

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

BOARD MEETING

VIA VIDEOCONFERENCE

and

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

October 5, 2021

9:30 a.m. to 10:11 a.m.

October 5, 2021

MEMBERS PRESENT:

Joni Kletter, Esq. - Commissioner/Chief Administrative Law
Judge, OATH, Chair/Executive Director, OATH ECB
Shamonda Graham - Department of Buildings (DOB)
Joseph Gregory, Esq. - New York City Fire Department
(FDNY)
Elizabeth Knauer, Esq. - Appointed Member (Water)
Madelynn Liguori, Esq. - Department of Sanitation (DSNY)
Jorge Martinez, Esq. - Department of Health & Mental
Hygiene (DOHMH)
Russell Pecunies, Esq. - Department of Environmental
Protection (DEP)
Matthew Schneid, Esq. - Appointed Member (Real Estate)
Tom Shpetner, Esq. - Appointed Member (Business)
Matthew Smith, Esq. - New York City Police Department
(NYPD)
Jarrod Whittington - Appointed Member (Noise)

ALSO PRESENT:

Rachel Amar - Special Assistant to Commissioner, OATH
John Castelli, Esq. - Deputy Commissioner for Legislative
Affairs, OATH
Kelly Corso, Esq. - Assistant Commissioner for Hearings
Division Adjudications, OATH
Svetlana Iosilevich, Esq. - Executive Agency Counsel,
Business Integrity Commission (BIC)
Catherine Jakubik, Esq. - Assistant General Counsel
Timothy Jones, Esq. - Senior Counsel, OATH
Richard J. LaPlant - Office of Management and Budget (OMB)
Nancy Lin - Office of Management and Budget (OMB)
Karin McAvoy - Administrative Coordinator, OATH
Frank Ng, Esq. - Deputy General Counsel, OATH
Peter Schulman, Esq. - Assistant Commissioner for Appeals,
OATH
Frances Shine - Secretary to the Board, OATH
Amy Slifka, Esq. - Deputy Commissioner/Hearings Division,
OATH
Samuel Solomon, Esq. - Chief of Staff/Special Counsel,
OATH
Thomas Southwick, Esq. - Supervising Attorney for Appeals,
OATH
Olga Statz, Esq. - Deputy Commissioner/General Counsel,
OATH
Joy A. Thompson, Esq. - Assistant General Counsel, OATH

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2 (The board meeting commenced at 9:30
3 a.m.)

4 JONI KLETTER, ESQ., CHAIR, EXECUTIVE
5 DIRECTOR, OATH ECB, COMMISSIONER/CHIEF
6 ADMINISTRATIVE LAW JUDGE, OATH: Hi. Good
7 morning. We're going to do a roll call.

8 [OFF MIC CONVERSATION]

9 JOY A. THOMPSON, ESQ., ASSISTANT GENERAL
10 COUNSEL, OATH: Good morning. We're going to
11 start with a roll call. I have Commissioner
12 Kletter.

13 MS. KLETTER: Here. Hello, here and
14 present.

15 MS. THOMPSON: Thank you. Shamonda
16 Graham? Joseph Gregory?

17 JOSEPH GREGORY, ESQ., NEW YORK CITY FIRE
18 DEPARTMENT (FDNY): Present.

19 MS. THOMPSON: Elizabeth Knauer?

20 ELIZABETH KNAUER, ESQ., APPOINTED MEMBER
21 (WATER): Present.

22 MS. THOMPSON: Madelynn Liguori?

23 MADELYNN LIGUORI, ESQ., DEPARTMENT OF
24 SANITATION (DSNY): Present.

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2 MS. THOMPSON: Jorge Martinez?

3 JORGE MARTINEZ, ESQ., DEPARTMENT OF
4 HEALTH & MENTAL HYGIENE (DOHMH): Present.

5 MS. THOMPSON: Russell Pecunies?
6 Matthew Schneid?

7 MATTHEW SCHNEID, ESQ., APPOINTED MEMBER
8 (REAL ESTATE): Here.

9 MS. THOMPSON: Thomas Shpetner?

10 THOMAS SHPETNER, ESQ., APPOINTED MEMBER
11 (BUSINESS): Here.

12 MS. THOMPSON: Matthew Smith?

13 MATTHEW SMITH, ESQ., NEW YORK CITY
14 POLICE DEPARTMENT (NYPD): Here.

15 MS. THOMPSON: Douglas Swann? And
16 Jarrod Whittington? We have quorum.

17 MS. KLETTER: Great. Thank you. I'm
18 going to ask for a motion to adopt the minutes of
19 the August 12, 2021 meeting. Thank you, Jarrod.
20 Does anyone have any corrections? Okay. Joy,
21 can you call a vote to approve the minutes?

22 MS. THOMPSON: Yes. Does anyone have
23 any objections to the approval of the minutes
24 from the August 12, 2021 ECB Board Meeting?

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2 Seeing and hearing none, the minutes are
3 approved. Thank you.

4 MS. KLETTER: Thank you. I'm going to
5 ask Olga Statz, our General Counsel, to introduce
6 the proposed rule updating OATH's Water Penalty
7 Schedule.

8 OLGA STATZ, ESQ., DEPUTY
9 COMMISSIONER/GENERAL COUNSEL, OATH: Yes, hi.
10 Oh, sorry. Good morning, everyone. You had in
11 your materials the Water Penalty update. This is
12 an unusual thing that we're doing. Normally, as
13 you know, we're making it where it's, we're in
14 the process of transferring all penalty schedules
15 that have been in ECB rules, OATH ECB rules, back
16 to the agencies. And this has been going on for
17 a number of years now. In this particular case,
18 we are proposing rules for DEP and, specifically,
19 their water rules, because the Administrative
20 Code indicates that the, the Water Penalties are
21 the responsibility of ECB.

22 At this point, we have chosen to go
23 forward to allow DEP to pass the rules that they
24 need with respect to their penalties, but, at the

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2 same time, work on amending the Administrative
3 Code to allow those rules to be promulgated by
4 DEP in the future.

5 This, we have precedent for this. A few
6 years back, I believe, the same thing occurred
7 with respect to the Sewer Code and there has been
8 an amendment to the Administrative Code to allow
9 OATH EC-, to allow DEP, itself, to, to promulgate
10 those rules. So we're hoping for the same result
11 now. But, in the meantime, in order not to delay
12 DEP in its, in promulgation of the rules and, and
13 revised penalty schedule, we are going through
14 with this particular penalty adjustment. Are
15 there any questions? Thank you.

16 MR. MARTINEZ: I have a question
17 regarding the actual rule.

18 MS. STATZ: Yes?

19 MR. MARTINEZ: Alright. So it, it, it
20 has a reference to fracking. So I know that, I
21 hear fracking in, in connection with other, you
22 know, activities in other states. How, how is
23 fracking an issue in a densely populated area
24 like New York City?

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2 MS. STATZ: I'm going to have to, to
3 defer to Russell Pecunies about, about the
4 substance of the rule. I'm, I'm not exactly sure
5 about the, the technological and the scientific
6 work behind rule.

7 MR. MARTINEZ: Okay.

8 RUSSELL PECUNIES, ESQ., DEPARTMENT OF
9 ENVIRONMENTAL PROTECTION (DEP): Yeah, hi. Good
10 morning. This is, this is Russ Pecunies. I just
11 was having some problems. I know it says that
12 I'm there, but I'm having audio problems. So I,
13 I'm actually speaking and listening over a phone
14 connection. So could you just repeat the
15 question?

16 MR. MARTINEZ: Alright. So the, the,
17 the rule has language that mentions fracking. So
18 I'm curious to see, to know how is fracking an
19 issue in a densely populated area, populated area
20 like New York City when you hear it in connection
21 with, you know, other states and, and less
22 populated areas?

23 MR. PECUNIES: Oh, okay. So, in other
24 words, the, the, the part that we're adding

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regarding the section that deals with fracking
waste?

MR. MARTINEZ: Right.

MR. PECUNIES: Yeah, okay. So that is,
is a section that we are adding to the penalty
schedule. It's more or less on a theoretical
basis, because the council passed a law
prohibiting the disposal of fracking waste in the
City.

We just want to be prepared in the
extremely unlikely event that that ever happens.
But we do not anticipate anyone actually
disposing of fracking waste in New York City.
The closest fracking, I believe, is somewhere in
Pennsylvania and we do not anticipate any actual
disposal of that waste or any need to ever
utilize this section. But because the council
did pass a law and provide for a penalty, we do
want to add it to the penalty schedule in an
abundance of caution.

MS. KLETTER: Thank you. Any other
questions? I'm going to ask for a motion to
approve the proposed rule. Thank you, Jarrod.

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2 I'm going to ask Joy to call a vote.

3 MS. THOMPSON: Thank you, Commissioner.

4 At this time, I would like to ask if there are
5 any objections to the approval of the proposed
6 rule updating OATH's Water Penalty Schedule?

7 Seeing and hearing none, the motion passes.

8 MS. KLETTER: Great. Thank you so much.

9 I'm now going to ask Olga Statz, again, to
10 introduce OATH's proposed final rule clarifying
11 the procedures for remote proceedings and
12 appearances.

13 MS. STATZ: Good morning, everybody.

14 Good morning, everybody, again. This is the
15 final round for the remote rules. Now, at the
16 la-, at our last gathering, we had interesting
17 discussions and substantive discussions
18 respecting the proposed rule. That proposed rule
19 has now gone through public hearing and it's
20 ready for a final vote. I'm happy to answer any
21 additional questions you might have about this
22 rule.

23 MS. KNAUER: This is Elizabeth Knauer,
24 Appointed Member. I, I guess I, I wasn't at the

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prior Board Meeting where this was, where the
proposed rule was discussed.

MS. STATZ: Yes.

MS. KNAUER: In reviewing the minutes, I
did notice that Matthew Schneid had asked about
the provision limiting representative appearances
to 25 summonses and whether that really meant 25
different cases, because sometimes when, you
know, it's, it's possible for, for posting cases,
etcetera, for there to actually be more than 25
summonses heard at one time. So I, I guess I
took it from the minutes that there was going to
be some thought put into, to revising that to
make, to clarify, but it seems like --

MS. STATZ: No, the wording is still
summons, because that's the way the clerk,
that's, the people who actually process these
unders-, do everything by, by summons. And the
25 limitation is really for the individual
attorney. So a firm can theoretically have many
more than that. So, but one attorney at a time
per phone call -- this is, this is basically the
number that was doable over the course of our, of

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2 our exercises over the pandemic. This is the
3 number that's actually doable for one attorney to
4 do.

5 AMY SLIFKA, ESQ., DEPUTY
6 COMMISSIONER/HEARINGS DIVISION, OATH: But,
7 Elizabeth, we, we can make exceptions and I do
8 see your point. We -- this is Amy Slifka, for
9 the record. I do see your report -- your point -
10 - regarding posting violations and, often, it is
11 one defense. So if we think we can manage 100 or
12 so, we will do so.

13 MS. KNAUER: Okay. So you could, you,
14 ad hoc, if there was some, you know, exception
15 where it only makes sense that one person is
16 going to appear for the case because it, because
17 it's all related and basically all the same
18 thing, that you, you can just make an ex-, an ad
19 hoc exception in that case. You're not bound by
20 it?

21 MS. SLIFKA: Correct. And I don't think
22 there'll be any issues in that sense. We are
23 finding that, just as, for your information, we
24 are finding that these high-volume reps who are

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2 signing in for more than, you know, 25 or 30
3 cases, they're not getting through their calendar
4 in a day. And I actually feel that's a little
5 bit of a disservice to the respondents who hire
6 them, because they have to be adjourned or
7 rescheduled.

8 MR. SCHNEID: Hi, this is Matt Schneid
9 speaking. I thought last time we were drawing a
10 distinction between a summons and a case. And
11 maybe, you know, I'm somewhat new to this, but we
12 were, we were saying that, you know, a case could
13 be five summons and we were going to revise it to
14 say 25 cases. Or, again, --

15 MS. SLIFKA: No --

16 MR. SCHNEID: -- that's, that's how
17 we're drawing the distinction. Maybe I'm a
18 little bit [unintelligible] [09:41:27]
19 [00:11:27].

20 MS. SLIFKA: No. It would be by, it
21 would be by summonses, but there are some
22 exceptions where there's one defense for certain
23 types of violations, such as posting violations.
24 It's usually one defense. "I didn't post it;

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2 somebody else posted it." "They got the flyer."
3 So it, it depends, it's really, it's really
4 summonses because high-volume reps sign in for 25
5 summonses, they are each a separate case, and
6 it's, it's a huge volume.

7 MR. SCHNEID: Do, do we need to have
8 specific language that permits these "exceptions"
9 to be made within the actual rule itself?

10 MS. STATZ: Not necessarily. CAPA
11 requires us to put in the rule things that are
12 the, what, what we expect to, to happen across
13 the board. But we do have the authority, in
14 certain instances, to make exceptions. But in
15 the rule, it's, you know, quite flexible.

16 MS. KLETTER: Yes, and --

17 MR. SCHNEID: Right, it says --

18 [CROSSTALK] [09:42:32] [00:12:32]

19 MS. KLETTER: It does state it in the
20 rule.

21 MR. SCHNEID: Right. But so, yeah, so
22 this goes, it says unless an exception is granted
23 by a tribunal prior to the hearing date. So I
24 guess they would just ask the hearing officer?

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2 Is that logistically what we're talking about?

3 MS. SLIFKA: They usually, they usually
4 request their hearings before, to the clerk's
5 office. The Chief Clerk discusses it with me, at
6 this point in time, and we decide what we think
7 we can handle.

8 MR. SCHNEID: Okay.

9 MS. KLETTER: And just to, for all of
10 your awareness, you know, from March 2020 through
11 September of 2021, we were doing all remote
12 hearings, all telephonic hearings. And then, in
13 September, we changed our, it's basically an
14 order by the Chief Judge to state that
15 individuals who, or, you know, respondents with
16 their attorneys who request an in-person hearing
17 will be offered an in-person hearing, barring
18 unforeseen, you know, circumstances. But we've
19 actually granted every in-person hearing request
20 that has been made over the last month and a
21 half. And as long as the respondent is making
22 that request at least, you know, three days in
23 advance, the request will be granted for an in-
24 person hearing.

Commented [TS(2): Delete? Wasn't mention

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2 So, at this point, now, everyone has the
3 option of a telephonic hearing, an in-person
4 hearing or, you know, an online written
5 submission in order to challenge the summons.
6 Very few individuals have actually requested in-
7 person hearings, which, to me, says that our
8 remote processes have been working extremely well
9 and are very effective and that's what people
10 prefer, and not including the high-volume reps.

11 Any other questions? Okay. I'm going
12 to ask Joy to -- I'm going to ask for a motion to
13 approve? Thank you, Jarrod. And I'm going to
14 ask Joy to call for a vote on the final rule
15 clarifying the procedures for remote proceedings.

16 MS. THOMPSON: Thank you, Commissioner.
17 At this time, I will ask if there are any
18 exceptions to the -- oh, I'm sorry -- if there's
19 any objections to approving the rule, the final
20 rule regarding remote proceedings and appearances
21 at the OATH tribunals. Seeing and hearing none,
22 the motion passes.

23 MS. KLETTER: Alright. Thank you so
24 much. I'm going to ask Olga Statz again to

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introduce OATH's proposed final rule regarding
repealing OATH's Sanitation Penalty Schedule.

MS. STATZ: Thank you, Commissioner,
again. This is the, this is the final step for
the repeal of the OATH Sanitation Rule.

[OFF MIC CONVERSATION]

MS. KLETTER: That's Mr. LaPlant.

MS. STATZ: Mr. LaPlant, could you
please mute? Thank you.

MS. KLETTER: Thank you.

MS. STATZ: So, at this stage, we are
presenting you with the proposed final rule
repealing OATH's Sanitation Penalty Schedule and
allowing the Department of Sanitation to
promulgate its own penalty schedule. This is, as
you know, part of our process that we started a
few years ago to remove all of the penalty
schedules from the OATH ECB rules and have those
penalty schedules go in the, the rules of the
various enforcement agencies. And so we're pre-,
we're, if there are any questions, I'm happy to
answer them.

MR. SCHNEID: I, I just want to confirm,

Commented [TS(3)]: Statz

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there is, there are no changes from the last time we discussed the proposal, right?

MS. STATZ: No.

MR. SCHNEID: Okay.

MS. KLETTER: Okay, thank you. I'm going to ask for a motion to approve. Thank you, Jarrod. I'm going to ask Joy to call for a vote on the proposed final rule repealing OATH's sanitation penalty schedule.

MS. THOMPSON: At this time -- thank you, Commissioner. At this time, are there any objec- objections to the proposed final rule?

MR. SHPETNER: I'd like to abstain.

MS. THOMPSON: Thank you. We have one abstention. Any other abstentions or objections? The motion passes.

MS. KLETTER: Great. Thank you so much. I'm now going to ask Russell Pecunies to introduce DEP's request for a cease and desist order.

MR. PECUNIES: Yes, thank you. This is Russell Pecunies with DEP Legal. The Department is requesting that the Board approve an order to

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2 cease and desist. We have not requested one of
3 these for quite some time because of the, the
4 pandemic. But we have a situation here involving
5 the Chipotle located at 185 7th Avenue in
6 Brooklyn.

7 Our first inspection regarding noise
8 from the kitchen exhaust was in January of 2019,
9 and there were subsequent inspections that led to
10 violations in September and in December of 2019.
11 The Chipotle defaulted on the first two summonses
12 and was found in violation as to the third. At
13 that point, before we came to the Board to ask
14 for a cease and desist, the COVID pandemic
15 started and everything sort of closed down, and I
16 guess the problem kind of went away, at least
17 temporarily.

18 We then started to receive complaints
19 again about the same equipment at the same
20 establishment and issued a fourth violation in
21 October of last year and a fifth violation in
22 March of this year. The fourth violation, the
23 fourth summons, they were found in violation of
24 in March and the fifth summons has been

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2 rescheduled to a couple of weeks from now.
3 Because of the repeated noise violations from the
4 same equipment at the same establishment and the
5 continuing failure by the respondent to correct
6 this noise condition, the Department is
7 requesting that the Board or-, issue an order to
8 cease and desist.

9 MS. KLETTER: Any questions? Matt?

10 MR. SCHNEID: Hi. Thank you. This is
11 actually my first time we've dealt with one of
12 these since I've been on the Board. Can you
13 explain the import of what happens when you have
14 a cease and desist? Like what's, what, what,
15 what occurs --

16 [CROSSTALK] [09:50:54] [00:20:54]

17 MR. PECUNIES: Sure. Sure. So they,
18 they would be scheduled, they would, they would
19 receive a notice to appear at a hearing in front
20 of an OATH hearing officer. And the purpose of
21 that hearing would be for them to show why the
22 equipment should not be sealed. In other words,
23 it's an opportunity for them to demonstrate that
24 they have resolved the problem.

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2 Normally, what they would bring forward
3 would be evidence, that they can bring forward
4 evidence that they've replaced the offending
5 equipment because the cease and desist equip-, or
6 order does pertain specifically to the equipment
7 that's been found in violation. So they can
8 choose to replace it. The equipment may be in
9 need of repair or servicing, which could solve
10 the problem. So they could show evidence of
11 that. They could show evidence that they have
12 put up an acoustical enclosure to keep the noise
13 from reaching the complainant's residence. So
14 there are a number of ways in which they can
15 demonstrate that they have come into compliance.

16 Then, there would be, once, once that
17 has taken place, there would be recommendations
18 made by the hearing officer which would come to
19 the Board, which normally entail them being
20 subject to reinspection for a specific period of
21 time during which, if there's a violation, they
22 can be immediately sealed. And if they default
23 on that hearing, on the cease and desist hearing,
24 then they would be sealed forthwith.

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2 MR. SCHNEID: And it sounds like they've
3 got a number of these violations. Do we have any
4 understanding about what actions they may have
5 taken or just the reason they have five, or
6 whatever number of violations you noted
7 outstanding, because nothing has happened?

8 MR. PECUNIES: No, I, I, I don't have
9 any specific information regarding any measures
10 that the Chipotle has taken to, to correct this.
11 The readings appear to be fairly consistent
12 across the inspections that I'm seeing. One of
13 them was 61 decibels, one of them was 60
14 decibels. So one of them was 58, with the
15 allowable being 42. So it, it does not appear
16 that there's been any material change to the
17 noise level across the various inspections that
18 we've done.

19 MR. SCHNEID: And the way to cure would
20 likely be to install some sound dampening
21 apparatus? Is that normally --

22 MR. PECUNIES: It can be. I mean, that,
23 how, how they choose to cure it is up to them.
24 They can, they can replace the equipment, they

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2 can erect an acoustical barrier, they can come up
3 with their own solution or they can hire a noise
4 consultant. How compliance comes about is left
5 up to them.

6 MS. KLETTER: Thank you. Any other
7 questions? I'm going to ask for a motion to
8 approve the cease and desist order. Thank you,
9 Jarrod. Joy, can you please call for a vote?

10 MS. THOMPSON: Sure. Thank you,
11 Commissioner. And I just want to note for the
12 record that I see Shamonda Graham, have you
13 joined us?

14 SHAMONDA GRAHAM, DEPARTMENT OF
15 BUILDINGS: Yes, good morning, guys. I am so
16 sorry for my tardiness.

17 MS. THOMPSON: Okay.

18 MS. GRAHAM: I had us pegged for
19 Thursday. I'm so used to the meetings being on
20 Thursday. I'm so sorry.

21 MS. THOMPSON: Okay, thank you so much.
22 At this time, I'd like to just ask if there are
23 any objections to the Board approving the DEP's
24 request for a cease and desist, desist order in

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2 this matter. Okay. Seeing and hearing none, the
3 motion passes.

4 MS. KLETTER: Thank you so much. Now,
5 I'm going to ask for a motion to go into
6 Executive Session to discuss new decisions and
7 the cases listed in the Judicial Report. Thank
8 you, Jarrod. We're now going into --

9 [OFF THE RECORD]

10 [ON THE RECORD]

11 MS. KLETTER: -- Karin, and bring back
12 everyone who was in the lobby. Karin, has Mr.
13 LaPlant logged back in?

14 [OFF MIC CONVERSATION]

15 MS. KLETTER: Okay, okay. Oh, okay,
16 good. Our next Board Meeting is December 9,
17 2021. Are there any additional questions?

18 [OFF MIC CONVERSATION]

19 MS. KLETTER: I think that's someone's
20 background. I'm going to ask for a motion to
21 adjourn the meeting.

22 MS. GRAHAM: Commissioner?
23 Commissioner?

24 MS. KLETTER: Yes?

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2 MS. GRAHAM: This is Shamonda Graham
3 from DOB. I'm not sure if you can hear me. Can
4 you hear me?

5 MS. KLETTER: I can. I can hear you.

6 MS. GRAHAM: Thank you. I just have one
7 question. Are we moving the meetings to Tuesday?

8 MS. KLETTER: Which meeting? The next
9 meeting?

10 MS. GRAHAM: The Board, the Board
11 Meetings. They're usually on Thursday, so I, I'm
12 just wondering, is there any push to move or are
13 we going to revert back to Thursday? Or was this
14 just a quirk today?

15 MS. THOMPSON: The, as, as we discussed
16 at the last meeting, because there were so --
17 this is Joy Thompson speaking. Because of some
18 rules that have hard deadlines, we had to
19 schedule this meeting for a Tuesday, but the --

20 MS. GRAHAM: Okay.

21 MS. THOMPSON: -- December 9th meeting
22 is on a Thursday.

23 MS. KLETTER: Okay. Meeting adjourned.
24 Thank you so much. See you soon.

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October 5, 2021

(The board meeting concluded at 10:11
a.m.)

Environmental Control Board, 10/5/2021

CERTIFICATE OF ACCURACY

I, Ryan Manaloto, certify that the foregoing transcript of Board Meeting of the Environmental Control Board on October 5, 2021, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



Date: November 15, 2021

GENEVAWORLDWIDE, INC

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