

ENVIRONMENTAL CONTROL BOARD

Notice of Promulgation of Rule

Pursuant to Section 1049-a of the New York City Charter, and in accordance with Section 1043(b) of the Charter, the Environmental Control Board hereby promulgates the following rule to amend subchapters A through E of Chapter 3 of Title 48 of the Rules of the City of New York, relating to procedures for adjudications conducted by the Environmental Control Board. New matter in the following rule is underlined, and deleted material is in brackets. This rule was not included in the Environmental Control Board's regulatory agenda because it was not anticipated at the time the agenda was created. The proposed rule was published in the City Record on April 13, 2012 and ECB held a public hearing on May 15, 2012.

Statement of Basis and Purpose of Final Rule

The Environmental Control Board held a public hearing on May 15, 2012 regarding amendments to its procedural rules found in Subchapters A through E of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY). Several members of the public attended the hearing and testified on the Proposed Rule. One written comment was received by ECB. The Board has considered the testimony and the written comment submitted by the member of the public.

Specifically, this rule:

- Codifies some procedures currently in place,
- Codifies a Board holding that permits the current owner of a property where a violation has allegedly occurred to participate in a hearing as a representative for a prior owner who was named as a respondent, and
- Adds rules to govern the conduct of people who appear at ECB.

Adjudication by Other Remote Methods

Since 2009, ECB has expanded the way it does business to include on-line and telephonic hearings. The current procedural rules include only adjudication by mail. These changes bring our rules in line with our current practice. (See 48 RCNY 3-11, 3-34).

Persons Who May Appear Before Tribunal

The rule adds to the definition of Person (See 48 RCNY 3-11) the term "limited liability company." It also changes the regulation regarding who is permitted to appear before the tribunal to codify the Board's holding in Appeal No. 40547 NYC v. Kern Sullivan Realty June 28, 2007. In that case, the Board found that the current owner of a place where a violation has occurred may participate in a hearing as a representative for a prior owner who was named as a respondent to present a deed indicating when title passed. The current owner of the property may only present a defense on the merits if the current owner agrees to substitute him- or herself for the prior owner, waiving service defenses. (See 48 RCNY 3-16 (d)).

Representatives and Attorneys

The rule (see 48 RCNY 3-16.1) requires representatives of five or more respondents (other than family members) within a calendar year to register with ECB. This will ensure that the tribunal has current contact information on file for these representatives and will better protect the public by requiring representatives to have familiarity with and respect for ECB rules and procedures. The rule also prohibits representatives who are not attorneys from misrepresenting their qualifications (see also Prohibited Conduct below). Attorneys admitted to practice in New York State are not required to register.

The rule also codifies an existing procedure that requires representatives and attorneys who appear on more than 15 notices of violation on a given hearing date to send a list of cases to ECB no later than noon, two business days prior to the scheduled hearing date (see 48 RCNY 3-

39). Advance notice of high volumes helps tribunal staff and parties to better manage calendars. The rule will also require that high volume representatives and attorneys provide sufficient staffing to handle their cases on hearing dates. (See 48 RCNY 3-51 (a) (3)).

Prohibited Conduct

ECB's rules currently allow a hearing officer to bar people from a hearing if they refuse to comply with the hearing officer's directions or behave in a disorderly, delaying or obstructionist manner. However, the rules do not provide for exclusion or discipline if the conduct takes place outside the hearing room or outside ECB. Therefore, 48 RCNY 3-16.2 is being added to define prohibited conduct and includes conduct that occurs both inside and outside of the hearing room. It also covers conduct outside ECB that would lead ECB personnel to conclude that a representative lacks honesty and integrity that will adversely affect a representative's practice before the tribunal—for example, repeatedly promising to appear on behalf of parties and then not appearing at ECB.

In drafting this rule, ECB looked to rules and requirements of other tribunals, its business processes and incidents over the last few years (verbal abuse in hallways and waiting areas, members of the public reaching over reception windows to operate ECB computers, representatives approaching respondents who are conversing with ECB employees and interjecting themselves into conversations, representatives following respondents who they do not represent into hearing rooms, requests to meet with hearing officers before or after a hearing or decision in attempts to influence the outcome).

The rule also allows the Executive Director to suspend registered representatives or attorneys who do not comply with ECB's rules but only after the attorney or representative is given notice and a reasonable opportunity to appear before the Executive Director to rebut the claims against him or her. The suspension may be for a specified period of time or indefinitely, at the discretion of the Executive Director.

Withdrawal of Prosecution

A new rule requires the petitioner agency to promptly notify ECB and the respondent when it withdraws a notice of violation (See 48 RCNY 3-31(e)).

No Post-Hearing Communication

The rule clarifies that post-hearing communication with hearing officers is prohibited (see 48 RCNY 3-51(g)). This is necessary because such communications are often made to attempt to influence the outcome of a decision. This does not apply to filing an appeal or to post-hearing submissions directed by a hearing officer (for example, briefs).

Disqualification Motions

The current rule allows a party to apply to the Executive Director for review of a hearing officer's denial of a request to disqualify him/herself. However, since it is not always feasible for the Executive Director to promptly hear these motions—for example, if the Executive Director is in meetings or on vacation - the rule allows the Executive Director to designate managing attorneys and tribunal affairs personnel to hear these applications (see 48 RCNY 3-52(e)(2)).

Recordings and Transcripts

The rule prohibits recording of proceedings without the permission of a hearing officer (see 48 RCNY 3-16.2 (a)(12)) and codifies that the official record is the recording/transcript made by the hearing officer, even if another recording was made (see 48 RCNY 3-56).

Decision Writing

This addition to 48 RCNY 3-57(b) allows the Executive Director to designate a different hearing officer to write a decision in a case due to tribunal needs, such as case backlogs, for example, or the unavailability of the hearing officer who heard the case. This will allow for case resolution under extraordinary circumstances such as the untimely death of a hearing officer. The

rule also clarifies that these decisions will be based on the entire record developed by the hearing officer who heard the case.

Default Rule

This change adds language to 48 RCNY 3-82, the default rule enacted last year. Since then, some courts have ordered ECB to hold hearings after a default due to humanitarian circumstances—for example, when the respondent defaulted again after a stay was granted because the new hearing date conflicted with a chemotherapy appointment. The rule authorizes the Executive Director to grant a new hearing only under exceptional circumstances and in the interests of justice. The intent is to have these terms construed narrowly and for such exceptions to be rare.

Requests for New Hearings due to Unauthorized Representation

Sometimes people who claim to represent parties at hearings are not authorized to do so. Currently, parties who allege that they have been so aggrieved must write a letter which is routed to a hearing officer who specializes in evaluating such claims. If the hearing officer determines that an unauthorized representative appeared on behalf of a party at hearing, he or she will make a fact-specific, discretionary determination on whether to vacate the decision. If the decision is vacated, a new hearing is held. If the case is still pending before the Board, the party must follow ECB’s other procedural rules, including filing an appeal. The rule, 48 RCNY 3-83, codifies this process and notifies the public that this procedure exists.

Deleted material is in [brackets].
New matter is underlined.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 3-11 of Subchapter A of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

As used herein the following terms [shall have the meanings specified.] mean:

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] by remote methods - for example, by mail[.], on-line or by telephone.

Board. “Board” means the Environmental Control Board of the City of New York.

Executive Director. “Executive Director” means the executive director 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, limited liability company 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.

Section 2. Subdivision (b) of Section 3-14 of Subchapter A of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

(b) All documents filed must be signed by the party or by the party's attorney or other duly authorized [agent] representative. 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.

Section 3. Section 3-16 of Subchapter A of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

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

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

(b) [A] Subject to the restrictions stated in section 3-16.2 (c), 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] representative.

(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.

(d) The current owner of a property may appear on behalf of the prior owner of the property if the notice of violation:

(1) names the prior owner,

(2) is a premises related violation and

(3) was issued after title to the property was transferred.

However, the current property owner may only appear for the purposes of presenting a deed indicating when title passed. The current owner of the property may only present a defense on the merits if the current owner agrees to substitute him or herself for the prior owner, waiving service defenses.

Section 4. Subchapter A of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to add two new sections immediately following Section 3-16, "Appearances" to read as follows:

§3-16.1 Registered Representatives.

A representative, other than a family member or an attorney admitted to practice in New York State, who represents five or more respondents before the tribunal within a calendar year must:

(a) be at least eighteen (18) years of age;

(b) register with the tribunal by completing and submitting a form provided by the tribunal. The form must include proof acceptable to the tribunal that identifies the representative, and must also include any other information that the tribunal may require. Registration must be renewed annually;

(c) notify the tribunal within ten (10) business days of any change in the information required on the registration form;

(d) not misrepresent his or her qualifications or service so as to mislead people into believing the representative is an attorney at law if the representative is not. A representative who is not an attorney admitted to practice must refer to him or herself as "representative" when appearing before the tribunal;

(e) exercise due diligence in learning and observing tribunal rules and preparing paperwork;

(f) be subject to discipline, including but not limited to suspension or revocation of the representative's right to appear before the tribunal, for failing to follow the provisions of this subdivision.

§3-16.2 Prohibited Conduct.

(a) Prohibited conduct: A party, witness, representative or attorney must not:

(1) engage in abusive, disorderly or delaying behavior, a breach of the peace or any other disturbance which directly or indirectly tends to disrupt, obstruct or interrupt the proceedings at the tribunal;

(2) engage in any disruptive verbal conduct or action or gesture which a reasonable person would believe shows contempt or disrespect for the proceedings or which a reasonable person would believe to be intimidating;

(3) willfully disregard the authority of a hearing officer or other tribunal employee. This may include refusing to comply with the hearing officer's directions or behaving in a disorderly, delaying or obstructionist manner as stated in section 3-52 (d);

(4) leave a hearing in progress without the permission of the hearing officer;

(5) attempt to influence or offer or agree to attempt to influence any hearing officer or employee of the tribunal by the use of threats, accusations, duress or coercion, a promise of advantage, or the bestowing or offer of any gift, favor or thing of value;

(6) enter any area other than a public waiting area unless accompanied or authorized by a tribunal employee. Upon conclusion of a hearing, a party, witness, representative or attorney must promptly exit non-public areas;

(7) request any tribunal clerical staff to perform tasks that are illegal, unreasonable or outside the scope of the employee's job duties;

(8) operate any tribunal computer terminal or other equipment at any time unless the equipment has been designated for use by the public;

(9) submit a document, or present testimony or other evidence in a proceeding before a hearing officer which he or she knows, or reasonably should have known, to be false, fraudulent or misleading;

(10) induce or encourage anyone in a proceeding before a hearing officer to make a false statement;

(11) solicit clients, or cause the solicitation of clients by another person on tribunal premises;

(12) make or cause to be made a stenographic, electronic, audio, audio-visual or other verbatim or photographic reproduction of any hearing or other proceeding, whether such hearing or other proceeding is conducted in person, by telephone, or other remote methods, except upon application to the hearing officer. This does not include copies of documents submitted to the tribunal during a hearing including written or electronic statements and exhibits. Except as otherwise provided by law, such application must be addressed to the discretion of the hearing officer, who may deny the application or grant it in full, in part, or upon such conditions as the hearing officer deems necessary to preserve the decorum of the proceedings and to protect the interests of the parties, witnesses and any other concerned persons.

(b) Prohibited Communication: All parties must be present when communications with tribunal personnel, including a hearing officer, occur, except as necessary for case processing and unless otherwise permitted by these rules, on consent or in an emergency. All persons are prohibited from initiating communication with a hearing officer or other employee before or after a hearing or before or after a decision on motion, in order to attempt to influence the outcome of a hearing or a decision on motion.

(c) Penalties for misconduct: Failure to abide by these rules constitutes misconduct. The executive director or his or her designee may, for good cause, suspend or bar from appearing before the tribunal an attorney or representative who fails to abide by these rules. The suspension may be either for a specified period of time or indefinitely until the attorney or representative demonstrates to the satisfaction of the executive director that the basis for the suspension no longer exists. However, the executive director may not act until after the attorney or representative is given notice and a reasonable opportunity to appear before the executive director or his or her designee to rebut the claims against him or her. The executive director or his or her designee, depending upon the nature of the conduct, will determine whether said appearance will be in person or by a remote method. This section in no way

limits the power of a hearing officer to discipline any person as set out in § 3-52(d) of these rules.

(d) Discipline on other grounds: The executive director may, in addition to the provisions of subdivision (c) of this section, suspend or bar a representative upon a determination that the representative lacks honesty and integrity and that the lack of honesty and integrity will adversely affect his or her practice before the tribunal. Any action pursuant to this subdivision will be on notice to the representative and the representative will be given an opportunity to be heard in a proceeding prescribed by the executive director. Factors to be considered in determining whether a representative lacks honesty and integrity may include, but need not be limited to, considering whether the representative has made intentionally false, misleading or inappropriate statements to parties or tribunal staff.

(e) The decision of the executive director under subdivision (c) or (d) of this section constitutes a final agency action. Judicial review of the decision may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.

Section 5. The Table of Contents immediately following the label “Subchapter B” of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

§3-31 Notice of Violation.

§3-32 Admissions and Payments by Mail[.]or
Other Remote Methods

§3-33 Pre-hearing Reschedules.

§3-34 Adjudication by Mail[.]or Other Remote
Methods

§3-35 Motions to Intervene.

§3-36 Consolidation.

§3-37 Discovery.

§3-38 Subpoenas.

§3-39 Pre-hearing Notification of Schedule for
Registered Representatives and Attorneys.

Section 6. Section 3-31 of Subchapter B of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to add a new subdivision (e) read as follows:

(e) Where a petitioner withdraws a notice of violation, even if it has been adjudicated, is open or has been decided by the tribunal, the petitioner must promptly notify the tribunal and the respondent in writing.

Section 7. Section 3-32 of Subchapter B of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

§3-32 Admissions and Payments by Mail[.]or Other Remote Methods.

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 or other remote method acceptable to the tribunal 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.

Section 8. Section 3-34 of Subchapter B of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

§3-34 Adjudication by Mail or Other Remote Methods.

(a) The executive director may designate certain classes of alleged violations or defenses as appropriate for adjudication by mail, or other remote methods and prescribe procedures for such adjudication. Where respondent is offered the option of contesting the violation or presenting a defense by mail or other remote methods, 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 or other remote method, 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 or other remote method and direct respondent to appear for a hearing in person.

Section 9. Subchapter B of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to add a new section immediately following Section 3-38, "Subpoenas." to read as follows:

§3-39 Pre-hearing Notification of Schedule for Registered Representatives and Attorneys.

- (a) No registered representative or attorney may appear on fifteen (15) or more notices of violation on a given hearing date unless the registered representative or attorney emails or faxes in advance a written list of all scheduled cases to the tribunal office in the borough where the cases are scheduled to be heard. This list must be sent no later than noon, two (2) business days before the scheduled hearing date.
- (b) Cases may only be added to this list on the day of the hearing at the discretion of the managing attorney or his/her designee.

Section 10. Section 3-51 of Subchapter C of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to change the heading of subdivision (a), to add two new paragraphs to subdivision (a) and to add a new subdivision (g) to read as follows:

(a) [*Expedition.*]**Case Processing.**

(1) 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, the hearing officer shall have the authority to grant brief adjournments, for good cause shown, and consistent with the requirements of expedition.

(2) When a registered representative or attorney appears on more than one notice of violation on a single hearing day, the tribunal will have the discretion to determine the order in which the notices of violation will be heard.

(3) Each registered representative or attorney must provide sufficient staffing to ensure completion of his or her hearings. Factors in determining whether sufficient staffing has been provided include:

(A) the number of cases the representative had scheduled on the hearing date,

(B) the number of attorneys or representatives from a given firm or business sent to handle the cases,

(C) the timeliness of the arrival of the attorneys or representatives,

(D) the timeliness of the arrival of any witnesses.

In addition, the tribunal may also consider:

(E) the availability of issuing agency personnel throughout the scheduled hearing date,

(F) the number of hearing officers present throughout the scheduled hearing date,

(G) delays in hearings due to the issuing agency,

(H) computer issues, and,

(I) other unforeseeable or extraordinary circumstances.

The failure of a registered representative or attorney to provide sufficient staffing, as described above, may be considered misconduct under §3-16.2 (c) above.

(g) Unless directed by the hearing officer, parties are prohibited from submitting additional material or argument after the hearing has been completed.

Section 11. Paragraph (e) (2) of Section 3-52 of Subchapter C of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

(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 or his or her designee which may include a deputy director of tribunal affairs or any managing attorney.

Section 12. Section 3-56 of Subchapter C of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

§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. Transcripts of proceedings made a part of the record by the hearing officer will be the official record of proceedings, notwithstanding the existence of any other transcript or recording, whether or not authorized under these rules.

Section 13. Section 3-57 of Subchapter C of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to add a new subdivision (b) and to reletter the former subdivision (b) to read as follows:

(b) The executive director may, due to tribunal needs or the unavailability of the hearing officer who heard the case, designate another hearing officer to write the recommended decision and order. The decision and order will state the reason for the transfer and will be based on the record, which must include (i) the notice of violation; (ii) all briefs filed and all exhibits received in evidence; and, (iii) a complete audio recording of the hearing or, if a complete audio recording is unavailable for any reason, a complete transcript of the hearing.

(c) 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.

Section 14. The Table of Contents immediately following the label "Subchapter E" of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

§3-81 Default by Respondent.	§3-83 <u>Request for a New Hearing due to</u>
§3-82 Request for a New Hearing after	<u>Unauthorized Representation.</u>
a Failure to Appear (Vacating a Default).	§3-84 Stipulation in Lieu of Hearing.

Section 15. Section 3-82 of Subchapter E of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended to add the following language immediately preceding subdivision (d) of that section to read as follows:

In exceptional circumstances and in order to avoid injustice, the Executive Director will have the discretion to grant a request for a new hearing.

Section 16. Subchapter E of Chapter 3 of Title 48 of the Rules of the City of New York (RCNY) is amended by adding a new section 3-83 to read as follows:

§3-83 Request for a New Hearing due to Unauthorized Representation. Notwithstanding any other provision of these rules, a party may, within three years after a decision and order pursuant to a hearing has become final, move to vacate the decision and order on the grounds that the person who appeared on the party's behalf at the hearing was not authorized to do so. Upon a determination that the person who appeared was not authorized to represent the party, the executive director or his or her designee may vacate the decision and order and order a new hearing.

In exceptional circumstances and in order to avoid injustice, the executive director will have the discretion to grant a motion to vacate a decision and order after the three year period has lapsed.