The rule has been certified
6 by the Mayor's Office of Operations and by the
7 City Law Department for promulgation. The rule
8 has not -- the final rule has not been altered in
9 any way from the proposed rule presented on
10 August 22nd.

11 MS. RICHARD: Okay.

12 MR. DIETZ: Any questions?

13 MS. RICHARD: Alright. So is there a
14 motion to approve? Okay. And all in favor of
15 adoption. Okay. So that's seven. All opposed?
16 That's two. Okay. Thank you. Alright. So is
17 there a motion to go into executive session to
18 discuss the judicial report. Okay. Alright.
19 All in favor. Alright. Thank you.

20 [OFF THE RECORD]

21 [ON THE RECORD]

22 MS. RICHARD: Alright. So we're back in
23 public session and the last item on the agenda is
24 the discussion of the letter that was mailed to

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2 the parties in *DOB v. Owen Foster*, a full board

3 appeal that was discussed in the June meeting.

4 And that letter essentially summarized our

5 discussion at the board meeting as to how to

6 resolve that case because we had not been able to

7 have a vote of seven members in favor of one side

8 or the other. And so we resolved that. What we

9 were going to do is if 180 days had passed since

10 the appeal was filed, we were going to resolve it

11 by having the hearing officer decision be the

12 final OATH determination. Subsequent to that, we

13 wrote a letter when we realized 180 days had

14 passed -- OATH wrote a letter advising the

15 parties of that decision. And then -- but there

16 was disagreement as to whether or not OATH should

17 have sent the letter without the Board's review

18 of the letter. That was the discussion. I think

19 that was the reason why there was a request to

20 put a discussion that letter on the Board agenda.

21 So there it is. And if anybody wants to add or

22 disagree or --

23 MR. SHPETNER: I mean, Shamonda was the

24 key, one of the key proponents of putting it on

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2 there, so I don't know if I have anything to add
3 on her behalf or if you guys discussed it.

4 MICHAEL BURNS, DEPARTMENT OF BUILDINGS
5 (DOB): No, but I'm glad that it's on the record.
6 I mean, I don't know what kind of precedent this
7 will set. And the philosophical legal question
8 is could the Building Department ever take an
9 Article 78 from a decision that's a final
10 decision. I don't know.

11 MS. RICHARD: Mm-hmm.

12 MR. BURNS: Practically, probably not.

13 MS. RICHARD: Mm-hmm.

14 MR. BURNS: I mean --

15 MS. RICHARD: We've had those
16 discussions with the Law Department. Right?

17 MR. BURNS: We have right, yes. I don't
18 know. But I would only say that this was for
19 illegal, I believe for illegal advertising and
20 transient use. Sometimes even when people lose,
21 they comply in the future. So it's not as if --
22 it's an important case, but I don't know if this
23 individual has been named in any new summonses
24 for illegally transient advertising.

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2 MS. RICHARD: Mm-hmm.

3 MR. BURNS: What kind of precedential
4 value this would have, we don't have to decide
5 now until it actually arises.

6 MS. RICHARD: But that's a very good
7 question. Right. Right. Because we've taken
8 the position that hearing officer decisions don't
9 have precedential value.

10 MR. BURNS: Right, right.

11 MS. RICHARD: So it's -- yeah, there are
12 lots of questions here. The good news is that we
13 have new board member. So maybe we won't have so
14 many occasions when we can't get to seven. So we
15 won't rely on the 180-day rule.

16 MR. BURNS: Well, I'm filling in for
17 Shamonda. I was told you needed a quorum so I'm
18 glad to be here.

19 MS. RICHARD: Yes. Thank you, Mr.
20 Burns. Alright. So, yeah, a lot is riding on
21 you, Mr. Whittington. Alright. Any other
22 questions on the letter? I mean, we really did
23 attempt to make it as succinct as possible, but
24 to provide as much, sort of, legal citation so

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2 that somebody picking it up could look at those
3 two laws and understand how we got, how we got
4 there so. Alright.

5 Any other board matters? Yes.

6 MR. SHPETNER: I credit that it's a lot
7 of work to assemble all of the items, but --

8 MS. RICHARD: I know you had asked for a
9 week in advance.

10 MR. SHPETNER: Well, some of the, I
11 think the Agency stuff, like, the CNDs would be
12 great.

13 MS. RICHARD: I respect that request. I
14 really, really do and I apologize we didn't make
15 that, that standard this month. We did endeavor
16 to do that.

17 MR. SHPETNER: I'm just suggesting 80/20
18 rule. I would bet a lot of it could be sent a
19 week in advance. Like, the C and Ds --

20 MS. RICHARD: The C and Ds --

21 MR. SHPETNER: -- the backflow things.
22 I'm guessing rule changes -- I think a lot of
23 that stuff doesn't change in the week before the
24 meeting. I credit that maybe the judicial report

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2 needs a few eyes on it or something else. But I
3 would bet you that a lot of the Agency stuff
4 could be done probably quickly.

5 MS. RICHARD: That's a good point.
6 That's a good point.

7 MR. SHPETNER: A week ahead. And I
8 think actually piecemeal is totally alright --
9 We can try to get them in as [unintelligible]
10 [00:17:46] as we come. -- as long as we're just
11 clear that -- you know, and Frances is very good
12 about this actually, like, saying this is number
13 1, and this is number 2, this package 3.

14 MS. RICHARD: Mm-hmm.

15 MR. SHPETNER: So I don't, I don't think
16 the, the system --

17 MS. RICHARD: It's true.

18 MR. SHPETNER: I think the system lends
19 itself well. I just think a lot of it's baked
20 already.

21 MS. RICHARD: Yeah. Yeah. Fair point.
22 Alright. Yes.

23 MR. MARTINEZ: Are they -- you know,
24 being things transparent, are there any things

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2 you feel the Board should know that are coming
3 that we should be aware of, should we get a heads
4 up at this point since, since we get the
5 information not as quickly as we would wish for
6 various reasons?

7 MS. RICHARD: Board matters, I, I mean,
8 I know that there had been movement and
9 discussion around, you know, reducing or getting
10 rid of the Board. There's a been a lot of, sort
11 of, I guess, change afoot. Those are not matters
12 that I'm looking at right now. I have -- not on
13 my top 10 at all. I mean, we're going forward.
14 We're happy to have a new board member so that we
15 can assist those who are reviewing the panel
16 decisions and reduce the number of times you're
17 serving on panels. But we're just sort of, we're
18 just going forward right now with respect to the
19 Board. So I have no news in that area. Alright?
20 Any other questions?

21 And I, you know, we do appreciate it.
22 We, I get word from Tim and Olga all the time
23 about the panel discussions and the value of
24 having the public members, you know, throw in,

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2 you know, opposition when you think that there's
3 something, you know, that needs to be challenged
4 or, you know, a better understanding of what the
5 evidence was. So, you know, I appreciate that
6 very much, and think that that's an important
7 contribution. Right? I mean, that's sort of
8 when the Board was created, that was the reason
9 to have public members. So thank you for that.
10 Yes.

11 DOUG SWANN, APPOINTED MEMBER: We've got
12 a new Board member, are we going to keep the two
13 panel, two panel --

14 MS. RICHARD: Oh. So -

15 PETER SCHULMAN, ESQ. ASSISTANT DIRECTOR
16 FOR APPEALS, OATH: I think that's a discussion
17 we need to have right now. With three of you
18 coming to -- only one person to a panel, you're
19 actually coming once every three meetings.
20 Right? Three panel meetings.

21 MR. SHPETNER: I've never done the math.

22 MR. SCHULMAN: If you go back to two
23 people, you're going to be coming once every two
24 meetings again. So it's really up to you to

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2 figure out what you want to do.

3 MR. SWANN: The, the thing is packages
4 are a lot thicker. Doug's right. They, they
5 used to be much more lighter, they've put on
6 weight.

7 MR. SHPETNER: Right. That's just fact.
8 I mean, I've done this now for about four or five
9 or six years, I don't even know, but, you know.

10 MR. SCHULMAN: So if we go back two
11 members per meeting, you're going to be going to
12 one meeting every month. Whereas, right now,
13 you're going to meeting every month and a half.

14 MR. SHPETNER: I understand that.

15 MR. SCHULMAN: So it's up to you to
16 decide how you want to do it.

17 MS. RICHARD: But it's the size of
18 the -- right. So it's, it's -- right? It's
19 either --

20 MR. SHPETNER: I'm ambivalent. I think
21 the Board should have every seat full. I mean,
22 as a matter, as a governance matter, that's --
23 we're sort of skip, stepping over that dead body,
24 I think.

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2 MS. RICHARD: We have -- we do have one
3 more member or one more prospective member who's
4 in process. We have another.

5 MR. SHPETNER: Great. And then once
6 that happens, we should have that discussion
7 again.

8 MS. RICHARD: Then it will really be
9 half.

10 MR. SHPETNER: And then we can go back
11 to the old schedule.

12 MS. RICHARD: Uh-huh.

13 MR. SHPETNER: I mean.

14 MS. RICHARD: Okay. Okay.

15 AMY SLIFKA, ESQ. DEPUTY

16 COMMISSIONER/HEARINGS DIVISION, OATH: So you
17 want to make it status quo until you get a little
18 bit --

19 MS. RICHARD: So status quo until the
20 next meeting then.

21 MR. SHPETNER: I think we should because
22 having an additional person in the rotation means
23 some measure of --

24 MS. RICHARD: Relief.

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2 MR. SHPETNER: I'm not looking for
3 relief, like, this is killing me. I just think
4 it's important that the workload resembles
5 something of what it once was. The packet's
6 gotten longer and, you know, we've gotten us to
7 be a smaller organ.

8 MR. SCHULMAN: And I think one option
9 might be for Jarrod to attend the meeting that he
10 wants to attend right now, and he could be a
11 second person at meetings that he wants, and --
12 unless you want to come and be the only member.
13 It's up to you, I think, really too.

14 MR. WHITTINGTON: Yeah, I mean, I
15 really, I don't really know yet what --

16 MR. SCHULMAN: Right. So it might --

17 MR. WHITTINGTON: -- you know, what I
18 need to sit in on.

19 MR. SCHULMAN: I don't know if you might
20 feel more comfortable if the panel meeting you
21 attend has two members at it.

22 MR. WHITTINGTON: Yeah, I mean, for the
23 first ones, yeah, I would prefer that.

24 MR. SCHULMAN: So we can keep in the

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2 rotation where --

3 MR. SHPETNER: I know. My first one I
4 was thrown right in the --

5 MR. SWANN: That's how it works.

6 MR. SHPETNER: Remember that person from
7 the Fire Department.

8 MS. SLIFKA: Oh, Tao [phonetic]. Tao.

9 MR. SHPETNER: No, no. Tao's supervisor

10 MS. SLIFKA: Julian.

11 MR. SHPETNER: Julian Basil grabbed me
12 by the shoulders trying to tell me how to vote.
13 Yeah, first, first five minutes of my, my
14 experience here so. I didn't agree with it, but
15 he did try to educate me as to the Fire
16 Department.

17 MR. SCHULMAN: As to the upcoming panel
18 meeting, we have one next Thursday, and then --
19 I'll let you know the date, and you can decide
20 when you want to come and, and get your feet wet
21 on that.

22 MR. WHITTINGTON: Yeah, definitely.

23 MS. RICHARD: Okay. Alright. And, and
24 we're going to close out. But, you know, if, if

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2 you all have advice for the new board member or
3 if you want to sort of share with him the
4 experiences of the panels, then, you know, I'm
5 sure he'll appreciate it.

6 Alright. So is there a motion to
7 adjourn? All in favor. Alright. Thank you.

8 (The board meeting concluded at 10:21
9 A.M.)

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CERTIFICATE OF ACCURACY

I, Natalya Brook-Abegha, certify that the foregoing transcript of Environmental Control Board - Board Meeting on October 17, 2019 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



Date: November 18, 2019

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