

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

BOARD MEETING

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

May 26, 2016

9:17 A.M. to 10:25 A.M.

May 26, 2016

MEMBERS PRESENT:

Lt. Dan Albano, Esq. - Police Department
Ernest J. Cavallo - Citizen Member
Fidel F. Del Valle, Esq. - Chair, OATH
Alexandra Fisher, Esq. - Department of Buildings
Joseph Gregory, Esq. - Fire Department
Madelynn Liguori, Esq. - Department of Sanitation
Jorge Martinez, Esq. - Dept. of Health and Mental Hygiene
Russell Pecunies, Esq. - Dept. of Environmental Protection
Thomas D. Shpetner, Esq. - Citizen Member

ALSO PRESENT:

Simone Salloum, Esq. - Assistant General Counsel, OATH
Frances Shine - Secretary to the Board, OATH

Rachel Amar - Special Assistant to the Commissioner, OATH
Helaine Balsam, Esq. - Deputy General Counsel, Asst. Commissioner, OATH

Denis Brogan, Esq. - Assistant General Counsel, OATH
John Burns, Esq. - First Deputy Commissioner, Supervising ALJ, OATH
John Castelli, Esq. - Asst. Commissioner, Legislative Affairs, OATH
Kevin Chan - Computer Science Technician, OATH
Kelly Corso, Esq. - Assist. Director for Adjudications, OATH

Fana Garrick - Public Affairs Assistant, OATH
David Goldin, Esq. - Administrative Justice Coordinator, Mayor's Office
Diana Haines, Esq. - Assistant General Counsel, OATH
Jonathan Jacobs - BIC
Maria Marchiano, Esq. - Deputy Commissioner/Chief Clerk, OATH
Arisleyda Ramirez - Facility Coordinator, OATH
Marisa Senigo - Assistant Commissioner, Public Affairs & Communications, OATH
Mathew Smith - Police Department
Tynia Richards, Esq. - Deputy Commissioner, General Counsel, OATH
Peter Schulman, Esq. - Assistant Director for Adjudications, OATH
Amy Slifka, Esq. - Deputy Commissioner, OATH
Thomas Southwick, Esq. - Supervising Attorney, Appeals, OATH

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2 (The Board Meeting commenced at 9:17
3 A.M.)

4 MR. FIDEL DEL VALLE, ESQ., CHAIRPERSON,
5 COMMISSIONER & CHIEF ADMINISTRATIVE LAW JUDGE,
6 OATH: Good morning everyone.

7 MR. THOMAS D. SHPETNER, CITIZEN MEMBER:
8 Good morning.

9 MR. DEL VALLE: Good morning everyone.
10 I'm saying that again because the mic was off.
11 I'm not doing like a Woody Allen silent movie.
12 Welcome to this meeting of the Environmental
13 Control Board on this first hot day of 2016.

14 MR. DEL VALLE: Is there a motion to
15 accept the minutes of the last meeting unless
16 anyone has any questions or corrections or
17 whatever? The minutes are accepted. Thank you
18 very much.

19 MR. JORGE MARTINEZ, ESQ., DEPARTMENT OF
20 HEALTH AND MENTAL HYGIENE: Abstention.

21 MR. DEL VALLE: You were absent. The
22 first thing on our agenda today has to do with
23 repeal of ECB's air quality penalty schedule. And
24 Helaine Balsam will give us a summary and I'll

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2 ask some questions as to the hearing that was
3 held in conjunction with that. Helaine?

4 MS. HELAINE BALSAM, ESQ., DEPUTY GENERAL
5 COUNSEL, OATH: Good morning everybody. I'm
6 Helaine Balsam, Deputy General Counsel for OATH.
7 We have two final rules on the agenda today. The
8 first concerns the repeal of the air code penalty
9 schedule. The Department of Environmental
10 Protection has promulgated an air code penalty
11 schedule, which I believe went into effect on May
12 11th, Russ? Yes?

13 MR. RUSSELL PECUNIES, ESQ., DEPARTMENT
14 OF ENVIRONMENTAL PROTECTION: 11th, yes.

15 MS. BALSAM: Yeah. So we need to repeal
16 ours. In addition, the Law Department asked us to
17 amend Section 3-100 of the ECB rules -- the OATH
18 rules, I'm sorry, to have the hearing officers
19 look to the agency penalty schedules when they
20 are adjudicating air code cases. We did have a
21 public hearing. Several people showed up but
22 nobody testified on this rule. We have submitted
23 a finding of substantial need for earlier
24 implementation to City Hall. I don't know exactly

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2 when they are planning on signing it. We hope by
3 tomorrow. Any questions? Yeah?

4 MR. ERNEST J. CAVALLO, CITIZEN MEMBER:

5 Is this all part of this program to repeal the
6 ECB code sections and replace them with the rules
7 that the individual agencies institute?

8 MS. BALSAM: Yes.

9 MR. CAVALLO: Okay. I know we've got two
10 things and the second one is the general rules
11 that we discussed last time.

12 MS. BALSAM: Correct.

13 MR. CAVALLO: I'm referring to the air
14 code thing. What's the rationale again for that
15 on this particular agency?

16 MS. BALSAM: So that -- this particular
17 agency? Well, I think the rationale applies to
18 all agencies, in that the enforcement agency is
19 in the best position to determine the amount of
20 the penalty for deterrence and that the
21 rulemaking will go much faster because they're
22 enacting rules; then we are enacting a second set
23 of rules concerning the penalties. Also, it'll
24 put the public on better notice because the

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2 penalties will be associated in the rules where
3 the violations occur, as opposed to having to go
4 elsewhere. So that's the rationale.

5 MR. CAVALLO: For the record, I'll
6 repeat what I repeated the last time. I think
7 there's less transparency in this and I think
8 it's a bad government initiative. I don't see why
9 they cannot just cut and paste our rules and put
10 it on their website. And a small delay in having
11 a process and having a real review by albeit four
12 citizen members or two citizen members as we have
13 today is one more step to ensure that the
14 citizens have some input in rulemaking that
15 applies to all of them.

16 I also wish to make a motion to -- at
17 this point to postpone this vote to the end so we
18 can do the other issues that we have here because
19 I am prepared to walk out and you will not have a
20 quorum. But I do not wish to have the appeals and
21 Russ and everybody else go without having a vote
22 on it. So I have made that motion right now and I
23 think there will be a second.

24 MR. SHPETNER: So, let me just add for

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2 the record that I think the repeal of these rules
3 and the moving of them is -- flies in the face of
4 good governance. It's undermining the public's --
5 the role that I was entrusted to play when I
6 accepted this position, which was to represent
7 the citizens of the City. Good governance means
8 healthy debate. This is a solution in search of
9 problem.

10 MR. CAVALLO: That's a second I take it?

11 MR. SHPETNER: That is a second. I would
12 say that we don't want to upend the important
13 other business that we do and that we consider
14 these two items at the end of the meeting.

15 MR. DEL VALLE: Anything else?

16 MS. BALSAM: No? Should we vote on the
17 motion?

18 MR. DEL VALLE: Is there a motion to
19 vote on the rules?

20 MR. CAVALLO: No, I've made a motion to
21 --

22 MR. DEL VALLE: I understand you made a
23 motion.

24 MR. CAVALLO: Are you not taking my

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2 motion?

3 MR. DEL VALLE: No.

4 MR. CAVALLO: I'm leaving. Let's --

5 LT. DAN ALBANO, ESQ., POLICE DEPARTMENT:

6 Can we wait to the end for this vote?

7 MR. CAVALLO: That's what I made the
8 motion for.

9 MR. DEL VALLE: Do we have a quorum?

10 MS. BALSAM: No.

11 MR. DEL VALLE: No? So I guess we don't
12 have a meeting. This meeting is adjourned and
13 we'll see what the City Council wants to do.
14 Thank you for your time folks.

15 [OFF THE RECORD]

16 [ON THE RECORD]

17 MR. DEL VALLE: The issue was raised
18 that once -- once we have a quorum, once we begin
19 with a quorum, even if somebody leaves we still
20 had a quorum to begin the meeting. Does any --
21 I'm looking towards Counsel if they have any
22 insight on that question?

23 MS. BALSAM: I do not.

24 MR. DEL VALLE: Off the record for a

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2 moment to review that question.

3 [OFF THE RECORD]

4 [ON THE RECORD]

5 MR. DEL VALLE: We have a procedural
6 issue with having the two members of -- so-called
7 citizen members -- excuse me --

8 MS. TYNIA RICHARD, ESQ. DEPUTY
9 COMMISSIONER, GENERAL COUNSEL, OATH: Can we stop
10 again? We have five instead of six.

11 MR. DEL VALLE: Oh, did we lose
12 somebody?

13 MS. BALSAM: We did.

14 MS. SLIFKA: Yeah, Jorge, when we --
15 before left when everybody else and we've been
16 calling him to get him back. And he hasn't been
17 responding to his cell.

18 MR. DEL VALLE: Well, I'm six.

19 MR. PECUNIES: I thought the quorum was
20 five.

21 MS. BALSAM: A quorum is five.

22 LT. ALBANO: It doesn't have to be made
23 up of citizen and --

24 MR. PECUNIES: No, it's supposed to be

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2 the five with two citizens.

3 MR. DEL VALLE: That's, that's a normal
4 quorum.

5 MR. PECUNIES: Well --

6 MS. SLIFKA: At least --

7 MR. DEL VALLE: Well, we still have at
8 least five regular board members, plus the Chair.
9 Okay. Are we still -- are we on?

10 MS. RICHARD: Yes.

11 MR. DEL VALLE: Okay. We have a
12 procedural question. We will be asking the City's
13 Corporation Counsel for guidance on it and as to
14 the validity of what follows. The immediate
15 research we have done is unclear as to what the
16 answer is. So being that it is unclear, I want to
17 leave the situation in a manner which will allow
18 the Corporation Counsel's Office to fully hash-
19 out where we're at, which is this: We began this
20 meeting with a quorum. The quorum is defined in
21 the Charter having a certain number of people
22 from -- who are from the Commissioners for the
23 City of New York's six agencies and six
24 appointees by the Mayor -- from the public.

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2 There were two members of the public
3 here this morning. They decided that since they
4 appeared to be on the losing end of two votes,
5 they would walk out and think that they would win
6 by having a minority of two to seven. The
7 question is: Do we still have a valid quorum
8 since we began with a quorum? That is the
9 question that will be posed to the Corporation
10 Counsel. We tried to reach them. There is no one
11 available on this short notice. And we will find
12 out eventually from them what the City's position
13 is with regard to that.

14 To allow them the ability to proceed one
15 way or the other, depending on what their
16 research and conclusions come with, I propose
17 that we vote on the two rules issues that were on
18 today's agenda and adjourn and then find out from
19 the Corporation Counsel what -- how to proceed
20 from there.

21 We've had an introduction from the
22 Deputy Commissioner -- the Deputy General Counsel
23 rather, on the proposal for repeal of the
24 Environmental Control Board's penalty structure

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2 for the Department of Environmental Protection
3 rules. The Department of Environmental Protection
4 has, as it is authorized to do, it has been
5 determined after extensive research by the
6 Corporation Counsel and others that they can
7 promulgate a penalty structure within their rules
8 structure.

9 The reason to revoke the existing rules
10 schedule that exists in OATH's ECB rules for ECB
11 penalties is very simply because they are
12 redundant and frankly no longer control and
13 there's no point in having them there. The
14 presentation has been made on that right now and
15 for the record and the Corporation Counsel can
16 then work on it; for the record I move to adopt
17 the revocation of the ECB air penalty schedule
18 from OATH's rules. Is there a second?

19 MR. PECUNIES: This is the vote? This is
20 the vote, yeah?

21 MR. DEL VALLE: Yeah.

22 LT. ALBANO: No, I'm -- no.

23 MR. DEL VALLE: Okay. We have one, two,
24 three, four, five in favor. It passes.

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2 LT. ALBANO: If I could?

3 MR. DEL VALLE: Please.

4 LT. ALBANO: I, I, I've got to protest.
5 I, I -- this is a sensitive issue and the full
6 Board isn't here. We've had two board members
7 walk out over this issue. I think this can be
8 tabled 'til next time. Let's get some of the
9 Board's business done: the cease and desist
10 orders for Russ, the pre-sealing reports. We can
11 hear the judicial review and then the work from
12 the panels we can do. That I think would suffice
13 to get something done for this month and not
14 address a very sensitive issue.

15 MR. PECUNIES: Well, I would just ask a
16 question as to why only the rules changes would
17 be voted on today instead of everything? Because
18 either the Law Department is going to tell us
19 that all of it is valid or none of it is valid.
20 So --

21 MR. DEL VALLE: I, I agree. I think we
22 should vote on the rest of the stuff too.

23 MR. PECUNIES: Okay.

24 MR. DEL VALLE: Alright. If everybody's

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2 in agreement of it's all or nothing basically?

3 LT. ALBANO: I'm just -- I'm just trying
4 to support the baby.

5 MR. DEL VALLE: So for the record, with
6 the existing members of the Board present, the
7 rule passes. The third item --

8 MS. BALSAM: So the third item is the
9 proposed model rules, which will bring the
10 Environmental Control hearing officers under the
11 procedural rules for the Hearings Division. We
12 did have a public hearing. We had two people
13 attend. We had actually five people attend, two
14 people spoke. One of the people who spoke also
15 submitted a written comment. In addition, we have
16 two written -- two additional written comments;
17 one of which didn't make sense and the other
18 which we read very closely. We have made some --
19 we have made seven -- six changes to the rules as
20 a result of all of the comments; some actually
21 from DOB.

22 In 3-12, which is the Section that
23 remains and is for ECB, we have changed board
24 from the tribunal as authorized by the board. So

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2 we're trying to make clear where it's the board
3 that's acting, as in the -- you guys and the
4 hearing officers of the tribunal. So that was one
5 change. We made a similar change to 3-18. We
6 changed board to tribunal as authorized by the
7 board in certain places and we also eliminated
8 the statement about the stipulation must be in
9 the manner and form set by the board because we
10 couldn't decide if it should be the board or the
11 tribunal but nobody's changing the stipulations,
12 so I don't know that that's really an issue.

13 In Section 6-01, we added a definition
14 of the OATH Hearings Division, which includes
15 ECB, but made the definition of tribunal just the
16 Hearings Division. 6-13E, we added only to
17 conform -- to confirm that a motion to amend a
18 pleading -- that there must be a motion to amend
19 a pleading, that a hearing officer cannot amend
20 sua sponte. And in 6-17C3 and 6-19E3, again we
21 changed board to the tribunal as authorized by
22 the Board. So those were the changes. Everything
23 else is the same from what it was when it was the
24 proposed rules. Any questions?

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2 MR. DEL VALLE: New York County Lawyers
3 Association testified as well?

4 MS. BALSAM: They did. They were one of
5 the people that testified. They were very much in
6 favor of the rule changes. I think everybody got
7 a copy of the transcript from the public hearing.
8 It should have gone out with your Board
9 materials.

10 MR. DEL VALLE: The purpose of these
11 rules is to homogenize hearing procedures on
12 administrative summonses across the City of New
13 York. In too many instances, there have been
14 contradictory and inconsistent rules depending on
15 what division of OATH somebody went to; which is
16 of great -- considerable detriment to the public.

17 At the same time, as many of us have
18 heard, yesterday the City Council of the City of
19 New York passed a Criminal Justice Reform Act;
20 which ultimately transfers summons cases from
21 criminal court to OATH. Actually what it does is
22 it gives police officers the option of writing
23 either to criminal court or to OATH. What they
24 envision and frankly only time will tell is that

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2 approximately at some point about 300,000
3 summonses that now go to criminal court will come
4 to OATH.

5 These rule changes in part facilitate
6 the administration of that function. A lot of
7 work has been put into this with the Mayor's
8 Office of Criminal Justice and the 16 agencies
9 that -- actually 24 agencies if you include all
10 the tribunals that feed summonses to OATH right
11 now. And particularly a lot of this stuff has to
12 do with IT and computer work that has to be, it's
13 really a five-year project among many agencies,
14 particularly a lot of work being put in by the
15 police IT people and OATH IT people and DoITT IT
16 people. And that's where this is at. And I move
17 for adoption of these rules. Is there a second?
18 And they're adopted five to one.

19 MS. BALSAM: Thank you.

20 MR. DEL VALLE: Let's go through the
21 exercise on the cease and desist orders, the pre-
22 sealing reports and the other regularly scheduled
23 stuff.

24 MR. PECUNIES: Russell Pecunies,

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2 Assistant Counsel with DEP. The Department is
3 requesting that the Board approve I believe it's
4 25 cease and desist orders this month, relating
5 to failure to install backflow prevention
6 devices. All of these follow the same pattern as
7 the requests that have been brought before the
8 Board on a regular basis. So, the Department of
9 Environmental Protection is asking the Board to
10 approve these 25 cease and desist orders.

11 MR. DEL VALLE: Is there a motion?

12 MR. DEL VALLE: It's unanimous of all
13 present, with one abstention obviously.

14 MR. PECUNIES: Yes, with one abstention.
15 The Department is also requesting that the Board
16 approve a cease and desist order under the Sewer
17 Code in matter of Sipan Restaurant at 702
18 Amsterdam Avenue in Manhattan. This restaurant
19 was ordered in July of last year to install
20 grease interceptors on five different drains.
21 After a series of violations and Commissioner's
22 Orders failed to result in compliance, the
23 restaurant was ordered to appear for a mandatory
24 compliance meeting with the Bureau of Waste Water

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2 Treatment on March 2nd; which they failed to
3 appear for. Due to the continuing failure to
4 comply, DEP is asking the Board to issue an order
5 to cease and desist.

6 MR. DEL VALLE: A motion? Approved
7 unanimately with one abstention.

8 MR. PECUNIES: And one abstention. And
9 finally, under the Noise Code the Department is
10 asking the Board to approve a cease and desist
11 order in the matter of Dell's Maraschino
12 Cherries, which is located at 175 Dikeman Street
13 in Brooklyn. This was a location that had become
14 a little bit notorious a couple of years ago when
15 it was raided by the NYPD. The Maraschino Cherry
16 factory was being used as a front for a marijuana
17 farm and during the raid, the owner of the
18 business committed suicide. So it was in all the
19 papers at the time.

20 His heirs have continued the Maraschino
21 Cherry business. One thing that is odd about the
22 way that they're conducted the businesses is that
23 they're not connected to Con Edison power. The
24 entire thing is powered by a giant Caterpillar

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2 generator. And it is the noise from that
3 generator that is the subject of the cease and
4 desist order. They have been cited for excessive
5 noise from the generator on four occasions since
6 last summer. It is still too noisy and based on
7 the continuing failure to comply with the Noise
8 Code, DEP is asking the Board to issue an order
9 to cease and desist.

10 MR. DEL VALLE: It's of no particular
11 relevance but what do they fuel the generator
12 with?

13 MR. PECUNIES: I actually don't know. I
14 actually received -- I wasn't aware of this
15 except that I received a call from an attorney
16 who's representing the complainants to find out
17 when a cease and desist order was going to be
18 issued. And he informed me that they have this
19 generator because for some reason they're not
20 connected to Con Edison.

21 MR. DEL VALLE: I saw the photograph of
22 the generator. It seems like it's more expensive
23 to fuel it than to be hooked up to Con Ed but
24 anyway.

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2 MR. PECUNIES: I don't have an
3 explanation for that at this point.

4 MR. DEL VALLE: It's, it's a very
5 Ripley's Believe It Or Not case, I think.

6 MR. PECUNIES: Yes.

7 MR. DEL VALLE: Is there a motion to --
8 and again it's unanimous with one abstention.

9 MR. PECUNIES: One abstention. Thank
10 you.

11 MR. DEL VALLE: And that's something to
12 talk about over cocktails later on. That's truly
13 weird. Thank you for that comic relief.

14 MR. PECUNIES: Hmm?

15 MR. DEL VALLE: Thank you for the comic
16 relief. We needed something.

17 MR. PECUNIES: No problem.

18 MR. DEL VALLE: Kelly?

19 MS. KELLY CORSO, ESQ., ASSISTANT
20 DIRECTOR FOR ADJUDICATIONS, OATH: Kelly Corso,
21 Assistant Director of Adjudications for OATH. We
22 have 39 pre-sealing reports today. In 17 of these
23 cases, DEP is recommending and the hearing
24 officers are agreeing with that recommendation

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2 that the C&D proceedings be discontinued. And the
3 basis of that is for either there was a review of
4 the records by DEP or inspection by DEP showing
5 that the respondents have come into compliance or
6 that they no longer own the cited premises. And
7 for the discontinuances, three of them were sewer
8 cases and 14 were backflow cases.

9 In the remaining 22 cases, the
10 respondents did appear for hearings. In 19 of
11 those cases, the hearing officer recommended no
12 sealing or other action based on the respondent's
13 evidence of compliance that was presented at the
14 hearings. Four of those cases were Air Code cases
15 and 15 were backflow cases.

16 There are also three Noise Code cases.
17 In two of those cases, the respondents provided
18 evidence that there had been some work done to
19 bring the cited premises into compliance. And
20 based on that evidence, the hearing officers are
21 recommending no sealing or other action; provided
22 that DEP's initial re-inspection and further re-
23 inspections for a period of 180 days show no
24 violation.

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2 In the final noise case, the hearing
3 officer has recommended sealing the violating
4 equipment. The respondent in this case is 9135
5 NYC LLC. And this involves a kitchen exhaust
6 system at the respondent's restaurant located at
7 135 Seventh Avenue South in Manhattan. The
8 respondent received a summons in January of 2015.
9 No one appeared for that hearing and the case
10 went into default. The default order imposed a
11 penalty and order for the compliance. The
12 respondent did not comply and DEP issued
13 subsequent summonses for the same equipment in
14 March and June of 2015. The respondent defaulted
15 on both those summonses as well. DEP issued a
16 final summons in October of 2015.

17 A representative of the respondent did
18 appear at the hearing and stated that the exhaust
19 fan is going to be relocated so that it will
20 comply with the Noise Code. The hearing officer
21 did stay the summons and order of compliance
22 forthwith. A subsequent inspection by DEP at the
23 end of October 2015 showed respondent still had
24 not complied.

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2 So on January 28, 2016, the Board
3 approved a C&D order in this case. At the initial
4 pre-sealing hearing on February 23, 2016, and in
5 each of the subsequent pre-sealing hearings in
6 March, April, and May, including the last hearing
7 on the 17th, the respondent's representative did
8 not provide any evidence of work done to bring
9 the equipment into compliance with the Noise
10 Code. And so based on respondent's failure to
11 present any evidence of work done, the hearing
12 officer recommends that its kitchen equipment --
13 kitchen exhaust equipment be sealed immediately.

14 MR. DEL VALLE: Is there a motion?

15 MR. PECUNIES: One abstention.

16 MR. DEL VALLE: Unanimous with one
17 abstention. So, we'll now go into Executive
18 Session. And folks, if there's anybody who is not
19 a member of OATH or the Board, please leave the
20 Executive Session.

21 [OFF THE RECORD]

22 [ON THE RECORD]

23 MR. DEL VALLE: We are now back in
24 public session. Is there a motion to adopt the

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2 appeals panel's recommendations from the May 5th
3 and May 23rd panels? And it's unanimous. Before
4 we adjourn, I just want to make two points. Point
5 number one is DEP's penalty structure went into
6 effect on May 11th.

7 MR. PECUNIES: May 11th.

8 MR. DEL VALLE: That is the most recent
9 and relevant penalty structure for DEP violations
10 and they are the controlling, therefore the
11 controlling penalty structure for those
12 violations and they will be treated that way
13 going forward. The item that was on today's
14 agenda for clean-up, which was removing the now
15 arcane and non-functioning essentially penalty
16 structure, legacy penalty structure, from the ECB
17 rules, as a matter of clean-up. But nevertheless
18 the controlling penalty structure is the penalty
19 structure adopted by the Department of
20 Environmental Protection for violation of rules
21 of the Department of Environmental Protection,
22 which is where they belong.

23 Number two, this meeting -- this meeting
24 commenced with a full quorum. At the time that

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2 the meeting was commenced, this was a legal
3 meeting of the Environmental Control Board. And
4 despite two members walking out of the meeting,
5 we still have a quorum in my opinion. And the
6 actions taken by the Board since their departure
7 are still valid actions of the Board. Is there a
8 motion to adjourn? We are adjourned.

9 (The Board Meeting concluded at
10 approximately 10:25 A.M.)

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CERTIFICATE OF ACCURACY

I, Lea Simmons, certify that the foregoing transcript of Environmental Control Board on May 26, 2016 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



Date: May 27, 2016

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