

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

BOARD MEETING

Office of Administrative Trials and Hearings
OATH Multi-Purpose Training Room
100 Church Street, 12th Floor, New York, New York

December 5, 2024

09:48 AM to 10:27 AM

MEMBERS PRESENT:

Asim Rehman, Esq. - Commissioner & Chief Administrative
Law Judge, OATH; Chairperson
Ivy Chiu (sub) - Department of Buildings (DOB)
Joseph Gregory, Esq. - New York City Fire Department
(FDNY)
Elizabeth Knauer, Esq. - Appointed Member (Water)
Madelynn Liguori, Esq. - Department of Sanitation (DSNY)
Russell Pecunies, Esq. - Department of Environmental
Protection (DEP)
Harminderpal Rana, Esq. - Department of Health & Mental
Hygiene (DOHMH)
Matthew Shneid, Esq. - Appointed Member (Real Estate)
Thomas Shpetner, Esq. - Appointed Member (Business)
Matthew Smith, Esq. - New York City Police Department
(NYPD)
Douglas Swann - Appointed Member (Air)
Lisa Urban, Esq. - Appointed Member (General)
Jarrod Whittington - Appointed Member (Noise)

ALSO PRESENT:

Rachel Amar, Senior Advisor to the Commissioner, OATH
Sola Best, Esq. - Assistant General Counsel, OATH
John Castelli, Esq. - Assistant Commissioner for
Legislative Affairs, OATH
Cindy Chen - OMB
Kelly Corso, Esq. - Assistant Commissioner, Hearings
Division Adjudications, OATH
Leon Dawson, Esq. - Assistant General Counsel, OATH
Diana Haines, Esq. - Assistant General Counsel, OATH
Madeline Halimi, Esq. - Parliamentarian, Assistant General
Counsel, OATH
Karin McAvoy - Administrative Coordinator, OATH
Cindy Nesbit, Esq. - Assistant General Counsel, OATH
Frank Ng, Esq. - General Counsel, OATH
Latisha Pender - DOT
Laura Quaigraine-Kamaru, Esq. - Assistant General Counsel,
OATH
Peter Schulman, Esq. - Deputy Commissioner, Appeals, OATH
Frances Shine - Secretary to the Board, OATH

1 (The board meeting commenced at 09:48 a.m.)

2 COMMISSIONER ASIM REHMAN: Good morning. We are
3 here for the December 5th meeting of the Environmental
4 Control Board. Hope you're all doing well and had a nice
5 Thanksgiving holiday. I'd like to call today's meeting to
6 order and ask the Parliamentarian to do a roll call to
7 verify quorum.

8 ASSISTANT GENERAL COUNSEL HALIMI: Good morning,
9 everyone. Commissioner Asim Rehman?

10 COMMISSIONER ASIM REHMAN: Present.

11 ASSISTANT GENERAL COUNSEL HALIMI: Department of
12 Buildings?

13 MS. IVY CHIU: Ivy Chiu. Present. Thank you.

14 ASSISTANT GENERAL COUNSEL HALIMI: Joseph
15 Gregory?

16 MR. JOSEPH GREGORY: Present.

17 ASSISTANT GENERAL COUNSEL HALIMI: Elizabeth
18 Knauer?

19 MS. ELIZABETH KNAUER: Present.

20 ASSISTANT GENERAL COUNSEL HALIMI: Madelynn
21 Liguori?

22 MS. MADELYNN LIGUORI: Present.

23 ASSISTANT GENERAL COUNSEL HALIMI: Russell
24 Pecunies?

25 MR. RUSSELL PECUNIES: Present.

1 ASSISTANT GENERAL COUNSEL HALIMI: Harminderpal
2 Rana?
3 MR. HARMINDERPAL RANA: Present.
4 ASSISTANT GENERAL COUNSEL HALIMI: Matthew
5 Shneid?
6 MR. MATTHEW SCHNEID: Present.
7 ASSISTANT GENERAL COUNSEL HALIMI: Thomas
8 Shpetner?
9 MR. THOMAS SHPETNER: Present.
10 ASSISTANT GENERAL COUNSEL HALIMI: Matthew Smith?
11 MR. MATTHEW SMITH: Present.
12 ASSISTANT GENERAL COUNSEL HALIMI: Douglas Swann?
13 MR. DOUGLAS SWAN: Present.
14 ASSISTANT GENERAL COUNSEL HALIMI: Lisa Urban?
15 MS. LISA URBAN: Present.
16 ASSISTANT GENERAL COUNSEL HALIMI: Jarrod
17 Whittington?
18 MR. JARROD WHITTINGTON: Present.
19 ASSISTANT GENERAL COUNSEL HALIMI: Did you say
20 Schneid?
21 MR. MATTHEW SCHNEID: Schneid, yes.
22 ASSISTANT GENERAL COUNSEL HALIMI: Okay. From now
23 on. [chuckles]
24 MR. MATTHEW SHNEID: No problem.
25 ASSISTANT GENERAL COUNSEL HALIMI: We have a

1 quorum 13 out of 13.

2 COMMISSIONER ASIM REHMAN: Great. Thank you very
3 much. We have a written attendance list going around, so
4 please sign that if you haven't. Get Russ to sign and then
5 send it down for Lisa. All right. Our first item, the
6 agenda are the minutes of the October 10th, 2024, meeting.
7 Does anyone have any corrections to the minutes? Okay. May
8 I have a motion to adopt the minutes of October 10th? A
9 motion and a second? We see a second.

10 ASSISTANT GENERAL COUNSEL HALIMI: Are there any
11 objections to the motion adopting the minutes at the
12 October 10th, 2024, ECB meeting? Seeing none and hearing
13 none, the motion is approved unanimously.

14 COMMISSIONER ASIM REHMAN: Thank you very much.
15 We'll next turn it over to Russell Pecunies from DEP
16 regarding a Cease and Desist Order request.

17 MR. RUSSELL PECUNIES: Yes. Thank you. Good
18 morning. For this meeting, DEP has a request for the Board
19 to issue a Cease and Desist Order for 2351 Richmond
20 Terrace in Staten Island. This is a rather remote location
21 under the Goethals Bridge, which is a cement facility. We
22 had one of these a few months ago in the Bronx, which was
23 a similar situation where they did not have a valid
24 Certificate of Operation for the cement silo and the
25 cement dust was affecting the surrounding neighborhood.

1 Despite its relatively remote location, we have
2 gotten a lot of complaints about this facility. The one
3 in the Bronx, by the way, did not appear for its hearing,
4 but has come into compliance. We are going to be
5 submitting something probably for the next Board meeting
6 to discontinue that Cease and Desist Order since they are
7 now in compliance. As far as this one is concerned, they
8 were cited in July of '23 for a violation, which they
9 stipulated to in November of '23. They were then cited
10 again at the end of 2023. That summons was, I believe,
11 defaulted and has now been rescheduled for January 13th. A
12 third summons was issued just around about three weeks
13 ago, which also has a hearing date in January. Given the
14 fact that we are continuing to get complaints they are not
15 in compliance, we are requesting that the Board issue a
16 Cease and Desist Order.

17 I did include a photograph with the
18 documentation. You can see on top of this rectangular
19 column, the two rectangles on top of that are the dust
20 collectors that are supposed to be keeping the cement dust
21 from being emitted into the surrounding air. Actually, you
22 can see in the background, I think, of that photo is the
23 bridge, the Goethals Bridge. It's right next to the
24 Goethals Bridge. If there are any questions or--?

25 COMMISSIONER ASIM REHMAN: What would the

1 relationship to the Cease and Desist Order be to the
2 January 27th hearing? They'd have the hearing coming up--
3 [crosstalk]

4 MR. RUSSELL PECUNIES: It's just that that one is
5 pending. We can't really because these things-- as you can
6 see, the first violation was issued well over a year ago.
7 The histories of these things sometimes become very
8 prolonged, and when they're fielding more or less constant
9 complaints about a location, and since the Board meets
10 only every two months. We want to bring this in front of
11 the Board instead of waiting until the February meeting
12 for the two hearings to take place in January.

13 MATTHEW SCHNEID: One thing I'm a little confused
14 about is they only had one hearing over the past two
15 years, right? The second summon was a year ago already.

16 MR. RUSSELL PECUNIES: The second summons went
17 into default and they have apparently recently rescheduled
18 it so that it is now on in January. It was issued back at
19 the end of '23.

20 MATTHEW SCHNEID: Right. They must have defaulted
21 a long time ago?

22 MR. RUSSELL PECUNIES: If it was issued at the
23 end of '23, presumably they defaulted on it sometime in
24 early '24. I don't have that specific date. Ticket Finder
25 does indicate that it's been rescheduled out of a default.

1 MATTHEW SCHNEID: What was the stipulation? They
2 just agreed to cure it? The stipulation they had in '23,
3 they agreed to cure the problem at that time?

4 MR. RUSSELL PECUNIES: Whenever you stipulate,
5 part of the stipulation is that you agree to compliance.
6 Whenever you're found in violation, stipulate, or even in
7 the default order, there's always a provision that you
8 have to come into compliance.

9 COMMISSIONER ASIM REHMAN: Comments or questions?
10 Yes, Elizabeth?

11 MS. ELIZABETH KNAUER: I just wanted to note that
12 I need to abstain from this vote. Based on the name, it
13 looked familiar to me, so I did a conflict check last
14 night when I was reviewing the materials. My firm does
15 represent this entity and I don't think with respect to
16 these violations, but just putting that in for the record.
17 [chuckles]

18 COMMISSIONER ASIM REHMAN: Thank you for letting
19 us know. Any other comments or questions? Okay. Can we
20 have a motion to approve the request for the Cease and
21 Desist Order? A motion and a second? We see a second.
22 Okay. The request for the Cease and Desist Order relating
23 to respondent F.M.B. Materials Inc., Island-Ready Mix Inc.
24 is approved. Thank you very much, everyone. Oh, I'm sorry.
25 Let's take a look.

1 [laughter]

2 COMMISSIONER ASIM REHMAN: Sorry.

3 ASSISTANT GENERAL COUNSEL HALIMI: Are there any
4 objections to the motion approving the Cease and Desist
5 Order? Seeing none, hearing none, the motion is approved.

6 COMMISSIONER ASIM REHMAN: Okay. Thank you very
7 much. Sorry for that. We're [unintelligible 00:08:25]. The
8 next item on our agenda concerns a notice of proposed rule
9 regarding the Water Penalty Schedule. Just if you will
10 indulge me, I'd like to provide some introductory comments
11 on this just to provide context. The first thing I want to
12 acknowledge is that this was sent late. It was sent out as
13 an addition yesterday to today's agenda. I'm sorry it was
14 not available sooner. I'll get to the timing thing in just
15 a second.

16 First I want to discuss what this proposed rule
17 is for. A lot of it has to do with rain. As you know,
18 we've been in a dry season in New York City and the City
19 of New York recently announced a drought warning, and has
20 encouraged New Yorkers to take steps, and to engage in
21 water-saving measures. DEP has a central role in that, in
22 protecting our water supply and enforcing water usage and
23 waste. As part of that role, DEP very recently sought to
24 update the Water Penalty Schedule to meet the serious
25 need. However, the Administrative Code says that ECB

1 consent the Water Penalty Schedule, and the law is
2 actually not very clear on whether the Department of
3 Environmental Protections Commissioner has their own
4 authority to set the Water Penalty Schedule. You have in
5 front of you, a copy of the Ad Code. The Ad Code, you go
6 to the second page, has this sentence at the end that
7 says, "Before its discretion, may," not shall. "May,
8 within the limits set forth in the subdivision, establish
9 a schedule of civil penalties indicating the minimum and
10 maximum penalty for each separate offense."

11 I'll note that this is rare today. This is an
12 anomaly now, while it used to be the case in the past that
13 the Board had control over the penalty schedules, that
14 changed. In 2016, as some of you know, there was a shift
15 to move the penalty schedule authority. The authority to
16 edit and change the penalty schedules into the enforcement
17 agencies. That's the reality that we've been living under
18 since then with some limited exceptions, including this
19 one.

20 I do not know why this is an exception, but it
21 is one of the few exceptions. For the last eight years,
22 the model that we've been following is that the
23 enforcement agencies have the authority to the rulemaking
24 authority with respect to penalty schedules. In my view,
25 and in the view of many of OATH, this has worked. It's

1 something that is what we believe in, and as a Tribunal,
2 we think we shouldn't be the one setting the penalty
3 schedules.

4 Now, in keeping with that framework of having
5 enforcement agencies set the penalty schedule, what would
6 this proposed rule do? The proposed rule would say that
7 the Board delegates to the DEP Commissioner, the authority
8 to set the Water Penalty Schedule. We have looked into
9 this and determined that it is legal, and it is
10 defensible. If we take a look at the actual proposed rule
11 that you have from the middle of the first page, where it
12 says Water Penalty Schedule in bold and then throughout
13 the rest, that's the current rule. The current rule as it
14 exists has the Water Penalty Schedule. Then the pages that
15 follow except for the very last line of the last page is
16 the Water Penalty Schedule. What the proposed rule would
17 do is it would delete that and replace it with the
18 underlying text that you see at the top of the first page.
19 The underlying text accomplishes what I just outlined,
20 that the Board delegates to the Commissioner of DEP, the
21 authority to establish the Water Penalty Schedule. It's a
22 delegation of authority.

23 If today's proposed rule passes, then we would
24 start the formal rulemaking process, Notice-and-Comment,
25 et cetera. If it passes, then concurrently, DEP would do

1 its own rulemaking. Such that if the proposed rule passes
2 and if the rule is then implemented after going through
3 Notice of Comment and the CAPA process, then as soon as it
4 is implemented that day, DEP would have a Water Penalty
5 Schedule ready to go.

6 There's some urgency here, as we've all seen,
7 given the weather patterns and the city declaration of a
8 drought warning, this is something that city agencies want
9 to move on as quickly as possible. That is partly why we
10 get to timing. The drought warning was announced only
11 recently, then there had to be some planning around this,
12 how can we address this? The idea of delegation emerged,
13 then that had to go through a legal review.

14 Once it was determined that delegation is
15 something that can be done and is defensible, then does
16 text have to be drafted. As soon as it became available
17 midday yesterday, I asked that it be shared with all of
18 you. I want to be very clear about why you're receiving it
19 a day before. If we could have sent it out earlier, we
20 would've-- I'm sorry that that folks would have more time
21 on it.

22 Because it was sent out last minute, we could do
23 one of two things. We can discuss it today and vote on it,
24 or if any of you are not ready, you haven't had a chance
25 to read it, if the overview I just gave you was not

1 thorough enough and even just taking five minutes of time
2 to just let everyone time to read it. If you need more
3 time to think through this, then what we could do is I can
4 hear a motion to adjourn this for a special meeting. We
5 could schedule a special meeting next week or the
6 beginning of the following week, not until our next
7 meeting, where we can then adjourn the discussion until
8 that time.

9 That's really just to make sure people have the
10 appropriate time to review this. I don't want to assume
11 everyone's ready. I want to make sure that you've had a
12 fair opportunity to read and understand that. Before we
13 get into the substance of this, let me start with that.
14 Let me start to see based on everything I've outlined and
15 those of you who have read or had an opportunity to read
16 it, if there's anyone who feels like, "Wait a second, I
17 need more time for this." Okay. On that note, then let's
18 discuss the actual notice of proposed rule.

19 MR. RUSSELL PECUNIES: Let me just provide a
20 little bit more context to this in the sense of why are we
21 doing this now? Yes, because of the drought warning. Also,
22 because two years ago, the drought regulations were
23 extensively revised. One thing, they were changed from
24 drought regulations to water shortage regulations. That
25 they will apply not only in the case of a drought but in

1 the case of some other interruption of water service to
2 the city, like one of the water tunnels, goes out of
3 service for some reason, unexpectedly or something like
4 that.

5 They're no longer called the Drought
6 Regulations; they're called the Water Shortage
7 Regulations. At the same time, unfortunately, for reasons
8 unknown to me, because I did not work on those
9 regulations, they renumbered a lot of the sections in
10 those regulations. That the section numbers in the current
11 penalty schedule are not right anymore. If you look at the
12 Drought Emergency Regs, where it starts on 2111. Right
13 now, it's 2111 A, B, C, D, E, F, G, H, I. When they
14 revised the regulations, they changed it to 2111 A1, A2,
15 A3, A4, A5.

16 These section numbers are no longer correct. In
17 the event we need to enforce these, if there is a drought
18 emergency, which hopefully there won't be, and it's
19 supposed to rain for three straight days next week, and
20 hopefully there won't be a drought emergency. If we ever
21 have to enforce these, the section numbers in the schedule
22 are now wrong. We don't need to fix the penalties
23 themselves, but we need to fix the section numbers. That's
24 why we originally came to OATH thinking that OATH would do
25 it as an OATH rulemaking -- board rulemaking. Board

1 rulemaking. Then after discussions with OATH and the Law
2 Department, this idea of the Board delegating this penalty
3 schedule to DEP was suggested so that every time the
4 schedule has to be amended in the future, for whatever
5 reason, we don't have to come and bother the Board to do
6 it because all of the other penalty schedules have been in
7 our rules for eight years.

8 COMMISSIONER ASIM REHMAN: Yes.

9 MR. RUSSELL PECUNIES: This is the only one that
10 got left behind because of this vague language in the
11 Water Code that says that the Board is to -- may establish
12 penalties.

13 COMMISSIONER ASIM REHMAN: May.

14 MR. RUSSELL PECUNIES: It was because of that
15 language that this penalty schedule got left behind in
16 OATH's rules. That's just to provide some additional.

17 COMMISSIONER ASIM REHMAN: Thank you, Russ.
18 Comments? Yes. Thomas?

19 MR. THOMAS SHPETNER: I think this is
20 unacceptable. I've been watching the powers of the Board
21 whittled down for over a decade, maybe 15 years at this
22 point. We've been moving penalty schedules around by
23 clerks for years with no discernible benefit. Other than
24 the waste of everybody's time, in my opinion, a lot of
25 pixels been spilled over this. I believe the separation of

1 powers between the Board and the agencies is an important
2 topic. It's certainly very timely. I expect the city
3 agencies to fall in line because that's what they're
4 instructed to do.

5 This does nothing to help with the drought that
6 is pushing on a rope. A drought is a non-issue here.
7 Whether there is one or there isn't one, has nothing to do
8 with the efficiency of these schedules. Let's take that
9 drought argument off the table. As far as bothering the
10 Board, I've only been bothered by moving penalty
11 schedules. Okay. And we've been doing that for over a
12 decade now, I think. It's no bother if we need to change a
13 penalty schedule. I get an email, I read it, it's about
14 all that happens. Then I come to a meeting and I vote.
15 There's no bother, so let's take that argument off the
16 table.

17 Renumbering section numbers, easily done. I'll
18 do it this afternoon if somebody wants to give me access
19 to everything. Okay? It's not hard seriously. Further, the
20 language proposed, and I'm referring in pertinent parts to
21 the final part of the final sentence is mush. Partly this
22 is because I've been reading The Power Broker for the last
23 two months, but partly because the devil's in the details
24 with these rules.

25 I don't know what "rules and regulations

1 promulgated by the Board" even means here. This is a
2 throwaway sentence that could have profound impact. I'm
3 not going back to the, "I want to retrain and have more
4 time," but I don't really think anybody really knows what
5 that sentence means. I don't know who the drafter was, but
6 clearly, if the Board has the power to promulgate rules,
7 then let's exercise it. Shoving all of these penalty
8 schedules into an agency on the basis of the arguments
9 that have been propounded so far, seems to me to be a
10 ruthless winnowing of the Board's responsibilities and an
11 abdication of its mandate to effectuate a cleaner and more
12 livable city for all of us. I want to be on the record as
13 being profoundly troubled by our willingness to neuter our
14 own organization. It's been happening for years, and I
15 find it despicable, and I see it as a solution in search
16 of a problem.

17 COMMISSIONER ASIM REHMAN: Any other comment?

18 Elizabeth?

19 MS. ELIZABETH KNAUER: I just wanted to provide a
20 little historical context in line with what Tom is saying.
21 Some of us have been on the Board since the time when we
22 did adopt changes to penalty schedules. I would say that,
23 I think mission or the statement you made about OATH as a
24 Tribunal, and our view is that we shouldn't be in control
25 of the penalty schedules. I think that is attributing a

1 view that maybe is not, as I think is clear from Tom's
2 statements, it's not necessarily shared by the entire
3 Board.

4 COMMISSIONER ASIM REHMAN: I didn't mean to imply
5 that. Thank you for clarifying that.

6 MS. ELIZABETH KNAUER: Okay. Just to put that-

7 COMMISSIONER ASIM REHMAN: Of course. Of course.

8 MS. ELIZABETH KNAUER: -on the record, I think
9 that when the shift towards the penalty schedules of the
10 Board being repealed and agencies adopting their own
11 penalty schedules within their own rules occurred, it was
12 in a different Mayoral Administration, a shift that I
13 think was moving towards the eradication of this Board,
14 that would obviously require a charter amendment that
15 wasn't put forward. Basically, the impetus was to remove
16 authority from this Board, and one of the things being the
17 penalty schedules.

18 I personally do not believe that the Board
19 having the power to review and consider penalty schedules
20 proposed by the agencies is inconsistent with the
21 tribunal. I think when the agencies are adopting their own
22 penalty schedules, those schedules therefore limit the
23 power of the Board in terms of the penalty that it can
24 assess against respondents. Basically, the Board ends up
25 being subject to those penalty schedules adopted by the

1 agencies, even as the tribunal that's adjudicating the--
2 It is unable to adjudicate the fairness of the penalty. I
3 think that it's consistent with the tribunal to assess
4 penalties that if believes are fair, and having those
5 penalty schedules within the agency's rules deprived the
6 Board of that opportunity. My personal view as it is not
7 inconsistent with the tribunal role to be adopting the
8 penalty schedules. Of course, that's gone by the wayside,
9 but we're past that point here. I think this is just a
10 singular outlier in the overall-- the shift has happened.
11 This would just be one individual instance of the Board. I
12 think we know where this is going, but I just wanted to
13 put that historical context on the record from the
14 standpoint of some of us who don't really share the
15 viewpoint that you articulated. That's all.

16 COMMISSIONER ASIM REHMAN: Comments?

17 MR. MATTHEW SCHNEID: More of a question. I
18 wasn't here when it had the shift a couple years ago. Was
19 that by the City Council change their legislation or the
20 Board voted to eliminate the powers or limit our powers?

21 COMMISSIONER ASIM REHMAN: I'll let the comment--
22 [crosstalk]

23 MR. THOMAS SHPETNER: I'll be glad to address
24 that. It was the puppet installed by Commissioner De
25 Blasio--

1 MS. ELIZABETH KNAUER: Mayor De Blasio.

2 MR. THOMAS SHPETNER: Mayor de Blasio. He had a
3 big debt to the TLC and installed this guy who had taxi
4 experience. That's what happened.

5 MR. MATTHEW SCHNEID: Did this Board vote to
6 limit the powers or the City Council made a--?

7 MR. THOMAS SHPETNER: No, the City Council did
8 nothing of the sort, the Board shot itself in its own both
9 feet.

10 COMMISSIONER ASIM REHMAN: I believe, Russ, you
11 were there and you may be able to comment, but my
12 understanding is that the Board voted to have the penalty
13 schedule authority transferred over to the agencies. There
14 was a lively discussion and there was-- Yes.

15 MS. ELIZABETH KNAUER: It was not unanimous.

16 COMMISSIONER ASIM REHMAN: It was not unanimous

17 MS. ELIZABETH KNAUER: It actually happened
18 penalty scheduled by penalty schedule because it was
19 subject to CAPA to repeal the penalty schedules that had
20 been adopted by the Board in the past, and then for the
21 agencies to promulgate a penalty schedule in their own
22 rules. It happened one at a time over the course of
23 probably a couple of years.

24 MR. MATTHEW SCHNEID: Sounds like what maybe
25 makes more sense is we should be revisiting that change

1 after a decade of seeing it rather than giving up more.
2 Right? Because some of these penalties are outrageous on
3 citizens, I've seen on many occasions, often unfair.

4 COMMISSIONER ASIM REHMAN: Sorry, other comments?

5 MR. DOUGLAS SWANN: I think they've said it all.

6 [chuckles]

7 COMMISSIONER ASIM REHMAN: Coming back to my
8 earlier points-. First, Elizabeth, thank you for
9 clarifying. When I said our, I did not mean to suggest
10 every member here. That's why we have the Board so that
11 we're bringing other perspectives. I was talking with
12 respect at the Agency and my colleagues here at OATH. I
13 was not here when all of that transpired. I appreciate
14 that we have colleagues here who do and bring those
15 perspectives. I went back and had a chance to look at some
16 of the meetings that were conducted then, and saw that
17 there was very strong points of view held in opposition to
18 this.

19 As I mentioned, it's the regime that we've been
20 under for the past eight years, and I think it's worked. I
21 understand it's not a universally held point of view.
22 Right now, this is an outlier. I understand your point,
23 Matt, of, "If it's an outlier, maybe we swing everything
24 back in the other direction." I would be very surprised in
25 just speaking personally because it's not a policy topic

1 that I've discussed with anyone, but in my experience thus
2 far, I would be surprised if that succeeded.

3 I also want to note that, while I respect the
4 point of view about the change or production in authority
5 of the Board, in the time that I've been here, I've seen
6 this Board very actively address a lot of issues. We've
7 had thorough discussions on issues of public importance.
8 We've had extensive debate over various topics. We've
9 moved resolutions through. We've had to revisit those
10 resolutions after hearing back from the courts.

11 Most importantly, all of you play a critical
12 role in the panel review of the individual decisions.
13 There's still remains, in my view, remains isn't even the
14 right word. There is a lot of authority that this Board
15 has in a significant role that it plays, though I
16 understand that delegating this is by definition saying
17 that there is an authority that we have and we are voting
18 to delegate that authority to another agency. Other
19 comments? Yes, Lisa?

20 MS. LISA URBAN: Just so I'm clear, this is the
21 only agency at this point that we're aware of that we
22 still have the ability to establish the penalties?

23 COMMISSIONER ASIM REHMAN: I don't have to list
24 in front of me. I saw just yesterday, one other small
25 item, and then I remember last week or this week, someone

1 showing me something that's a type of schedule for a type
2 of conduct that because of today's day and age, it just
3 wouldn't come up there. It's just a type of issue that is
4 outdated. I don't believe this is the last one but it may
5 be, of the last ones, it may be the most significant. If
6 anyone else can comment to that.

7 MR. RUSSELL PECUNIES: I think it's the only one
8 that really gets used. I think there are maybe some other
9 ones with things like the Battery Disposal Penalty
10 Schedule or something. I think there are a couple of
11 penalty schedules that don't really belong to any specific
12 agency maybe, and that are never really used, that are
13 still in OATH's rules. This happened and, Madelynn, you
14 were here at that time as well. Under de Blasio, they did
15 something called Regulatory Review.

16 I think it was where all of the city's
17 regulations, everything in the RCNY was reviewed and there
18 were a whole pile of recommendations that were then made
19 to make the rules work better. Moving the penalty
20 schedules out of OATH's rules into the agency's rules was
21 one of those recommendations. I believe the rationale was,
22 is that it would be easier for the public to find them if
23 they were in the rules of the agency that was issuing the
24 summons instead of the court that was adjudicating
25 summons. If I remember, that was the rationale.

1 MR. THOMAS SHPETNER: That like every rationale
2 I've heard about this just falls apart. The internet is a
3 very powerful tool, searching for things. We can make it
4 easier, we should make it easier, but I still don't
5 understand what this language really means that we're
6 voting on. It's vague and it again represents a continuing
7 diminution of our responsibilities and is inconsistent
8 with a healthy separation of powers.

9 MS. LISA URBAN: Is it inconsistent also for us,
10 just on the flip side of that, to have power? If we vote
11 not to change this for DEP, is it inconsistent for us to
12 just have it here, the ability as opposed to the other
13 agencies? Why--

14 COMMISSIONER ASIM REHMAN: I'm sorry, Lisa. I'm
15 not following.

16 MS. LISA URBAN: If we retain the authority to
17 set the penalties for water but we don't have authority
18 for any other agency, is that inconsistent in our role as
19 under our role on this Board? The second part of that is,
20 how-- We are enforcing-- Basically what was done
21 previously was that these penalties were then put back to
22 the agencies that set penalties. Then now we are enforcing
23 those penalties, but we haven't made a determination
24 whether those penalties were fair. Those penalties went
25 back to those agencies rather, and they said, "Okay, this

1 is what we're going to assess." Then we have to say, "Oh,
2 that's fair or not fair," because we don't have any
3 ability to change those penalties once they come to us. We
4 either say yes or we say no. By delegating these penalties
5 and not just now with DEP rules, what was said before,
6 basically advocating our role to say, "Well, is this fair
7 or is this not fair," which goes back to what Matt said
8 about, well, maybe we should really be looking
9 holistically at the full of the penalty, if that's
10 possible today.

11 MR. THOMAS SHPETNER: Well, and also really the
12 only time any of us plays a policy role of any import is
13 in connection with reviewing individual cases, and all we
14 ever hear is our hands are tied. That's the penalty that's
15 in the code. That's the refrain. Every time I get a panel
16 package, I see a penalty that's obscene. I don't even
17 bring it up, because I know my hands are tied. We've
18 delegated this, we've abdicated all of our enforcement
19 capabilities. This is what everybody dislikes about
20 government, grinding bureaucracy, and this is perpetuating
21 it. We could remember these rules in an afternoon and be
22 done with it.

23 COMMISSIONER ASIM REHMAN: If the Board set the
24 penalty schedules and it set a penalty amount of \$100 for
25 a certain type of violation, if that case came up on

1 panel, you wouldn't have the ability to change that \$100
2 in that whole-- [crosstalk]

3 MR. THOMAS SHPETNER: I would be able to go the
4 next morning and say, "We should look at this penalty
5 schedule."

6 COMMISSIONER ASIM REHMAN: And do additional
7 rulemaking, because there's all-- [crosstalk]

8 MR. THOMAS SHPETNER: I have no policy authority.
9 I'm sorry, I didn't mean to interrupt.

10 COMMISSIONER ASIM REHMAN: Yes, I was saying, all
11 of this would go through rulemaking anyway. Lisa, to your
12 point, you're correct that it wouldn't be the Board that
13 would have the authority to write the penalty schedules,
14 but through the CAPA process there's still opportunity to
15 weigh in on the penalty itself. [crosstalk]

16 MS. LISA URBAN: Not very to the public.

17 COMMISSIONER ASIM REHMAN: Tom and then Madelynn,
18 I'm sorry.

19 MR. THOMAS SHPETNER: No, no. I'm done.

20 COMMISSIONER ASIM REHMAN: Okay. Madelynn?

21 MS. MADELYNN LIGUORI: Just to clarify in terms
22 of fine amounts, the City Council sets the fine amounts
23 for the most part. Sometimes there are ranges of amounts
24 where the agency makes decisions. In other cases, they're
25 stated in the law. There's no wiggle over room when

1 there's stated in the law. It doesn't matter what an
2 agency does. Sanitation in its penalty schedule, if it's
3 stated in the law, we don't add it to our penalty
4 schedule. They can go to the Ad Code to see the penalty
5 amount, just as an FYI.

6 COMMISSIONER ASIM REHMAN: Where it's stated in
7 the law. [crosstalk]

8 MS. MADELYNN LIGUORI: Where it's stated in the
9 law.

10 COMMISSIONER ASIM REHMAN: Where it's not stated
11 in the law.

12 MS. MADELYNN LIGUORI: We have no jurisdiction
13 over many of our penalties.

14 MR. MATTHEW SCHNEID: I assume these are here
15 because these are not stated in the law?

16 COMMISSIONER ASIM REHMAN: I think that's
17 correct.

18 MR. MATTHEW SCHNEID: I think we're saying these
19 are all going to get increased, not just changing the
20 numbering. That's essentially what's going to happen.

21 COMMISSIONER ASIM REHMAN: If by delegating
22 authority, then the DEP Commissioner in their discretion
23 would determine through rulemaking, changing of the--

24 MR. RUSSELL PECUNIES: Right. What we would do is
25 we would do a rulemaking where we would re-promulgate this

1 schedule in our rules with the corrected section numbers.
2 Then going forward, unless I guess if the Board revoked
3 the delegation at some point, going forward, this penalty
4 schedule would be an hour rules and when it needed to be
5 amended, it would be done by DEP.

6 MR. THOMAS SHPETNER: I'm sorry. Does DEP
7 currently have in hand a revised penalty schedule that
8 they're prepared to promulgate? This is getting 86, right?
9 Everything from Water Penalty Schedule. [crosstalk]

10 MR. RUSSELL PECUNIES: Right. In other words,
11 would be repealed from OATH's rules and re-promulgated in
12 DEP's rules.

13 MR. THOMAS SHPETNER: I understand that, but is
14 it being re-promulgated in its entirety without edits, or
15 is it being re-promulgated with significant revisions?

16 MR. RUSSELL PECUNIES: The only revisions would
17 be to change the references from drought to water shortage
18 because the rules are no longer called the drought rules,
19 and to change the section numbers to conform to the new
20 section numbers. We are not proposing to change any
21 penalty.

22 MR. THOMAS SHPETNER: You're saying that the
23 necessity is predicated upon the terminology, water
24 shortage, no longer drought, and administrative edits to
25 the numbering of the--?

1 MR. RUSSELL PECUNIES: To the section numbers.

2 MR. THOMAS SHPETNER: Why does that require a
3 diminution of this Board's responsibility?

4 MR. RUSSELL PECUNIES: I just wouldn't say on
5 that. From our standpoint, all we care about is that if
6 the Mayor declares a drought emergency, we can write
7 tickets for these regulations, which right now we couldn't
8 for a lot of them because the section numbers in the
9 penalty schedule are wrong. We originally came to this
10 thinking that this would be a rulemaking done by OATH, and
11 then after discussions, it was decided that this would be
12 a delegation from OATH to us.

13 MR. THOMAS SHPETNER: Russ, all we're talking
14 about-- [crosstalk]

15 MR. RUSSELL PECUNIES: We don't care whether you
16 promulgate it or we promulgate it, as long as it gets
17 promulgated.

18 MR. THOMAS SHPETNER: I'm sorry. One quick thing.
19 Then, in fact, you have established my point, which is
20 that this is Ministerial. If you have no designs on
21 changing the penalties and you have--

22 MR. RUSSELL PECUNIES: We do not intend to change
23 any of the penalties.

24 MR. THOMAS SHPETNER: Excuse me, you're cutting
25 across. Then you have, in fact, endorsed my point that

1 this is Ministerial, it doesn't require a diminution of
2 the Board's authority.

3 MR. RUSSELL PECUNIES: Again, we don't care who
4 promulgates it, as long as it gets done.

5 MR. THOMAS SHPETNER: Well, if you don't care,
6 [chuckles] then why are we doing this? That's just--

7 MS. ELIZABETH KNAUER: I guess just from a timing
8 standpoint, from DEP's perspective, wouldn't it be-- It
9 seems like this is going to require one rulemaking to
10 delegate and then a subsequent rulemaking to adopt the
11 corrected penalty schedule in DEP's rules. From your
12 perspective, wouldn't it be quicker, at least in this
13 instance, if there's the urgent need to fix the section
14 numbers so that you can enforce?

15 Wouldn't it be quicker for the Board to issue a
16 proposed rulemaking to do that now rather than having a
17 two-step process requiring two separate CAPA? It just
18 seems like this is going to extend out the time if we have
19 to issue a proposed rulemaking to delegate, which then has
20 to go through CAPA before DEP can even put out a proposed
21 rule to adopt the corrected schedule rather than us just
22 putting out a proposal to adopt the corrected schedule
23 now.

24 COMMISSIONER ASIM REHMAN: On the timing front,
25 that's the very last line, which is section two, which

1 says effective date. The way that the effective date will
2 work is that the two processes work not back to back, but
3 simultaneously, in parallel, so that by the time this
4 rule, if it is adopted, gets implemented, then immediately
5 the DEP penalty schedule will go into effect. Is they will
6 do parallel rulemaking on the--

7 MS. ELIZABETH KNAUER: The law department
8 determined that that was legal even though they wouldn't
9 actually have the delegated authority yet under a final
10 rule?

11 COMMISSIONER ASIM REHMAN: Yes. I want to come to
12 Tom's point about if the changes are limited, then why do
13 this? It is because we may find ourselves in this seat
14 again and again. It comes back to what I started with,
15 which I understand that there's not universal consensus
16 on. That is that if the framework that we have right now
17 is one where the penalty schedules sit with the agencies
18 and not with the Board, except with minor exceptions, then
19 this presents an opportunity because it is coming up.

20 Whether it's a significant or minor change, it
21 is still a moment, it's still an opportunity to right size
22 the ship so that the penalty schedules are now more or all
23 with the limited exceptions of ones that really aren't
24 being used with the enforcement agencies. That's why this
25 is being proposed. It's an opportunity to make that

1 adjustment, of whether folks agree with that adjustment or
2 not, we'll put it to a vote. It is separate from the
3 content of the changes. It's the delegation so that the
4 board - the department, DEP, has this authority going
5 forward. Other comments or questions? I would like to
6 request a motion to vote on the proposed rule. We have a
7 motion from Jared. A second? A second from Madelynn.

8 ASSISTANT GENERAL COUNSEL HALIMI: Are there any
9 objections to the motion approving the proposed rule?

10 MR. MATTHEW SCHNEID: Can we do a roll call vote?

11 COMMISSIONER ASIM REHMAN: Yes, let's do that.

12 ASSISTANT GENERAL COUNSEL HALIMI: Okay. Sure.
13 Commissioner Asim Rehman?

14 COMMISSIONER ASIM REHMAN: Yes, in favor.

15 ASSISTANT GENERAL COUNSEL HALIMI: DOB, Ivy Chiu?

16 MS. IVY CHIU: In favor.

17 ASSISTANT GENERAL COUNSEL HALIMI: Joseph
18 Gregory?

19 MR. JOSEPH GREGORY: In favor.

20 ASSISTANT GENERAL COUNSEL HALIMI: Elizabeth
21 Knauer?

22 MS. ELIZABETH KNAUER: I'll say that my
23 consistent vote on all of these repeals has been no. I
24 guess at this point in time I don't really see the point
25 in objecting to the one last item. I'll vote in favor just

1 because I do feel there's some value to consistency. I'm
2 just putting on record that, in general, in terms of this
3 move, but I am not in favor of it.

4 ASSISTANT GENERAL COUNSEL HALIMI: okay. Your
5 final vote is yes?

6 MS. ELIZABETH KNAUER: Yes.

7 ASSISTANT GENERAL COUNSEL HALIMI: Madelynn
8 Liguori?

9 MS. MADELYNN LIGUORI: Yes.

10 ASSISTANT GENERAL COUNSEL HALIMI: Russell
11 Pecunies?

12 MR. RUSSELL PECUNIES: In favor.

13 THOMAS SHPETNER: Wait, wait, wait. Is Russ
14 allowed to vote here?

15 COMMISSIONER ASIM REHMAN: Yes.

16 MS. ELIZABETH KNAUER: Yes.

17 ASSISTANT GENERAL COUNSEL HALIMI: Harminderpal
18 Rana?

19 MR. HARMINDERPAL RANA: In favor.

20 ASSISTANT GENERAL COUNSEL HALIMI: Matthew
21 Schneid?

22 MR. MATTHEW SCHNEID: No.

23 ASSISTANT GENERAL COUNSEL HALIMI: Thomas
24 Shpetner?

25 MR. THOMAS SHPETNER: Profound no.

1 ASSISTANT GENERAL COUNSEL HALIMI: Matthew Smith?

2 MR. MATTHEW SMITH: In favor.

3 ASSISTANT GENERAL COUNSEL HALIMI: Douglas Swann?

4 MR. DOUGLAS SWANN: Not in favor.

5 ASSISTANT GENERAL COUNSEL HALIMI: Lisa Urban?

6 MS. LISA URBAN: No.

7 ASSISTANT GENERAL COUNSEL HALIMI: Jarrod
8 Whittington?

9 MR. JARROD WHITTINGTON: Yes.

10 ASSISTANT GENERAL COUNSEL HALIMI: We have nine
11 yeses.

12 COMMISSIONER ASIM REHMAN: How many noes?

13 ASSISTANT GENERAL COUNSEL HALIMI: We have four
14 noes.

15 COMMISSIONER ASIM REHMAN: Okay.

16 ASSISTANT GENERAL COUNSEL HALIMI: The motion is
17 approved.

18 COMMISSIONER ASIM REHMAN: The motion is
19 approved. Thank you, everyone. I want to note for the
20 record just because a question was raised regarding DEP,
21 that even if DEP hadn't voted, the motion would've
22 carried, would've been eight for and one abstention. I
23 also want to thank everyone for their party discussion on
24 this. As I mentioned, I had a chance to look at some of
25 the older discussions, and there was a lot of passionate

1 views that came up. I appreciate that people brought very
2 articulate and relevant points to this discussion. We're
3 not always going to agree on everything, and that's why we
4 put these to a vote, and that's why we have open
5 discussion. Thank you for the thoughtful and civil
6 discourse. Yes, Tom?

7 MR. THOMAS SHPETNER: Am I wrong, there's
8 ambiguity at the end of the sentence there? Are we going
9 to not address that or do you feel--? I mean, the die is
10 cast, so maybe I'm just pushing against a rope here. I
11 don't really know what this means, and rules and
12 regulations promulgated by the Board. You've got language
13 that to me is best, soft, that's charitable. The die is
14 cast, as you sow, so shall you reap. It's not good.

15 COMMISSIONER ASIM REHMAN: Other comments?

16 MR. THOMAS SHPETNER: Does that mean we're
17 sticking with it?

18 COMMISSIONER ASIM REHMAN: It was voted on as
19 drafted.

20 MR. THOMAS SHPETNER: Good. All right. Well, the
21 lawyer who did this can live with it.

22 COMMISSIONER ASIM REHMAN: Other comments? Could
23 I please have a motion to move to Executive Session?
24 Motion? Second? We have a second.

25 ASSISTANT GENERAL COUNSEL HALIMI: Are there any

1 objections to the motion to go into executive session?
2 Seeing none, hearing none, the motion is approved
3 unanimously.

4 COMMISSIONER ASIM REHMAN: Thank you.

5 MS KAREN MCAVOY: Please hold.

6 [pause 00:46:59]

7 COMMISSIONER ASIM REHMAN: We've returned from
8 Executive Session and the last item for today is selecting
9 a date for the next Board meeting. Let me suggest two
10 options. These would be in February, February 6th or
11 February 13. Any comments or problems with either of those
12 dates?

13 JARROD WHITTINGTON: I would prefer February 6th,
14 if possible.

15 COMMISSIONER ASIM REHMAN: Sorry, did someone
16 else-- [crosstalk]

17 MATTHEW SCHNEID: I'll also say in the 6th.

18 COMMISSIONER ASIM REHMAN: Does anyone have any
19 problems with February 6th? Then we will set February 6th
20 as our next meeting. I'd like to ask for a motion and a
21 second to adjourn today's meeting. I can see a motion and
22 a second.

23 ASSISTANT GENERAL COUNSEL HALIMI: Are there any
24 objections to the motion to adjourn the meeting? Seeing
25 none, hearing none, the motion is approved unanimously.

1 COMMISSIONER ASIM REHMAN: Adjourning today's
2 meeting. I hope you all have a good end of year and
3 holiday season.

(The board meeting concluded at 10:27 a.m.)

Reviewed and corrected by OATH Office of the
General Counsel, 12/18/24



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Gladys S. Gist

Dated: **12/12/2024**

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