

NOTICE OF OPPORTUNITY TO COMMENT ON
PROPOSED AMENDMENT OF THE RULES OF PROCEDURE OF
THE ENVIRONMENTAL CONTROL BOARD,
CHAPTER 3 OF TITLE 48 OF
THE RULES OF THE CITY OF NEW YORK

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY
VESTED IN the Environmental Control Board by Section 1049-a
of the New York City Charter, that the Environmental
Control Board intends to promulgate amendments to its Rules
of Procedure as required by Local Law 35 of 2008.

Written comments concerning the proposed amendments to
the rules may be sent to James Macron, Counsel to the
Environmental Control Board, 66 John St., 10th Floor, New
York, N.Y. 10038, on or before May 1, 2009. A public
hearing on the proposed rule will be held on May 1, 2009,
at 10:00 A.M., at the Environmental Control Board, 66 John
St., 10th Floor, New York, N.Y. 10038. Persons seeking to
testify are requested to notify James Macron, Esq., by
April 30, 2009, by e-mail at jmacron@dep.nyc.gov or by
telephone at (212) 361-1515. Persons requesting that a
sign language interpreter or other form of reasonable
accommodation for disability be provided at the hearing are

asked to notify James Macron, Esq., as set forth above, by April 24, 2009. Written comments and a summary of the oral comments will be available for public inspection within a reasonable time after receipt thereof between the hours of 9:00 a.m. and 4:30 p.m. at the Environmental Control Board's offices, 66 John St., New York, N.Y. 10038.

Proposed Amendments

Following are proposed amendments of the Rules of Procedure of the Environmental Control Board, which appear as Chapter 3 of Title 48 of the Rules of the City of New York. No amendment of Subchapter G is proposed. Because of its length, Subchapter G is not reproduced below.

Matter in underline is new, to be added;

Matter in [brackets] is to be deleted.

ENVIRONMENTAL CONTROL BOARD

RULES OF PROCEDURE

Subchapter	A	General Rules
	B	Adjudications - Pre-Hearing Procedure
	C	Adjudications - Hearing Procedures
	D	<u>Adjudications - Appeal Procedures</u>

E	Miscellaneous
F	Special Hearings and Enforcement Proceedings
G	Penalties

SUBCHAPTER A

GENERAL RULES

§ 3-11	Definitions.
§ 3-12	Scope of Rules.
§ 3-13	Filing.
§ 3-14	Form of Documents.
§ 3-15	Computation of Time.
§ 3-16	Appearances.
§ 3-17	Public Information and Access.

§ 3-11 **Definitions.**

As used herein the following terms shall have the meanings specified.

Appearance. "Appearance" means a communication with the board or its tribunal that is made by a party or the representative of a party in connection with a notice of violation that is or was pending before the board or its tribunal. An appearance may be made in person or otherwise - for example, by mail.

Board. "Board" means the Environmental Control Board of the City of New York[;].

Executive Director. "Executive Director" means the [E]xecutive [D]irector of the Environmental Control Board of the City of New York[;].

Hearing Officer. "Hearing Officer" means a person designated as a hearing officer by the chairman of the board[;].

Notice of Violation. "Notice of Violation" means the document issued by a petitioner to a respondent which specifies the charges forming the basis of an adjudicatory proceeding before the Environmental Control Board.

Party. "Party" means the person named as petitioner or respondent, or intervening as of right, in an adjudicatory or enforcement action before the board or its tribunal.

Person. "Person" means any individual, partnership, unincorporated association, corporation or governmental agency[;].

Petitioner. "Petitioner" means the commissioner, department or bureau within a department of the City of New York which commences an adjudicatory or enforcement proceeding before the Environmental Control Board[;].

Respondent. "Respondent" means the person against whom the charges alleged in a notice of violation have been filed[;].

Tribunal. "Tribunal" means the hearing officers and staff at the Environmental Control Board under the direction of the executive director charged with holding hearings on notices of violation, or hearings in the course of any special enforcement proceeding by the board.

§ 3-12 **Scope of Rules.**

The rules contained herein govern the conduct of all adjudicatory hearings at the tribunal brought pursuant to the provisions of § 1049-a of the New York City Charter and provisions of the New York City Administrative Code, or as otherwise authorized by law, and the conduct of such special hearings or enforcement proceedings before the board as authorized by Title 24 of the New York City Administrative Code.

§ 3-13 **Filing.**

All documents required or permitted to be filed with the tribunal or the board shall be filed at the office of the executive director or at the tribunal or a branch thereof when more specifically provided by notice from the tribunal.

§ 3-14 **Form of Documents.**

(a) All documents filed with the executive director shall contain a caption setting forth the title of the action, the file or docket number assigned to the action and a designation as to the nature of the document.

(b) All documents filed must be signed by the party or by the party's attorney or other duly authorized agent. The signature of an attorney constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief, there is good ground to support it[,]; and that it is not interposed for delay.

(c) All documents, other than notices of violation (provision for which is made in [rule] § 3-3), required to be served on other parties, shall be accompanied by an affidavit of service when filed. Such affidavit of service shall recite the date and manner of service as to each party and be executed by the serving party.

§ 3-15 **Computation of Time.**

(a) Except as otherwise provided herein, computation of any period of time prescribed in these rules shall be as follows:

(1) The start date for the time period shall not be considered in the computation. The next business day is the first day of the time period.

(2) The computation is based on the number of calendar days.

(3) If the last day in the period is a Saturday, Sunday or New York City legal holiday, the period is extended to the next business day.

(b) When mail is used for service of any document (other than a notice of violation) on an opposing party, five additional days shall be granted the opposing party in taking any action or making any response required or permitted by these rules.

(c) Any emergency action taken by the board which requires action within a 24 hour period shall be taken regardless of whether the 24 hour period includes a Saturday, Sunday or legal holiday.

§ 3-16 **Appearances.**

The following persons are permitted to participate in proceedings before the tribunal:

(a) An individual may appear [in] on his or her own behalf or by an authorized agent, or by attorney licensed to practice in the State of New York.

(b) A business entity, not-for-profit organization or government agency may appear by any authorized officer or employee or by attorney licensed to practice in the State of New York, or by any other duly authorized agent.

(c) Any representative who is authorized by a City agency to appear on its behalf before the board or its tribunal may be authorized by any other City agency that issues notices of violation returnable to the board to appear on its behalf. An appearance includes any time an agency appears before a hearing officer to present a case or a motion for adjournment or for any other purpose concerning a notice of violation.

§ 3-17 **Public Information and Access.**

(a) The executive director shall maintain files containing all information, documents, evidence, tape recordings, transcripts, and any other items submitted or produced in the course of any adjudicatory or special hearing or enforcement proceeding.

(b) Case files shall be available to the public in accordance with the Public Information Law of the State of New York (Public Officers Law, Art. 6) and the Rules of the City of New York (43 RCNY 1). Case files shall be retained on the premises of the tribunal for one year after the final action in a proceeding and then may be archived or destroyed in accordance with law.

SUBCHAPTER B

ADJUDICATIONS - PRE-HEARING PROCEDURE

- § 3-31 Notice of Violation.
- § 3-32 Admissions and Payments by Mail.
- § 3-33 Pre-hearing Reschedules.
- § 3-34 Adjudication by Mail.
- § 3-35 Motions to Intervene
- § 3-36 Consolidation.
- § 3-37 Discovery.
- § 3-38 Subpoenas.

§ 3-31 **Notice of Violation.**

(a) *Form:* All adjudicative hearings instituted by a petitioner shall be commenced by the issuance of a notice of violation on a form approved by the board.

(b) *Contents:* The notice of violation shall contain the name and address, when known, of a respondent[,]; a brief description of the alleged violation, its date and place of occurrence[,]; and reference to the provision of law or rule charged. The notice of violation shall contain information advising the respondent of the maximum penalty and of the time in which the respondent may admit or deny the violation charged. The notice of violation shall also contain a warning to the respondent that failure to plead in the manner and time stated in the notice may result in a default decision and order being entered against the

respondent. On or after November 25, 2008, any notice of violation filed pursuant to this section that refers to section 1404 of the Charter as the legal authority [and] for jurisdiction under which a hearing is to be held shall be deemed to refer to [section] § 1049-a of the Charter.

(c) *Service:* A notice of violation issued by a petitioner may be served on a respondent in accordance with the methods set out in §1049-a(d)(2) of the New York City Charter which render the tribunal's decision and order automatically docketable in Civil Court, or alternatively as provided by the statute, rule or other provision of law governing the violation alleged. Lawful service in a manner other than that provided for in §1049-a(d)(2) shall give the tribunal jurisdiction to hold a hearing or render a decision and order whether after hearing or in default thereof, but such decision and order shall not be entered in Civil Court or any other place provided for entry of civil judgments without court proceedings.

(d) *Filing:* The original or a copy of the notice of violation, together with the proof(s) of service, shall be filed with the tribunal prior to the first scheduled hearing date. Failure to timely file all proofs of service shall not divest the tribunal of jurisdiction to proceed with a hearing or to issue a default order.

§ 3-32 **Admissions and Payments by Mail.**

Where the notice of violation states that a mailable penalty schedule exists for the cited violation, a respondent may admit to the violation charged and pay the penalty by mail in the manner and time directed by the notice of violation. Payment in full is deemed an admission of liability and no further hearings or appeal will be allowed.

§ 3-33 **Pre-hearing Reschedules.**

Upon application by respondent, ex-parte, to the executive director and for good cause shown, the executive director may postpone the hearing date set in the notice of violation for a brief period of time and reschedule the hearing. The executive director may deny any further requests for a reschedule and require respondent to appear and make such motion for adjournment to a hearing officer at the scheduled hearing.

§ 3-34 **Adjudication by Mail.**

(a) The executive director may designate certain classes of alleged violations or defenses as appropriate for adjudication by mail and prescribe procedures for such adjudication. Where respondent is offered the option of contesting the violation or presenting a defense by mail, respondent may move for such adjudication by application

addressed to the tribunal. Such application shall set forth all facts and arguments relevant to the case relied on by the respondent. The application may be supported by affidavits or other documentary evidence.

(b) Upon receipt by the tribunal of an application for adjudication by mail, the matter shall be assigned to a hearing officer who shall review the record. The hearing officer may request further evidence to be submitted by respondent, may direct respondent to serve a copy of the application on petitioner, or may render a recommended decision and order based on the evidence in the record. The hearing officer may also deny the application for adjudication by mail and direct respondent to appear for a hearing in person.

§ 3-35 **Motions to Intervene.**

(a) *As of Right.*

(1) A person may intervene as of right in an adjudicatory or enforcement proceeding if such person may be directly and adversely affected by an order of the board. An order imposing a monetary penalty only shall not be deemed an order directly or adversely affecting any person other than respondent.

(2) A written application by any person to intervene as of right shall be filed with the tribunal and served

upon each party to the proceeding not less than 5 days before the hearing. Such application shall set forth in detail the reasons the applicant seeks to intervene. Upon being served with an application for intervention, any party wishing to respond thereto may do so within 3 days after receipt of the application. Such response, accompanied by any supporting documents, must be filed with the tribunal and served upon the applicant and all other parties. When such written application is made by any person, the matter shall be assigned to a hearing officer for disposition.

(3) An intervenor as of right shall have all the rights of an original party, except that the hearing officer may provide that such intervenor shall be bound by orders previously entered or evidence previously received, and that the intervenor shall not raise issues or seek to add parties which might have been raised or added more properly at an earlier stage of the proceeding.

(b) *Discretionary Intervention.*

When written application by any person for discretionary intervention is filed with the tribunal prior to the date set for hearing in any adjudicatory proceeding, the matter shall be assigned to a hearing officer. The hearing officer, subject to the necessity of conducting an

orderly and expeditious hearing, may permit such person to intervene if good cause is shown therefore or if the applicant is in a position to assist in the proof or defense of the proceeding. An intervenor permitted to intervene at the discretion of the hearing officer shall be assigned such role in the proceeding as the hearing officer in his or her discretion may direct, taking into consideration the avoidance of unfairness to the parties and the intervenor and the avoidance of undue delay. An oral application to intervene by any person may be made at the commencement of the hearing and shall be considered by the hearing officer assigned to the case. A discretionary intervenor is not a party to the proceeding and has no standing to appeal the hearing officer's recommended decision and order.

§ 3-36 **Consolidation.**

In the interest of convenient, expeditious and complete determination of cases involving the same or similar issues or the same parties, the hearing officer may consolidate two or more notices of violation for adjudication at one hearing.

§ 3-37 **Discovery.**

(a) Upon written request received by the opposing party at least five business days prior to the scheduled

hearing date, any party is entitled to receive from the opposing party a list of the names of witnesses who may be called and copies of documents intended to be submitted into evidence.

(b) Pre-hearing discovery shall be limited to the matters enumerated above. All other applications or motions for discovery, including depositions on oral examination, shall be made to a hearing officer at the commencement of the hearing and the hearing officer may order such further discovery as is deemed appropriate in his or her discretion.

(c) Upon the failure of any party to properly respond to a lawful discovery order or request or such party's wrongful refusal to answer questions or produce documents, the hearing officer may take whatever action he or she deems appropriate including but not limited to preclusion of evidence or witnesses, or striking the pleadings or defenses of such party. It shall not be necessary for a party to have been subpoenaed to appear or produce documents at any properly ordered discovery proceeding for such sanctions to be applicable.

§ 3-38 **Subpoenas.**

(a) Upon application to the tribunal by a party, the tribunal shall issue a subpoena for attendance at

deposition or hearing, which may include a command to produce specified books, documents or tangible things which are reasonably necessary to a resolution of the issues, subject to the limitations on discovery prescribed by these rules.

(b) All subpoenas shall be issued on forms approved by the board and shall be signed by a hearing officer. A hearing officer, on motion timely made before the return date of the subpoena, or on the hearing officer's own motion, may quash or modify the subpoena if it is unreasonable or was wrongfully issued.

SUBCHAPTER C

ADJUDICATIONS - HEARING PROCEDURES

§ 3-51 General Rules.

§ 3-52 Hearing Officers.

§ 3-52.1 Adjournments.

§ 3-53 Amendments to Notice of Violation.

§ 3-54 Evidence.

§ 3-55 Interlocutory Appeals.

§ 3-56 Transcript.

§ 3-57 Decisions.

§ 3-51 **General Rules.**

(a) *Expedition.* Hearings shall proceed with all reasonable expedition and insofar as is practicable shall be held at one place and shall continue without suspension, except for brief recesses, until concluded. Subject to § 3-52.1, t[T]he hearing officer shall have the authority to grant brief adjournments, for good cause shown, and consistent with the requirements of expedition.

(b) *Notice of Hearing.* The notice of violation shall set the hearing date and place or, if none, the executive director shall set such time and place. In no event shall such hearing date be set for more than 60 days after the filing of the notice of violation at the tribunal. At least 10 days notice of such hearing date and location shall be sent to all parties. Where respondent waives the 10 day notice and requests an expedited hearing, the executive director may assign the case for immediate hearing, upon appropriate notice to petitioner and opportunity for petitioner to appear.

(c) *Rights of Parties.* Every party, except intervenors under § 3-35(b), shall have the right of due notice, cross examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing.

(d) *Order of Hearing.* The following shall be the order of all adjudicatory hearings, subject to modification by the hearing officer for good cause:

(1) Presentation and argument of motions preliminary to a hearing on the merits;

(2) Presentation of opening statements; if any

(3) Petitioner's case in chief;

(4) Respondent's case in chief;

(5) Petitioner's case in rebuttal;

(6) Respondent's case in rebuttal;

(7) Respondent's closing argument;

(8) Petitioner's closing argument.

(e) *Oaths.* All persons giving testimony as witnesses at a hearing must be placed under oath.

(f) *Language Assistance Services.* (1) Appropriate language assistance services shall be afforded to respondents whose primary languages are not English to assist such respondents in communicating meaningfully with hearing officers. Such language assistance services shall include interpretation of hearings and of pre-hearing conferences conducted by hearing officers, where interpretation is necessary to assist the respondent in communicating meaningfully with the hearing officer. At the beginning of any hearing or pre-hearing conference, the

hearing officer shall advise the respondent of the availability of interpretation. In determining whether interpretation is necessary to assist the respondent in communicating meaningfully with the hearing officer, the hearing officer shall consider all relevant factors, including but not limited to the following: (i) information from board administrative personnel identifying a respondent as requiring language assistance services to communicate meaningfully with a hearing officer; (ii) a request by the respondent for interpretation; (iii) even if interpretation was not requested by the respondent, the hearing officer's own assessment whether interpretation is necessary to enable meaningful communication with the respondent. If the respondent requests an interpreter and the hearing officer determines that an interpreter is not needed, that determination and the basis for the determination shall be made on the record.

(2) When required by paragraph (1) of this subsection, interpretation services shall be provided at hearings and at pre-hearing conferences by a professional interpretation service that is made available by the board, unless the respondent requests the use of another interpreter, in which case the hearing officer in his or her discretion may use the respondent's requested interpreter. In exercising

that discretion, the hearing officer shall take into account all relevant factors, including but not limited to the following: (i) the respondent's preference, if any, for his or her own interpreter; (ii) the apparent skills of the respondent's requested interpreter; (iii) whether the respondent's requested interpreter is a child under the age of eighteen; (iv) minimization of delay in the hearing process; (v) maintenance of a clear and usable hearing record; (vi) whether the respondent's requested interpreter is a potential witness who may testify at the hearing. The hearing officer's determination and the basis for this determination shall be made on the record.

§ 3-52 **Hearing Officers.**

(a) *Who [p]Presides.* Hearings in enforcement proceedings shall be presided over by a hearing officer appointed by the board.

(b) *Powers and [d]Duties.* Hearing officers shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to these ends, including the following:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas and discovery orders and to rule upon objections to such orders;

(3) To rule upon offers of proof and receive evidence;

(4) To regulate the course of the hearing and the conduct of the parties and their representatives;

(5) To hold conferences for the simplification of issues or any other proper purpose;

(6) To interrogate witnesses;

(7) To consider and rule upon all procedural and other motions, including requests for adjournment;

(8) To make and file recommended decisions and orders.

(c) *Interference.* In the performance of their adjudicative functions, hearing officers shall not be responsible to or subject to the supervision or direction of any officer, employee or agent of a petitioner. No ex-parte communication relating to other than ministerial matters regarding a proceeding, including internal agency directives not published as rules, shall be received by a hearing officer from the petitioning agency or from individual members of the board.

(d) *Power to [d]Discipline.* The hearing officer may for good cause noted on the record, and after a warning, bar any person, including a party or an attorney or other representatives of a party, from continued participation in

a hearing where such person refuses to comply with the hearing officer's directions or behaves in a disorderly, dilatory or obstructionist manner. Any person so barred may make a prompt application to the executive director for a review of the hearing officer's action. The hearing may continue at the hearing officer's discretion, unless the executive director orders that further proceedings be stayed pending a decision on the application. No interlocutory appeal shall lie to the board from the decision of the executive director granting or denying the application.

(e) *Disqualification of Hearing Officer.*

(1) When a hearing officer deems himself or herself disqualified to preside in a particular proceeding, the hearing officer shall withdraw from the proceeding by notice on the record and shall notify the executive director of such withdrawal.

(2) A party may, for good cause shown, request that the hearing officer remove or disqualify himself or herself. Such motion shall be ruled upon by the hearing officer in the proceeding. If the hearing officer denies the motion, the party may obtain a brief adjournment in order to promptly apply for review by the executive director.

(3) Upon recusal or removal of the hearing officer, the executive director shall appoint another hearing officer to continue the case. If a refusal to recuse is upheld by the executive director, the party may re-raise the issue on appeal.

§ 3-52.1 **Adjournments.**

(a) In general, a hearing officer may adjourn a proceeding if he or she decides that the adjournment would allow one party to present its side of the dispute more effectively and would not be unreasonably inconvenient or unfair to the other party. In certain instances, however, a hearing officer's authority to adjourn a proceeding is limited. This Rule describes those instances. The Rule uses these special definitions:

(i) A respondent's appearance is "timely" if the respondent appeared within one hour of the scheduled hearing time for a notice of violation.

(ii) If the respondent has timely appeared, an appearance by the officer who issued the notice of violation is "timely" if the officer appears within two hours of the scheduled hearing time for the notice of violation or within one hour after a hearing officer has announced that he or she is available to call the notice of violation for a hearing.

(iii) "Extraordinary circumstances" are circumstances that could not reasonably have been foreseen by the petitioner agency. They do not include the fact that the parties disagree about the notice of violation or the charges it contains.

(b) Respect for a respondent's convenience means that a hearing should not be routinely adjourned once a respondent has appeared at a board office as instructed by the notice of violation. If a respondent makes a timely appearance on the date indicated on a notice of violation and at the specific board office location indicated on the notice of violation (or, if no specific board office location is indicated, at any board office location), the hearing officer may adjourn the hearing only if (i) the respondent consents to the adjournment; or (ii) a representative of the petitioning agency appears at the hearing, unless the failure of any representative of the petitioning agency to appear is due to extraordinary circumstances.

(c) Once a hearing has been adjourned for the convenience of one party, it should not routinely be adjourned again to accommodate the same party unless good cause is shown that a further adjournment is necessary to afford the party a reasonable opportunity to present

relevant, non-cumulative testimony or evidence that would contribute to a full and fair hearing of each party's side of the dispute. However, absent extraordinary circumstances, a hearing will not be adjourned for the sole purpose of enabling the officer who issued the notice of violation to attend if: (i) the hearing has already been adjourned for the sole purpose of enabling the officer who issued the notice of violation to attend; (ii) the respondent timely appears on the adjourned hearing date at the specific board office location indicated on the adjournment order; and (iii) the issuing officer does not timely appear at the specific board office indicated on the adjournment order. In order to ensure the fairness and efficient functioning of the adjournment process, the petitioning agency will be granted an opportunity to confirm the issuing officer's availability for the proposed adjourned date of the hearing. If it is not possible for the date to be confirmed at the time of the hearing, proposed adjourned dates will be selected at the hearing, the petitioning agency will confirm with the hearing officer and within one week of the initial hearing notify the board of the adjourned date upon which the issuing officer will be available. A written notice will be mailed

by the board to the respondent and the petitioning agency confirming the new adjourned date.

(d) An adjournment will sometimes be appropriate because of extraordinary circumstances. Under such circumstances, a petitioning agency may be entitled to an adjournment that would not otherwise be permitted. To ask for an adjournment because of extraordinary circumstances, the agency must file with the board a written statement of the claimed circumstances, accompanied by any supporting documents. The agency must also serve a copy of its request and any supporting documents on the respondent. The request must be made as soon as is reasonable after the agency becomes aware of the circumstances it claims to be extraordinary, but in no event more than five days after the agency becomes aware of those circumstances. The hearing officer before whom the case is pending shall determine whether extraordinary circumstances have been demonstrated to warrant an adjournment. The hearing officer shall also determine whether the case should be continued through consideration of written submissions only or through one or more additional hearing dates. In making those determinations, the hearing officer shall give the respondent an opportunity to state and support a position with respect to the existence of extraordinary

circumstances, the appropriateness of an adjournment, the best approach to continuing the hearing and any other matter raised by the petitioning agency's submission.

§ 3-53 **Amendments to Notice of Violation.**

(a) *By Leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the hearing officer may, upon such conditions as are necessary to avoid injustice or unfair surprise to a party, allow appropriate amendments to the notice of violation.

(b) *Conformance to Evidence.* When issues not raised by the notice of violation but reasonably within its scope are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised, and such amendments of the notices of violation as may be necessary to make it conform to the evidence shall be allowed at any time.

§ 3-54 **Evidence.**

(a) *Burden of Proof.* The petitioner shall have the burden of proof in establishing by a preponderance of the credible evidence that respondent has committed the violation charged in the notice of violation, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto. The notice of violation, if sworn to or affirmed, shall

constitute prima facie evidence of the facts stated therein.

(b) *Admissibility.* Relevant, material and reliable evidence shall be admitted without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York. Irrelevant, immaterial, unreliable or unduly repetitious evidence shall be excluded. Immaterial or irrelevant parts of an admissible document shall be segregated and excluded so far as practicable.

(c) *Official Notice.* Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the board or the hearing officer. Opportunity to disprove such noticed fact shall be granted to any party making timely motion therefore.

(d) *Objections.* Objections to evidence shall be timely and shall briefly state the grounds relied upon. Rulings on all objections shall appear on the record.

(e) *Exceptions.* Formal exception to an adverse ruling is not required.

§ 3-55 **Interlocutory Appeals.**

Interlocutory appeals from rulings of a hearing officer may be filed only after leave to file has been

obtained from the hearing officer. Leave to appeal will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice. The board may, in its discretion, refuse to hear such interlocutory appeal even though leave to appeal has been obtained from the hearing officer. Unless otherwise ordered by the board or the hearing officer, an interlocutory appeal shall not stay the proceeding or extend the time for the performance of an act.

§ 3-56 **Transcript.**

The board shall provide or arrange for either a stenographically reported or mechanically recorded verbatim transcript of all hearings. A digital, tape or other electronic or mechanical recording may be deemed the transcript of the hearing for all purposes under these Rules.

§ 3-57 **Decisions.**

(a) *Hearing Officer's Recommended Decision and Order.*
As soon as possible after conclusion of the hearing, the hearing officer shall prepare a recommended decision and order. The hearing officer's decision shall set forth

findings of fact and conclusions of law, and it shall set forth the hearing officer's reasons for findings on all material issues. If the charges contained in the notice of violation are upheld, the hearing officer shall prepare an order setting forth the penalty, and if the board is authorized by law to impose remedial relief or other sanction, the relief or sanctions recommended. The recommended decision and order shall be filed with the executive director and served on all parties.

(b) *Finality.* If timely exceptions are not filed as per § 3-71, the hearing officer's recommended decision and order will be automatically adopted by the board without further action and shall constitute the board's final action in the matter.

SUBCHAPTER D

ADJUDICATIONS - APPEAL PROCEDURES

§ 3-71 Exceptions to Recommended Decision and Order.

§ 3-72 Timeliness and Extensions of Time.

§ 3-73 Payment of Penalty.

§ 3-74 Board Review.

§ 3-75 Amendments to Board Appeal Decision and Order.

§ 3-76 Judicial Review of Board
Decisions.

§ 3-71 **Exceptions to Recommended Decision and
Order.**

(a) *Filing.* Any party aggrieved by the hearing officer's recommended decision and order may, within 30 days of mailing of the same, file written exceptions with the tribunal. A copy of the exceptions shall be served upon all parties, and proof of such service filed with the tribunal within 30 days of the mailing of said decision and order. Written exceptions must contain a concise statement of the issues presented, specific objections to the findings of fact and conclusions of law set forth in the hearing officer's recommended decision and order, and arguments presenting clearly the points of law and fact relied on in support of the position taken on each issue.

(b) *Answer.* Within 20 days after the service on a party of exceptions to the hearing officer's recommended decision and order, any party supporting the hearing officer's recommended decision and order or opposing the matters raised in the exceptions may file an answering brief. An answering brief shall follow the format and be served as required of exceptions by subparagraph (a).

(c) **Replies.** Further briefing shall not be permitted unless required by the board.

§ 3-72 **Timeliness and Extensions of Time.**

(a) Any application for a written copy of the transcript of the hearing or a copy of the audio tape shall be made within the time allotted for the filing of exceptions. A copy of such application shall be served upon all parties, and proof of such service filed with the tribunal within the time allotted for filing exceptions. In that event, the time within which exceptions to the hearing officer's recommended decision and order must be filed with the tribunal shall be extended by 20 days from the date when such transcription or audio tape is delivered or mailed to the party requesting same.

(b) Any application to extend time to file for any other reason shall be made to the executive director and supported by evidence of impossibility or other explanation of inability to file timely. A copy of such application shall be served upon all parties, and proof of such service filed with the tribunal.

§ 3-73 **Payment of Penalty.**

(a) No appeal by a respondent shall be permitted unless within 20 days of the mailing of the hearing officer's recommended decision and order the civil penalty

imposed by said order is paid or the respondent shall have posted a cash or recognized surety company bond in the full amount imposed by the decision and order appealed from.

(b) Any application for a waiver of such prior payment of the civil penalty must be made within 20 days of the mailing of the hearing officer's recommended decision and order and must be supported by evidence of financial hardship. Waivers of such prepayment may be granted in the discretion of the executive director.

§ 3-74 **Board Review.**

(a) When exceptions have been filed with the tribunal, the board shall consider the entire matter on the basis of the record before it. The notice of violation, the transcript of the hearing and all briefs filed and exhibits received in evidence, together with the hearing officer's recommended decision and order, shall constitute the hearing record.

(b) The board may from time to time establish panels from among its members who shall conduct the review. If an appeal panel deems it necessary, it shall order further testimony or evidence be taken or submitted, or it may order oral argument on any or all of the questions raised on appeal. The appeal panel shall report its findings to the full board for final resolution.

(c) After such review, the board shall issue its decision. Such decision shall contain findings of fact and conclusions of law. An order consistent with such decision shall be made, exercising such of the board's powers as are deemed appropriate.

§ 3-75 **Amendments to Board Appeal Decision and Order.**

An application to the board by any party for a superseding appeal decision and order may be made within 10 days of mailing of the board's final decision and order, to correct ministerial errors or errors due to mistake of fact or law. [After exhaustion of the procedures set forth above, judicial review of the final decision and order of the board may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.]

§ 3-76 **Judicial Review of Board Decisions.**

(a) After exhaustion of the procedures set forth above, judicial review of the final decision and order of the board may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.

(b) If a respondent appeals and the board does not issue a final decision and order after 180 days from the filing of exceptions, the respondent may at any time seek judicial review of the hearing officer's recommended

decision and order pursuant to Article 78 of the New York Civil Practice Law and Rules and rely on the hearing officer's recommended decision and order as the final decision and order of the board, provided that three specific conditions are met:

(i) at least 45 days before the filing of a petition pursuant to Article 78 of the New York Civil Practice Law and Rules, the respondent files with the board written notice of the respondent's intention to file the petition;

(ii) the board has still not issued a final decision and order when the respondent files the petition; and

(iii) the respondent serves the petition on the board pursuant to the New York Civil Practice Law and Rules.

(c) After a respondent files with the board notice of intention to file a petition for judicial review under the preceding subsection (b), the board may still issue a final decision and order unless the respondent has already filed the petition.

SUBCHAPTER E

MISCELLANEOUS

§ 3-81 Default by Respondent.

§ 3-82 Stays of Default.

§ 3-83 Late Request for Stay of Default.

§ 3-84 Stipulation in Lieu of Hearing.

§ 3-81 **Default by Respondent.**

(a) Failure of a respondent to make a timely response, or appear or proceed as required by the tribunal or hearing officer or these rules shall constitute a default. Upon default, the hearing officer or board shall thereupon render such decision and order in accordance with § 1049-a(d)(1)(d) of the Charter. Orders rendered in consequence of a default shall take effect immediately. Notice of such order shall be sent to respondent.

(b) Where respondent was permitted to admit and pay by mail pursuant to § 3-32, respondent shall also be offered the opportunity to enter a late admission and payment by mail within 30 days of the mailing date of the default order issued against respondent. An appropriate fee may be imposed by the tribunal for the processing of such late admission.

§ 3-82 **Stays of Default.**

Except as otherwise provided by rule or statute, a request by respondent for a stay of a default order and a hearing must be made by application to the executive director within 30 days of mailing of the default order. When a timely request is made for a stay of a first default, the executive director shall grant the request. A

timely request for a stay of a second or subsequent default made for the same notice of violation may be denied by the executive director absent a showing of a meritorious defense.

§ 3-83 **Late Request for Stay of Default.**

(a) A request by a respondent for stay of default and a new hearing made more than 30 days after service of the default order shall be granted where, within 90 days from mailing of the default order, respondent alleges a credible explanation and excuse for the default together with an allegation of a meritorious defense to the violation charged.

(b) The executive director may designate categories of alleged defenses which in the interest of justice shall be grounds for a late stay of default and a hearing without regard to the requirements set out in paragraph (a) above.

§ 3-84 **Stipulation in Lieu of Hearing.**

(a) At any time prior to the issuance of the hearing officer's recommended decision and order the petitioner may offer the respondent a settlement of the matter by stipulation in lieu of further hearing. The stipulation shall contain an admission of the violation, the further facts stipulated to, if any, the amount of the penalty to be imposed, and the compliance ordered, if any.

(b) If entered into by respondent and filed with the tribunal prior to the first scheduled hearing date, in the manner and form set by the tribunal, the stipulation shall be reviewed by the board. Within a reasonable time after receipt of such stipulation, the board shall cause to be issued a final decision and order incorporating the terms of said stipulation or, if the stipulation is not acceptable to the board, the matter will be rescheduled for further hearing.

(c) If entered into before a hearing officer during the course of a hearing and if the hearing officer approves such stipulation, it shall be incorporated into the hearing officer's recommended decision and order.

(d) Decisions and orders based upon stipulations shall not be appealable.

SUBCHAPTER F

SPECIAL PROCEEDINGS AND ENFORCEMENT PROCEEDINGS

- § 3-91 Cease and Desist Actions
- § 3-92 Post-Sealing Special Hearing
- § 3-93 Application for a Temporary or Limited Unsealing or Stay
- § 3-94 Hearings after Emergency Cease and Desist Orders

§ 3-91 **Cease and Desist Actions.**

(a) *Scope.* This section governs cease and desist actions brought by the board pursuant to Administrative Code §§ 24-178, 24-257, or 24-524, after respondent has had notice and an opportunity for a hearing on the violations alleged pursuant to the provisions of §§ 24-184, 24-263, or 24-524 as appropriate, and has failed to comply with orders issued by the board in such proceedings.

(b) *Issuance of Order and Notice.* Cease and desist actions shall be commenced by the issuance by the board of an order to cease and desist and a notice of special hearing. The order and notice shall identify the particular compliance order previously issued after an adjudicatory hearing, or in default thereof, that respondent is alleged to have disregarded, and the activity, equipment, device and/or process involved. The order shall direct respondent to show cause at a special hearing why the equipment, device or process should not be sealed and additional penalties imposed and shall notify respondent that if respondent does not appear as directed, the board order will be implemented forthwith.

(c) *Service.* The order to cease and desist and notice of special hearing shall be served personally or by certified mail, return receipt requested.

(d) *Hearing.* The special hearing shall be presided over by a hearing officer of the tribunal who shall have all of the powers and duties set out in subchapter C of these rules [for adjudicatory hearings], except as more specifically provided below. The hearing officer shall receive such evidence as may be presented by the petitioner which requested the board to issue the cease and desist order concerning respondent's failure to comply with orders previously issued, and such evidence as respondent may present in defense.

(e) *Report.* In lieu of a recommended hearing decision and order, the hearing officer shall prepare a report summarizing the evidence and arguments offered together with the hearing officer's findings of fact and recommendation as to whether the sealing should proceed and additional penalties be imposed. The report shall be promptly filed with the board.

(f) *Board Order.* Upon receipt of the hearing officer's report, the board may adopt, reject or modify the findings and recommendations and direct such further hearings or issue such further orders to respondent as are

appropriate under the circumstances to assure correction of the violations. In any case in which the board issues an order requiring affirmative action to be taken by the respondent, such order may also require the respondent to file with the board a report or reports under oath attesting to respondent's compliance with the order. Failure to file a required report within the time limit set forth may, in the board's discretion, constitute a violation of the order regardless of whether the respondent has otherwise been in compliance with the provisions of the order.

§ 3-92 **Post-Sealing Special Hearing.**

At any time after a sealing has taken place, a respondent may request a special hearing to present evidence as to why the seal should be removed or sealing order modified. The request may be made by letter addressed to the board or the executive director or their designee at the tribunal. A special post-sealing hearing shall then be scheduled and shall be presided over by a hearing officer of the tribunal and conducted in accordance with the provisions of subparagraphs (d), (e) and (f) of § 3-81 [of these rules].

§ 3-93 **Application for a Temporary or Limited Unsealing or Stay.**

If it appears that remediation undertaken by a respondent cannot proceed or its effectiveness cannot be tested while a seal remains in place, the respondent may, by written application addressed to the executive director, request that a seal be temporarily removed or stayed for a limited period. The executive director may authorize a temporary unsealing or stay of sealing for the above specified reasons for such limited period and subject to such conditions as the executive director deems appropriate.

§ 3-94 **Hearings after Emergency Cease and
Desist Orders.**

When the board has issued an emergency cease and desist order, without hearing, on account of an imminent peril to public health, pursuant to Administrative Code §§ 24-178(f), 24-346(e) or 24-523(b), any person affected by such emergency order may, by written notice to the board, request a hearing or an accelerated hearing in accordance with said provisions. The hearing held pursuant to the request shall be held by the board and shall not be referred to a hearing officer. The hearing shall otherwise be conducted in accordance with the relevant provisions of law and such of the board's rules for adjudicatory hearings as may be applicable.

(a) Upon the motion of any party, the board may amend a judgment or judgments to designate a judgment debtor by his, her or its correct legal name.

(b) The motion shall be made in writing and filed with the executive director. The movant shall also file an affidavit setting forth the facts and evidence relied on by the movant and an affidavit of service, by certified or registered mail and regular mail, of the motion on the party whose name is sought to be corrected in the judgment or judgments at his, her or its last known address and at the address or addresses at which the notice or notices of violation was or were served. Such motion shall be served on all parties. The date and time of the hearing on the motion is to be set forth in the moving papers in accordance with the direction of the executive director but shall not be sooner than 10 days after the service of such motion on the party whose name is sought to be corrected. At such hearing any party may appear, in person or otherwise, with or without counsel, cross-examine witnesses, present evidence and testify. If the party whose name is sought to be corrected does not appear at the hearing the hearing officer may proceed to determine the

evidence presented by the moving party in support of the motion.

(c) If the hearing officer finds that the movant has established, by a preponderance of evidence (i) the true name of the judgment debtor, (ii) that such person is the same person as the person designated on the notice of violation as responsible for the violation or violations and (ii) that service of the notice or notices of violation and of all other papers in the proceeding or proceedings was or were properly made upon such person, he or she shall grant such motion and issue a recommended decision and order directing the amendment and correction, to reflect the correct legal name of such person, of all records relating to the proceedings commenced by the service of such notice or notices of violation, including the records of judgments filed with the civil court and in the office of the county clerk.

(d) The recommended decision and order shall be filed with the executive director and served on all parties. Any party who appeared at the hearing, in person or otherwise, may file exceptions to such recommended decision and order in the manner provided in § 3-71 [of these rules] and the board shall render a final decision and order on such exceptions. Such final decision and order shall be the

final decision of the board for purposes of review pursuant to article 78 of the Civil Practice Law and Rules.

(e) If exceptions are not filed within the time provided in § 3-71, the hearing officer's recommended decision and order shall become the final decision and order of the board and, in accordance with applicable law, shall not be subject to review pursuant to article 78 of the Civil Practice Law and Rules.

(f) An order correcting a judgment shall not affect the duration of a judgment. The judgment shall remain in full force and effect for eight years from the date the judgment was originally entered.

Statement of Basis and Purpose

Local Law 35 of 2008, signed by the Mayor on August 12, 2008 and effective November 23, 2008, created a new § 1049-a of the City Charter, which consolidates the Environmental Control Board with the Office of Administrative Trials and Hearings. Section 2 of Local Law 35 also amended the City Charter to include a new subdivision b-1 of § 1049-a, which imposes upon the Environmental Control Board the obligation to promulgate rules concerning provision of language assistance services and limitations on the discretion of a hearing officer to

adjourn a hearing under certain circumstances. Section 2 also adds a new subdivision (f) of Section 1049-a, which allows for judicial review of a hearing officer's recommended decision and order if the respondent files exceptions in accordance with the board's rules and the board does not render a decision within 180 days, provided that the respondent complies with certain requirements including prior written notice. Section 13 of the Local Law requires that mandated rules must be promulgated no later than 180 days after the effective date of the local law. Therefore, it is required that these amended rules be promulgated no later than May 22, 2009.

The amendments proposed are intended to effectuate the purposes and the specific requirements now set forth in § 1049-a, subdivision b-1 of the City Charter, as amended by Local Law 35. Other amendments have been proposed to clarify that a recording of a hearing may serve as a transcript for purposes of an appeal from a hearing officer's decision and to correct typographical errors and inconsistencies in the existing Rules of Procedure.

