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Can Community Residents Use Class Action and Public Nuisance Suits to Gain Power Against Local Power Producers and Encourage State Officials

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NOTE

CAN COMMUNITY RESIDENTS USE CLASS ACTION AND PUBLIC NUISANCE SUITS TO GAIN POWER AGAINST LOCAL POWER PRODUCERS AND ENCOURAGE STATE OFFICIALS TO INITIATE THE DEVELOPMENT OF A RESPONSIBLE ENERGY POLICY?

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INTRODUCTION

In a withering hail of glass and fire [resulting from the September 11th attacks], New York City's power crisis. . . . [has been] snuffed . . . Hundreds of megawatts of 'load,' or demand, suddenly disappeared from the power system . . . Before the terrorist attacks, the city had been walking a thin line between sufficiency and shortage. . . . *It now appears New York City may have enough surplus power to become, at times, a minor exporter of electricity to other parts of the state. . . .*¹

In the wake of energy deregulation, New York City faces both major power plant expansions and the addition of several new power plants. Although new plants promise to be cleaner than those currently in operation,² technologically-advanced facilities are unlikely

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1. Rebecca Smith, *Power Drain: The U.S. Energy Crisis Terrorist Attack Stamps Out New York's Power Crisis*, WALL ST. J., Sept. 14, 2001, at A2 (emphasis added).

2. Such facilities do not even meet 1970 Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C.A. §§ 7401-7671q (2003) standards because they were erected prior to its enactment, and are considered "grandfathered."

to replace existing, dirtier facilities because they enjoy significant economic advantages. In fact, if these “cleaner” plants are approved without commitments to reduce overall pollution levels, New York City is likely to become an even greater dumping ground for New York State’s electric power pollution.³

The New York Power Authority⁴ (“NYPA”) and members of the New York State legislature⁵ have threatened California-type blackouts⁶ and spikes in the price of electricity⁷ to push forward the *immediate* construction of new electric generating turbines in western Queens.⁸ With this impetus, three power companies have received certification or submitted applications to either expand or construct

3. See Smith, *supra* note 1, at A2.

4. NYPA is the nation’s largest state-owned power organization, which supplied 22% of New York States electricity in 2000. NYPA, PAST PRESENT FUTURE: GENERATING MORE THAN ELECTRICITY 1 (2000) [hereinafter GENERATING MORE THAN ELECTRICITY]. Its principal office is located in Albany. See NYPA, OUR LOCATIONS, at <http://www.nypa.gov/html/ourlocat.html> (last visited Dec. 20, 2002) [hereinafter NYPA LOCATIONS].

5. See Richard Perez-Pena, *Power Plants May be in Use a Bit Longer*, N.Y. TIMES, Mar. 23, 2001, at B1; Mike Aldax, *Controversy Still Looms for New Proposed Generators Site*, QUEENS COURIER, Jan. 24, 2001 (on file with FORDHAM ENVTL. L. J.); Paul Tonko, *Addressing Environmental Values in Resource Planning, Siting and Acquisition*, 18 PACE ENVTL. L. REV. 319 (2001) (stating that a full-blown energy crisis is inevitable and will put the economy at risk and jeopardize the health and safety of our citizens).

6. Blackouts are common among cities that limit the energy provided to certain neighborhoods to prevent an entire power grid from failing. California implemented blackouts for a period of six days during California’s unprecedented energy crisis in 2001. See CAL. CEO, HIGHLIGHTS AND NO LIGHTS, at <http://www.californiaceo.com/archive.0302/03energytimeline.html> (last visited Dec. 20, 2002).

7. The law of economics dictates that a sharp increase in demand for any given product coupled with dormant supply will generally lead to a massive increase in the price of that product. This phenomenon was at the heart of California’s energy crisis. See sources cited *supra* note 6 and accompanying text; see also Kara Blond, *New York Considers Some Possible Problems with Deregulation*, N.Y. NEWSDAY, Jan. 25, 2001, at A7.

8. See Donald Bertrand, *Mega Push for City Power: Turbines Heading to 6 Sites*, DAILY NEWS, Feb. 7, 2001, Suburban, at 5; Donald Bertrand & Elizabeth Hays, *Suing to Fight the Power: Watchdogs go to Court to KO Electricity Plans*, DAILY NEWS, Feb. 8, 2001, Suburban, at 1; *Schumer Backs NYPA*, CRAIN’S INSIDER, Jan. 30, 2001, at 1 (a daily fax on government action) (on file with FORDHAM ENVTL. L. J.); Nick Abadjian, *A Shock to the System: Will Queens Become Power Plant Central?*, QUEENS TRIB., Apr. 13–19, at 26. *But see* Eugene W. Zeltmann, *New Power Generators Only Way City Stays ‘On,’* DAILY NEWS, Feb. 13, 2001, at 25.

new facilities in the same neighborhood. Several community groups⁹ and elected officials¹⁰ vehemently oppose these projects unless the proper environmental review is completed, since the communities of western Queens are already inundated with pollution generated from existing facilities.¹¹ The leaders of this opposition contend “that power plants have a destructive impact on . . . air and water resources, as well as on community character [and that] the impact of any proposed facility cannot be examined in a vacuum.”¹² They further contend that when considering the expansion of an existing facility or the construction of a new plant, the Public Service Commission¹³ and Article X¹⁴ should mandate the completion of a cumulative impact study weighing the adverse effects of the added

9. *See How Many Electric Generating Plants will be Built in Your Neighborhood?—C.H.O.K.E. Knows, Informs & Fights For Your Community!*, C.H.O.K.E. (Coalition Helping Organize a Kleaner Environment, Long Island City, N.Y.), Sept. 2000, at 1 (newsletter prepared by Abe Turken and Donna Digilio-Arruffat) (on file with FORDHAM ENVTL. L. J.).

10. E. E. Lippincott, *New \$100,000 EPA Study will Examine West Qns. Air Problem*, QUEENS CHRON., Jan. 31, 2002, at 1 (discussing Congressman Joseph Crowley’s (D-Queens) efforts to alleviate pollution caused by factors including power plant emissions); *see* Press Release, Carolyn Maloney, U.S. Congresswoman, Maloney Stands United with Queens Presidents in Fight for a Cleaner, Healthier Borough (June 4, 2001) (urging an immediate halt to power plant construction in western Queens until full health and environmental impacts are considered) (on file with FORDHAM ENVTL. L. J.); Speaker Peter Vallone, Statement made before CHOKÉ (Apr. 13, 2000) (highlighting the former NYC Council Speaker’s concerns about the lack of a comprehensive study on the cumulative impact of any expansion or construction of power plants in Astoria); Press Release, George Onorato, New York State Senator, Senator Onorato Announces Funding Opportunities for Groups Against Local Plants (Dec. 21, 1999) (on file with FORDHAM ENVTL. L. J.).

11. *See* Press Release, Martin Connor, New York State Senate Democratic Leader, Connor Introduces Bill Requiring all Power Plant Proposals to Undergo Full Environmental Review Processes (Feb. 6, 2001) (on file with FORDHAM ENVTL. L. J.).

12. Vallone, *supra* note 10.

13. The Office of Electricity and Environment of the New York State Public Service Commission is responsible for overseeing the performance of electric corporations under its jurisdiction to ensure that they provide safe, adequate, and efficient service at just and reasonable rates. The Office coordinates review of applications for new power plants to ensure compliance with technical and environmental requirements. N.Y. STATE PUB. SERV. COMM’N, OFFICE OF ELECTRICITY AND ENVIRONMENT, at <http://www.dps.state.ny.us/directory.htm#ee> (last visited Dec. 20, 2002) [hereinafter OFFICE OF ELECTRICITY AND ENVIRONMENT].

14. *See* discussion *infra* Part II.

pollution from a proposed facility in an area already housing various other pollution producing facilities such as power plants and airports.¹⁵

Since September 11th, the daily demand on New York City's power system has significantly decreased,¹⁶ yet power authorities continue to insist that new electric generating facilities are necessary to avoid blackouts.¹⁷ What troubles local residents and elected officials most is why power officials continue to approve projects that impose the majority of New York City's power burden on only a handful of communities.¹⁸

This Note offers a new approach to solving the problems facing these communities, and explores the use of class action and public nuisance suits as effective legal remedies to halt the stampede to build and expand electric generating facilities. The facts surrounding the problem in western Queens will be used as a model to argue that community residents can use the class action suit as a device to stop local power producers via injunction or allow residents to claim real damages for injuries caused by power plant pollution. Part I presents a history of the current problem facing western Queens, including the damages suffered by its residents. Part II outlines the Article X process, which empowers the New York Board on Electric Generating Siting and Environment ("Siting Board") to approve applications for the expansion and creation of new electric generating facilities in over-saturated communities. Part III explores the possibility of having a community aggrieved by power producers bring a class action or public nuisance suit for damages and injunctive relief in federal court. Part IV discusses the advantages and disadvantages of bringing suit for either damages or injunctive relief, and explores the social implications associated with choosing this model as a ve-

15. Vallone, *supra* note 10; *Senator Onorato Co-Sponsors New Law to Meet New York's Power Need While Reducing Pollution*, QUEENS TIMES, Feb. 3, 2000, at 5; see also *Meeting Power Needs & Protecting People*, QUEENS LEDGER, Sept. 13, 2001, at 1.

16. See Smith, *supra* note 1, at A2.

17. See Press Release, Eugene W. Zeltmann, President & Chief Operating Officer, New York Power Authority, to the Bronxville Rotary Club (Dec. 20, 2002), available at <http://www.nypa.gov/interest/20311a.htm> (last visited Dec. 20, 2002)[hereinafter Zeltmann]; see also OFFICE OF ELECTRICITY AND ENVIRONMENT, *supra* note 13 (listing a compliance determination date for the Reliant Energy Astoria Repowering after the September 11th attacks).

18. See Maki Becker, *Power Plant Foes to Air Grievances*, DAILY NEWS, May 1, 2000 (on file with FORDHAM ENVTL. L. J.).

hicle to drive legislative change. This Note concludes by arguing that communities can use class action and public nuisance suits to prevent local power producers from building or expanding power plants in areas saturated with existing electric facilities.¹⁹

I. PETITIONS, RALLIES & LAWSUITS;
WHAT'S ALL THE FUSS ABOUT IN WESTERN QUEENS?

A. *The Neighborhood*

Queens County is a predominantly residential borough that comprises 37% of New York City's territory. It is almost as large as Manhattan, the Bronx and Staten Island combined.²⁰ "It is bounded to the north by the East River and Long Island Sound, to the east by Nassau County, to the south by the Atlantic Ocean . . . and to the west by the East River" and Brooklyn.²¹ A substantial number of immigrants settled in Queens since the Immigration Act of 1965, and by the 1970's, Queens was claimed as the city's most culturally diverse borough.²² By 1990, it boasted demographically of the largest foreign born population of any New York City borough.²³ According to the 2000 Census, of the 1,975,676 residents of Queens, 61.9% are minorities and 16.3% live below poverty level.²⁴

B. *The Problem Facing the Neighborhood*

On Thursday evening December 14th, . . . [a local public school] auditorium . . . vibrated from the energy and emotion of the large crowd of about 200 people who came to fight NYPA's proposal of two new generating plants . . . [in] Long Island City. . . Some [protesters] arrived wearing gas masks . . . [while surrounded] with

19. The hypothetical class action suit presented in Parts III and IV assumes that the power companies are incorporated in a state other than New York. Also, such suit would not be brought against NYPA.

20. ENCYCLOPEDIA OF NEW YORK CITY 966, 969 (Kenneth T. Jackson ed., 1995).

21. *Id.*

22. *Id.* at 969.

23. *Id.*

24. U.S. CENSUS BUREAU, Community Survey, available at <http://www.census.gov/acs/www/Products/Profiles/Chg/2001/SS01/NY.htm> (last visited Dec. 20, 2002).

posters made by children, asking such questions as, “Do you know what you are breathing in?”²⁵

In 1999 plans to site three new electric generating plants in western Queens were announced.²⁶ These proposals automatically sparked opposition from residents and elected officials,²⁷ claiming that power companies did not completely divulge their plans to build additional plants.²⁸ As a result, residents and local organizations were prevented from voicing concerns regarding the abnormally high asthma rate existing in western Queens and the other health risks associated with building new plants in the area.²⁹ Community groups, formed to voice the interests of neighborhood residents, quickly gained support from many local elected official.³⁰ Protests and rallies were organized to demonstrate that residents suffered from the pollution generated by the seven plants already in existence.³¹ Today, the proliferation of power plants is one of the pressing political and social issues in western Queens.

1. How the Problem Began

NYPA began its mission to “meet the need of additional generating capacity” by planning the immediate installation of several electric generators in New York City.³² These turbines were “intended to avert electricity supply problems and stabilize prices in the *short term*, until larger plants [were installed].”³³ Two of these turbines

25. William Milgrim, *Community Opposes L.I.C. Power Plant*, W. QUEENS GAZETTE, Dec. 20, 2000, at 1.

26. See *Silvercup Studios, Inc. v. Power Auth. of New York*, No. 2858/01 (Queens County Sup. Ct. Mar. 29, 2001), *modified and aff'd* by *Silvercup Studios, Inc. v. Power Auth. of New York*, 285 A.D.2d 598 (N.Y. App. Div. 2d Dept. 2001) (discussing two power plants proposed by NYPA).

27. Milgrim, *supra* note 25, at 1.

28. *Id.*

29. *Id.*

30. *Id.*

31. Telephone interview with Krista Brennen, Chief of Staff, Assemblymember Michael Gianaris (Apr. 19, 2002). Such facilities are operated by NYPA, Orion Energy, Keyspan Energy, Consolidated Edison Corporation and Astoria Energy, LLC.

32. NYPA LOCATIONS, *supra* note 4, at 8; see also *Silvercup Studios, Inc. v. Power Auth. of New York*, No. 2858/01 (Queens County Sup. Ct. Mar. 29, 2001).

33. *Id.* (emphasis added).

were to be located at a single site in western Queens.³⁴ In order to bypass the comprehensive site review and public hearings required by Article X, if a project generates an electrical output of 80 megawatts or more, NYPA proposed that the turbines' combined production not exceed 79.9 megawatts.³⁵

Former Queens Borough President, Claire Schulman, adamantly opposed the project stating that the generators "pose an immediate and palpable threat to the longstanding, ongoing planning and economic development policies . . . implement[ed] over the last quarter century. . . ."³⁶ According to Schulman, nearly 50% of the electricity consumed by New York City is generated in western Queens, and the siting of additional power plants will have "a chilling effect upon [the borough's] economic development and job creation."³⁷ Additionally, because western Queens has been reported to have the highest incidence of asthma in New York City, power officials should be forced to find more appropriate sites for power plants, away from residential areas.³⁸ In a press release, Schulman stated, "The New York Power Authority—in its haste to win this conflict—has made a very poor land use decision that will hurt [western Queens] for years to come."³⁹ Many residents were also of the opinion that the approach taken regarding the proposal was in bad faith.⁴⁰ At a public meeting, one resident pointed out that the public had learned of the proposal only after reading an article printed in the *New York Times*.⁴¹

Silvercup Studios, a major television studio, threatened to move to New Jersey after NYPA revealed plans to build the two new turbines adjacent to its complex.⁴² Silvercup, along with several local elected

34. See *id.*; see also *Uprose v. Power Auth.*, 285 A.D.2d 603, 605 (N.Y. App. Div. 2d Dept. 2001).

35. See *Silvercup*, No. 2858/01 at 4 (noting "the mere increase of 0.1mw would mandate compliance with Article X").

36. John Toscano, *Two Generators Will Do "Irreparable Harm,"* QUEENS GAZETTE, Mar. 7, 2001, at 8.

37. *Id.*

38. See *id.*

39. Press Release, Claire Schulman, Queens Borough President, Borough President Says New York Power Authority (NYPA) Proposal For Two Generator in Long Island City Will Hurt Queens for Years to Come; Releases Analysis of Proposed Power Plants in Northwest Queens, Showing Their Proximity to One Another and NYPA Generators (Feb. 27, 2001).

40. See Milgrim, *supra* note 25, at 1.

41. *Id.*

42. See Aldax, *supra* note 5.

officials and the Coalition Helping Organize a Kleaner Environment ("CHOKE"),⁴³ brought suit in Queens Supreme Court⁴⁴ to block construction of the generators. Petitioners asserted that NYPA engaged in regulatory shortcuts in order to avoid public oversight and circumvent the State Environmental Quality Review Act ("SEQRA"). Moreover, they pointed out that the community only became aware of the project after the process was nearly complete.⁴⁵ Petitioners also maintained that NYPA opted to purchase twin gas turbines with a capacity of 79.9 megawatts so as to avoid Article X review.⁴⁶

Justice Joseph Golia ruled that NYPA illegally bypassed environmental rules. He asserted that NYPA, "acting as a rational decision maker, must have conducted an investigation and reasonably exercised its discretion so as to make a reasoned elaboration as to the effect of a proposed action on a particular environmental concern."⁴⁷ However in this instance, "NYPA acted in the dual role of developer and the lead agency for SEQRA review, and conducted its review with an eye towards approv[al]. . . ."⁴⁸ The court ordered NYPA to prepare an environmental impact statement, and granted petitioners' motion for a permanent injunction, "to the extent that NYPA [was] directed to cease all construction . . . until full SEQRA review [had] been completed."⁴⁹ The court also vacated the Department of Environmental Conservation's air pollution control permit which allowed NYPA to carry out its plan.⁵⁰

43. *See generally id.*

44. *Silvercup Studios, Inc. v. Power Auth. of New York*, No. 2858/01 (Queens County Sup. Ct. Mar. 29, 2001).

45. *Id.* at 12.

46. *Id.* at 14.

47. *Id.* at 30 (internal citations omitted).

48. *Id.* at 33.

49. *Id.* at 40.

50. *Id.* In October 2000, NYPA requested that it "serve as the lead agency" to conduct a coordinated environmental review." *Id.* at 5. "The DEC acceded to this request." *Id.* In November 2000, NYPA filed applications for air permits for each site in New York City. The DEC reviewed the applications, published notice of a public hearing, and accepted public comments for a seven-day period thereafter. The DEC reviewed the comments and determined that none raised a significant or substantial issue requiring the DEC to deny the applications, nor mandate any substantial changes to the project. *Id.*

The decision was affirmed in part and reversed in part by the Appellate Division of the Supreme Court of New York.⁵¹ This prompted NYPA to negotiate an “agreement” with Silvercup.⁵² As part of that agreement, Silvercup pledged to support construction of the new NYPA plant at a different site.⁵³

2. The Aftermath of the Silvercup Law Suit

Although this “compromise” satisfied some elected officials – who were pleased that Queens would not lose the 2,000 jobs if Silvercup relocated⁵⁴ – the settlement contained no guarantee that the plants would be moved in a manner that would not further harm the already overburdened environment of western Queens.⁵⁵ The settlement was also deficient in that it did not require NYPA to modernize older plants, which do not operate in accordance with 1970 Clean Air Act standards. Therefore, the threat of additional pollution generated from new power plants remains imminent for the residents of western Queens.

3. What Damages Have Been Inflicted on the Neighborhood?

a. *The Air*

A report co-authored by the American Lung Association revealed that two of the city’s worst polluting power plants are situated in Astoria,⁵⁶ a residential neighborhood located in western Queens.

51. *Silvercup Studios, Inc. v. Power Auth. of New York*, 285 A.D.2d 598 (N.Y. App. Div. 2d Dept. 2001). The appellate court affirmed the annulment of NYPA’s negative declaration, stayed the injunction, but reversed the annulment of the DEC air permits, and remitted the matter to NYPA for preparation of a full environmental impact statement. *Id.* at 599.

52. Toscano, *supra* note 36, at 8.

53. *Id.*

54. See Aldax, *supra* note 5.

55. Toscano, *supra* note 36, at 8 (citing Assemblyman Michael Gianaris); see also Nick Abadjian, *Deal Struck on Closing of Vernon Blvd. Power Plant*, QUEENS TRIBUNE, Dec. 21–27, 2001, at 5.

56. See AM. LUNG ASS’N OF N.Y. STATE ET AL., *DIRTY POWER ON THE RISE* (1999), available at http://www.cmap.nypirg.org/webmaps/powerplants/dirty_power_on_the_rise98.htm (last visited Dec. 20, 2002); see also ENVTL. ADVOCATES ET AL., *NEW YORK’S DIRTY SECRET: THE POWER PLANT POLLUTION LOOPHOLE 1* (1998) [hereinafter *DIRTY SECRETS*]. These plants include the Charles Poletti station operated by NYPA and Astoria Energy Project. See *id.*

These plants benefit from a federal loophole, exempting facilities erected before the Clean Air Act ("CAA") was passed in 1970, and amended in 1977, from modern air emissions standards.⁵⁷ Although it was believed that these older facilities would be retired and replaced by cleaner technology,⁵⁸ over three decades later, they continue to emit increasing levels of sulfur dioxide ("SO₂"), nitrogen oxide ("NO_x") and carbon dioxide ("CO₂").⁵⁹

The inhalation of these pollutants, in addition to ground level ozone ("smog") and particular matter ("soot"), severely impacts human respiratory systems.⁶⁰ Neighborhoods with an abundance of such pollutants are likely to have high incidents of lung inflammation, coughing and asthma.⁶¹ "Children are of special concern because their small airways are still developing and they breathe more rapidly. . . . Children also spend more time outdoors and they are less likely to recognize symptoms. . . ." ⁶² These pollutants also have a wider detrimental effect on the entire population,⁶³ since chronic exposure may lead to poisoning, reproductive problems, birth defects, and in some instances, cancer.⁶⁴

A recent citywide study revealed that from 1997 to 1999, Queens was the only borough with an increasing child asthma hospitalization

57. *Id.*

58. *Id.*

59. *Id.* According to the report, smog and soot pose particular threats to public health. *Id.* "Ground level ozone (smog) is formed when NO_x and other air pollutants are 'cooked' in hot temperatures and bright sunlight. When inhaled, smog can cause acute respiratory problems, aggravate asthma, cause inflammation of lung tissue, lead to increased hospital admissions and emergency room visits." *Id.* Soot, also known as fine particles, constitutes a diverse class of pollutants. "They include small, solid particle of soil and soot, gaseous sulfur and nitrogen, liquid chemicals, and aerosols." *Id.* at 5.

60. *Id.*

61. *See id.* at 3. *See generally* AM. LUNG ASS'N OF N.Y. STATE ET AL., *supra* note 36. *But see* Katherine S. Lobach, M.D., *Childhood Asthma*, 15 CITY HEALTH INFO. 3 (1996) (stating that "air pollutants of all kinds have actually significantly *decreased* during the past decade, as asthma has been on the rise) (emphasis supplied). However, Dr. Lobach makes an interesting observation that there are some local situations in which air pollution does play a role in the rate of asthma. *Id.* Such "situations," of course, are an increase in air pollutants resulting from power plant emissions.

62. DIRTY SECRETS, *supra* note 56, at 5.

63. *See id.* at 3.

64. *Id.* at 5-6.

rate.⁶⁵ The same study also showed western Queens as having one of the highest, annual child asthma hospitalization rates when compared to other metropolitan neighborhoods.⁶⁶ Children living in western Queens are three times more likely to be hospitalized for asthma when compared to children from the rest of New York State.⁶⁷

Air pollutants are now regulated by the Environmental Protection Agency ("EPA"),⁶⁸ as required by the CAA. Today, the EPA is particularly concerned with the health risks associated with "ultra-fine soot particles, 2.5 microns or smaller,"⁶⁹ and has recently [proposed] [sic] a new standard to reduce exposure to the very smallest particles that penetrate to the deepest areas of the lungs and cause premature death."⁷⁰ Such particles are "both directly emitted by power plants and are formed in complex reactions involving SO₂ and NO_x."⁷¹ Scientists increasingly believe soot to be the most dangerous air pollutant . . . [and] have found that . . . inciden[ts] of strokes and heart failure [are] greater in areas with high levels of soot."⁷² Long-term exposure to particular matter may also reduce life span.⁷³ A recent

65. *Asthma Initiative Info*, CHILDHOOD ASTHMA INITIATIVE (Dep't of Health, New York, N.Y.), Spring 2001 (a Community HealthWorks Project), at Insert, available at <http://www.nyc.gov/html/doh/pdf/asthma/spring01.pdf> (last visited Dec. 20, 2002); see also N.Y. CITY CHILDHOOD ASTHMA INITIATIVE, N.Y. CITY DEP'T OF HEALTH, ASTHMA FACTS 6 (1999) (listing the 1997 asthma hospitalization rates by neighborhoods for children between the ages 0 and 14).

66. *Id.*; see also Howard Girsky, *Asthma: It Takes Your Breath Away*, QUEENS COURIER, Oct. 27, 1999, at 2; *New York Forum For Childhood Health 2000: Report Card for New York State, Regions and Counties*, N.Y. ACAD. OF MED. 2 (N.Y. Forum for Child Health Updates, New York, N.Y.) (July 2000) [hereinafter *Childhood Health 2000*] available at <http://www.nyam.org/publications/online/reportcard/> (last visited Dec. 20, 2002).

67. See *Childhood Health 2000*, *supra* note 66, at 2.

68. DIRTY SECRETS, *supra* note 56, at 5.

69. See generally Office of Air Quality Planning & Standards, Information of Particular Matter (1997), at <http://www.epa.gov/oar/oaqps/regusmog/infpart.html> (last visited Dec. 20, 2002).

70. DIRTY SECRETS, *supra* note 56, at 5.

71. These are also pollutants generated from smokestacks.

72. Sierra Club, Clean-Up Dirty Power: Co-sponsor the "Clean Power Act" at <http://www.sierraclub.org/cleanair/factsheets/cleanpoweract.asp> (last visited Dec. 20, 2002).

73. See U.S. Dep't of Health & Human Services, Community Health Status Report: Queens County New York 2, 4, 8 (2000), available at <http://www.communityhealth.hrsa.gov/Documents/V-NY/CHSI-V-36-081-NY->

Community Health Status Report indicates that Queens has an alarmingly high coronary heart disease rate and that its average life expectancy is below the national average.⁷⁴ Infant mortality rates are also considerably higher than counties similar in population size.⁷⁵ Noneless, the CAA has not been amended to regulate fine particle pollution.⁷⁶

b. *The Ecosystem*

Airborne mercury is another pollutant that harms both “humans’ and animals’ nervous systems and can damage the brain.”⁷⁷ Mercury is emitted into the air, and then accumulates in lakes and rivers through precipitation.⁷⁸ Fish and animals – like humans – that rely on fish as a food source are adversely affected.⁷⁹ One particularly great concern is the danger to pre-natal life.⁸⁰ “Mercury disrupts brain development in fetuses and permanently impairs mental abilities [of small children].”⁸¹ Another concern is infant mortality, and although studies linking the effects of mercury to infant mortality rates remain inconclusive, recent reports indicate that Queens has an alarming infant mortality rate.⁸²

Natural resources in western Queens are further affected by acid rain, which occurs when SO₂ and NO_x emissions are “transformed into strong acids . . . and return[ed] back to the earth in rain, fog, snow and dust particles.”⁸³ This “acidification” often causes aquatic

Queens.pdf (last visited Apr. 23, 2002) (printed copy on file with *FORDHAM ENVTL. L.J.*).

74. *Id.*

75. *See id.* at 6.

76. NRDC, *Danger in the Air: Thousands of Early Deaths Could be Averted with Cleaner Air Standards*, at <http://www.nrdc.org/air/pollution/nbreath.asp> (last visited Dec. 20, 2002); Office of Air Quality Planning & Standards, *Regulating Smog and Particle Air Pollution: An Integrated Approach* (1997), at <http://www.epa.gov/air/oaqps/regusmog/index.html> (last visited Dec. 20, 2002); *see also* Lisa Garcia, *Panel Discussion at the Fordham Environmental Law Journal Symposium* (Mar. 15, 2002), 13 *FORDHAM ENVTL. L.J.* 445, 546 (2002) [hereinafter *Panel Discussions*].

77. *DIRTY SECRETS*, *supra* note 56, at 6.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See* U.S. Dep’t of Health & Human Services, *supra* note 73, at 8.

83. *Id.* at 7.

systems to become inhabitable in the long run, therefore diminishing the food supply and causing disruptions to animal reproduction.⁸⁴ Acid rain also contaminates soils and marine waters, and essentially causes irreparable damage to our ecosystem.⁸⁵

4. Renewed Efforts in the Fight Against Power Plants

More than two years have passed since community activists, politicians and a movie studio began their legal battle against NYPA's decision to install ten turbines around the city. Since then, another lawsuit was decided on appeal in favor of community groups demanding that power companies complete an environmental impact statement. This statement would weigh the dangers of fine particle pollution before new projects are approved.⁸⁶ Several briefs have also been filed with the Siting Board urging it to deny applications proposing the construction or expansion of power facilities in western Queens.⁸⁷ Furthermore, politicians on the city and state level have introduced legislation that would help mitigate the negative impact of power plants in western Queens. A resolution was introduced to the New York City Council in February 2002, calling for the state to provide reduced energy rates for people who live near power plants to offset the costs associated with living near such facilities (i.e. higher medical bills and lower property values).⁸⁸ A similar proposal will also be introduced in the state legislature.⁸⁹

The motivations driving the legal, legislative and community efforts to thwart the proliferation of power plants in western Queens are indistinguishable. It is a proven fact that asthma rates in western Queens are abnormally high, and that increased emissions of air pollutants will exacerbate this problem. It is also believed that emissions from smokestacks have converted Long Island City and As-

84. *See id.*

85. *See id.*

86. *See Uprose v. Power Auth.*, 285 A.D.2d 603 (N.Y. App. Div. 2d Dept. 2001).

87. *See* Joint Brief on Exceptions of Coalition Helping Organize a Kleaner Environment et al. at 27, *In re* Application of New York Power Authority (No. 99-F-1627); Brief on Exceptions of the City of New York, *In re* Application of New York Power Authority (No. 99-F-1627).

88. *Panel Discussions supra* note 76, at 536.

89. *Id.*

toria into cancer hot spots.⁹⁰ This is why the community is concerned with reducing the emissions associated with power plants. The revision of the Article X process promises to be the first step towards achieving this goal.⁹¹

II. AN OUTLINE OF THE ARTICLE X PROCESS

Article X of the New York State Public Service Law sets forth the exclusive procedures for applicants seeking certification to design, construct and operate a major electricity-generating facility⁹² in New York State.⁹³ The laws and regulations adopted under Article X authorize the Siting Board to review applications, and if the application is approved, request that the Department of Environmental Conservation ("DEC") issue the requisite permits.⁹⁴ Article X was enacted in 1992, and amended in November 1999, to clarify the air and water permit process.⁹⁵ Revising Article X procedure was among the top priorities on the 2002 New York State legislative agenda.

A. *Why Article X Was Enacted*

The companies that make up the electric power industry in New York State provide electric service to over 8 million residential, commercial, governmental and industrial customers throughout the state.⁹⁶ The Article X process was designed to create "one-stop shopping"⁹⁷ for entities seeking approval of new power plants.⁹⁸ In

90. Victor Ross, *Pataki Orders 50 Percent Pollution Cuts at Power Plants*, QUEENS COURIER, Oct. 21-27, 1999, at 1 (referring to a report issued by the EPA).

91. *See generally* Panel Discussions, *supra* note 76, at 543-547.

92. Any generating facility with a "generating capacity of eighty thousand kilowatts or more, including interconnection electric transmission lines . . ." is considered a major generating facility. N.Y. PUB. SERV. LAW § 160.2 (McKinney 2002).

93. OFFICE OF ELECTRICITY AND ENVIRONMENT, *supra* note 13, at 1.

94. *Id.*

95. *Id.*

96. The Committee on Energy, Restructuring New York's Electric Power Industry: A Progress Report, 56 The Record 56 (2001).

97. "Essentially, Article X became a procedure creating a unified process whereby an applicant could obtain the necessary permits, undertake environmental impact analyses, and obtain approval in one proceeding." Stephen P. Sherwin, Comment, *Deregulation of Electricity in New York: A Continuing Odyssey 1996-2001*, 12 ALB. L.J. SCI. & TECH. 263, 299 (2001).

essence, this process was created to facilitate the review process in New York State for any application to construct and operate an electric generating facility with a capacity of 80 megawatts or more.⁹⁹ The Siting Board was created to administer the process, and acts as the ultimate decision-making body in the application process.¹⁰⁰ However, legislators, environmentalists and community activists contend that the Article X process is inherently unfair primarily because it lacks a “plan identifying [locations] that would be most appropriate for siting various types of power plants.”¹⁰¹ Furthermore, the process offers residents little opportunity to oppose a project sited in their communities.¹⁰²

B. *The Structure of Article X*

1. The Siting Board

Perhaps what draws the most criticism from legislators and community residents is the make-up of the seven-member Siting Board. Section 160 of the Public Service Law requires that the Siting Board be comprised of five permanent members, or their designees, and two ad hoc members.¹⁰³ Governor-appointed commissioners of the New York State Departments of Environmental Conservation, Health, Economic Development and Public Service are granted permanent status.¹⁰⁴ The Governor also selects the two remaining “resident” members on a case-by-case basis.¹⁰⁵ Therefore, the decision to approve power plant applications is inherently placed within the Governor’s discretion.

98. See New Article X Siting Bill to Governor for Signature, at <http://www.astoriaenergy.com/news/governor.html> (last visited Dec. 20, 2002).

99. See Sherwin, *supra* note 98, at 299.

100. N.Y. PUB. SERV. LAW § 160.4 (McKinney 2002).

101. See Harriet Cornell, Statement on the Draft NYS Energy Plan (Mar. 14, 2002), available at <http://www.co.rockland.ny.us/legislature/Lnews/03-14-02Crnl.htm> (last visited May 2, 2002)(on file with the FORDHAM ENVTL. L. J.).

102. See Sherwin, *supra* note 98, at 299.

103. N.Y. PUB. SERV. LAW § 160.4 (McKinney 2002).

104. See *id.*

105. *Id.*

2. Public Involvement

To facilitate the application process and enable public participation, the Article X process requires applicants to carry out a meaningful public involvement program.¹⁰⁶ An applicant is expected to hold public meetings, offer presentations to individual groups and organizations, and establish a community presence.¹⁰⁷ “Establishing a local office, toll-free telephone number, web-site, or community advisory group are among the actions an applicant may take.”¹⁰⁸ However, some community groups believe that public comments and recommendations regarding the siting of new power generators fall on deaf ears. Public officials and activists consider the public involvement “requirement” a mere formality, and argue that community residents are powerless against the Siting Board and power producers.¹⁰⁹ Additionally, power companies often minimally adhere to this “requirement.” For example, in *Silvercup*, 285 A.D.2d 598 (N.Y. App. Div. 2d Dept. 2001), NYPA merely published two notices of public hearings and restricted the public comment period to eight days.¹¹⁰

3. The Application Process

The Article X application process consists of two phases. In the pre-application phase, each prospective applicant should consult informally with state agencies, municipalities, environmental organizations and local residents with likely interest in the facility, although there is no formal mandate to do so.¹¹¹ The formal consultation process begins after the filing of a “Preliminary Scoping Statement” that informs interested parties of the proposed project, and provides

106. OFFICE OF ELECTRICITY AND ENVIRONMENT, *supra* note 13, at 3.

107. *Id.*

108. *Id.*

109. See Panel Discussion, *supra* note 76, at 535 (discussing the limitless power provided to the Siting Board and power companies). Councilmember Peter Valone stated that “. . . other than the right to be heard and disregarded by [the Siting] Board, the community has no recourse. The residents who are directly effected are powerless.” *Id.*

110. *Silvercup Studios, Inc. v. Power Auth. of New York*, No. 2858/01 at 5 (Queens County Sup. Ct. Mar. 29, 2001).

111. OFFICE OF ELECTRICITY AND ENVIRONMENT, *supra* note 13, at 2.

preliminary information on the project and its environmental setting.¹¹²

The next phase begins after public notice is given, and upon the company filing its application with the Siting Board. At this point the Governor appoints the two *ad hoc* members to the Siting Board.¹¹³ Article X specifies that certain state and other public agencies are parties in the case.¹¹⁴ Residents and local municipalities may also request party status¹¹⁵ within forty-five days of the date on which an application's filing is noticed to the public.¹¹⁶ The Chairman of the Siting Board¹¹⁷ must determine whether an application is in compliance with Article X within sixty days after its filing.¹¹⁸ A presiding examiner from the Department of Public Service and an associate examiner from the DEC are subsequently appointed to conduct public hearings. Once these hearing are concluded, the presiding examiner issues a written recommended decision.¹¹⁹ During this certification process, the DEC concurrently reviews applications (submitted as part of an Article X application) for permits involving the discharge of water pollutants and emissions of air pollutants.¹²⁰

4. The Siting Board Decision

After reviewing the recommended decision issued by the presiding examiner, in addition to briefs prepared by the parties in the case, the Siting Board issues its final decision on certification.¹²¹ The Siting Board is generally required to render a decision within one year of the date that the application is determined to be in compliance with Article X.¹²²

112. N.Y. PUB. SERV. LAW § 163 (McKinney 2002).

113. *See* N.Y. PUB. SERV. LAW § 160.4 (McKinney 2002).

114. *Id.* § 166.

115. Such requests must be made in writing and addressed to the Secretary of the Siting Board. *Id.* § 166.1(k).

116. *Id.*

117. Section 160 of the Public Service Law mandates that the Commissioner of the Department of Public Service preside as Chairman of the Siting Board. *Id.* § 160.4.

118. *Id.* § 165.1.

119. *Id.* § 165.2.

120. *Id.* § 172.1.

121. N.Y. PUB. SERV. LAW § 169 (McKinney 2002).

122. *Id.*

C. *Should Article X Be Repealed or Amended?*

Debates in Albany are now focused on policy alternatives relative to Article X, which will expire on January 1, 2003.¹²³ Some legislators support a simple repeal of Article X and mandate that new generating plants be licensed under SEQRA.¹²⁴ Others advocate a replacement of the current Article X process with a new siting law that places rigorous time limits on the review of applications. The amendment of Article X to provide a higher minimum threshold, thereby exempting more projects from the Article X process, is also being considered.¹²⁵ However, such proposals only consider making the siting process a more expeditious one,¹²⁶ and do not address the problems discussed in Part I of this Note. Specifically, the "Article X siting process does not . . . address the cumulative impact of several proposals in one community or a proposal in combination with existing pollutant sources in a neighborhood."¹²⁷ It also fails to obligate exclusive compliance with Clean Air standards.

III. IS A CLASS ACTION OR PUBLIC NUISANCE SUIT THE ANSWER?

In New York State alone, over 3,000 people's lives are cut short each year due to power plant pollution.¹²⁸ Of New York State's sixty-two counties, nearly 25% of those whose deaths resulted from power plant pollution were residents of only two counties: Brooklyn and Queens.¹²⁹ Asthma rates in these counties are also listed among the highest in the nation.¹³⁰ Common sense dictates that the Siting Board considers such figures when approving plans to increase the number of power plants in these communities. Fairness requires that damages to the population residing in the vicinity of such facilities

123. *See id.* § 160.

124. *See* The Committee on Energy, *supra* note 97, at 76.

125. *See id.*

126. *See* Sherwin, *supra* note 98, at 302 (citations omitted).

127. Memorandum from the Environmental Advocates (May 2, 2002) (on file with FORDHAM ENVTL. L. J.); *see also* *Power Plant Conference Packs the House*, CURRENTS (Hudson River Env'tl. Soc'y, N.Y.), July 2000, at 2.

128. DIRTY SECRETS, *supra* note 56, at 5; *see also* discussion accompanying note 71; Memorandum from Patricia M. Reilly, Director of State Affairs to Speaker Peter Vallone, and to Karen Persichillei Keogh, Chief of Staff to Speaker Peter Vallone (Oct. 17, 2000) (on file with FORDHAM ENVTL. L. J.).

131. DIRTY SECRETS, *supra* note 56, at 5.

132. *Id.*

also be contemplated. The Article X process however, does not require that any such consideration be given. Part III examines whether a class action or public nuisance suit brought by a community can prevent local power producers from building or expanding additional electric generating facilities.

A. *Bringing a Class Action Suit*

The class action is a device used to adjudicate the rights of a large number of similarly situated individuals in one lawsuit.¹³¹ State and federal courts frequently use the class action device when institutional reform is sought.¹³² Class actions can seek injunctive relief as well as money damages. In the past, this device was effectively used in civil rights cases seeking injunctive remedies to require desegregation in schools or reform in prisons. When considering the problem facing western Queens and similar communities, a class action may be a viable alternative to individual lawsuits seeking to halt the proliferation of power plants. A power plant that exponentially pollutes the natural resources of a community will unavoidably impinge on the rights of a large number of residents who live within its vicinity.

B. *Meeting Federal Jurisdiction Requirements*

“Whether or not a suit has merits, class certification threatens a defendant with the prospect of a bet-the-company trial, where intangibles often weigh in plaintiff’s favors and verdicts are often huge.”¹³³ Recognizing this reality, federal courts are becoming more reluctant to grant class certification.¹³⁴ Residents of western Queens and other communities aggrieved by power producers have a difficult, but not impossible battle to fight if they seek class certification in a mass tort or toxic tort action against an electric company.¹³⁵ Rule 23(b) of the

131. Elizabeth R. Kaczynski, Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397, 398 (1985).

132. Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT’L L. 165, 172 (2001).

133. Victor E. Schwartz, *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 417 HARV. J. ON LEGIS. 483, 496 (2000).

134. *Id.*

135. See, e.g., *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55 (Mass. Dist. Ct. 1999).

Federal Rules of Civil Procedure is the focus of most judicial inquiry, and provides the basis most often asserted for denying certification. However prior to determining whether a class can be certified, a court must determine that the action brought by residents of western Queens involves federal jurisdiction.¹³⁶

Federal diversity jurisdiction requires that all named plaintiffs have diverse citizenship from all defendants,¹³⁷ and that each plaintiff asserts an amount in controversy over \$75,000.¹³⁸ The Court in *Zhan v. International Paper Co.*¹³⁹ held that plaintiffs could not aggregate their claims to meet the amount in controversy.¹⁴⁰ However, raising claims of equitable relief that can not be expressed in monetary amounts is one method of avoiding the precedent established by *Zhan*.¹⁴¹ Residents of western Queens meet such requirements if their claim includes an order for injunctive relief.

Federal question jurisdiction must also be satisfied. A suit against a power company could raise a Clean Air Act¹⁴² or Toxic Substances Control Act¹⁴³ violation. Under the CAA, the EPA "set[s] national ambient air quality standards for the chief air pollutants." The CAA imposes upon the states the primary responsibility for attaining and maintaining National Ambient Air Quality Standards. Such standards are promulgated by the EPA pursuant to section 109(b) of the CAA for the six criteria pollutants discussed *supra* Part I.B, and are intended to provide definitive thresholds for air pollution.¹⁴⁴ Subject to EPA approval, each state must adopt a plan that sets binding emission limitations on particular pollution sources.¹⁴⁵ An action against a power company could essentially raise numerous CAA issues. Such issues include whether permits issued by the DEC have been granted upon the condition that applicants implemented EPA-

136. 28 U.S.C. §§ 1331, 1332 (1994).

137. 28 U.S.C. § 1332; *see generally In re Northern Dist. Cal. "Dalkon Shield" IUD Prod. Liab. Litig.*, 256 F. Supp. 887 (N.D. Cal. 1981), *vacated*, *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

138. 28 U.S.C. § 1332(a).

139. 414 U.S. 291 (1973).

140. *Zahn*, 414 U.S. at 302.

141. *Biechele v. Norfolk & W. Ry.*, 309 F. Supp. 354, 355 (N.D. Ohio 1969) (concerning damages and equitable relief for abatement of air pollution).

142. 42 U.S.C.A. §§ 7401 *et seq.* (2003).

143. 15 U.S.C.A. §§ 2601 *et seq.* (2003).

144. 42 U.S.C.A. § 7409(b) (2003).

145. *Application of Concerned Homeowners of Rosebank v. N.Y. Power Authority*, No. 40096U, slip op. at 4 (N.Y. Sup. Ct. Richmond County 2001).

approved computer models to simulate and quantify the consequences of the release of air pollutants.¹⁴⁶

The overall purpose of the Toxic Substance Control Act “is to set in place comprehensive, national scheme[s] to protect humans and [the] environment from dangers of toxic substances.”¹⁴⁷ Section 2605(a)(6) provides that the EPA can prohibit or regulate any manner or method of disposal of toxic substances to the extent necessary to protect against an unreasonable risk of injury to public health or the environment.¹⁴⁸ The term “chemical substances” includes “any organic or inorganic substance of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction. . . .”¹⁴⁹ Because toxic pollution torts are almost exclusively based on state common law theories, satisfying federal question jurisdiction is difficult.¹⁵⁰ However, assuming that all other jurisdictional requirements are satisfied, residents of western Queens could bring an action seeking an injunction against power plants that emit (or dispose of) a level of ground-level ozone or particulate matter creating an unreasonable risk to public health or the environment. Even if state law creates the cause of action, a court can conclude that plaintiffs’ demands “necessarily [depend] on resolution of a substantial question of federal law.”¹⁵¹

1. Getting a Class Certified: The Requirements of Rule 23

Class certification is conditioned on plaintiffs’ ability to meet the four threshold requirements of Rule 23(a)¹⁵² of the Federal Rules of Civil Procedure. Rule 23(a)(1), the numerosity prerequisite, asserts that the class must be “so numerous that joinder of all members is

146. *Id.* at 38.

147. 15 U.S.C.A. § 2601 (citations omitted).

148. *Id.* § 2605(a)(6) (2002).

149. *Id.* § 2602(2)(A).

150. James W. Elrod, Comment, *The Use of Federal Class Actions in Mass Toxic Pollution Torts*, 56 TENN. L. REV. 243, 250 at n.20 (1988); *see also* Boone v. Dubose, 718 F. Supp. 479 (M.D. La. 1988).

151. *Boone*, 718 F. Supp at 482.

152. Rule 23(a) states that:

One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

impracticable.”¹⁵³ Pursuant to Rules 19 and 20, joinder is a technique enabling plaintiffs to be joined together in a lawsuit in which a common interest exists.¹⁵⁴ Joinder becomes impossible however, when the number of plaintiffs runs into the hundreds or thousands because each party has a right to participate in and direct the litigation strategy.¹⁵⁵ Therefore, if five hundred residents of western Queens were joined in a suit against NYPA or Keyspan Energy, each one could individually proceed with the trial in any way they saw fit. The end result could be a larger trial that has five hundred different, smaller trials within it. Unlike the joinder technique, a class action has a limited number of parties that may determine the litigation procedure—those being the named plaintiffs.¹⁵⁶ While the named plaintiffs direct the litigation, other parties in the class action may protect their interest by “opting out”¹⁵⁷ of the class.

Rule 23(a)(2) requires that the actions of the parties must concern “questions of law or fact common to the class.”¹⁵⁸ This demand for commonality is not a “high threshold.”¹⁵⁹ The test or standard for meeting the commonality requirement is qualitative rather than quantitative. That is, there need only be a single issue common to all members of the class.¹⁶⁰ By interpreting the commonality requirement broadly, courts demonstrate a willingness to sacrifice strict adherence to procedure in order to gain efficiency through the class action device. Therefore, it is feasible to assume that pollution generated by a power company has damaged residents of western Queens in the same manner. If a mass toxic tort action was brought, “the requirement of common questions [could be] satisfied by a showing of commonality either as to liability . . . or as to the cause or impact of the tortious action.”¹⁶¹ In this scenario, the operation of a new power plant is sufficient to give rise to litigation, the common issue being that all plaintiffs have been exposed to pollution generated by the facility.

153. *Id.* at 23(A)(1).

154. *See id.* at 19, 20.

155. *See id.*

156. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) (acknowledging that member of a class could be bound to the outcome of the class action although they did not participate in the litigation).

157. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

158. FED. R. CIV. P. 23(a)(2).

159. *Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986).

160. *Reilly v. Gould, Inc.*, 965 F. Supp. 588 (M.D. Pa. 1997).

161. *Id.* at 597.

The typicality prerequisite centers on whether the claims asserted by the named plaintiff are representative of the class.¹⁶² Rather than concentrating on questions of law and fact, this provision focuses on the strength of the actual claims asserted by the plaintiffs. To ensure that each class member's interest is protected, Rule 23(a)(3) focuses on whether the claims of the named plaintiffs are interrelated with those of the entire class.¹⁶³ Thus, "the typicality requirement is intended to preclude certification of those cases where the legal theories [proposed by the named plaintiffs] conflict with those of [other class members]. . . ."¹⁶⁴ If an action alleged personal injuries, then class certification could be granted if plaintiffs could show a direct link between asthma, coronary disease or cancer and the emissions of a particular power plant. The typicality requirement could also be satisfied if residents could show that they developed cancer as a result of a power plant's contamination of their communities' air, water or ecosystem.

The last prerequisite ensures adequacy of representation. Rule 23(a)(4) determines whether the named plaintiffs and their counsel are sufficiently equipped and competent to handle the interests of all members of the class.¹⁶⁵ The number of class members, severity of the damages, and resources available to the plaintiffs will all be considered.

In addition to the four threshold prerequisites, plaintiffs must also satisfy one of the three elements of Rule 23(b).¹⁶⁶ Such elements

162. FED. R. CIV. P. 23(a)(3).

163. *See id.*

164. *Reilly*, 965 F. Supp. at 598.

165. FED. R. CIV. P. 23(a)(4).

166. Federal Rule of Civil Procedure Rule 23(b) states that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

- (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual member of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
- (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making ap-

can be fulfilled if a risk of receiving different judgments in individual lawsuits exists in the absence of a class action suit, or if a defendant has a "limited fund"¹⁶⁷ impeding the possibility of dispersing money to all claimants if individual actions were to be pursued. To satisfy Rule 23(b), plaintiffs can also argue that the defendant acted in a manner that was "generally applicable to the class" and that all parties would request similar equitable relief against the defendant.¹⁶⁸ This most likely would apply to residents of a community seeking injunctive relief against a power company. Finally, Rule 23(b) will be established if a court determines that plaintiffs' claims have common question of law or fact that "predominate" over separate individual claims, and that a class action is "superior" to all other methods of adjudication.¹⁶⁹ In its analysis, a court must consider the interest of the individual controlling the claims, the extent that other litigation has begun, the benefits of consolidating the matter and the difficulties that may ensue in managing the class.¹⁷⁰

If residents of western Queens are granted class certification, it is likely that the class will be divided into different subclasses. Although geographical vicinity to a power plant could bind the entire class, the type of damage alleged to have been suffered will define each subclass.¹⁷¹ The classes in *Reilly v. Gould*¹⁷² were classified as a property damage class, medical monitoring class and personal in-

appropriate final injunctive relief of corresponding declaratory relief with respect to the class as a whole, or

- (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

167. FED. R. CIV. P. 19; FED. R. CIV. P. 23(b)(1)(B). However, most plaintiffs are unable to establish that a limited fund exists. *In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3rd Cir. 1986).

168. FED. R. CIV. P. 19; FED. R. CIV. P. 23(b)(1)(B).

169. FED. R. CIV. P. 23(b)(1)(B).

170. FED. R. CIV. P. 19; FED. R. CIV. P. 22(b)(3).

171. *Reilly v. Gould, Inc.*, 965 F. Supp. 585, 593 (M.D. Pa. 1997).

172. *Id.*

jury class. Presumably, a class certified in our hypothetical will also be divided into residents who have sustained property damage or personal injuries, and a medical monitoring class for children and adults who have been exposed to a facility's pollution over a specific duration. Such class members could presumably be monitored for asthma, coronary disease and cancer.

2. Future Claimants and Rule 23(b)(2)

A future member is an individual who acquires class membership status after the judgment in the class action is rendered. Although the act that gave rise to the present members' cause of action has occurred in the past, defendant's conduct has not *yet* affected the future member. We can apply this principle to residents exposed to power plant emissions who have not yet developed adverse symptoms. Since the Fourth Circuit in *Cypress v. Newport News General and Nonsectarian Hospital Association*¹⁷³ acknowledged the existence of future victims, "many litigants cognizant of the prospective nature of injunctive relief, have argued that future members should be included in actions brought under Rule 23(b)(2)."¹⁷⁴ However, *res judicata* could bar future claimants from recovering damages in a toxic tort class action.¹⁷⁵ Nevertheless, probability indicates that half of a community's population can be affected by the toxic soot and smog pollution generated by a power facility located within its vicinity.¹⁷⁶ Hence, "the insidious nature of toxin-related latent diseases creates several problematic legal issues for future claimants."¹⁷⁷ If a class action were brought and damages or other injunctive relief were granted, a resident whose illness was later discovered could be barred from recovering damages. The issuance of reasonable notice to every future claimant of a toxic tort class action is also impossible. To fully satisfy Rule 23(c), plaintiffs must notice every resident who may not yet manifest physical symptoms, but have merely been exposed to the pollution. Essentially, this would require that plaintiffs notify not only every resident of western Queens, but also addi-

173. *Cypress v. Newport News Gen. & Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967) (*en banc*).

174. Kaczynski, *supra* note 131, at 402.

175. See Daniel M. Wedelle, Note, *Settlement Class Actions and "Mere-Exposure" Future Claimants: Problems in Mass Toxic Tort Liability*, 47 *DRAKE L. REV.* 113, 115 (1998).

176. *Id.* at 115.

177. *Id.*

tional populations that are likely to be harmed by an individual power plant. Given the proximity of Queens to Nassau County, Brooklyn, the Bronx, Manhattan and New Jersey, plaintiffs may also be required to provide notice to populations residing in those areas.

C. *Bringing a Public Nuisance Suit*

"Nuisance is the common law backbone of modern environmental law."¹⁷⁸ Given its unlimited application, public nuisance law has been used to address air, water and soil pollution.¹⁷⁹ Damages and injunctive relief are available to plaintiffs bringing a public nuisance action. Whether or not plaintiffs have standing depends to some extent on the redress they are seeking. To assert a public nuisance claim against a power company,¹⁸⁰ plaintiffs must show that a power company substantially and unreasonably interfered with a right common to the general public.¹⁸¹ Plaintiffs could allege that a power company's contamination of the air, water and ecosystem surrounding western Queens constitutes an interference with the right to quality of life, and that such actions also caused special injury.¹⁸² Such injuries could include an inability to sell ones property because of its proximity to an electric generating facility.¹⁸³

The Restatement (Second) of Torts offers guidance in determining whether interference is unreasonable. It considers:

- (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
- (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
- (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.¹⁸⁴

178. Siobhan O'Keeffe, *Using Public Nuisance Law to Protect Wildlife*, 6 *BUFF. ENVTL. L.J.* 85, 93 (1998) (citations omitted).

179. *Id.*

180. *See Lewis v. General Elec. Co.*, 37 F. Supp. 2d 55 (D. Mass. 1999).

181. *Planned Parenthood League of Mass., Inc. v. Bell*, 677 N.E.2d 204, 208 n.4 (Mass. 1997) (defining public nuisance).

182. *Lewis*, 37 F. Supp. 2d at 61.

183. *See id.*

186. *RESTATEMENT (SECOND) OF TORTS* § 821B (1979).

Polluting the air and other natural resources through power plant emissions would likely fall under subsection (c). Such conduct may constitute an unreasonable interference even if it complies with CAA standards.¹⁸⁵ This is predicated on the notion that "every business has a duty to conduct its operations in a reasonable manner such that it does not materially interfere with the general well-being, health, or property rights"¹⁸⁶ of the general public.

IV. WILL THE NEEDS OF A COMMUNITY BE SERVED USING A CLASS ACTION OR PUBLIC NUISANCE SUIT AGAINST POWER COMPANIES?

The criticism surrounding class action litigation enhances the discussion in this section. One criticism is that "class actions unfairly stack the deck against defendants."¹⁸⁷ For nearly three years, the community has been engaged in a losing battle against power companies who consciously disregard increasing asthma rates and deteriorating health conditions in order to maximize electric-generating capacity in an area dubbed "power central."¹⁸⁸ Perhaps the decision to increase capacity or expand facilities in an area already equipped with an energy distribution system is one of pure economics. Specifically, power companies prefer to spare themselves the cost of building new transmission lines or turbines at an appropriate site, than to force a community to bear more than its fair share of the power burden.¹⁸⁹ However, as each pollution-filled day passes, residents of western Queens are deprived of clean air, calling for drastic measures to be taken.

A class action suit encompassing every resident damaged by pollution generated by a single power plant can attract a staggering number of plaintiffs.¹⁹⁰ Astoria, Long Island City and Jackson Heights, which jointly make up only a portion of the western Queens community, is home to over 150,000 residents.¹⁹¹ A successful class action suit could essentially give a "voiceless" community a vehicle

185. O'Keeffe, *supra* note 178, at 99.

186. *Id.* at 99-100.

187. Peter A. Drucker, *Class Certification and mass Torts: Are "Immature" Tort Claims Appropriate for Class Treatment*, 29 SETON HALL L. REV. 213, 219 (1998).

188. *See Panel Discussions, supra* note 76, at 544.

189. *Id.*

190. Drucker, *supra* note 187, at 312.

191. Panel Discussion, *supra* note 76.

to drive social change. Presumably, the threat of 150,000 residents simultaneously suing one power company and winning would force other companies to heed the writing on the wall—that a community that produces 50% of the city's power burden can not be forced to bear any more. However, even if class certification fails to attract such a large number of plaintiffs, certification could lead to a substantial monetary award or settlement. "Research on jury behavior has demonstrated that aggregating claims increases both the likelihood that a defendant will be found liable and the amount that a jury will award."¹⁹² The presence of a large number of severely injured plaintiffs strengthens the overall merits of the action, and as a result increases the jury award.¹⁹³

Perhaps the greatest disadvantage of a class action is the possibility that a court does not grant certification to the class. However, a class action brought for damages could drive defendants to settle.¹⁹⁴ "Mass tort [and toxic tort] class actions are rarely tried, probably because defendants usually cannot win them. . . . Even where the probability of a judgment [is] low, defendants [do not] risk trial because the sheer size of a potential judgement would likely destroy the company."¹⁹⁵ Settlement can be both advantageous and unsuitable. Although class members, as "plaintiffs," would be compensated for their damages, they would fail as "residents" to set a legal precedent. Without a history of trials, courts cannot determine whether common factual issues predominate in class actions against power companies. Therefore, settlement may defeat the very purpose of the class action—to stop the power hungry from overburdening a community with power plant pollution.

When compared to individual lawsuits or a public nuisance suit, a class action would potentially reduce duplicative discovery, motion practice and pretrial procedures and would enable a single judge to familiarize himself with the legal and factual issues.¹⁹⁶ A class action would also yield a consistent outcome for the injured and for the defendant, and enhance the possibility of a single action resolving the entire problem.¹⁹⁷ This would eliminate the need for repetitive litigation of similar issues. Perhaps most importantly, a class action

192. Drucker, *supra* note 187, at 312.

193. *See id.*

194. *See id.*

195. *See id.* at 225.

196. Weinstein, *supra* note 132, at 172.

197. *Id.*

permits recoveries for small claims by those who may not even know they were injured by a power plant and may not have the financial resources to sue individually.¹⁹⁸ When considering the advantages in our hypothetical context, the class action is superior to those devices employed by the western Queens community, as it would save enormous resources in a manner that will "not unduly hinder the rights or interests of the parties involved."¹⁹⁹

Nevertheless, bringing a public nuisance suit has distinct advantages. The hurdle of class certification will be eliminated, and a community will have sufficient precedent to point to when claiming damages or seeking injunctive relief against a power company.²⁰⁰ However, bringing a potentially successful public nuisance suit over a class action may or may not bring about the same legislative change. Considering that Article X is up for revision, and assuming a class can be certified, residents of western Queens would set a legal precedent that is likely to be considered.

For decades, residents of western Queens have been forced to inhale dangerous emissions that have or may adversely affect their health. When asked why additional facilities are sited to an already overburdened community that absorbs over 50% of the city's power plant pollution, power officials merely shrug their shoulders and allude to a supposed power crisis that they fear *may* occur in the future.²⁰¹ The bottom line is that companies in business to produce electricity at the cheapest rate are not concerned with a community's asthma or cancer rate. Moreover, if not mandated to do so, companies will not eliminate polluting 19th century facilities that enjoy significant economic gains.

CONCLUSION

"Air pollution is a euphemism for airborne poison, presumably used to soften the reality."²⁰² When power companies concentrate pollution in one area causing irreparable harm to a community, legis-

198. *See id.*

199. Elrod, *supra* note 150, at 288.

200. *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55 (D. Mass. 1999); *Nalley v. Gen. Elec. Co.*, 630 N.Y.S.2d 452 (N.Y. Sup. Ct. 1995).

201. Zeltmann, *supra* note 17.

202. David Slawson, *The Right to Protection From Air Pollution*, 59 S. CAL. REV 672, 672 (1986).

lative and judicial action must correct the problem. Within communities the environment and the public's health are inescapably intertwined.²⁰³ Yet a community and its residents are often those least involved in making environmental decisions that affect their immediate well being.²⁰⁴ This is the reality facing the residents of western Queens. However, successful implementation of a class action or public nuisance suit can drive the state and federal legislature to initiate the development of a responsible energy policy. Such a policy may encompass amending Article X to the effect that it requires applicants to study the cumulative impact of a proposed facility in relation to the other pollution generating facilities in the area. On a broader scale, perhaps this policy could even close the federal loophole that enables power plants to spew toxins at levels not regulated by the CAA.

Although most elected officials support their community's effort to halt the stampede of power plants, one can argue that they are *obligated* to do so. After all, it is that same constituency that elects them every term. Implementing change on a national level involves more than petitions, rallies and lawsuits in county courts. It encompasses fostering an awareness and concern for the issue on a national scale.

203. Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENVTL. L. & LITIG. 37, 39 (1998).

204. *Id.*