

## NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION

### Notice of Public Hearing and Opportunity to Comment on Proposed Rules

**What are we proposing?** The Department of Environmental Protection is promulgating rules that would establish a process to appeal an abatement order issued pursuant to section 24-146 of the Administrative Code.

**When and where is the hearing?** The Department will hold a public hearing on the proposed rule. The public hearing will take place at 10 a.m. on January 18, 2017. The hearing will be held in the 8<sup>th</sup> floor conference room at 59-17 Junction Boulevard, Flushing, New York.

**How do I comment on the proposed rules?** Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Department of Environmental Protection through the NYC rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to [nycrules@dep.nyc.gov](mailto:nycrules@dep.nyc.gov).
- **Mail.** You can mail comments to the Department of Environmental Protection, Bureau of Legal Affairs, 59-17 Junction Boulevard, 19<sup>th</sup> Floor, Flushing, NY 11373.
- **Fax.** You can fax comments to the Department of Environmental Protection, Bureau of Legal Affairs, at 718-595-6543.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by calling 718-595-6531. You can also sign up in the hearing room before the hearing begins on January 18, 2017. You can speak for up to three minutes.

**Is there a deadline to submit written comments?** Yes, you must submit written comments by January 18, 2017.

**Do you need assistance to participate in the hearing?** You must tell the Bureau of Legal Affairs if you need a reasonable accommodation of a disability at the hearing. You must tell us if you need a sign language interpreter. You can tell us by mail at the address given above. You may also tell us by telephone at 718-595-6531. You must tell us by January 11, 2017.

**Can I review the comments made on the proposed rules?** You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, a transcript of the hearing and copies of the written comments will be available to the public at the Bureau of Legal Affairs.

**What authorizes the department to make this rule?** Section 1043 of the City Charter and sections 24-146 and 24-105 of the City Administrative Code authorize the Department to make

this proposed rule. This proposed rule was included in the Department's regulatory agenda for this fiscal year.

**Where can I find the department's rules?** The Department's rules are in title 15 of the Rules of the City of New York.

**What rules govern the rulemaking process?** The Department must meet the requirements of Section 1043(c) of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043(b) of the City Charter.

### **Statement of Basis and Purpose of Proposed Rule**

Local Law Number 38 of 2015 amended Section 24-146 of the Administrative Code, which provides for the issuance of an abatement order when it is found that work is being performed in violation of the provisions of Section 24-146.

DEP is proposing these rules, as required by Section 24-146(f)(5)(iii), to establish a procedure for requesting a hearing to appeal a written abatement order as a new Chapter 45 of title 15 of the Rules of the City of New York (RCNY).

DEP is also amending Chapter 32 of title 15 of the Rules to add the hearing for appeal of written abatement orders provided for in the new Chapter 45 to the list of adjudicatory hearings that can be conducted by DEP.

In addition, Chapter 32 is being amended to simplify complex legal references and to update obsolete references, including the repeal of subdivisions (f), (g) and (h) of 15 RCNY §32-01. Subdivision (f) is being repealed because the reference to noise sensitive zones in Administrative Code § 24-229(b) was repealed as part of the revision to the Noise Pollution Control Code by Local Law 113 of 2005. Subdivision (g) is being repealed because the reference to Environmental Ratings in Administrative Code § 24-154(b) was repealed as part of the revision to the Air Pollution Control Code by Local Law 38 of 2015. Subdivision (h) is being repealed because the reference to "approved noise consultants" incorrectly referenced the Air Pollution Code, and the process to appeal a revocation as a noise consultant is already set forth accurately in 15 RCNY § 32-01(b). Finally, this rule would allow parties in Department hearings to select the option of e-mail notification of the Department's final determination.

Consistent with the above, DEP promulgates the following new Rule, to be found at 15 RCNY Chapter 45 and 15 RCNY Chapter 32.

The Rule is authorized by Section 1043 of the Charter and sections 24-105 and 24-146 of the Administrative Code.

The text of the Rule follows.

Section 1. Subdivisions (a) and (d) of Section 32-01 of Chapter 32 of Title 15 of the Rules of the City of New York are amended to read as follows:

(a) Revocation or Suspension of a certificate issued by the Asbestos Control Program [Certification], pursuant to Administrative Code § [24-146.1(d)(5)] 24-136(e)(4).

(d) Appeal [to Commissioner] of a Stop Work Order issued pursuant to Administrative Code § [24-146.1(h)] 24-136(h).

§ 2. Subdivision (f) of Section 32-01 of Chapter 32 of Title 15 of the Rules of the City of New York, relating to the Commissioner's Noise Sensitive Zone designation, subdivision (g) of such section, relating to appeal of the Commissioner's Environmental Rating, and subdivision (h) of such section, relating to appeal of revocation or removal from the "Approved Noise Consultants" list, are REPEALED.

§ 3. A new subdivision (e) has been added to Section 32-01 of Title 15 of the Rules of the City of New York to read as follows:

(e) Appeal of Written Abatement Order issued pursuant to Administrative Code § 24-146(f).

§ 4. Subdivision (a) and paragraphs 1, 2, and 3 of subdivision (b) and paragraphs 2 and 3 of subdivision (d) of Section 32-02 of Chapter 32 of Title 15 of the Rules of the City of New York are amended to read as follows:

(a) The [Adjudication] Hearing Procedures in this § 32-02 shall apply to the [adjudications] hearings referred to in § 32-01 of this chapter.

(b) *Hearing procedures.*

(1) All parties shall be given reasonable notice of the hearing, including a statement of the nature of the proceeding and the time and place it will be held, a statement of the legal authority and jurisdiction under which the hearing is to be held, and a reference to the particular section of the law and rules involved, and a short statement of the matters to be [adjudicated] heard, including reference to the particular law and rules involved.

(2) [The burden of proof shall be on the party who initiated the Proceeding to establish its claim by a preponderance of the relevant evidence.] The party who initiated the Proceeding has the burden of proving the facts claimed by a preponderance of the relevant evidence.

(3) All parties shall be afforded due process of law, including the opportunity to be represented by counsel, to issue subpoenas or request that subpoenas be issued to call witnesses, to examine and cross-examine [opposing] witnesses, to [present oral and written arguments on the law and on the facts, and] make factual or legal arguments orally or in writing, to present evidence in support of their claims and to have other rights essential for due process and a fair hearing.

(d) *Final determination.*

(2) A copy of the final determination and order shall be served personally or by certified or registered mail or by email to an address supplied by any party at the hearing with the written

consent of such party, or, when applicable, in accordance with §§ 24-115 or 24-213 of the Administrative Code of the City of New York, to all parties to the proceeding.

(3) At any time prior to the issuance of the final determination of the Commissioner, or his/her designee, the Department may enter into a stipulation or consent order with any party. [Such stipulation or consent order shall be admissible as evidence to provide the basis for a finding of fact in any subsequent proceeding brought by the Department against such party.] Such a stipulation or consent order may be used as factual evidence in a later proceeding brought by the Department against such party.

§ 5. Section 32-03 of Chapter 32 of Title 15 of the Rules of the City of New York is amended to read as follows:

§ 32-03 Conduct of Adjudicatory Hearings by the Office of Administrative Trials and Hearings. New York City Department of Environmental Protection [adjudications] hearings regarding the fitness and discipline of agency employees will be conducted by the Office of Administrative Trials and Hearings. After conducting [an adjudication] a hearing and analyzing all testimony and other evidence, the hearing officer shall make written proposed findings of fact and recommend decisions, which shall be reviewed and finally determined by the Commissioner.

§ 6. Title 15 of the Rules of the City of New York is amended by adding a new Chapter 45, to read as follows:

#### Chapter 45 Abatement Orders

##### § 45-01 Abatement Orders issued pursuant to section 24-146

(a) The department may issue an abatement order whenever it is found that work is being performed in violation of the provisions of subdivisions (a) through (f) of section 24-146 of the administrative code, or chapter 13 of these rules, and that such work poses a threat to human health and safety. Such circumstances may include, but are not limited to causing or permitting the emission of dust as a result of the transportation or storage of any material that may generate dust, the construction or alteration of a building or its appurtenances or a road, the spraying of any insulating material in or upon any building or other structure during its construction, alteration or repair, or the causing or permitting a building or other structure to be demolished. Upon issuance of an abatement order, the activity giving rise to the violation shall immediately stop unless otherwise specified.

(b) Such order may be given orally or in writing to the owner, lessee or occupant of the property involved, or to the agent of any of them, or to the person or persons performing the work. Except as provided in subdivision (c), a verbal order shall be followed promptly by a written order and shall include the reason for the issuance of an abatement order. The order may require all such work to be done as may be necessary, in the opinion of the commissioner, to remove the danger therefrom.

(c) An abatement order issued pursuant to subdivision (a) of this section may be appealed in accordance with the section 45-02 of these rules. In the case of a verbal abatement order, if the

commissioner determines that the condition that gave rise to the order has been immediately corrected, such order shall be lifted at once and shall not be followed by a written order.

§ 45-02 Procedure to Appeal a Written Abatement Order Issued Pursuant to Section 24-146

(a) Notice and Opportunity to be Heard.

- (1) The appeal shall be filed on a form to be prescribed by the department.
- (2) Upon filing of an appeal, a hearing will be scheduled in accordance with the provisions of chapter 32 of title 15 of these rules. The hearing will be held within 14 days of the filing of the appeal.
- (3) After the hearing, the department may lift the abatement order if it is determined that the order was not properly issued, or upon the submission of proof satisfactory to the commissioner that the requirements of such order have been satisfied.

**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:** Appeal of Abatement Orders

**REFERENCE NUMBER:** 2016 RG 063

**RULEMAKING AGENCY:** Department of Environmental Protection

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  
Acting Corporation Counsel

Date: December 6, 2016

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS  
253 BROADWAY, 10<sup>th</sup> FLOOR  
NEW YORK, NY 10007  
212-788-1400**

**CERTIFICATION / ANALYSIS  
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE:** Appeal of Abatement Orders

**REFERENCE NUMBER:** DEP - 29

**RULEMAKING AGENCY:** Department of Environmental Protection

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/ Norma Ponce  
Mayor's Office of Operations

Date: *December 6, 2016*