

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

BOARD MEETING

Training Room 143, 12th Floor

100 Church Street

September 25, 2015

[9:20 a.m. to 11:19 a.m.]

9/25/2015

## MEMBERS PRESENT:

Lt. Dan Albano, Esq. - Police Department  
Robert Carver, Esq. - Citizen Member  
Fidel F. Del Valle, Esq. - Commissioner, OATH, Chair, ECB  
Alexandra Fisher - Department of Buildings  
Joseph Gregory, Esq. - Fire Department  
Elizabeth Knauer, Esq. - Citizen Member  
Madelynn Liguori, Esq. - Department of Sanitation  
Jorge Martinez, Esq. - Department of Health and Mental  
Hygiene  
**Russell Pecunies, Esq. - Department of Environmental  
Protection**  
Thomas D. Shpetner, Esq. - Citizen Member  
Douglas Swann - Citizen Member

## ALSO PRESENT:

Jim Macron, Esq. - Counsel to the Board, OATH/ECB  
Frances Shine - Secretary to the Board, OATH/ECB  
Rachel Amar - Special Assistant to the Commissioner,  
OATH  
James Armstrong, Esq.- Agency Interne, OATH  
**Helaine Balsam, Esq. - Deputy General Counsel, OATH**  
Reuben Fuller Bennett - Hudson River Park Trust  
Ann Biebel, Esq.- Staff Attorney, Appeals, OATH/ECB  
Denis Brogan, Esq. - Assistant General Counsel, OATH  
John Castelli - Assistant Commissioner for Legislative  
Affairs, OATH  
Vanessa Caughman - Computer Service Technician, OATH  
**Kelly Corso, Esq. - Assistant Director of  
Adjudications, ECB**  
Dwayne Crispell- General Counsel Intern, OATH  
**Michael Dockett - Assistant Commissioner, Department  
of Parks**  
Fana Garrick - Public Affairs Assistant, OATH  
David Goldin, Esq. - Administrative Justice  
Coordinator, Mayor's Office  
Diana Haines, Esq. - Assistant General Counsel, OATH  
Vivienne Kahng, Esq. - Staff Attorney, Appeals,  
OATH/ECB  
Nancy Lin - Office of Management & Budget  
Maria Marchiano, Esq.- Senior Counsel/Assistant  
Commissioner, OATH  
Carol Moran - Deputy Commissioner of Health and

9/25/2015

Consumer Hearings and Taxi, OATH

Doris Stewart - Department of Transportation

Peter Schulman, Esq. - Assistant Director of  
Adjudications, ECB

Amy Slifka, Esq. - Deputy Commissioner, ECB

Thomas Southwick, Esq. - Supervising Attorney,  
Appeals, ECB

Vincent Maniscalco- Department of Transportation

Kevin Lawner, Esq., Staff Attorney, Appeals, ECB

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9/25/2015

## INDEX

	Page
Fidel Del Valle, Esq.	5
Michael Dockett	7
Alexandra Fisher	8
Madelynn Liguori, Esq.	12
Helaine Balsam, Esq.	12
Jorge Martinez, Esq.	15
Elizabeth Knauer, Esq.	29
Thomas Shpetner, Esq.	38
Joseph Gregory, Esq.	41
Douglas Swann	58
Russell Pecunies, Esq.	93
Kelly Corso, Esq.	98

1 9/25/2015

2 (The board meeting commenced at 9:20  
3 a.m.)

4 ALJ FIDEL F. DEL VALLE, ESQ., CHAIR,  
5 OATH: Welcome to our unregularly scheduled  
6 meeting of the Environmental Control Board. We  
7 are meeting one day later than normal in order  
8 that we can vote on certain rules regarding water  
9 towers in a little while.

10 Before we go on with the rest of the  
11 agenda, I assume everybody got a copy our minutes  
12 of the last meeting. If there's a motion to  
13 accept those minutes we will accept the minutes.  
14 And it's anonymous, anonymous -- unanimous.

15 And we'll go into Parks Department  
16 presentation where they are requesting the rule  
17 change.

18 And I'll do a little preamble which is  
19 the Parks Department is doing is updating our  
20 processes that one step in our updating our  
21 processes the board which legacy items, things  
22 that, that were left over before from a different  
23 time when there was a very different city,  
24 different operations. When the Environmental

1 9/25/2015

2 Control Board, among other things over saw,  
3 other, other city agencies which it no longer  
4 does.

5 Environmental Control Board is now  
6 essentially a, an adjudicatory entity more than  
7 anything else. Once upon a time, the  
8 Environmental Control Board actually over saw the  
9 operations of our city agencies such as the  
10 Sanitation Department, DEP and others.

11 I won't go into the history of how that  
12 happened or how it de-evolved into where it is  
13 now, but as things changed they are, we have  
14 found in reviewing things over the last ten  
15 months or so that there are a lot of legacy  
16 things that continue to be done even though it  
17 didn't make any sense simply because quote,  
18 "that's the way it was always done". And it was  
19 assumed that it was required by law when it  
20 wasn't required by law. In other words, the end  
21 result was a, was a rather convoluted and  
22 inefficient way through example, through rule  
23 making.

24 And the Parks Department is, right now

1 9/25/2015

2 the first agency to wholesale, get rid of some of  
3 those legacy anachronisms.

4 MR. MICHAEL DOCKETT, ASSISTANT  
5 COMMISSIONER, DEPARTMENT OF PARKS: So. My name  
6 is Mike Dockett. I'm Assistant Commissioner of  
7 Parks. I also receive the enforcement division  
8 of Parks with beach and pool operations.

9 So, we would like to move the PARKS  
10 penalty table out of the ECB rules section of the  
11 law and put it under Park rules so that we can  
12 have a penalty table under Park rules. It would  
13 be easier for our customers and our patrons who  
14 get a violation to see the, what the violation  
15 is, to look up penalty for it.

16 It would also allow us an easier process  
17 to amend the penalty tables, and we would do that  
18 through the CAPA process. So, we're proposing  
19 eliminating it, repealing it from where it is,  
20 putting it under Park rules and then starting a  
21 process to make that happen.

22 So, this is the, the first step in the  
23 process is for the board to agree to do that  
24 move.

1 9/25/2015

2 CHAIR DEL VALLE: Essentially it will  
3 involve a revoking those, those rules in the ECB  
4 rules that relate to Parks Department penalties  
5 and then the Parks Department will then  
6 essentially reintroduce them into their rules.  
7 So, it's all in one package. The most practical  
8 thing for the public that, you know, to be able  
9 to go one location and find out what the  
10 penalties are for rule violations.

11 Are there any questions from any of the  
12 board members?

13 MS. ALEXANDRA FISHER, DEPARTMENT OF  
14 BUILDINGS: Yes. Alexandra Fisher from  
15 Buildings.

16 MR. DOCKETT: Hi.

17 MS. FISHER: Has the Law Department  
18 opined on this change in this process? I mean  
19 they've expressed some concerns, and  
20 [unintelligible] [00:04:27] I'm --

21 MR. DOCKETT: Okay. So, I'm not aware  
22 of any objection from the Law Department. So,  
23 Parks legal has opined on this. Well, I'd  
24 imagine they've had discussion with the Law

1 9/25/2015

2 Department, but I'm not 100 percent sure.

3 MS. FISHER: So, I guess I'd like to  
4 know that.

5 MR. DOCKETT: Okay. I can find that out  
6 while this meeting is going on.

7 MS. FISHER: That's fine.

8 MR. DOCKETT: And talk to general  
9 counsel.

10 CHAIR DEL VALLE: Just as an aside, when  
11 I inquired a few months ago as to where, what,  
12 why was it, wh- why did the structure exist as it  
13 existed?

14 And I was initially told it's because it  
15 in the Charter with the Administrative Code, and  
16 I later asked, show me where in the Charter and  
17 the Administrative code it is. It turns out it's  
18 not. It's nowhere in the Charter or the  
19 Administrative Code. It turned out to be lore  
20 more than law. And that it was being, it was  
21 done since 1974 essentially because in 1974, we  
22 basically controlled those, those agencies or  
23 those entities.

24 I have no idea what the Law Department's

1 9/25/2015

2 concerns are, but they, they have to certify that  
3 the rules ultimately conform with the City  
4 Charter and local laws and is within the Board's  
5 authority or Parks Department authority as the  
6 case may be. That's their function. And as far  
7 as a matter of policy that is not their function.  
8 Any, any other questions?

9 LT. DAN ALBANO, ESQ., POLICE DEPARTMENT:  
10 Commissioner Dockett, there's no change to the  
11 criminal penalties right?

12 MR. DOCKETT: No.

13 CHAIR DEL VALLE: We can't change the  
14 criminal penalties --

15 MR. DOCKETT: -- City Counsel -- yes.

16 CHAIR DEL VALLE: These are, these are  
17 just purely administrative penalties. That's the  
18 only thing that we have authority over, so far.

19 LT. ALBANO: Well, my, my, my question  
20 was the move that we'd be doing is that effect  
21 the criminal penalties and I don't think so.

22 MR. DOCKETT: No.

23 MR. DEL VALLE: Anything else? What --  
24 the next step right now would be in direction of

1 9/25/2015

2 the board to staff to publish the proposed rule  
3 changes for public comment. And eventually a  
4 public hearing on it. Is there a motion to do  
5 so?

6 LT. ALBANO: I, I think we've got to  
7 wait until we found out if the Law Department  
8 passed it. I mean wasn't it --

9 CHAIR DEL VALLE: The Law department  
10 won't pass on it until we publish on it.

11 MS. FISHER: But I think, I feel  
12 respectfully I would like to know whether an  
13 opinion is on this prior to this board saying yay  
14 or nay otherwise we have no issue, but I really  
15 would like to understand what their position is.  
16 And I understand --

17 CHAIR DEL VALLE: I'm, I'm not asking  
18 for yay or nay. I'm just asking to publish so we  
19 can get comment from the public.

20 MS. FISHER: And I'd like to hear from  
21 the Law Department first. I mean if you can just  
22 make the phone call, and we can table it for  
23 later.

24 MR. DOCKETT: Yeah, I'll do that.

1 9/25/2015

2 LT. ALBANO: But I that is part, part of  
3 the processes. It goes to the Law Department.  
4 If the Law Department passes on it, then we'd go  
5 from the rest of the CAPA process. Helaine, am I  
6 right?

7 MS. HELAINE BALSAM, ESQ., DEPUTY GENERAL  
8 COUNSEL, OATH: Yes.

9 LT. ALBANO: Okay.

10 CHAIR DEL VALLE: That --

11 MS. MADELYNN LIGUORI, ESQ., DEPARTMENT  
12 OF SANITATION: Madelynn Liguori, Sanitation. I  
13 think the real question other than legal counsel  
14 for you is if Ad Law has looked at it, because I  
15 know several years ago we were required to start  
16 the CAPA process for each penalty because of a  
17 street vendor case.

18 And in light of that, I want to make  
19 sure, I guess the agencies want to make sure that  
20 if we're repealing, our penalty schedules  
21 [unintelligible] [00:08:15] our penalty schedules  
22 it's not going to alter anything.

23 MS. BALSAM: Can I just --

24 CHAIR DEL VALLE: Mm-hmm.

1 9/25/2015

2 MS. BALSAM: Helaine Balsam, Deputy  
3 General Counsel for OATH. I think the idea  
4 behind the Ousmane decision, is which the one  
5 that you're referring to Madelynn was that  
6 passing penalties is rule making. The decision  
7 itself doesn't say it must say be ECB rule  
8 making, but that if there are penalties being set  
9 there should be rule making.

10 So, we're not saying that the agencies  
11 wouldn't still do rulemaking to set penalties.  
12 It's just that you would be doing your own  
13 rulemaking as opposed to passing on ECB rules.  
14 Does that make sense?

15 CHAIR DEL VALLE: Right. Right now the,  
16 the process is an absurd process. Is this mic  
17 on?

18 Right now the process is an absurd  
19 process where an agency decides either because of  
20 legislation or internally that there should be a  
21 rule regarding a particular item, whatever it is.

22 And the agency goes through the entire  
23 CAPA process saying thou shalt not mix apples and  
24 oranges in your recycling, for example, something

1 9/25/2015

2 like that.

3 After they passed that rule, that rule  
4 is absolutely meaningless if they're no penalties  
5 attached to a violation of the rules. They then  
6 come to the Environmental Control Board, and ask  
7 the Environmental Control Board to create a, a  
8 penalty structure for those violations. A  
9 penalty structure which is actually designed by  
10 the agency itself.

11 And then the Environmental Control Board  
12 repeats the same exact CAPA process, the same  
13 exact considerations, essentially duplicating  
14 every step of the way that the original agency  
15 did at the end of the exercise approving what the  
16 agency wanted to do and doubling the time  
17 required to do a rule making.

18 Apart from the blatant absurdity of that  
19 you also have the transparent impropriety of the  
20 entity that does the adjudication being the  
21 entity that creates the, the penalty structure  
22 which I think is an inherent conflict in the, in  
23 the functions of what, what's supposed to be an  
24 adjudicatory entity. The adjudicatory entity

1 9/25/2015

2 shouldn't be creating the penalties. It should  
3 be imposing whatever penalties the entity,  
4 whether it's the legislature or the enforcement  
5 agency created. It's creating a hybrid situation  
6 that's putting the, the trier of fact almost in  
7 the position of also being the enforcement agent  
8 which I think is, is inappropriate. But --

9 MR. JORGE MARTINEZ, ESQ., DEPARTMENT OF  
10 HEALTH And MENTAL HYGIENE: Jorge Martinez, He-,  
11 Health Department. As far as this proposal is  
12 concerned, besides the Law Department, doesn't  
13 the, doesn't City Hall also have to weigh in on  
14 this?

15 CHAIR DEL VALLE: Who?

16 MR. MARTINEZ: City Hall.

17 CHAIR DEL VALLE: I am City Hall. I'm,  
18 I'm operating under the instructions of City  
19 Hall. I'm not, I'm not working in a vacuum.

20 MR. MARTINEZ: I understand.

21 CHAIR DEL VALLE: Yeah.

22 MS. LIGUORI: Madelynn Liguori. Just  
23 one other concern. Now you're repealing this ob-  
24 , is it the ruling going to be concurrent?

1 9/25/2015

2 MR. DOCKETT: Yes.

3 MS. BALSAM: Yes.

4 MS. LIGUORI: Okay. Because that's also  
5 very important. We don't want to have --

6 CHAIR DEL VALLE: A vacuum. This thing  
7 just went beep, beep, beep -- anybody monitoring  
8 it seems to have died. The backup recorder.  
9 Anyway, let's continue.

10 MS. BALSAM: Is it working?

11 CHAIR DEL VALLE: Anything else? Would  
12 you like to make that phone call.

13 MR. DOCKETT: I'll make a few phone  
14 calls and get right back to you.

15 CHAIR DEL VALLE: Okay.

16 MR. DOCKETT: Thank you for your time.

17 CHAIR DEL VALLE: Okay. We'll, we'll,  
18 we'll hold on that for a few minutes and come  
19 back to him. Let me know, let me know the moment  
20 you get something.

21 MR. DOCKETT: Okay.

22 CHAIR DEL VALLE: We'll come back to  
23 that. Introduce amendments to ECB's building  
24 penalty schedule. This is regarding the cooling

1 9/25/2015

2 tower issue which is why we're meeting today  
3 instead of yesterday.

4 MS. BALSAM: Good morning. Just again,  
5 for the record, Helaine Balsam, Deputy General  
6 Counsel. I want to thank you for altering your  
7 schedules to make this possible. I'm presenting  
8 to you the final rule regarding cooling towers  
9 from a DOB penalty schedule to include free  
10 charges relating to cooling towers, failure to  
11 register, failure to notify a discontinued use,  
12 and failure to file an annual certification.

13 I distributed before the meeting a  
14 finding of substantial need that the mayor  
15 signed. So, this will become effective when it's  
16 published in The City Record which should be  
17 Tuesday. Questions?

18 CHAIR DEL VALLE: No questions? Is  
19 there a motion? I believe it's unani-  
20 unanimously approved. Everyone on the sheet  
21 should now be there. One abstention, sorry about  
22 that.

23 MS. BALSAM: Okay. Next we have a --

24 CHAIR DEL VALLE: That was quick.

1 9/25/2015

2 MS. BALSAM: Next we have a proposed  
3 rule which also amends the Department of  
4 Building's penalty schedule.

5 It updates some sections of law for  
6 pedestrian protection, sidewalks and walkways,  
7 and the building with open lot occupied without a  
8 valid certificate of occupancy and failure to  
9 obey a vacate order.

10 It updates some descriptions, new  
11 buildings or open lot occupied without a valid  
12 certificate of occupancy and failure to obey,  
13 obey a vacate order, it's a least on existing  
14 violation and substitutes another one regarding  
15 scaffold training, Law and, OPS-, have approved  
16 the proposed rule. Any questions?

17 CHAIR DEL VALLE: No questions? This is  
18 disappointing.

19 Is there a motion? It's unanimous with  
20 one abstention.

21 MS. BALSAM: Alright. So, we next we  
22 have a proposal to move some of the ECB  
23 procedural rules out of Chapter 3 of the OATH  
24 rules and into Chapter 6 to join ECB under the

1 9/25/2015

2 umbrella of the OATH's Hearings Division.

3 We tried to preserve pretty much  
4 everything. There are couple of major changes but  
5 as per the memo, the specific amendments of note:  
6 we amended the definition of Petitioner, that  
7 would be in Chapter 6 in order to preserve DEP's  
8 not DEP's right, but the right of individuals  
9 under our air and noise code to bring actions  
10 before the tribunal.

11 We amended the reschedule rule  
12 previously in the ECB rules. Petitioner actually  
13 had no right to reschedule; Respondent had a  
14 right to ask for ex parte hearing reschedule now,  
15 both sides now each have one reschedule.

16 State of default under the previous ECB  
17 rule -- or current ECB rule I should say, not  
18 previous. So to be previous, we hope. The time  
19 in which to file requests in which you could  
20 automatically reopen a default was 45 days from  
21 the missed hearing date. That has been changed  
22 to 60 days from service of the default decision.

23 We changed the definition of appearances  
24 to include the fact that a petitioner may appear

1 9/25/2015

2 through any authorized representative that would  
3 include a representative of another petitioner.

4 As you know, the Charter provides that a  
5 Petitioner for the purpose of requesting an  
6 adjournment may appear by any representative from  
7 another petitioner who appears before ECB.

8 Adjournments we changed the adjournment rule that  
9 was in Chapter 6 to actually comply with the  
10 adjournment rule that was in, or at least the  
11 spirit of the adjournment rule that was in  
12 Chapter 3. And as you know that the, a hearing  
13 cannot be adjourned solely for the presence of  
14 the issuing officer unless the respondent  
15 consents or there is a representative of  
16 Petitioner present to request an adjournment.

17 So, that part of the rule again,  
18 required by the Charter, was moved over to  
19 Chapter 6. In terms of motions to intervene, we  
20 decided it would be a good idea to have  
21 discretionary intervention for everybody. So  
22 that's also in Cha-, now moved to Chapter 6. And  
23 the intervention as of right be moved to a new  
24 sub Chapter B of Chapter 3 because it really

1 9/25/2015

2 applies to the cease and desist process. If you  
3 look at how the rule is worded, somebody can only  
4 intervene as of right, which in essence gives  
5 them party status because they have a right to  
6 appeal if there's more than money at stake. And  
7 the only place where that actually happens is in  
8 the cease and desist process at ECB.

9 We changed some of the rules for  
10 registered representatives and attorneys. Those  
11 rules were actually exactly the same in Chapter 3  
12 and Chapter 6, but we've had some experiences  
13 over the years so we revised the rule in Chapter  
14 6 a little bit to cover some situations that we  
15 had encountered.

16 The requirement to pay the penalty in  
17 full within 30 days or to pay the penalty in full  
18 prior to filing an appeal we altered that to  
19 include some language that the penalty must be  
20 paid unless the agency that's responsible for  
21 collecting payment waives that requirement. But  
22 that's because the Department of Consumer Affairs  
23 will issue payment plans, and because the Taxi  
24 and Limousine Commission which collects the, the

1 9/25/2015

2 fines that are generated from the Taxi and  
3 Limousine Tribunal Cases, respondents do not have  
4 to pre-pay in order to file an appeal so we  
5 needed to cover those particular things.

6 And then of course we have the appeals  
7 process. So, as you know the current process is  
8 that the hearing officer decides if nobody  
9 appeals that decision becomes final within 30  
10 days. That has stayed exactly the same.

11 Currently, if there's an appeal, the  
12 appeal's unit will prepare a decision that goes  
13 to a three member panel of board members. We  
14 intend to keep panels but not board members.  
15 They will be senior staff within the appeals unit  
16 at OATH.

17 So, we are asking you to approve that  
18 the Appeals Unit in fact, their decision would be  
19 the final decision of the board. And I know  
20 that's a big change, and it's something that  
21 we're going to discuss, and it's something that  
22 the Law Department will weigh in I'm sure.

23 The problem that we see -- there are a  
24 couple of problems with it not working that way.

1 9/25/2015

2 The biggest legal problem that I see at least is  
3 that if the board is still deciding and everybody  
4 is using the same procedural rules, the Board  
5 could theoretically make a decision on procedural  
6 issue. That's not necessarily binding for the  
7 decisions on let's say restaurant cases or taxi  
8 cases. So, we can wind up with sort of disparate  
9 legal results. So, that's I think that's a very,  
10 very real concern.

11 The other problem is, as you all know,  
12 you know, the Board, the panels meet twice a  
13 month, and then we have the Board. So, basically  
14 you have sort of like drip, drip marathon, drip,  
15 drip, drip marathon, drip, drip, drip, big  
16 marathon, right? So, you know, your, your kind  
17 of like, things are moving through the process  
18 and then weekend before the panel, or all the  
19 panels get their weekend reading, and then we  
20 move along, and then the next panel and everybody  
21 gets their weekend meeting, and then the Board  
22 decides, and all the decisions go out once a  
23 month.

24 If we let the appeals unit make those

1 9/25/2015

2 determinations, those decisions could  
3 theoretically go out daily. The panels could  
4 meet daily. We could send the decisions out  
5 either that day if we wanted to, or probably we  
6 envision it being weekly, every Friday we'll do a  
7 mailing.

8 So, the public will get justice that  
9 much, the public and the agencies will get  
10 justice that much sooner. So, those are our,  
11 that's our rationale behind that change. I'm  
12 sure you have lots of questions and comments.

13 CHAIR DEL VALLE: And then, and like I  
14 said, remember that once upon when ECB was  
15 originally created, all violations came before  
16 the entire board. There were no hearing  
17 officers. That was okay, when I don't know what  
18 number of violations were issued in 1974, but  
19 right now we deal with 700,000 summonses a year  
20 just to the ECB panel. And if, the City Council  
21 winds up doing what we think they might wind up  
22 doing in the coming year we'll have an additional  
23 200 to 300,000 more summonses coming in as, as  
24 certain items are either decriminalized or

1 9/25/2015

2 priorities are, are changed where the summonses  
3 are returnable. Many of those summonsses already  
4 we can be returnable but they, as a matter of, of  
5 practice they're not. That said, I think there's  
6 a lot of stuff for everybody here to chew on.  
7 So, start chewing. Russell.

8 MR. RUSSELL PECUNIES, ESQ., DEPARTMENT  
9 OF ENVIRONMENTAL PROTECTION: Russell Pecunies.  
10 Assistant Counsel DEP. So, Helaine, my first  
11 question is 6-05.

12 MS. BALSAM: Okay --

13 MR. PECUNIES: So, apparently now both  
14 sides are allowed to reschedule prior to the  
15 hearing?

16 MS. BALSAM: Correct.

17 MR. PECUNIES: But the Petitioner is  
18 required to notify the respondent and give ECB  
19 proof of that. How would we notify the  
20 respondent that we are requesting a reschedule?

21 In most cases, we don't have a phone  
22 number, we don't have an e-mail address. So, the  
23 suggestion would be that we'd have to send the  
24 Respondent the letter telling them that we were

1 9/25/2015

2 asking OATH for a reschedule, and then provide a  
3 copy of that letter to OATH?

4 MS. BALSAM: Yes.

5 MR. PECUNIES: Okay. 'Cause I don't --  
6 with, with that, with that requirement I don't  
7 think we would be asking, we would be availing  
8 ourselves of that particularly often unless it  
9 was an exceptional situation.

10 MS. BALSAM: This is actually an  
11 existing rule at the Hearings Division already.  
12 I'm, I'm going to ask Carol Moran if she wants to  
13 address that.

14 MS. CAROL MORAN, DEPUTY COMMISSIONER OF  
15 HEARINGS DIVISION AND TAXI, OATH: Carol Moran,  
16 Deputy Commissioner for the hearing's division  
17 which includes the health cases.

18 The Department of Health does not  
19 frequently request reschedule or new dates. So,  
20 it doesn't particularly come up. Generally  
21 speaking there is basic contact information,  
22 particularly with licensees. Licensees obviously  
23 provide contact information and more recently,  
24 the Department of Health has been gathering e-

1 9/25/2015

2 mail addresses. Actually it's just part of a  
3 separate initiative on their own to have an  
4 alternate way to be able to contact the Petitioner,  
5 the licensee in a licensee case. And so, it has  
6 not raised an issue, particularly at the moment,  
7 the rules are reasonably new though.

8 MR. PECUNIES: Okay. So, if some reason  
9 we did have the respondent's e-mail address,  
10 because they had given it to us on a notification  
11 form or something like that, then we could do  
12 that --

13 MS. BALSAM: Yes.

14 MR. PECUNIES: Okay. Okay. And in-,  
15 and also in 6-05 --

16 MS. BALSAM: Okay.

17 MR. PECUNIES: 6-06 is referenced but  
18 then 6-06 is reserved. Is that --

19 MS. BALSAM: Yes. Actually that is a, a  
20 -- something that I forgot to change. So, we --  
21 originally the pre-hearing request for inspectors  
22 was inserted because it had been there, that's  
23 one of a, a good example of something that is,  
24 well "it was always that way", and if it had been

1 9/25/2015

2 that way at the Health Tribunal when it was under  
3 the Department of Health, but we couldn't really  
4 see a reason for this 6-06, so we did actually  
5 speak to health and see whether or not they  
6 cared. They said no. So, we are going to take  
7 out 6-06 and I will update that line. Thank you.

8 MR. PECUNIES: Okay. In 6-07 --

9 MS. BALSAM: Yes.

10 MR. PECUNIES: It provides for a pre-  
11 hearing discovery which under the current rules,  
12 basically you're entitled to, if you make a  
13 request five business days before the hearing.

14 MS. BALSAM: Mm-hmm.

15 MR. PECUNIES: Now, it says that if an  
16 opportunity to obtain is offered by the  
17 petitioner, so how would we make that offer and  
18 I'm just sort of thinking about why we would make  
19 that offer? I mean --

20 MS. BALSAM: Well, there are, there are  
21 agencies that regularly engage in discovery.

22 MR. PECUNIES: Well, we do too.

23 MS. BALSAM: Yeah.

24 MR. PECUNIES: But it's because people

1 9/25/2015

2 are entitled to it.

3 MS. BALSAM: Okay.

4 MR. PECUNIES: If we have to offer them  
5 the opportunity now, I -- how would we do that?  
6 And --

7 Ms. ELIZABETH KNAUER, ESQ., CITIZEN  
8 MEMBER: Elizabeth Knauer, Citizen Member. I  
9 would just, you know, like to speak up and say  
10 that I think it's only fair that pre-hearing  
11 discovery should be available to respondents.

12 This, you know, especially if it's, it's  
13 just discretionary to the agency then that really  
14 leaves Respondents with this disadvantage of when  
15 your, especially if you're talking about some  
16 technical DEP violation. How can they prevent an  
17 events that they don't have discovery from, you  
18 know, the agency.

19 MS. BALSAM: So, I, I understand what  
20 you're saying. I can tell you that when we were  
21 working on redrafting the rules for the hearing's  
22 division, we had a lot of pushback from the  
23 Department of Health. And they were afraid that  
24 they would have to engage in discovery which they

1 9/25/2015

2 had never had to do before.

3 Consumer Affairs we were also working at  
4 the time because hopefully their cases will be  
5 coming to the hearing's division soon, wanted to  
6 have discovery, regularly has discovery, so this  
7 actually represents a compromise.

8 MS. KNAUER: So, I, I guess my view  
9 though is that the agency, then it's up to the  
10 agency's discretion then, you know, it's more  
11 work for the agency, so, you know, just based on  
12 what Russ just said --

13 MR. PECUNIES: I mean we --

14 [CROSSTALK]

15 MR. PECUNIES: I mean people get  
16 discovery when they come in. But in terms of  
17 giving it to them before the hearing, we give it  
18 to them because the rules say they're entitled to  
19 it.

20 MS. KNAUER: Right.

21 MR. PECUNIES: Now, this would say that  
22 we have to offer them the opportunity and first  
23 off, I don't know how that would work. I mean  
24 would we put on the ticket? You have the right

1 9/25/2015

2 to discovery? Or --

3 MS. BALSAM: That's, I think that's one  
4 way we do it. You could also post something on  
5 your website about that.

6 MS. KNAUER: But again, but again if  
7 it's up to the -- if it's up to the agency's  
8 discretion, won't many agencies decide not to do  
9 that because it's just, it's just additional work  
10 for them. But is also really deprives the  
11 respondent of an opportunity not to present a  
12 full defense.

13 MS. BALSAM: Not -- that's actually not  
14 really true because the respondent can still get  
15 any documents they want under FOIL.

16 MS. LIGUORI: And not only that, at the  
17 hearing. So, they come for a hearing. So --

18 MS. KNAUER: But sometimes it's nice to  
19 know before.

20 MS. BALSAM: Well, of course, but you  
21 have to --

22 MS. KNAUER: The FOIL process can take a  
23 lot longer than the discovery process. And I, I  
24 just don't think that's really -- there's also,

1 9/25/2015

2 there's also, the FOIL is potentially less, you  
3 know, less like expansive in terms of the scope  
4 the discovery is.

5 LT. DAN ALBANO: Well, you're not  
6 supposed to use FOIL for discovery.

7 MS. KNAUER: I don't, I don't think it's  
8 adequate -

9 CHAIR DEL VALLE: It shouldn't be, you  
10 shouldn't have to be forced to use FOIL for  
11 discover purposes. Although it's, it's done.

12 Philosophically, I, I agree with  
13 Elizabeth Knauer on this issue. I mean basic  
14 fairness says you, you should, you should, you  
15 should be able to have whatever it is that is  
16 necessary for you to defend your position. I've  
17 sat as defense and I've sat as a prosecutor, and,  
18 and you know, fair is fair.

19 MS. BALSAM: So, we could delete the  
20 clause if an opportunity to obtain pre-hearing  
21 discovery if offered by the petitioner. So, then  
22 it would just say discovery may be obtained in  
23 the following manner which in essence mirrors  
24 what we have now.

1 9/25/2015

2 MS. KNAUER: Which would then I guess  
3 that, that raises the Department of Health's  
4 issue, but I would say that --

5 CHAIR DEL VALLE: They, you know,  
6 sometimes the, the DA has to, to work at that  
7 providing the defendant with, you know, copies of  
8 DNA reports or, or whatever, you know.

9 If you're prosecuting something you  
10 should have, you should be able to prosecute and  
11 provide the defense with whatever you're going to  
12 be hitting them with.

13 MS. BALSAM: And honestly, it's just --

14 CHAIR DEL VALLE: I mean it's just --

15 MR. PECUNIES: I mean we, we --

16 CHAIR DEL VALLE: -- fundamental  
17 fairness I think.

18 MR. PECUNIES: Yeah. I mean we would  
19 probably, if we still if we had to offer them we  
20 might still not do it on certain types of cases  
21 because giving them the evidence in advance often  
22 leads to them stipulating by mail. So, we might  
23 still do it for certain types of cases. I don't  
24 know if we would offer --

1 9/25/2015

2 CHAIR DEL VALLE: And, and doesn't  
3 though, doesn't this all mean that we have to  
4 recite and basically in, in the summons, the  
5 entire rules packet that stuff that people are  
6 entitled to, because, you know, summonses will  
7 then go like 50 pages long.

8 But there are a lot of, out of work  
9 lawyers who can use the, use the work and  
10 represent somebody, but you know, we'll, we --  
11 this, this is an administrative process. We  
12 don't have to basically give somebody Miranda  
13 rights every time we issue them a summons.

14 MS. BALSAM: So, we could make that  
15 change. And obviously, all of the agencies that  
16 write returnable to ECB and to OATH hearings  
17 division, which will include eventually the Taxi  
18 and Limousine Tribunal, Health Tribunal, and ECB  
19 cases.

20 And maybe new agencies coming in as well  
21 will have opportunity to comment just like you  
22 have an opportunity to comment. We've already  
23 actually sent a copy of what we sent to you to  
24 the other agencies, the, the general counsel.

1 9/25/2015

2 MR. PECUNIES: Two, two more quick  
3 things. In 6-12(B), so an inspection report will  
4 be, now be able to make an inspection report part  
5 of the summons. So, that, that's not --

6 MS. BALSAM: If it's served --

7 MR. PECUNIES: -- an ECB practice.

8 MS. BALSAM: Correct.

9 MR. PECUNIES: Alright. So, if you  
10 serve it with the summons, it becomes part of the  
11 summons.

12 MS. BALSAM: Correct.

13 MR. PECUNIES: Okay.

14 MS. BALSAM: So, you could allege  
15 additional -- but you can't allege additional  
16 charges. That's not what we're contemplating.

17 MR. PECUNIES: Right.

18 MS. BALSAM: We're alleging additional  
19 factual informat-, we're envisioning additional  
20 factual information. And in fact, the Department  
21 of Health, at the Hearings Division regularly  
22 does that.

23 MR. PECUNIES: Okay.

24 MS. BALSAM: So, they'll serve their

1 9/25/2015

2 inspection report along with the NOV when they're  
3 handing it to somebody at the restaurant.

4 MR. PECUNIES: Okay.

5 CHAIR DEL VALLE: Which is generally all  
6 the discovery anybody needs anyway.

7 MR. PECUNIES: Okay. And the last thing  
8 it says that appeals will have to be on a  
9 prescribed form. Is that --

10 MS. BALSAM: Yes.

11 MR. PECUNIES: So, it wouldn't be, you  
12 wouldn't be able to file an appeal in the form of  
13 a, like a brief anymore? You'd have to file it  
14 on a form? A specific prescribed form?

15 MS. BALSAM: Yes. But you could  
16 certainly right in the area this is why the  
17 decision is wrong, see attached. Right. And  
18 attach a brief if you like to.

19 CHAIR DEL VALLE: The, the --

20 MS. BALSAM: You know, it's really to  
21 capture information so that we make sure that we  
22 have the right mailing addresses, and who to  
23 contact. It's more designed for respondents than  
24 it really is for --

1 9/25/2015

2 MR. PECUNIES: Okay. So, so basically  
3 you fill out a form and then attach the --

4 MS. BALSAM: Correct.

5 MR. PECUNIES: Okay.

6 CHAIR DEL VALLE: And it's basically set  
7 up so we have the, the necessary information to  
8 know who the heck is, is, is appealing and how to  
9 contact them. But they, you, you can attach a  
10 Brandeis [phonetic] brief if you want.

11 MR. PECUNIES: Okay.

12 MR. MARTINEZ: Jorge Martinez, DOH.  
13 Section 3-74 having the Hearings Division of the  
14 Appeals Unit do their own appeals review.

15 My issue with that is currently, you  
16 have members of different agencies and doing  
17 these they[unintelligible] [00:34:27] and you  
18 have Citizen Members also weighing in and I think  
19 the process as it stands now is more, at least a  
20 more considerate decision. On a review I'm  
21 concerned about that not happening. We have more  
22 in-house stuff going on by the hearing appeals.

23 CHAIR DEL VALLE: The, the Appeals Unit,  
24 it is totally segregated from the actual hearings

1 9/25/2015

2 unit for one thing. And I don't think that they  
3 will be considering appeals any more lightly than  
4 they're considered now. If, if, if they do then  
5 they are being grossly unethical.

6 MR. TOM SHPETNER, CITIZEN MEMBER: I'm  
7 sorry. I didn't under-, Tom Shpetner, citizen  
8 member. I didn't understand your last remark.

9 CHAIR DEL VALLE: If, if the appeals  
10 unit, in whatever context it is, if it's essenti-  
11 , if the implication is that they will not give  
12 due consideration to the appeal, that they're  
13 essentially rubber stamping it, it would be  
14 grossly unethical. Whether it's, it's the way  
15 it's constituted now, or any other matter. And I  
16 don't believe that will happen.

17 MR. MARTINEZ: I wasn't -- I didn't mean  
18 that they would be rubber stamped. I meant that  
19 you have more input in it. You have different  
20 agency folks here and Citizens Members, that's  
21 what I'm concerned about. You want to have that  
22 if we go the route that you're considering.

23 CHAIR DEL VALLE: It's, it's essentially  
24 questions of, of law. That the, that they are

1 9/25/2015

2 for review. It's not policy.

3 MR. SHPETNER: Tom Shpetner, Citizen  
4 Member. But the, I think the point or the point  
5 that Jorge is trying to make that there's some  
6 very healthy debate, in panel meetings,  
7 definitely get new issues that require a  
8 diversity of viewpoints.

9 We definitely have certain times of the  
10 year, things that have to go to the full board  
11 because the three panelists can't agree. Or the  
12 issue is so novel that it deserves discussion. I  
13 guess in recent cases, and I've had experiences  
14 where policy has changed mid-stream and we've had  
15 cases that have Sub judice that have gendered  
16 some very vigorous debate.

17 So, it seems like it could be a conflict  
18 between the desire to be more transparent to the  
19 public and cutting down an additional avenue for  
20 these decisions to generate more debate.

21 I, I want to underscore that the  
22 appellate group is extremely competent, good  
23 writers, that works very hard, they're fast. The  
24 time their decision is gone, three or so years

1 9/25/2015

2 that I've been here, you know, they've really  
3 done, they've been on the march and they're doing  
4 a great job. But I do think that those debates  
5 have been very vigorous, very useful in the, in  
6 the benefit of the public.

7 MR. ROBERT CARVER: I'm going to add, and  
8 be even more frank than Tom is. In that, is  
9 that, the only real meaningful participation of  
10 the public members of the board is really through  
11 the cases on appeal. And that is a major change  
12 that I really don't think the members of the  
13 public could support.

14 MR. SHPETNER: I, I would echo that  
15 remark.

16 CHAIR DEL VALLE: Yeah, although,  
17 although, I'll, I'll, I'll, I'll put in  
18 parenthesis there that it's not really a  
19 transparent process in the sense, it's not a  
20 public process, but I understand what you're  
21 saying.

22 MR. SHPETNER: Well, I, I just, I know  
23 everybody in the room through their participation  
24 in the process and repeats these things and

1 9/25/2015

2 debates them very vigorously. So, I think losing  
3 that would not in the public benefit.

4 CHAIR DEL VALLE: Okay.

5 MS FISHER: Alexandra Fisher, Buildings.  
6 I would just want to add that I think there's a  
7 level of expertise understanding that there are  
8 many legal issues that arise and certainly those  
9 have or we wouldn't -- they would be fine to do  
10 that. And there's a level of expertise and I  
11 think that was the intention of creating these so  
12 that you would have the diversity of experience  
13 sitting and making these decisions and debating  
14 them as, as we've all pointed out.

15 CHAIR DEL VALLE: Well, these were  
16 created because the Board couldn't sit for  
17 700,000 hearings a year. And that was one way to  
18 deal with it. And, and, and as we all know,  
19 agencies that have a, an appeal coming up on, on  
20 the panel have to recuse themselves from that  
21 panel at least from, from that particular appeal.  
22 For, for I think obvious reasons, thank goodness.

23 MR. JOSEPH GREGORY, ESQ., FIRE

24 DEPARTMENT: Joseph Gregory, Fire Department. I

1 9/25/2015

2 noticed also when the, that the Section 3-75 is  
3 being repealed which gives us the ins-, gives  
4 the, both parties petitioner and the respondent  
5 the ability to do a superseding to correct  
6 miniscule errors and errors due to mistakes of  
7 fact and law

8 And I was wondering, if reading  
9 correctly, that if it's being repealed, what  
10 mechanism, if any, would be put in place to allow  
11 the agencies, I know that these, the respondent  
12 [unintelligible] [00:39:45] what allows the  
13 agencies to, to correct mistakes along that?

14 MS. BALSAM: There is nothing that would  
15 allow the agencies to request that those  
16 corrections be made. You know, it's, it's been  
17 used a lot more recently, and I think it's only  
18 be successfully used twice. So, in, in other  
19 words, where an action caused a, a reversal of  
20 the original decision. So, you know, when you're  
21 weighing all of the different concerns and  
22 interests, it seemed to us that it really wasn't  
23 worth the trouble to be perfectly honest.

24 CHAIR DEL VALLE: The process right now

1 9/25/2015

2 that's used in exactly the same situation and has  
3 been used before --

4

5 CHAIR DEL VALLE: -- bless you. For at  
6 least 30 years that I'm aware of, at the, by the  
7 Taxi and Limousine Commission is that they  
8 withdraw the summons and reissue a corrective  
9 summons. That's basically it.

10 MR. GREGORY: Well, to a certain degree  
11 you can't do that because of res judicata.

12 MR. DEL VALLE: If, if, if it hasn't  
13 been adjudicated yet, there is no res judicata.

14 MS. BALSAM: Well, no this would be --

15 MS. BALSAM: -- this is superseding  
16 appeals that's been adjudicated and then appealed  
17 and then it's after the appeal. It's like a  
18 motion to reargue. It's what it is.

19 CHAIR DEL VALLE: Oh.

20 MS. KNAUER: Elizabeth Knauer, Citizen  
21 Member. I'm just -- I'm going back to the  
22 discussion of, of the importance of, of panels.  
23 I'm just wondering if there is any middle ground  
24 where there could still be panels of the members

1 9/25/2015

2 of the board reviewing appeals, but not the  
3 necessity of the full board approving all of the  
4 appeals decisions would be at the end of the  
5 month. Because I, I don't think there's a great  
6 deal of, of actual review that takes place of  
7 those by the full board. But and that seems to  
8 just be a procedural step that happens. But it,  
9 but I do think that, just to echo what others  
10 have said, that there is a lot of substantive  
11 input type of board members have in, in the  
12 panels.

13 But, so, I'm just wondering if, you  
14 know, you talked about this sort of log jam that  
15 occurs where nothing's no actual decisions are  
16 rendered until after the full board votes on the  
17 recommended decisions. Which I, I do tend to  
18 agree with that, that don't have a lot of value  
19 to it. But I, I do think the panels do. So, I  
20 just wanted to --

21 MS. BALSAM: I think the log jam is a  
22 consideration. For, for me, from my perspective,  
23 but my biggest fear is that you'll make a  
24 decision on a procedural issue, and then we'll

1 9/25/2015

2 have the same issue let's say in a restaurant  
3 case, and you don't have the authority over the  
4 restaurant cases. So, is that binding precedent  
5 for that restaurant case? So, you know, because  
6 again, the Hearings Division will hear Taxi  
7 cases, restaurant cases, all of the ECB cases,  
8 and work for the DCA cases. I mean there's going  
9 to be a lot of things that are feeding in. So,  
10 you know, what, what do we as an agency do in  
11 that situation where you've opined on a  
12 procedural issue that might not work in another  
13 context. So, that's one -- to me, that's the big  
14 issue.

15 MS. KNAUER: So, can you just -- I'm,  
16 I'm -- can you sort of explain how the, the  
17 hearings, the appeals unit will be for the entire  
18 hearings division? Is that --

19 MS. BALSAM: Correct.

20 MS. KNAUER: So, the appeals unit, if,  
21 if the decisions were just arising out of the  
22 appeals unit, they, they, those appeals would be  
23 binding on all other, you know --

24 MS. BALSAM: They should be binding on

1 9/25/2015

2 anybody that's appearing before the, the hearings  
3 division.

4 CHAIR DEL VALLE: We, we're aiming for  
5 consistency across the board on ult- ultimately  
6 on every ag-, administrative summons issued in  
7 the City of New York.

8 So, that a member of the public, or  
9 business gets a summons from the City of New  
10 York, no matter what they are, will know exactly  
11 what the process is, what the rules are on, on  
12 getting it adjudicated, and, and, and the entire  
13 mechanic of process.

14 MS. KNAUER: The, the issue that  
15 Helaine's raising is that there is an appeal  
16 decision that interprets the rules a certain way.

17 And that, so if, if there were a panel  
18 of Environmental Control Board members that had  
19 input into that, but that would create some sort  
20 of problem of whether that's binding on other -- I  
21 mean if, if it's still coming out of the appeals  
22 unit, it's, it would still be binding on other  
23 agencies. I'm not it's -- I'm just, what I'm --  
24 so, it's not, it's not really different. It

1 9/25/2015

2 would just be that the, that the --

3 CHAIR DEL VALLE: Well, well, I think  
4 what she's saying --

5 MS. KNAUER: -- for the appeals  
6 involving the Environmental Control Board  
7 violations would be members of the board would  
8 have input.

9 MS. BALSAM: But it's a question of,  
10 it's a question of final authority.

11 MS. KNAUER: But the appeals unit will  
12 still be issuing the appeal decision in any  
13 event, correct?

14 MS. BALSAM: Yes. But --

15 MS. KNAUER: So --

16 MS. BALSAM: It's kind of the question  
17 of who gets the last word. So, for example, we,  
18 you could have situation as we've had, over the  
19 years, not too often I think, but where the board  
20 members --

21 MS. KNAUER: The full board.

22 MS. BALSAM: -- the full board, or, or  
23 even the panel members will disagree with the  
24 draft decision from the appeals unit, right? So,

1 9/25/2015

2 right now what would happen is that, that  
3 decision would be redrafted in accordance with  
4 the wishes of the board members because the board  
5 has the final say.

6 CHAIR DEL VALLE: The example, of an  
7 inconsistency would be say there is an appeal  
8 from taxi case or a health department case that  
9 goes one way. And then there is a, even the  
10 Health Department case that, that was, that was  
11 done at, see the former health tribunal, which  
12 has nothing to do with Environmental Control  
13 Board.

14 And then there's a, there's a health  
15 case that goes through ECB process and if there's  
16 no people there. And those two appeals results  
17 are inconsistent with each other. And who, there  
18 is no super -- there's no Supreme Court of, of  
19 administrative appeals in the City of New York  
20 to, to reconcile with that.

21 MS. KNAUER: But I think what would  
22 happen in that situation is that in -- if there  
23 was a, if there was a preceding decision, you  
24 know, involving that rule, that had, that would,

1 9/25/2015

2 that was in the context of the health department,  
3 not ECB health department case.

4 Then that would be taken into account in  
5 the research that was done in the, in the draft  
6 decision and I think, you know, I, I think that  
7 then probably the -- both the staff and the panel  
8 would agree to follow the precedent. So, I  
9 don't, I don't see that as arising as the, as a  
10 big --

11 CHAIR DEL VALLE: Mm-hmm.

12 MS. KNAUER: -- a big problem because it  
13 would be part of the ca-, it would be part of the  
14 body of law that was used in rendering the  
15 decision and I don't think that the panels are  
16 tempted, you know, inclined to go against  
17 whatever the precedent is.

18 CHAIR DEL VALLE: This is -- this sounds  
19 like a great law school seminar right now.

20 MS. KNAUER: It's a, it's a very  
21 interes-, it's a, it's a pretty interesting  
22 issue, but I don't necessarily see it as  
23 something that would arise very often being a  
24 problem competing precedents.

1 9/25/2015

2 MR. SHPETNER: But also there's  
3 competing precedents. It's good them to have  
4 them debated, and that's I think that's one of  
5 the useful outcomes of the appellate panel  
6 discussions. And that's definitely come up in  
7 the past, in that the public would be ill served  
8 if we removed that.

9 MS. KNAUER: There's no equ-, I guess  
10 there's no equivalent structure for the, for the  
11 non-ECB tribunals.

12 CHAIR DEL VALLE: There are other, in  
13 some cases, even more bizarre structures, but  
14 essentially the normal, the normal process for  
15 the non-ECB cases, is it will go to appeals  
16 panel. The appeals panel will do it's, it's  
17 review. And if the respondent is unhappy with  
18 the, with result, they take an Article 78. Just  
19 the same as, that we take an Article 78 --

20 MS. KNAUER: Correct.

21 CHAIR DEL VALLE: -- here.

22 MS. KNAUER: But your, the appeals panel  
23 that you're referring to are current-, are  
24 currently st- staffed?

1 9/25/2015

2 CHAIR DEL VALLE: Yeah.

3 MR. GREGORY: In, in that same scenario,  
4 the agency wouldn't have had any recourse.

5 MR. DEL VALLE: Um --

6 MS. BALSAM: The agency can they, can  
7 the agency, can participate in the appeal --

8 [CROSSTALK]

9 MS. BALSAM: -- when the agency isn't a  
10 party to the appeal.

11 MS. KNAUER: They can't file an Article  
12 78 against them.

13 CHAIR DEL VALLE: Well, here, here,  
14 here's, here's one of the anomalies. Some  
15 agencies reserve the right to appeal to  
16 themselves which is something that has to be  
17 discussed shall we say at, at, at a higher level  
18 then us.

19 I, I see a major problem with agencies  
20 taking an appeal to themselves for obvious  
21 reasons. They are that -- then they become the,  
22 the cop, the judge, and the executioner which  
23 totally eviscerates the whole concept of, of the  
24 public having an expectation to having a, an

1 9/25/2015

2 impartial neutral panel decide a summons. That  
3 happens right now. And some of the results of,  
4 of that process of expose very, very clear biases  
5 that are reminiscent of the Justice Department  
6 report on Ferguson.

7 What I'm talking about is, for an  
8 example, which, which is very, still burned in  
9 my, in my consciousness where a hearing officer  
10 on, on -- I'm not going to name what agency right  
11 now, but a hearing officer made a determination  
12 based on an agency rule which included a, a  
13 statement that if the respondent was found guilty  
14 of this violation among the penalties that, that  
15 could be imposed one penalty and this was for a  
16 licensee may be a 30 day suspension of the, of  
17 the individual's license. The hearing officer  
18 determined that given the mitigating  
19 circumstances the penalty wasn't imposed but did  
20 not include a 30 day suspension.

21 The agency in question took an appeal to  
22 itself and came down with a decision that in its  
23 rule "may" shall mean must impose a, a 30 day  
24 suspension. That doesn't quite jive with any

1 9/25/2015

2 dictionary that I have seen for the word "may,"  
3 but clearly demonstrates an interest, in a, a  
4 self-interest and clearly demonstrates a bias,  
5 and that's the kind of stuff that we want to  
6 eliminate -- not only in fact but in perception.

7 In the months that's I've been here  
8 since November I have met with about a third of  
9 the City Council and I have met with innum-  
10 innumerable civic organizations and groups.

11 And there perception of Environmental  
12 Control Board is radically different than the  
13 perception of the folks in the board and our  
14 staff. As far as public perception of the  
15 Environmental Control Board is, is that we are  
16 essentially gestapo; that we are unfair; that we  
17 incompetent; that we are biased and are only  
18 interested in making money for the City of New  
19 York.

20 I know for a fact that's not true. I  
21 know our statistics demonstrate very clearly  
22 that, that's not true, because a huge proportion  
23 of the summonses that come before the  
24 Environmental Control Board are dismissed. If

1 9/25/2015

2 that's not proof that, that, that we're not  
3 biased, I don't know what could be. But one of  
4 the clear reasons that these adjudicatory  
5 entities exist is so that the public has  
6 confidence that they're getting a fair shot  
7 whenever they get a summons just like they  
8 believe they get a fair shot when they have to go  
9 to civil court or the state supreme court. That  
10 is not the perception of the public in the City  
11 of New York.

12 That's neither the perception of the  
13 Council Members of the City of New York almost  
14 unanimously, and that's very disturbing. And  
15 part of what we are trying to do is create a  
16 structure that makes it's absolutely clear that,  
17 that's not the case.

18 Another part of what we're doing is we  
19 are radically changing the panels, the, the,  
20 Hearings Division actually interacts with the  
21 public. A lot of the things that are done at the  
22 Hearing Division Tribunals which are seen by the  
23 staff as being a reasonable accommodation to a  
24 city agency or whatever are perceived by the

1 9/25/2015

2 respondents who are sitting there when they see  
3 it as, as a, as biased. Or as fix, or as a, a,  
4 a, the scales are, are, are pressed so that the  
5 pay the summonses rather than ask for a fair  
6 hearing.

7 A lot of this stuff is, or virtually all  
8 of it is very innocent on the part of the  
9 mechanism of, of the, of the adjudicatory panels.  
10 A lot of it has evolved over the last 50 years  
11 simply because it's a cheaper way to do it  
12 because it's an easier way to do it because it's,  
13 it's an accommodation because of staffing issues.  
14 All sorts of innumerable excuses.

15 All of which makes sense if you just  
16 you're sitting on one side of, of, of the bench  
17 as it were. And you're just trying to process  
18 the stuff administratively. But if you're  
19 sitting on the other side of the bench as a  
20 respondent, what your perception is, is something  
21 very different.

22 If, if, I have a summons, for example,  
23 that says I have to be there at 8:30 in the  
24 morning and all of the summonses issued that day

1 9/25/2015

2 for that agency say 8:30 in the morning and that  
3 agency sends four representatives to prosecute  
4 those summonses, and it's 4:00 p.m., 2- 2:00 p.m.  
5 and I'm sitting there and there's a hearing  
6 officer over there not doing anything because  
7 there's not enough prosecutors there, because all  
8 of the summonses were called for 8:30 a.m., I'm  
9 going to think that there's a fixing going on, or  
10 I'm being he-, or the agent or the city just  
11 interested in squeezing me until I pay the  
12 summons and not get a fair hearing. I have  
13 gotten correspondence like that.

14 I get correspondence like that every  
15 week through 311. That's just -- apart from the  
16 fact that they are wrong that is the perception.  
17 Apart from the fact that it, the, the system  
18 exists for economic expediencies doesn't matter.  
19 The public thinks they're getting ripped off;  
20 they do. And you don't have to take my word for  
21 it. Walk down the street; walk into any, any,  
22 any store, any diner and ask them, do they know  
23 what the ECB is and, and what do they think about  
24 it? And you'll hear that.

1 9/25/2015

2 That's why they hire some of these, I  
3 think, many less than ethical reps to rip them  
4 off, because they don't want to sit there all day  
5 for a summons. And what, what invariably will  
6 happen is at the end of the day many reps --  
7 well, because I'm so good, or because I have a  
8 fix in with the, with the judges at ECB, you only  
9 have to pay \$100 when in fact they would never  
10 had to pay more than \$100 anyway and may have  
11 actually gotten it dismissed if they had been  
12 there in person, and, and put up a, a, whatever  
13 defense that they actually had which was not put  
14 up.

15 In fact, some of these individuals  
16 actually do all of their hearings by telephone  
17 which the respondent could have done himself. I  
18 want to make them essentially irrelevant. So,  
19 the public can get a, a he-, a fair hearing,  
20 understand they're getting a fair hearing and not  
21 be tortured in the process of getting a fair  
22 hearing. The rules that, that we're proposing  
23 today are one step in that direction to eliminate  
24 that. I don't want to wind up seeing rightly or

1 9/25/2015

2 wrongly, some report saying that the City of New  
3 York engages in, in enforcement for profit.

4 When it in particularly when I know it's  
5 not true, and everybody in this room knows it's,  
6 it's not true, but that's the perception and it's  
7 ugly. And that's where we're coming from. Yeah.

8 MR. DOUGLAS SWANN, CITIZEN MEMBER: Doug  
9 Swann, Citizen Member. Are you saying with, with  
10 that, that the transparency issue is related to  
11 panelists, citizen members being on the panel  
12 currently? Or are you just talking in, in  
13 general terms?

14 CHAIR DEL VALLE: In general terms.  
15 People want their, their cases resolved quickly  
16 and fairly. And they want to, and they want to  
17 believe that it's quick and fair.

18 I've, especially, at least a lot of you  
19 guys had the experience I'm sure where somebody  
20 has walked away after a hearing or a trial saying  
21 I don't like the result but I know that the, the,  
22 they gave me a fair trial and I understand the  
23 decision. As opposed to walking away and saying,  
24 they just rooked me over. And, and it's, it's a

1 9/25/2015

2 futile exercise. I'll just from now on write a  
3 check, or, or I'll write a check to this guy who  
4 will write a bunch of other checks because he  
5 tells me he knows the judges and I'll pay have to  
6 pay less at the end of the day, or at least I  
7 won't have to waste all day going to, to hearings  
8 and what not. And this happens all the time,  
9 every day, that's what you hear from restaurant  
10 owners all the time.

11 MR. SWANN: I don't, I don't disagree  
12 with that goal, but just talking specifically  
13 about the replacement of the panelists, I think I  
14 come from a somewhat unique perspective in that  
15 I'm probably the only member here I think that's  
16 a non-lawyer.

17 So, when I get on these panels, you  
18 know, when I first started, you know, I didn't  
19 know anything about the law. I'm an engineer,  
20 but you know, the staff there they do an  
21 excellent a job in explaining it to me,  
22 explaining me, explaining it to me how, how it  
23 works with the City.

24 And you know, eventually I understood

1 9/25/2015

2 it, and as representative of the public which is  
3 what I, you know, as a Citizen Members, and a  
4 representative of the public, I thought it was  
5 really serving a purpose. So, to get rid of it -  
6 -

7 CHAIR DEL VALLE: Well, the, the  
8 actually going back historically, the purpose  
9 that it served was, was originally, was, because  
10 the entire board couldn't hear all the appeals.

11 MR. SWANN: For expediency.

12 CHAIR DEL VALLE: Yeah. Yeah. And to  
13 be perfectly frank, it's still an open question  
14 as far as I'm concerned as to whether we can  
15 legally do that to begin with. But the Law  
16 Department has been asked to, to consider it as  
17 well, and we are, we're digesting, we digesting  
18 the processes, whether it can be done without  
19 legislation.

20 The, the catch 22 is if you're going to  
21 follow the literal original concept that was  
22 written up, that want to say, we're going to sit  
23 for 700,000 summonses which is nuts.

24 MS. LIGUORI: Madelynn Liguori, Legal

1 9/25/2015

2 Affairs. In light of that the fact that Law  
3 Department hasn't reviewed whether or not panels  
4 can be eliminated, shouldn't we table this  
5 discussion until the Law Department does opine?

6 CHAIR DEL VALLE: Well, this, this is --

7 MS. LIGUORI: And eliminate the appeals  
8 board from the, the roles at least as they are --

9 CHAIR DEL VALLE: This, this is, this --

10 MS. LIGUORI: -- until they --

11 MR. DEL VALLE: They won't, they won't  
12 opine on it until, unless and until we, we, we  
13 put it up for publication.

14 MS. LIGUORI: Well, you can call  
15 administrative law and ask them what they --we  
16 sanitation, always goes to legal counsel and  
17 administrative law before we promulgate rules  
18 when there's a significant question of fact or  
19 law. Then we need to decide before we take that  
20 action to start the CAPA process.

21 CHAIR DEL VALLE: I don't, I don't want  
22 an informal opinion from the Law Department. I  
23 want a formal opinion from the Law Department on  
24 this issue.

1 9/25/2015

2 MS. LIGUORI: But I --

3 CHAIR DEL VALLE: And keep in mind  
4 something about the Law Department, you know, and  
5 there's been some a lot of confusion lately about  
6 the Law Department's role in stuff, and it's,  
7 it's, it relates to the fact that four, it's got  
8 to be now the last 12 years or so, the folks and  
9 including right now, the folks at City Hall  
10 aren't, have not been lawyers.

11 Function of the Law Department as I  
12 understood it when I worked for Ed Koch, and for  
13 Rudolph Giuliani, and David Dinkins is to be the  
14 attorneys for the City of New York. They can  
15 give opinions and they can defend the positions  
16 of the City of New York with respect to various  
17 and sundry things, lawsuits being particular.  
18 They don't make policy. It's not their business  
19 to make policy.

20 It is the policy of ci-, it is the  
21 business of City Hall and the individual agencies  
22 to make policy. And if the Law Department says  
23 something is illegal that's one thing. If the  
24 Law Department says something like I don't think

1 9/25/2015

2 it's a good idea that's something entirely  
3 different.

4 MS. KNAUER: I, just to, I'm sorry to  
5 interrupt, but I think what Madelynn was  
6 suggesting was that if, if it's ultimately going  
7 to be determined by the Law Department that this  
8 would be illegal, is it worth us having this  
9 debate right now? As opposed to waiting to find  
10 out whether it's even, whether it's moot or not.

11 CHAIR DEL VALLE: We have to put, we  
12 have to put the question to them.

13 LT. ALBANO: I'm from the Police  
14 Department. One, one of the reasons we go to the  
15 Law Department before we do things is because  
16 there's the ones that ultimately defend you. We  
17 want their opinion as to whether it's defensible.

18 CHAIR DEL VALLE: That's why, that's why  
19 exactly, that's exactly at, if you notice when,  
20 when these things are, are published that there  
21 is, there are two, there are two documents that  
22 are attached. One is from the Law Department and  
23 one is from the --

24 MS. BALSAM: Operations.

1 9/25/2015

2 CHAIR DEL VALLE: -- Operations. The  
3 Law Department is, is a certification that the  
4 action of the agency with respect to whatever is  
5 proposed is not ultra vires. And operations is  
6 that they reviewed it, and they think it's, it's  
7 legible for most of the world, essentially. Like  
8 lawyers can figure it out that, but that's,  
9 that's the mechanics of it.

10 MS. BALSAM: The question really is,  
11 what we send to them. So --

12 CHAIR DEL VALLE: Will we send them  
13 question?

14 MS. BALSAM: We're, we're proposing to  
15 send them this. They may come back and say no  
16 you can't, and here's why. Let me just say that  
17 we had lots of research done on this issue, over  
18 the summer particularly, by a couple of our  
19 interns. And we couldn't come up with a good  
20 reason why we can't. So we did-, you know, we're  
21 not, it's not off the cuff. It's, it's, there's  
22 been a lot of thought, and a lot of, I think good  
23 legal minds that have worked on the issue.

24 MS. FISHER: I don't think anyone here

1 9/25/2015

2 disputes that. I, I absolutely respect that, but  
3 I think at the same time, to my colleagues point,  
4 I think this group probably has more to say on  
5 the issue, that it would be helpful to know if at  
6 the end of it are statements make any, our, we're  
7 talking about this thing that the Law Department  
8 will ultimately approve.

9 And I understand that you've done a lot  
10 of vetting, but I think it would be helpful in  
11 particular the other issue from earlier to know  
12 that, that's not an issue reviewable. And if I  
13 may, this is not related to that topic, but just  
14 as a general matter, at least for me, it might be  
15 helpful, although this chart is great, and I know  
16 a lot of work went into it, if you had like a red  
17 line copy so that I can see where the changes are  
18 word-for-word because as a lawyer --

19 MS. BALSAM: Oh, I can certainly send  
20 you. I mean I can send the rule. It's 54 pages.  
21 I would be more than happy to send you the rule  
22 with the brackets and the underlines, if you'd  
23 like to see it.

24 MS. FISHER: I do appreciate it.

1 9/25/2015

2 MS. BALSAM: Okay.

3 CHAIR DEL VALLE: Remember we're not  
4 voting, we're not voting today to approve this by  
5 any means or disapprove it for that matter. What  
6 we are voting on is whether to send this out for  
7 comment.

8 We can't vote on something unless we've,  
9 we've scheduled it for a public hearing and we --  
10 there's been a public hearing and then there's  
11 been a, a public discussion by us, and then  
12 there's, there's a, a vote in 30 days after.  
13 That's the CAPA process. We're nowhere near  
14 that. What we've got here is a draft of stuff  
15 that we want to send for review. This is not,  
16 you know, if anybody is under the impression that  
17 this is, this is, you know, you know, do or die  
18 in this, you know, this just came from Mount  
19 Sinai or something like that, no it didn't. It  
20 didn't even come from Hunter Mountain.

21 MS. BALSAM: Joe.

22 MR. GREGORY: Well, to tag onto what the  
23 Chairman is saying does that mean that since it's  
24 being sent out for review that the considerations

1 9/25/2015

2 or concerns that we think, some of the agency  
3 members have would be addressed before it's sent  
4 out, or does that mean it's going to be sent out  
5 in its present form, and our number of concerns  
6 that we have with respect to some of the appeal  
7 issues and possibly some other issues.

8 CHAIR DEL VALLE: There's, there's a  
9 couple of things that, that will follow -- I hope  
10 follow anyway. Last, by the way, last week, I  
11 think it was last week, I sent copies of this to  
12 the, the various affect, all of the affected city  
13 agencies, actually like 26 city agencies, for  
14 them to come back with comments and observations  
15 with reaction whatever.

16 I sent it to the, the, the General  
17 Counsel of those agencies who, who presumably  
18 will advise their, their agency heads  
19 accordingly. As of yet, I have not gotten any  
20 response which is not surprising consider they've  
21 had it for about a week.

22 I don't want us to go forward on any of  
23 this stuff until all of us before us, preferably  
24 in writing, observations, comments or whatever

1 9/25/2015

2 from all 26 agencies that, that issue summonses  
3 that, that we adjudicate. Because they're all  
4 going to be affected in one fashion or another.

5 And after that's gone through and after  
6 that has been distilled through a, a final  
7 proposal, and this may not even be in the final  
8 proposal after, after we kick it around, and  
9 frankly, I'd be surprised if it is. Then it goes  
10 to the public at large and hopefully the public  
11 at large will look at it, and then they will  
12 comment and, and either in writing, hopefully,  
13 because that's usually the most lucid thing than  
14 having somebody ranting and raving at, at a  
15 hearing. Or come to the hearing and to who,  
16 which, you'll be invited to, to, to sit in on.

17 You'll certainly get the, the transcript  
18 and the report on the -- and then at the end of  
19 the exercise we'll get back to together, and, and  
20 decide what to do with it. In, in that way,  
21 it'll be a very public process and we'll distill  
22 out all of the nuances that will be involved in  
23 this thing.

24 MS. LIGUORI: Madelynn Liguori,

1 9/25/2015

2 SANITATION, again, I just, I just want to make  
3 sure, you would like the general counsels to  
4 respond directly to both, regarding their opinion  
5 about the rules at this, at this juncture or  
6 during the CAPA process?

7 CHAIR DEL VALLE: As soon as possible.  
8 I mean last week if, if, preferably. But I'd  
9 like a considered opinion.

10 MS. KNAUER: Elizabeth Knauer, Citizen  
11 Member. So, are we being asked today to approve  
12 this version for publication as a proposed rule  
13 or not?

14 CHAIR DEL VALLE: As a proposal, yes.

15 MS. BALSAM: Not, well not --

16 MS. KNAUER: I, I thought you just said  
17 that you, that the, that the proposed rule would  
18 read reflective of the comments of the various  
19 agencies.

20 CHAIR DEL VALLE: After, after --

21 MS. KNAUER: So, if we're approving this  
22 as the appr --

23 MS. BALSAM: What, what we're asking is  
24 that you approve the rules as they are subject to

1 9/25/2015

2 some of them the things we talked about in the  
3 proposal which we will then send to Law and Ops  
4 in the form of the proposed rule that will say  
5 this with this minor modifications that we  
6 already asked discussed. Law and Ops will then  
7 opine. We will come back to you after that.

8 In addition, during that time that Law  
9 and Ops are also looking at it, we want to get  
10 the feedback from all the agencies. And for the  
11 agencies, if your general counsels did not get  
12 the e-mail that we sent, please let, let us know  
13 right away. You can e-mail me.

14 CHAIR DEL VALLE: Now, what happens  
15 structurally is this,

16  
17 HELAINE BALSAM: And I sent it.

18 CHAIR DEL VALLE: In the very amazing  
19 situation where everybody says this is hunky-  
20 dory, lovely, and wonderful, then we will vote on  
21 it as it is.

22 I suspect that given the feedback we  
23 will get , there will be modifications made. If  
24 there is a substantive modification, then we have

1 9/25/2015

2 to republish. For example if it, if the feedback  
3 is that something is changed from, you know, 30  
4 days to 35 days, that's not a substantive change  
5 necessarily. If there's a change where we knock  
6 out the whole section we've been debating that's  
7 a substantive change. And then it would be  
8 republished and the process starts again all  
9 over.

10 The, the idea is that at the end of the  
11 exercise we have a refined set of rules that  
12 everybody's in sync with, every agency and the  
13 public and every member of this -- well, at least  
14 the majority of this board is in sync with.  
15 That's, that's the process that we envision.  
16 This is the biggest change to ECB in I don't know  
17 how many years. But part of this stuff is, is,  
18 is, is correcting stuff that goes back to 1974  
19 which is totally irrelevant today, when it was a  
20 different agency, in a different world, and a  
21 different philosophy, and a different amount of  
22 volume that we were dealing with. And this is  
23 just one step.

24 MR. GREGORY: Joseph Gregory, Fire

1 9/25/2015

2 Department. Quick question on another matter.  
3 On 6-08, the one, the subsection 1-ii,  
4 [unintelligible] [01:16:25] which is alternative  
5 [unintelligible] [01:16:27], is that an expansion  
6 of the service options as far as it being  
7 [unintelligible] [01:16:32] as far as the agency  
8 had as far as being served.

9 MS. BALSAM: 1-I you're talking about?

10 MR. GREGORY: 2-I.

11 MS. BALSAM: 2 --

12 MR. GREGORY: Where it says alternative  
13 --

14 [CROSSTALK]

15 MR. GREGORY: Is from what I'm reading  
16 it appears [unintelligible] [01:16:45] put this  
17 in the mail and that would be what we have, the  
18 [unintelligible] [01:16:50].

19 [CROSSTALK]

20 HELINE BALSAM: I, response to follow  
21 charter service unless that's going to --

22 MS. BALSAM: If you want, if you want to  
23 docket, auto docket, you would still have to  
24 follow charter service.

1 9/25/2015

2 MR. GREGORY: Okay.

3 MS. BALSAM: There are agencies now that  
4 issue violations returnable to ECB that do not  
5 follow charter service and do not docket, auto  
6 docket those cases. But if you want to continue  
7 to auto docket then you would have to --

8 CHAIR DEL VALLE: And there are --

9 MS. BALSAM: -- follow charter service.

10 CHAIR DEL VALLE: And there are agencies  
11 that follow CPLR service and they docket  
12 themselves.

13 MS. LIGUORI: I just have other  
14 questions. In 6-08(2) it mentions electronic  
15 filing of the summons and proof of service is  
16 required unless the tribunal grants an exception.

17 I know obviously sanitation was trying  
18 to be -- file most of this cases but I know a lot  
19 of the other agencies are not electronic. I know  
20 the move is to go, for everyone to be electronic,  
21 but is it going to be hard to get an exception?

22 MS. BALSAM: No.

23 MS. LIGUORI: And then --

24 MS. BALSAM: WE are realistic.

1 9/25/2015

2 MS. LIGUORI: Okay. Just checking. And  
3 then also in Section 6.08 C-5, it talks about  
4 expedited hearings. Where respondent waives the  
5 50 day notice and requests an expedited hearing.

6 The tribunal may assign the case for  
7 immediate hearing upon appropriate notice to  
8 petitioner, an opportunity for petitioner to  
9 appeal. What, what is appropriate notice?

10 Right now, we, an expedited hearing is  
11 requested there's a, we have to have a hearing  
12 within 72 hours. Is that still going to be the  
13 case?

14 MS. BALSAM: Yes. This actually came  
15 from ECB.

16 MS. LIGUORI: Okay. Okay. And then, in  
17 the adjudication by mail portion, we can still  
18 restrict those cases that we don't want  
19 adjudicated by mail correct?

20 MS. BALSAM: Yes.

21 MS. LIGUORI: Okay. Okay.

22 CHAIR DEL VALLE: As right there, some  
23 agencies insist on the respondent  
24 [unintelligible] [01:18:42].

1 9/25/2015

2 MS. LIGUORI: Okay.

3 MR. GREGORY: It's 6-16A, I figure that  
4 there's a typo because it references 6-24 of this  
5 chapter, Misconduct, but if you look on 6-24, it  
6 should actually be 6-25.

7 MS. BALSAM: Okay.

8 CHAIR DEL VALLE: Thank you. We don't  
9 want the thing to be dismissed because it cited  
10 the wrong section.

11 MS. BALSAM: 6-23 is registered  
12 representatives.

13 MR. GREGORY: I, I didn't say that.

14 MS. BALSAM: I'm sorry.

15 MR. GREGORY: I said 6-2-, reference is  
16 6-24 but it should be 6-25.

17 MS. BALSAM: 6-, oh I'm sorry. I'm  
18 looking at different line. I apologize.

19 MR. GREGORY: That's okay.

20 MS. BALSAM: Okay. 6-25. That's  
21 correct. I was looking at the top not in the  
22 middle.

23 CHAIR DEL VALLE: Proof reading will be  
24 greatly appreciated.

1 9/25/2015

2 MS. BALSAM: [Unintelligible]

3 [01:19:43]. Any other questions?

4 CHAIR DEL VALLE: So, can we send this  
5 to Operations and the Law Department for their  
6 review? And the public's review?

7 Is there a motion one way or the other?  
8 Shall I flip a coin? I -- okay, I'll make the  
9 motion to publish this, a proposal for comment.  
10 Those in favor say I. And those, those opposed  
11 say nay.

12 MR. PECUNIES: When you say publish it,  
13 you mean send it to Law and Operations?

14 MR. DEL VALLE: Send it to Law and  
15 Operations and the City Record.

16 MS. BALSAM: Well, we can't send it to -  
17 -

18 MR. PECUNIES: It doesn't have to --

19 CHAIR DEL VALLE: Well, we can't send to  
20 City Record, until --

21 MS. BALSAM: Law and Ops sign off.

22 CHAIR DEL VALLE: Right.

23 MS. KNAUER: But we would be approving  
24 that, assuming they, assuming they do sign off --

1 9/25/2015

2 CHAIR DEL VALLE: Right.

3 MS. KNAUER: -- we would be approving --

4 CHAIR DEL VALLE: No, we would not be  
5 approving it.

6 MS. KNAUER: Approving the publication.

7 CHAIR DEL VALLE: Publication.

8 MS. KNAUER: Would that be with the  
9 change to the discovery?

10 MS. BALSAM: Yes. Yeah. We'll make the  
11 change to the discovery, discovery line, and --

12 MS. KNAUER: There was another  
13 correction referring to a, a --

14 MS. BALSAM: The reference to 6-25 and  
15 then the -- take out the line about 6.06 that's  
16 in 6.05.

17 LT. ALBANO: Dan Albano from the Police  
18 Department, and this going forward before we get  
19 any feedback from the agencies other than --

20 MS. BALSAM: Well, we have to --

21 LT. ALBANO: -- what we've had here.

22 MS. BALSAM: I mean some, some day we  
23 have to send it to Law and Ops if it's going to  
24 at all, so, you know, we need to see what they

1 9/25/2015

2 say --

3 LT. ALBANO: But Law and Ops is  
4 different than The City Record. That's I think  
5 what's got most of the eyebrows raised.

6 MS. FISHER: No. You don't have the  
7 feedback from the agencies. I know they just got  
8 it last week, right?

9 MS. BALSAM: Right.

10 MS. FISHER: Okay. So, I think we'll  
11 need a little more time.

12 CHAIR DEL VALLE: A little more time  
13 before we send it to the Law Department?

14 MS. FISHER: Yes. We haven't finished  
15 discussing it, I don't think. There was an issue  
16 that's still not fully vetted here, panels.

17 MS. LIGUORI: And the superseding  
18 decision.

19 CHAIR DEL VALLE: Excuse me?

20 MS. LIGUORI: And the superseding  
21 decision [unintelligible] [01:22:23].

22

23 MS. KNAUER: Perhaps it would make sense  
24 for us, you know, to be once, once more comments

1 9/25/2015

2 are received from the other agencies, for us,  
3 and, and perhaps changes made and accommodation  
4 of their concern that we would be approving this  
5 for publication next month with it, it, you know,  
6 with changes made, if any. And it may be further  
7 opportunity for us to, to consider it.

8 CHAIR DEL VALLE: I, I don't want to  
9 leave it open ended for a very simple reason  
10 which is I don't want until forever where nothing  
11 will ever get done. If, if we, if we tell the  
12 agencies that we want responses within like 30  
13 days, I hope it doesn't take 30 days to review  
14 the implications for each agency to, to look at  
15 one of these things.

16 My experience with government, I don't  
17 want to get jerked around for the next year,  
18 because one agency or another just doesn't want  
19 to get around to it.

20 MR. MARTINEZ: Do we, I'm sorry, Jorge  
21 Martinez, DOH, do we, are they, do we get a  
22 chance to review other agencies comments? I  
23 mean, on the firm level we can review comments as  
24 submitted, state level as well. Will we have the

1 9/25/2015

2 opportunity to do that here?

3 CHAIR DEL VALLE: Sure. In fact, we'll,  
4 we'll circulate it. You, you don't, you'll,  
5 we'll have to wait until we have a Board meeting,  
6 we, we'll circulate it.

7 MS. LIGUORI: Madelynn Liguori,  
8 Sanitation. Could you also circulate the, the  
9 rule that would actually be published with the  
10 brackets and the underlines?

11 MS. BALSAM: Yes.

12 MS. LIGUORI: Because as -

13 [CROSSTALK]

14 MS. LIGUORI: -- trash rules for the  
15 Department of Sanitation, that makes it easier  
16 for me to see what's being taken out, what's  
17 being put in.

18 MR. MARTINEZ: Right.

19 MS. LIGUORI: And it's easier for my  
20 general councilman as well.

21 MS. KNAUER: It is also the more typical  
22 way in which we see the proposed rules that we're  
23 approving for publication. As we, I wasn't  
24 quite, you know, coming into the meeting, I

1 9/25/2015

2 wasn't quite clear what, what was being done. I  
3 mean, what we were going to be doing with this  
4 agenda item actually.

5 Because usually you see the, the whole  
6 cover sheet with the description of the, of the -  
7 -

8 MS. BALSAM: I -- honestly --

9 MS. KNAUER: -- purpose and all of that.

10 MS. BALSAM: I was trying to save you.  
11 It's, it's very difficult but I can see that,  
12 that was a problem and I will certainly circulate  
13 it. It does exist, and it [unintelligible]  
14 [01:24:59].

15 MR. PECUNIES: Yeah, Russell Pecunies,  
16 just to be clear then on the procedure, if we  
17 vote on this today, and approve it, we're  
18 approving it as a proposed rule. And the next  
19 time the board would get to vote on it would be  
20 as a final rule?

21 CHAIR DEL VALLE: Either, either vote on  
22 it as a final rule or we will be voting to  
23 publish a revised version of it. More likely a  
24 revised version of it.

1 9/25/2015

2 MR. PECUNIES: If, if changes are made  
3 based on the comments.

4 CHAIR DEL VALLE: Correct. Other than  
5 the changes we're making right now, because it  
6 hasn't been published.

7 MR. PECUNIES: Right.

8 MR. DEL VALLE: Because there, there  
9 are, there are changes based on just on the  
10 discussion we had here today.

11 MS. BALSAM: Can I ask a question about  
12 the superseding appeal?

13 CHAIR DEL VALLE: Mm-hmm.

14 MS. BALSAM: This superseding appeal, so  
15 the, the position is that you want to keep that.  
16 Is that -- okay.

17 MR. ROBERT CARVER 3: On the issues of  
18 the panels, must we vote on this as a package  
19 right now? Can the, or can that be split up?

20 CHAIR DEL VALLE: We want to send the  
21 whole package over to the Law Department which  
22 would include that and see what the, what the  
23 reaction is. Or we could do that.

24 MR. ROBERT CARVER: Well, it actually

1 9/25/2015

2 might be easier --

3 CHAIR DEL VALLE: Or give them both  
4 flavors.

5 MS. BALSAM: We could two versions of  
6 it. That's another possibility.

7 MR. PECUNIES: Would, would there a way  
8 to vote on approving it to go to Law and  
9 Operations but to communicate the Board's sense  
10 that, with regard to the panels, that the Board  
11 had strong reservation about that provision. And  
12 so that Law and Operations were aware that the  
13 Board had --

14 MR. SHPETNER: -- to, to -- Tom Shpetner.  
15 To, to Russell's point, is, is this in the  
16 transcript are these remarks going to be made  
17 available to these other agencies so that we can  
18 use the, maybe the minutes of this to, to reflect  
19 the discussion here?

20 MS. BALSAM: The transcript of ECB --

21 MR. SHPETNER: Well, there's been a lot  
22 of --

23 MS. BALSAM: ECB transcripts are posted  
24 on our website the week after the meeting.

1 9/25/2015

2 MR. SHPETNER: Fair enough.

3 MS. BALSAM: The transcripts up there.

4 MR. SHPETNER: But I guess my question  
5 is more a --

6 CHAIR DEL VALLE: We can add that --

7 MR. SHPETNER: -- more granular that  
8 this is whether or not the city agencies can  
9 actually confirm that they [unintelligible]  
10 [01:27:56] or --

11 CHAIR DEL VALLE: Yeah.

12 MR. SHPETNER: -- or anybody's opining  
13 on this that they have an opportunity to  
14 understand that the context in which this debate  
15 transpired.

16 CHAIR DEL VALLE: Yeah. We can, we --

17 MR. TOM SHPETNER: I mean it's on a  
18 website, I get that.

19 CHAIR DEL VALLE: You know, we, we can -  
20 - that's easy enough.

21 MR. TOM SHPETNER: In this case.

22 CHAIR DEL VALLE: That's simple enough.  
23 We can, we can send them a transcript.

24 CHAIR DEL VALLE: I think we should, at

1 9/25/2015

2 least a transcript of this portion of the meeting  
3 anyway, nothing else. Yeah.

4 MR. ROBERT CARVER: Frankly on the, on  
5 the panels, even if we can legally change the  
6 make-up, if we think it's a bad idea, let's not  
7 do it. We can vote it out of the document right  
8 now as an option.

9 CHAIR DEL VALLE: That's one option.

10 MS. KNAUER: And I, I just -- Elizabeth  
11 Knauer, just to, in furtherance of the rest of  
12 that idea, I mean, I don't think that, that  
13 eliminates the possibility of that change being  
14 introduced --

15 CHAIR DEL VALLE: Later on.

16 MS. KNAUER: Right. So, I mean if it, I  
17 feel like there's a, a bit of a consensus among  
18 the membership of this board that we do think  
19 that the panels have value.

20 So, you know, I would sug-, I would  
21 suggest approving the rule for publication. Let  
22 that be now potentially leaving in 3-75. And as  
23 opposed to eliminate or reappealing that. And if  
24 that, if that makes sense, and then, you know, at

1 9/25/2015

2 a later date, we can perhaps discuss further.

3 CHAIR DEL VALLE: That's a good idea.  
4 And, and revisit it at a later date after we get  
5 further info from the Law Department.

6 MS. KNAUER: Do you want us -- I mean  
7 there is a lot of, there is value with moving  
8 forward with the rest of this, so that seems to  
9 be the sticking point both in terms of the  
10 superseding appeals issue which some of the  
11 agencies feel strongly about as well as the panel  
12 issues with a, a number of us at least, don't  
13 know what that means about. So, I, I would  
14 suggest, if that makes sense, just not, not  
15 repealing that or, or not including that in this  
16 proposed rule for the time being.

17 LT. DAN ALBANO: Hopefully, hopefully --

18 MS. KNAUER: I -- there might be some  
19 implications to that --

20 MS. BALSAM: No, I just need to  
21 understand what it is that everyone's wanting to  
22 include.

23 MS. KNAUER: You can-, reading the, the  
24 --

1 9/25/2015

2 [CROSSTALK]

3 MS. BALSAM: -- five is the amendments  
4 to the board decision and order.

5 MS. KNAUER: That's the only the  
6 superseding --

7 MS. BALSAM: That's only the  
8 superseding.

9 MS. KNAUER: Okay. So, whatever,  
10 whatever --

11 MR. MARTINEZ: It's 15 --

12 MS. KNAUER: 3-74 I think is what we're  
13 talking about.

14 MS. BALSAM: Board review, right, right.

15 MS. KNAUER: So those two, so those two  
16 provisions not reappealing them.

17 MS. BALSAM: So, keeping in essence just  
18 look at 3-74 B and C. And 3-75?

19 [Unintelligible] [01:31:13]

20 MS. BALSAM :cross references in Chapter  
21 6.

22 MS. KNAUER: Right. I don't know if you  
23 need to keep 3-76 as a result of that --

24 MS. BALSAM: 3-76 is already there.

1 9/25/2015

2 MS. KNAUER: Oh, it's --

3 MS. BALSAM: It's on 3-16.

4 MS. KNAUER: Okay.

5 MS. BALSAM: It's the new 3-16.

6 MS. KNAUER: Okay. So, yeah, I mean  
7 that would be my proposal just because that  
8 enables this to move forward through the CAPA  
9 process, the rest of it, which I, I think  
10 personally, I think is a, is a great idea to have  
11 the rules regularized for the different, for the  
12 different types of violations.

13 So, that's, that would be my proposal.  
14 Along with the other modifications that we  
15 discussed earlier.

16 CHAIR DEL VALLE: Anybody second the  
17 motion? Okay.

18 LT. DAN ALBANO: Just to be clear what  
19 we're voting is the superseding the  
20 [unintelligible] [01:32:06] panel issue that's,  
21 that's what we're voting on?

22 MS. KNAUER: Those would be a li-, but  
23 those, but the reappealing those provisions would  
24 be eliminated from this proposed rule as well as

1 9/25/2015

2 the change to the discovery rule and those, and  
3 the remedy of those two --

4 MS. BALSAM: Files.

5 [CROSSTALK]

6 LT. ALBANO: Okay. Alright. I'm sorry.

7 CHAIR DEL VALLE: Oh, no, thank you. I  
8 want to be sure we agree [unintelligible]  
9 [01:32:30]. Those in favor of the motion as  
10 amended by Elizabeth Knauer, say aye. Opposed.  
11 Do you vote?

12 MR. SHPETNER: Abstaining.

13 CHAIR DEL VALLE: Abstain. Okay. With  
14 one abstention, it's approved.

15 MS. BALSAM: So, let me say now I have  
16 to make those changes so it's going to just ship  
17 out the rule right after the meeting, but I can't  
18 do that now. So, it may take me a day or so.

19 LT. ALBANO: What do you mean? You're  
20 including in with this change what, what --

21 MS. BALSAM: What you just voted on.

22 LT. ALBANO: [Unintelligible] [01:33:16]  
23 will write one change and I think Ms. Fisher  
24 asked for it too.

1 9/25/2015

2 Ms. FISHER: Yes. Well, not red- not  
3 red lined, brackets and underline.

4 CHAIR DEL VALLE: I think we, we're done  
5 with this customer for now.

6 I think the Parks Department has an  
7 update for us for we have in item number 2.

8 MR. DOCKETT: Sure.

9 CHAIR DEL VALLE: From where we were.  
10 Item, item number two.

11 MR. DOCKETT: Hello. Mike Dockett from  
12 Parks again. So, I had an opportunity to speak  
13 to general counsel of Parks. He had four major  
14 points.

15 The first was that we're not aware of  
16 any opposition to this move from the Law  
17 Department, but they actually are questioned  
18 directly, we're not in any direct talks with the  
19 Law Department about this move. We support the  
20 ECB's desire to move the penalty tables under  
21 Park rules and that's why we're, we're here  
22 today. And lastly, our direct conversation with  
23 the LAW department about this start at the  
24 beginning of the CAPA process.

1 9/25/2015

2 And it's pretty much limited to whether  
3 this is a lawful act. That's the question that  
4 we ask the Law Department. The policy decision  
5 about whether or not this is a good idea or not  
6 is made by the agency in consultation with ECB.

7 Then to answer your point, Dan, about  
8 the criminal penalty, he agreed that it does  
9 effect the criminal penalty.

10 LT. ALBANO: Thank you.

11 MR. DOCKETT: Any questions from DSNY  
12 about the Ousmane decision, I didn't follow that  
13 argument so I wasn't able to explain that to him.  
14 I [unintelligible] [01:34:48].

15 MS. BALSAM: The Ousmane decision just  
16 says penalty schedules should be rules. And if I  
17 could just add, this is not an unprecedented  
18 move. I mean the Health, the former Health  
19 Tribunal here, now the Hearing Division. The  
20 penalties that, the fixed penalties that they  
21 impose are in the health rules, the Taxi and  
22 Limousine Tribunals, the penalties that they  
23 impose are in the Taxi and Limousine Tribunal  
24 rules. They're not in OATH's rules. So, it's

1 9/25/2015

2 not an unprecedented move.

3 LT. ALBANO: Dan, Dan Albano. If I  
4 could just -- if, if anybody is confused by this,  
5 if you go looking for these penalties on, on  
6 parks rules on street vendors, it's almost  
7 impossible to find. Now it'll be directly under  
8 park rules, easier for everybody to find. Just  
9 like the AIMS Codes is real easy to find.

10 CHAIR DEL VALLE: And that goes towards,  
11 definitely goes towards public transparency as to  
12 what the penalties are and what the rules are.

13 Is there a motion on the Parks  
14 Department's proposal? And I take it that it's  
15 unanimously approved.

16 MS. FISHER: No. It's --

17 CHAIR DEL VALLE: Oh, with, with the  
18 exception of the Buildings. Is that no or  
19 abstention?

20 MS. FISHER: It's a no.

21 CHAIR DEL VALLE: Okay.

22 MR. DOCKETT: Thank you.

23 CHAIR DEL VALLE: Now, for the fun part  
24 of the program. Russell?

1 9/25/2015

2 MR. PECUNIES: Yeah.

3 CHAIR DEL VALLE: You're up.

4 MR. PECUNIES: Alright.

5 [CROSSTALK]

6 MR. PECUNIES: Okay. Good morning.

7 Russell Pecunies. Assistant Counsel DEP. DEP,  
8 DEP has this month one request for the Board to  
9 approve a cease and desist order. We're waiting  
10 to violation of the grease interceptor  
11 requirement in the sewer code.

12 This is relating to Domino's Pizza at  
13 109-64 Francis Lewis Boulevard in Queens. As  
14 reflected in the attachment to the request, the  
15 respondent has been repeatedly ordered and  
16 repeatedly issued notices of violation for not  
17 complying with the grease interceptor  
18 requirements. Based on the respondent's  
19 continuing failure to come into compliance, the  
20 Department is requesting that the Board issue an  
21 order to cease and desist.

22 CHAIR DEL VALLE: Any questions? And is  
23 there a motion? I guess -- since everybody's got  
24 their hand up, I assume it's unanimous with one--

1 9/25/2015

2 MR. PECUNIES: Yep.

3 CHAIR DEL VALLE: And Lt. Albano is not  
4 present so note that he abstains for the record.

5 MR. PECUNIES: Secondly, the DEP has one  
6 request for cease and desist order under the  
7 noise code. This is for New York Mott Street  
8 Inc. at 128 Mott Street in Manhattan. The  
9 kitchen exhaust at that location has been issued  
10 3 notices of violation for excessive noise. They  
11 have been found in violation actually they  
12 stipulated to the first one, defaulted on the  
13 second one, and the third one was the hearing  
14 date was earlier this week on Wednesday. Because  
15 of the continuing failure of this location to  
16 bring the kitchen exhaust into compliance with  
17 the noise code, DEP is asking the board to issue  
18 an order to cease and desist.

19 CHAIR DEL VALLE: Questions?

20 MR. PECUNIES: Yep.

21 MS. KNAUER: Elizabeth Knauer. You said  
22 that there was a hearing earlier this week. Do  
23 you know what the results of that were --

24 MR. PECUNIES: It was a --

1 9/25/2015

2 MS. KNAUER: It --

3 MR. PECUNIES: It was scheduled for  
4 Wednesday.

5 MS. KNAUER: Okay.

6 MR. PECUNIES: So, I don't have the  
7 result of that most recent.

8 MS. KNAUER: We don't know whether they,  
9 they [unintelligible] [01:39:47] direction.

10 MR. PECUNIES: No. I mean it's the, the  
11 request had to be put in last week. So, at the  
12 time the request was put in, the hearing date was  
13 still in the future.

14 MS. KNAUER: But if they have corrected,  
15 they would have opportunity --

16 MR. PECUNIES: I don't know that, that  
17 correction and correction could conceivably have  
18 been since this under 227 and it can be  
19 mitigated. Correction, it's conceivable that  
20 they could have brought forth evidence of  
21 correction at the hearing on Wednesday, but I'm  
22 not aware.

23 MS. KNAUER: Oh, no, I'm just saying  
24 they would have an opportunity at a special

1 9/25/2015

2 hearing to --

3 MR. PECUNIES: Oh, yeah. To show --  
4 yeah. Yeah.

5 MS. KNAUER: Okay. If they had some  
6 type of [unintelligible] [01:40:34].

7 MR. PECUNIES: Yes.

8 CHAIR DEL VALLE: They would be, they  
9 would show that they have in fact complied with  
10 the order to cease and desist .

11 MS. KNAUER: Right.

12 CHAIR DEL VALLE: Yeah. Any other  
13 questions? Motion? Approved with one  
14 abstention.

15 MR. PECUNIES: Abstention. The DEP has  
16 three requests for cease and desist orders for  
17 locations that have expired Certificates of  
18 Operation for boilers using number six fuel oil  
19 which was prohibited as of June 30th. These are  
20 down to a trickle at this point.

21 I don't think there would be too many  
22 more of these requests being made to the Board,  
23 but just because of scheduling reasons as far as  
24 when certificates expired and when violations

1 9/25/2015

2 were issued and adjudicated, there are still a  
3 handful of these in the pipe line. So, this  
4 month we have three of these boiler related cease  
5 and desist requests.

6 CHAIR DEL VALLE: Any questions? Is  
7 there a motion? Again, it's unanimous with  
8 abstention.

9 MR. PECUNIES: Yeah. And finally, there  
10 are 26 requests for cease and desist orders  
11 relating to failure to install backflow  
12 prevention devices. In each of these cases, the  
13 respondent has been ordered to install the  
14 required device, has been issued a notice of  
15 violation for failing to do so which has been  
16 adjudicated in violation, and is still not in  
17 compliance. So, in each of these cases DEP is  
18 asking the Board to issue an order to cease and  
19 desist.

20 CHAIR. DEL VALLE: Any questions? Is  
21 there a motion? It's approved by unanimous with  
22 one abstention.

23 It amazes me how people have a problem  
24 with putting in a backflow preventer.

1 9/25/2015

2 MR. PECUNIES: Thank you.

3 CHAIR DEL VALLE: Thank you. Kelly?  
4 Pre- Sealing Reports.

5 MS. KELLY CORSO, ESQ., ASSISTANT  
6 DIRECTOR OF ADJUDICATIONS, ECB: Good morning.  
7 I'm Kelly Corso from the OATH Environmental  
8 Control Board, Assistant Director for  
9 Adjudications. We have 13 pre-sealing reports  
10 this morning. Five of them pertain to back flow  
11 violations. In all those cases, the hearing  
12 officers are recommending no further action based  
13 on evidence that the approved backflow devices  
14 have been installed at the premises.

15 The remaining pre-sealing reports are  
16 for the violations of the air code, for failure  
17 to have valid operating certificates. And in all  
18 these cases, the hearing officers have  
19 recommended no further action be taken because  
20 the respondents have provided proof of valid  
21 operating certificates.

22 And that's it.

23 CHAIR DEL VALLE: Any questions? Are  
24 there a motion? It's unanimous. Thank you.

1 9/25/2015

2 MS. CORSO: Thank you.

3 CHAIR DEL VALLE: These are the  
4 [unintelligible] [01:43:46] motion for us to  
5 adjourn to executive session to discuss judicial  
6 matters. And we will adjourn.

7 CHAIR DEL VALLE: [Unintelligible]  
8 [01:44:00]. Services. Should we begin, let this  
9 [unintelligible] [01:44:09] of action. Is the  
10 recorder working?

11 MS. BALSAM: The recorder is not  
12 working, but we do have the videos. So, there is  
13 that.

14 CHAIR DEL VALLE: Okay. Alright.

15 MS. BALSAM: So you have multiple  
16 [unintelligible] [01:44:24].

17 MR. DEL VALLE: But the backup is  
18 [unintelligible] [01:44:28]. Should we  
19 [unintelligible] [01:44:32] back in?

20 MS. BALSAM: Yeah. I hope so.

21 CHAIR DEL VALLE: We are back in, we are  
22 back in public session. Having heard the  
23 judicial or [unintelligible] [01:44:49] related  
24 issues in executive session. Is there a motion

1 9/25/2015

2 to affirm the appeals decisions from September 3,  
3 2015 and 17 from the Appeals panel as presented  
4 in executive session? And I believe it's  
5 unanimous with all the members present. Let me  
6 note that Eli- Elizabeth Knauer and Ernesr  
7 Cavallo have left the meeting.

8  
9 MS. BALSAM: Ernie was nit at the meeting

10 CHAIR DEL VALLE: Adjournment. Right. Ernie  
11 wasn't here. That's it. Is there a motion to  
12 adjourn? Then we are adjourned.

13 (The board meeting concluded at 11:19  
14 a.m.)

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9/25/2015

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Environmental Control Board, 9/25/15

CERTIFICATE OF ACCURACY

I, Andrew Slawsky, certify that the foregoing transcript of the Environmental Control Board Meeting on September 25, 2015 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



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Date: September 29, 2015

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