

ENVIRONMENTAL CONTROL BOARD

NOTICE OF OPPORTUNITY TO COMMENT on Proposed Rule regarding penalties for offenses adjudicated by the Environmental Control Board (ECB).

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Environmental Control Board (ECB) by Section 1049-a(c)(3) of the New York City Charter, and by 1049-a of the New York City Charter, and in accordance with Section 1043(b) of the Charter, that the Environmental Control Board proposes to amend subchapter G of Chapter 3 of Title 48 of the Rules of the City of New York, setting forth penalties for offenses adjudicated 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.

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 January 28, 2010. A public hearing regarding the proposed rule will be held on January 28, 2010, at 66 John Street, 10th Floor, Reception, starting at 5:00 p.m. Persons 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 January 28, 2010. Persons 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 January 21, 2010. Persons 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.

Section 1. It is proposed to amend the Table of Contents of Title 48 Chapter 3, Enforcement Procedures Before the Environmental Control Board, to read as follows:

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

SUBCHAPTER E - MISCELLANEOUS

§3-81 Default by Respondent.

§3-82 [Stays of Default.] Request for a New Hearing after a Failure to Appear (Vacating a Default)

[§3-83 Late Request for Stay of Default.] Reserved

§3-84 Stipulation in Lieu of Hearing.

Section 2. It is proposed to amend section 3-82 of Title 48 Chapter 3, Enforcement Procedures Before the Environmental Control Board, read as follows:

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

§ 3-82 [Stays of Default] Request for a New Hearing after a Failure to Appear (Vacating a Default)

[Except as otherwise provided by rule or statute, a request by respondent for a stay of a default order and a hearing must be made by application to the executive director within 30 days of

mailing of the default order. When a timely request is made for a stay of a first default, the executive director shall grant the request. A timely request for a stay of a second or subsequent default made for the same notice of violation may be denied by the executive director absent a showing of a meritorious defense.]

(a) A request by a respondent for a new hearing after the respondent did not appear must be made by application to the executive director or his or her designee. The request must be on a form prescribed by the executive director. The request must contain a current mailing address for the named respondent; it must explain how and when the respondent learned of the violation and it must be sworn or certified to under the penalties of perjury. If the request is not made by the named respondent, the request must explain the relationship between the respondent and the person making the request.

(b) A request for a new hearing, as described in subdivision (a) of this section, that is received within 45 days of the hearing date upon which the respondent did not appear, shall be granted unless such request is found to be made in bad faith. Such findings shall be made at the discretion of the executive director and shall include, but not be limited to, requesting only to admit the charge(s), repeatedly filing the same request or filing the same request in more than one borough at the same time.

(c) A request for a new hearing that is received more than 45 days from the date upon which the respondent did not appear must contain, in addition to the information stated in subdivision (a) of this section, appropriate supporting documentation. Such request may be granted and a hearing conducted only if the respondent establishes that a new hearing was requested within one year of the time the respondent learned of the existence of the violation, and that there is a reasonable basis to believe that the respondent

(1) did not receive the notice of the violation because the respondent was

(A) not properly served with the violation under article three of the civil practice law and rules, article three of the business corporation law, section 1049-a of the New York City Charter or any other provision relating to service of violations returnable to the Environmental Control Board contained in the New York City Administrative Code or the Rules of the City of New York; or

(B) cited generically, for example, as "Owner" or "Agent," on all copies of the notice of violation sought to be served on the respondent; or

(2) was an improper party when the notice of violation was issued. An improper party is a named respondent who is

(A) an individual who was deceased or legally incompetent on the hearing date upon which the respondent did not appear; or

(B) for a premises related violation, not the owner, agent, lessee, tenant, occupant or person in charge of or in control of the place of occurrence on the date of the offense.

A decision to grant the request for a new hearing under this section shall not be considered a final decision on the issue of whether respondent was properly served or was a proper party on the date of offense.

(d) If a request for a new hearing is granted, the Environmental Control Board shall send a notice to the respondent at the respondent's address stated on the request for a new hearing. If the respondent is deceased or legally incompetent, a notice shall be sent to respondent's representative. Notice shall also be sent to the Petitioner.

(e) No more than one request for a new hearing under this section may be granted with respect to any one notice of violation unless the notice of the new hearing date was not mailed pursuant to subdivision (d) of this section. If the respondent is unable to appear on the hearing date scheduled after a request for a new hearing is granted, respondent may request that the hearing be rescheduled one final time.

(f) Review of a denial of a request for a new hearing after a failure to appear may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.

Section 3. It is proposed to delete section 3-83 of Title 48 Chapter 3, Enforcement Procedures Before the Environmental Control Board, as follows:

Deleted material is in [brackets].

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

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

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

Statement of Basis and Purpose of Proposed Rule

ECB is proposing to amend its rules to clarify its procedure and apply more objective standards in evaluation of requests for hearings after a respondent has failed to appear.

ECB currently receives numerous requests to re-open cases after a respondent has missed a hearing. Many of these requests are filed simultaneously in different borough offices. We also receive the same requests repeatedly even though these requests have been previously denied. In addition, because we often receive requests that contain insufficient information, we use agency resources trying to get supplemental information that should have been supplied by the respondent with the original request.

The purpose of the new rule is to discourage frivolous requests and encourage meritorious requests. Respondents will be required to file their request of a form provided by ECB. This form will be available in all borough offices and on line. The request must be accompanied by documentary evidence. The type of evidence required is listed on the form. The request must be made by the respondent or an authorized representative. Only one request to vacate the default on each case will be allowed.

Requests made within 45 days will be granted unless they are made in bad faith (including multiple or unsubstantiated requests). Once the 45 day period has passed, requests will only be granted based on narrow set of standards, set forth in the rule above. These standards have been designed to be easily understandable by both ECB staff and the public. Requests must be made within one year of when the respondent first learned of the violation. Respondent must supply documentation to the satisfaction of ECB to prove when respondent first learned of the violation.

Respondent will be required to provide a current mailing address along with the request. If the request is granted, both sides will receive notice of the new hearing date.

There will be only one opportunity to reopen, and the denial of the request will be a final agency decision.