

NOTICE OF PUBLIC HEARING

Subject: Opportunity to comment on Proposed Rule relating to procedures for adjudications conducted by the Environmental Control Board, pertaining to sovereign or diplomatic immunity.

Date / Time: October 16, 2013/ 3:30 p.m.

Location: Environmental Control Board (ECB)
66 John Street
10th Floor, Conference Room
New York, N.Y. 10038

Contact: James Macron
Counsel to the Board, ECB
66 John Street, 10th Floor
New York, N.Y. 10038
(212) 436-0594

Proposed Rule Amendment

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 proposes to amend Subchapter C 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, pertaining to sovereign or diplomatic immunity. 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.

Instructions

- Written comments regarding the proposed rule may be sent to James Macron, Counsel to the Board, ECB, 66 John Street, 10th Floor, New York, N.Y. 10038, on or before October 16, 2013. Members of the public may also submit comments on the rule electronically through NYC RULES at www.nyc.gov/nycrules.
- A public hearing regarding the proposed rule will be held on October 16, 2013 at 3:30 p. m., at ECB, 66 John Street, 10th Floor, Conference Room, New York, N.Y. 10038. Individuals seeking to testify are requested to notify James Macron, Counsel to the Board, ECB, 66 John Street, 10th Floor, New York, N.Y. 10038, (212) 361-1515 on or before October 16, 2013.
- Individuals who need a sign language interpreter or other accommodation for a disability are asked to notify James Macron, Counsel to the Board, ECB, 66 John Street, 10th Floor, New York, N.Y. 10038, (212) 361-1515 by October 9, 2013.
- Individuals interested in receiving written comments and a transcript of oral comments on the proposed rule may request them by writing to: James Macron, Counsel to the Board, ECB, 66 John Street, 10th Floor, New York, N.Y. 10038.

Statement of Basis and Purpose of Proposed Rule

The Environmental Control Board is proposing to amend its rules of procedure to add a rule governing presentation and resolution of defenses based on sovereign or diplomatic immunity. The new rule would appear as Section 3-96 of Subchapter F of Chapter 3 of Title 48 of the Rules of the City of New York. The City wants to maximize compliance of foreign governments, the United Nations and similar institutions (“Foreign Entities”) with local building, environmental, fire, sanitation and other health and safety codes. When named as a respondent on a notice of violation (“NOV”) returnable to the Environmental Control Board (“ECB”), a Foreign Entity may present a defense based on sovereign or diplomatic immunity. ECB currently does not have any specific procedure for adjudication of immunity defenses. As a result, processing of an NOV is generally suspended once immunity is invoked, leaving the unresolved violation pending indefinitely.

When an immunity defense is asserted, the City entity charged with serving as the official liaison with foreign governments (currently the Mayor’s Office for International Affairs) may be able to achieve respondent’s compliance or even payment of a penalty, either through direct negotiation or with the involvement of the U.S. State Department. This proposed rule would create a process that would provide for an adjournment of ECB proceedings when a defense of sovereign or diplomatic immunity is raised, which would allow the City entity charged with serving as the official liaison with foreign governments (“the liaison”) to work with Foreign Entity respondents.

The proposed rule provides that a defense of sovereign or diplomatic immunity may be presented in one of three ways:

1. In a writing received by ECB no less than seven days before the NOV is scheduled to be heard, in which case ECB will assign the NOV to a hearing officer when the defense is received; or
2. Orally or in writing at the hearing on the NOV, but only if the petitioning agency’s representative is present at the hearing or if the respondent consents to an adjournment; or
3. By mail in any case in which ECB’s rules permit adjudication by mail.

When a defense of sovereign or diplomatic immunity is presented, the hearing officer must issue an order adjourning the hearing for no less than 30 and no more than 60 days; setting forth in detail the violations alleged in the NOV; and giving notice to the liaison that the respondent has presented a defense based on sovereign or diplomatic immunity. ECB must promptly serve the liaison with the adjournment order. At a hearing held following an adjournment pursuant to this section, if the hearing officer determines that the respondent is entitled to immunity, he or she must dismiss the NOV without determining the respondent’s liability. If the hearing officer determines that the respondent is not entitled to immunity, he or she must conduct a hearing on the NOV pursuant to applicable ECB rules.

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. Title 48 of the Rules of the City of New York (RCNY) is amended to add a new section to read as follows:

§ 3-96 Defense Based on Sovereign or Diplomatic Immunity

(a) A respondent may present a defense based on sovereign or diplomatic immunity:

(1) in a writing that is received no later than seven business days before the date stated on the notice of violation by which the respondent may admit or deny the violation charged, in which event, the tribunal shall thereupon assign the matter to a hearing officer; or

(2) at a hearing orally or in writing, but only if a representative of the petitioning agency is present at the hearing or if the respondent at that time consents to an adjournment of the hearing; or

(3) in a mailed response in any case in which adjudication by remote method is allowed pursuant to section 3-32 of these rules.

(b) Upon presentation of a defense based on sovereign or diplomatic immunity, the hearing officer must issue an order:

(1) adjourning the hearing for no less than 30 and no more than 60 days;

(2) setting forth in detail the violations alleged in the notice of violation;

(3) giving notice to the City entity charged with serving as the official liaison with foreign governments, hereinafter referred to as "liaison," that the respondent has presented a defense based on sovereign or diplomatic immunity.

Any order issued pursuant to this subdivision must also be promptly served by the tribunal on the liaison.

(c) After the granting of an adjournment under subsection (b), either party may request to extend the time period of the adjournment. If the request is accompanied by a written submission from the liaison indicating more time is necessary for the parties to resolve the matter, the hearing officer must grant the request.

(d) (1) At a hearing held following an adjournment pursuant to this section, the hearing officer must issue a determination whether or not the respondent is entitled to sovereign or diplomatic immunity.

(2) If the hearing officer determines that the respondent is entitled to sovereign or diplomatic immunity, he or she must dismiss the notice of violation without a determination of the respondent's liability.

(3) If the hearing officer rejects the defense of sovereign or diplomatic immunity, a hearing on the violation must be conducted pursuant to the rules governing hearings in this Chapter.

NEW YORK CITY LAW DEPARTMENT

DIVISION OF LEGAL COUNSEL

100 CHURCH STREET

NEW YORK, NY 10007

212-356-4028

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Procedure for Presentation of Sovereign Immunity Defense

REFERENCE NUMBER: 2013 RG 070

RULEMAKING AGENCY: Environmental Control Board

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN

Date: August 21, 2013

Acting Corporation Counsel

NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS

253 BROADWAY, 10th FLOOR

NEW YORK, NY 10007

212-788-1400

CERTIFICATION / ANALYSIS

PURSUANT TO CHARTER SECTION 1043(d)

RULE TITLE: Procedure for Presentation of Sovereign Immunity Defense

REFERENCE NUMBER: OATH-ECB-35

RULEMAKING AGENCY: Environmental Control Board

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Ruby B. Choi

Mayor's Office of Operations

August 21, 2013

Date