Fordham Environmental Law Review

Volume 13, *Number* 3 2001 *Article* 6

Fordham Environmental Law Review Volume 13 Issue 3- Panel III- Electric Generators in New York City- Balancing the Energy

Fordham Environmental*

*

Copyright ©2001 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). http://ir.lawnet.fordham.edu/elr

PANEL III:

ELECTRIC GENERATORS IN NEW YORK CITY: BALANCING THE ENERGY AND ENVIRONMENTAL NEEDS OF THE COMMUNITY

Moderator

Aravella Simotas
Managing Editor, Fordham Environmental Law Journal

Panelists

Hon. Peter F. Vallone, Jr.
New York City Commissioner

Liam Baker
Asset Manager, Orion Power

Stephen L. Kass, Esq.
Carter, Ledyard & Milburn

Lisa Garcia, Esq.
Staff Attorney, New York Public Interest Research Group

Michael N. Gianaris
New York State Assembly Member, 36th Assembly Districtr

MS. SIMOTAS: Good afternoon. My name is Aravella Simotas. I am currently the Managing Editor of the *Fordham Environmental Law Journal.*

I am going to keep my remarks very short.

First, I would like to thank Eric Montroy and Ian Stratford for doing a wonderful job today. They really put forth a great effort on a very important topic that I am actually writing about, and that is why they have asked me to moderate the third panel.

It is a great honor for me to introduce all the panelists, but particularly our first panelist, who I have had the distinct honor of working with for several months.

I would like to invite all the panelists for Panel III to come find their seats.

Council Member Peter F. Vallone, Jr. is Chairman of the Public Safety Committee of the New York City Council. He also serves as a member of the Environmental, Governmental Operations, Oversight and Investigation, and Standards and Ethics committees.

As Pro Bono Counsel to the Coalition Helping Organize a Kleaner Environment (C.H.O.K.E.), Peter Vallone, Jr. led the fight against the proliferation of power plants in his community and represented C.H.O.K.E. and Astoria residents against the New York Power Authority. He also speaks regularly at rallies, community centers, and schools about the over-saturation of power plants in the Astoria community and the need for efficient and cleaner sources of energy.

Council Member Peter Vallone, Jr. also graduated Magna Cum Laude with high honors and Phi Beta Kappa from Fordham College and in 1986 he graduated from Fordham Law School.

I would like to thank him for taking time from his very busy schedule, I know — because I work in his office, I know how busy his schedule is — to take the time to participate with us today.

Our next panelist is Liam Baker. Mr. Baker is the Asset Manager for Reliant Resources' New York City generating stations. Among other duties, he is responsible as the on-site representative of the development team for the repowering of the Astoria Generating Station in Astoria, Queens.

Mr. Baker has a J.D. from Pace University School of Law, a Bachelor of Science in Mechanical Engineering from Manhattan College, and a Bachelor of Arts Degree in Liberal Arts from Fairfield University.

Reliant Resources, based in Houston, Texas, provides electricity and energy services to wholesale and retail customers in the United States and Europe, marketing those services under the Reliant Energy brand name.

Our next panelist is Lisa Garcia, who is a Staff Attorney at the New York Public Interest Research Group (NYPIRG). Lisa Garcia holds a law degree from Brooklyn Law School and a Bachelor of Arts in Political Science from SUNY at Stony Brook. She joined NYPIRG's Clean Air Enforcement Campaign in September 2000 and has been extensively involved in air permitting and environmental review for new resources.

Ms. Garcia was the co-counsel in the successful *Uprose v. NPA* lawsuit, which was the first case that required state agencies to look at the health impacts associated with fine particulate matter. Also, Ms. Garcia has represented NYPIRG in several Article X proceedings including the New York Power Authority's Poletti Expansion, the Orion Re-powering Project, and the Con Edison expansion of the East River Plant.

Prior to joining the staff of NYPIRG, Ms. Garcia represented community organizations on environmental justice matters as an attorney for New York Lawyers for the Public Interest, and worked in Spain on international issues.

Finally, we are very pleased to have Mr. Stephen Kass from the law firm Carter, Ledyard & Milburn. He earned his J.D. at Harvard University Law School Cum Laude and his Bachelor of Arts at Yale University Magna Cum Laude.

He has numerous affiliations, including the Association of the Bar of New York; he has been the Chair of the Special Committee on Consumer Affairs; he has been the Chair of the Committee of Inter-American Affairs; on the international level, he has been a member of the Board of Directors of Human Rights Watch; he has been the Chair of the Policy Committee; he has been on the Council on Foreign Relations. He has just a tremendous, tremendous résumé that I do not want to go through in order to spare us a little bit of time.

From 1998 to the present, he has been Adjunct Professor of International Environmental Law at Pace University Law School, and he has also been an Adjunct Professor of Historic Preservation Law at Pace University Law School and a lecturer on Environmental Law and Policy at the State University of New York at Purchase.

Without further ado, I would like to present Council Member Peter Vallone, Jr., who will start this panel.

Thank you very much.

MR. VALLONE: Thank you.

First, let me make it clear that I am not one of the people, Assemblyman Gianaris, that misled you in the past. I just wanted to point that out.

It is good to be back here for me. As Aravella said, I went to college here, Law School here. So did my father, College and Law School; so did my grandfather, College and Law School. So this is really an honor for me to be here.

I would also like to thank Eric Montroy and the staff of the *Fordham Environmental Law Journal*, and especially Aravella Simotas,

who works very closely with me on these issues, for choosing this timely topic, which I think concerns every New York resident.

I have been involved in the fight against the proliferation of power plants since the beginning, as Counsel to C.H.O.K.E., the Coalition Helping Organize a Kleaner Environment.

C.H.O.K.E. now represents over 300,000 people, and it is growing. Why was it formed and why is it so large? Because the Siting Board has failed the people of New York.

C.H.O.K.E.'s position is very simple — and my position, now that I am on the Environmental Committee of the City Council:

> • Number one, prove we need new power. As Assemblyman Gianaris said, that has not even been proved. These heresies in California were just ridiculous. That has not even been proved. That is Step One.
>
> • Number Two, once you prove you need new power, you are going to build these plants, have a system in place which retires the older plants, the older, filth-spewing plants of the 19th century, or at least bring them up to Clean Air Act standards. That is not in place.
>
> • Number Three, and the one I am going to concentrate mostly on, is disperse these plants fairly. We cannot put all these plants in one District, which happens right now to be my District and Assemblyman Gianaris's District.

I also cut out entire pages of my presentation here because it is Friday afternoon and because Assemblyman Gianaris so succinctly summed it up, and I agree. Let me just quickly say I agree with everything that he said.

I would like to highlight my concerns about erecting new power plants in communities without adequate consideration of the dangers and burdens these projects place on these communities. As Council Member, I represent around 150,000 residents of Astoria, Long Island City, Jackson Heights, who are suffering from these 19th century power plants that already exist in my District.

Presently there are at least five applications before the Siting Board for new power plants in my District: there is NRG, who I believe has representatives here, who have a 360-megawatt expansion; KeySpan has about a 250-megawatt expansion; Astoria Energy, 1,000 megawatts; Orion, who is also here, they are expanding also — and have already restarted, I believe, a 750-megawatt generator that Assemblyman Gianaris mentioned — they have restarted that, and that was built in 1953; and the Power Authority, of course,

has a 500-megawatt expansion. These are all in our very small District.

These are, in addition to those ten mini-turbines throughout the City, two in my District, which were built without proper environmental review, as was discussed, and which the Council of C.H.O.K.E. has challenged in court, along with Lisa Garcia of NYPIRG.

Under Article X, any proposed power plant can only be approved by the seven-member Siting Board. Five of these members are heads of state agencies appointed by Governor Pataki, and the other two are members of the community but appointed by Governor Pataki. So, other than the right to be heard and disregarded by this Board, the community has no recourse. The residents who are directly affected are powerless.

There is no limit to the amount of power plants in any given area, and, as I said before, there is no requirement that any of the older power plants be brought up to Clean Air Act standards.

Although I understand that we may need power in the future, though it has not been proved, my greatest concern stems from the lack of any comprehensive study on the cumulative impact of any expansion or construction of power plant facilities on an entire community. Article X does not require any such study be done before these plants are erected or expanded.

The proposed construction of a 1,000-megawatt facility by Astoria Energy, for example, illustrates the disturbing lack of cumulative studies. Although the Astoria Energy proposal covers many areas of environmental concern, such as air quality and water quality, it fails to include a study of the cumulative effect of the impact on the community when you add in what is already existing in the community, such as in my community LaGuardia Airport, the BQE, the Grand Central, toll plazas. Things like this exist in the community and are not taken into consideration by the Siting Board.

Each one of these proposals cannot be examined in a vacuum or on a category-by-category basis. The cumulative effect of the total project on the area must be examined. Common sense would say that this is unduly burdensome and unfair to the residents of Astoria in this case.

In addition, the Siting Board when considering expansion fails to require a study of the cumulative effect of the existing power plants in that district already. For example, if they are considering power plant *A*, and that one power plant may only increase the burden on

the environment a little bit, they have no duty to look at plants *B* and *C* which already exist.

Nor, even more important, do they have a duty or an opportunity to look at the plants that are in the pipeline, that are proposed before the Siting Board itself. For example, Astoria Energy has just been approved in my District for 1,000 megawatts. This is a completely new plant. This is not an expansion, where they put one right next to the old one. This is a completely new plant. Now, the Siting Board just approved it, outrageously, over our complete objections. Like I said, we were completely disregarded. They approved it.

One of the proposals in the pipeline is an Orion proposal. Now, Orion has availed itself of Assemblyman Gianaris's new law, which is an excellent law, which encourages repowering. They are actually going to remove two of the old generators and replace them with new generators. That is something that I think we can all get behind.

But the Siting Board cannot say, "You know what? There is a great project down the road which is going to provide the same energy." They can only look at the one project before them, which is just outrageous, but that is the way it works now.

So, therefore, I am a firm supporter of requiring that all studies prepared in relation to these power stations take into account all of the surrounding things, like highways and airports and the power plants that exist, and the proposals which are also before the Siting Board.

Currently the Legislature in Albany is working on redrafting Article X, and we would appreciate your help with lobbying the Members in this effort. There are other changes that they are working on as well, and Assemblyman Gianaris's new law is a great start and a step in the right direction.

But I have been working with the City Council on the local level to ensure that the residents are protected.

The first thing that I did as Council Member, the first bill I introduced, was a reintroduction of the Clean Air bill, which requires the City power plants to greatly reduce their carbon dioxide emissions or face stiff fines. I know there is some noise there, and the reason we are not preempting on that — and anybody from Fordham Law School probably knows this better than I know this, talking about preemption — is because neither the State nor Federal Government has acted in relation to carbon dioxide, so the City can do this now. That is our position on that and we believe that it will stand up to judicial scrutiny. This law will be the first of its kind among any local municipality.

There are cleaner and more efficient ways to produce energy right now, and if these older plants do not avail themselves of this technology, my bill will impose fines. So we will legislate and force this dirty energy to be unprofitable, and that we hope will put these older plants out of business.

That is one way to go. We have not had a hearing on it yet. There is opposition, obviously, from some of the power companies. Some of the power companies are actually in favor of it.

In general, it will reduce carbon dioxide emissions over a five-year period by about 20 percent. As I said, that was the first thing I did.

One of the other things I recently did was I put in a Resolution in calling upon Albany to lower energy rates for areas affected by power plants. The people are affected by these power plants. There are things like low property values, increased medical costs because of asthma and things like that, and this must be recognized. I am happy to say that Assemblyman Gianaris has taken up the ball on this and is introducing, I believe, this measure in Albany soon, and it is something that will hopefully provide a small measure of relief to communities which are affected by these power plants.

I assume you think that what I am saying here is common sense, about considering all the proposals and not putting everything in one District, but I have been saying this now — many of us have been saying this now — for two years. Other than Assemblyman Gianaris and a few others, we have been completely ignored on this. That is one of the reasons that I felt it was important to be here today.

When you hear the power companies speak, and they will get their turn — I am sure they have spoken earlier today. I can tell you what they said. I was not even here, but I can tell you what I am sure they said: "We need this new power." Assemblyman Gianaris explained to you why we do not. Then they will relate it to California, which is entirely untrue.

When you really press them, they will say, "Oh, if we put these new power plants in which are cleaner, eventually the old ones will go out of business." Well, that is not true. First of all, it is probably not true. They are also putting a lot of money into these older ones. I have spoken to the owners of some of these older ones. They have no intention of going out of business. And, even if they do, it could be fifty or a hundred years down the road. So that is not a good argument.

So, like I said, number one, it may not happen; and, number two, if it does, it could be a long time down the road. So I do not buy this

"these new ones will put the old ones out of business." That is the only thing that they will say if you really press them.

And what they will not say, what you will not hear today from them, what you have not heard and you will not hear, is why are they all in one small area. You will hear "we need this power," "it is clean power." You will not hear why one community has to suffer the burdens of these power plants. Mark my words, you will not hear that, and you have not heard that.

Let me give you one example. I was at the hearing that Assemblyman Gianaris was discussing, where the Power Authority said there was a bridge separating the power plant and the projects, which you can just walk right underneath, cross the street, and be there.

We have had our own dealings with the Power Authority. I would just like to put one example in. In his defense, Mr. Kass was not at these dealings that I have had with the Power Authority. They were proposing a 500-megawatt expansion. They have a 835-megawatt facility in my District right now that they just built. So they said to us, "You know what we will do? We will voluntarily limit the production on the older plant to about 300 megawatts and we will use the new plant and that will make cleaner energy."

Number one, I just do not believe them because they have misled us constantly. But I said, "You know what? First of all, even if that is true, the second you need new power, you are going to come straight to that plant that is already there." So that might last for a few months before they say, "Hey, guess what? We need more energy. We are going to start going over that 300 megawatts."

I said, "You know, we are not radicals. We do not want you to built a giant windmill" — obviously, we are completely in favor of alternative energy sources, but that is not my topic today — "If you need 800 megawatts but you want to voluntarily limit it to 300 and want a new 500-megawatt plant, you know what I will do? I will get the community out there in favor of you building an even bigger facility than you are proposing right now. Do not build a 500-megawatt one. Build a 800-megawatt one, build a 900--megawatt one. Get rid of the old one."

You know what? Not a peep. The next thing we heard, the Siting Board approved their 500-megawatt expansion. That is what it is like to deal with the Power Authority and that is why it is so important that you are here today listening to us.

I would like to thank again the *Fordham Environmental Law Journal* for inviting me to speak, I would like to thank you for listening, and hopefully thank you for your anticipated help in the future.

MS. SIMOTAS: We are going to hold all the questions until the end, and discussion.

Our next speaker is Liam Baker.

MR. BAKER: Thank you. I hate following Peter.

First, an apology. I did not go to Fordham Law or Fordham U. I did go to Fordham Prep, so I consider myself a distant cousin to you all.

My name is Liam Baker. I work for Reliant Energy. Three weeks ago, I worked for Orion Power Holdings. Orion Power was acquired by Reliant Energy.

Reliant Energy, in a nutshell, is based in Houston, Texas. They own approximately 25,000 megawatts of generating capacity in the U.S. and Europe. And it has a variety of fuel-fired facilities. Enough of the parent.

Today I am going to talk about two items. I will share my thoughts about siting new power plants in New York City. I believe it is possible to balance energy needs and environmental needs in New York City. I am also going to speak about Reliant's own plan to repower the Astoria Generating Station in Astoria, Queens. I believe this project embodies responsible development. I will keep my comments brief and, hopefully, we will have a good Q&A.

The need for reliable, clean, and efficient in-city generation is unquestionable and absolutely necessary. Fossil fuel facilities in-city are currently the only technology that can meet these three criteria simultaneously. While it may be contrary to our business interest, I do support renewable sources of energy; I do support wind and solar. We currently have sixty-nine hydroelectric stations in upstate New York, and I think more of the fuel mix in New York State should be fueled by renewable resources.

However, in New York City, because of the steadiness and the severity of the load in New York City, fuel continuity is a must, and we cannot, unfortunately, rely for the majority of our generating capacity in New York City on non-continuous sources of fuel, such as wind or solar.

However, a balanced solution does not necessarily require a breakneck pace in siting new power plants. Plants can be sited and developed in a responsible manner. Doing so requires adequate planning. Frankly, the planning over the last several years has been poor. Had there been adequate planning by those who are charged with providing for a reliable supply of electricity for New York City, there would not be such a crush, as there is currently to site new power plants.

To do an adequate job of planning and siting power plants requires taking risk. In their defense, for those unnamed entities that are charged with providing such electric power service in New York City there was no incentive to take on risk in the last six-to-ten years because of the advent of deregulation. Deregulation was the great uncertainty, and those entities would not be assured of recovering their investments, and so they did nothing. And now, with the advent of deregulation, entities, including myself, are confronted with the needs of New York City and the former entities have no obligation to build new power plants.

Reliant has proposed a plan for Astoria Generating Station in Astoria, Queens, which we believe balances the needs of the environmental sensitivity of New York City and the need for new energy in New York City. I will not run around screaming "The sky is falling, the sky is falling. Approve my plant or there will be blackouts." I do not think there will be blackouts, if I do not build my plant. But I think someone's plant needs to be built, and of course I would like it to be mine.

The existing Astoria Generating Station is about fifty years old. Some aspects of it are as young as forty. The site has been used for energy production since the late-1890s when it was used by the former Astoria Lighting & Power Company to manufacture gas. They burned coke and coal to manufacture natural gas, not an environmentally friendly process. My point is that the site has been used in some manner of speaking for energy production for over a hundred years.

What we propose to do is to continue to use that site for those purposes. However, what we are going to do is physically retire all of our existing boilers at the Astoria Generating Station. We are physically going to shut down the sources of emissions at our generating station and replace them with modern equipment. I will get into that in detail.

The existing Astoria facility is a traditional power plant. There are large boilers, there are large turbines, there are large generators, and there are almost no environmental controls on those emissions because of the genre of the power plants when they were built, and the current air requirements at that time.

When you shut down existing boilers and replace them with modern equipment, you have to do that to today's standards. What we are going to do is after retiring the old boilers — we need to replace their capacity with something to produce equal electricity. We are going to replace them with six new combined-cycle gas tur-

bines. As was mentioned earlier in the day, combined-cycle gas turbine technology is currently the most efficient way to use fossil fuel.

The installation of the new six combined-cycle gas turbines and their associated boilers requires the installation of the most modern control technology. That will be achieved by selective catalytic reduction to control NOx emissions, carbon monoxide catalysts to control carbon monoxide emissions, primarily burning of natural gas to control sulfur dioxide emissions. We will limit the burning of fuel oil at our plant to no more than thirty days per year, whereas currently we are permitted to burn oil all year around. We normally do not, but we are permitted to do that currently.

The benefits are apparent:

- As I said earlier, the site has been used for energy production for over a hundred years. There will be no change of use in the site. There will be no additional community burden — and it is a burden.
- The environmental benefits we offer are concrete. We are not relying on economic theory or computer models to justify our reductions of emissions. By physically retiring boilers and replacing them with modern equivalents, emissions on a pound-per-megawatt-hour basis, which is what environmental advocates will measure, based on the actual amount of emissions we will put into the air based on the amount of electricity that you create, will be substantially reduced. The emissions of SOx will be reduced by over 80 percent, the emissions of NOx will be reduced by over 75 percent, and the emissions of particulate matter will be reduced by over 75 percent.

Now, as I said, you may hear from some developers that they will rely on economic projections that if they build a new plant, the older plants will not be able to compete and they will have to be shut down. Let me assure you we are not relying on that model. We know the emission reductions that we are promising are real because we are actually going to shut down the sources of emissions.

- There was a comment earlier about diversification of locations for power siting. We cannot repower our station anywhere else but where it is. We cannot do that. So it is where it is, but we believe it still is not going to be an incremental burden on our neighbors.
- Water usage. It was mentioned earlier the new plants should minimize the use of water. Currently we use a

> very, very dated method of using East River water. We suck in over a billion gallons a day when we are producing at peak, and that kills an awful lot of fish. We will stop using that manner of cooling technology and replace it with its modern equivalent, which are known as cooling towers. That will reduce the amount of East River water used by over 98 percent, and correspondingly kill approximately 98 percent less fish in the East River.

Now, why are we doing this? Is it just because we are nice guys? We are nice guys, but there is actually a business sense to doing this, or else we would not be able to justify the estimated $100 billion cost.

We are going to increase the output of our station more than 50 percent. The current generation is about 1,240 megawatts. It will produce about 1,810 megawatts.

We will almost double the efficiency of the plant. What that means is — it is akin to your miles-per-gallon on your car — essentially we will be make approximately twice as many megawatts from an equivalent amount of fuel input. So the amount of fuel that we need to use to produce a megawatt will be substantially reduced.

That translates obviously to dollar savings in production cost, the idea being — going back to the economic models, which are what I am relying on — you will be able to produce electricity more cheaply than your competitors and, hopefully, recover your investment.

Now I want to wrap up and wait for the Q&A.

I would like to thank my company for giving me these new projects to try and sell because it is going to be a lot easier. I believe that this project and repowering projects similar to it embody the three key criteria for any responsible developer in New York City — that is, to provide reliable, clean, and efficient electric generation — and, in addition, it makes good economic sense.

Thank you very much.

MS. SIMOTAS: Before we continue, I would just like to clear up a statement. Council Member Vallone wants to correct one statement that he made. The New York Power Authority's application that he talked about earlier was submitted to the Siting Board, but has not yet been approved.

MR. VALLONE: It will be.

MS. SIMOTAS: Now we will hear from our third panelist, Lisa Garcia.

MS. GARCIA: I disagree with you that that is going to be approved.

MR. VALLONE: I hope you are right.

MS. GARCIA: I am going to talk about two issues that I think are of great concern in New York City. One of them is environmental justice, and I know a lot of people touched on it. The other one is the health impacts from fine particulate matter, or PM-2.5.

What is environmental justice, or sometimes called environmental racism? The concept basically stems from the realization that certain low-income communities of color have a disproportionately high number of industrial polluting facilities.

When the Clean Air Act was passed in the 1970s, it was a great new statute, and the Clean Water Act was also passed, and everyone was really excited that there were environmental regulations that would be able to at least protect the environment and the public health.

But what started happening was the realization that a lot of these polluting facilities were clustered in certain neighborhoods, and when you looked at the neighborhoods, they happened to be communities of color or low-income communities. So a lot of people, like advocates, started rallying around this notion that not only did we need to work on protecting the environment, but protecting certain neighborhoods that are disproportionately overburdened with these facilities.

It took many years, but finally, in 1997, President Clinton signed an Executive Order saying that federal agencies have to consider environmental justice concerns. As Mr. Turner mentioned, that is only for federal agencies. So that would go towards the EPA in implementing their regulations or in issuing permits.

What has happened since then is when groups try to bring up the Executive Order that President Clinton signed and environmental justice issues, the State permitting authorities say, "Well, that goes to your federal agency and not to the State agency." And basically they say, especially in New York State, "Since New York State has not adopted any laws or put in environmental justice standards, we do not require an assessment of environmental justice."

And, as Mr. Kass mentioned, as far as I know, the New York Power Authority, in January of 2001, was one of the first agencies that put out an environmental justice analysis. As the Assemblyman mentioned, we disagree on the actual conclusion of that, but that is still up for debate.

One of the things that has come out of this debate over environmental justice is: "Okay, now everyone has recognized that yes, certain communities are overburdened; yes, there is a clustering of these industrial polluting facilities; and yes, that if you look at the asthma rate and the respiratory illness rate and the cardiac illness rate in those areas, they happen to be, on average, higher than the national average. But when you are siting a facility, when you begin to look at that facility, you only look at the incremental impact of that facility, and there is no cumulative impact analysis done."

So an EJ analysis might say: "Yes, we see that this is an area of concern, and so we are going to now look at the impact of our facility." What might happen is they will say, "The noise impact will only be, let's say, four decibels higher than what is already at the background level, and so therefore that is negligible. And, since the community is already used to these loud rumbles from the trucks and the airplanes flying over and the other polluting facilities, if you put in a power plant that just happens to hum the whole time, it is actually going to be negligible. No one will notice the difference." So that is your EJ analysis. You can still site it there because it is negligible.

I think that is kind of where the debate is now.

What came our of some of the EJ concerns is how advocates could come up with different arguments on how to stop the clustering of these polluting facilities.

One case in New Jersey tried to use the Title VI section of the Civil Rights Act, saying that, "This is basically discriminatory. If you site another polluting facility in this neighborhood, it is a violation of the Civil Rights Act because you are disproportionately siting these facilities, and therefore it is discriminatory." In that community in South County, New Jersey, the community was 91 percent of color and the majority of that was African-American. This community was completely industrial land where they kept on siting all these polluting facilities in the same neighborhood.

When they brought up the EJ plan, no one listened to them because there is no EJ plan, so they went ahead and tried to bring it under the Civil Rights Act. They won in the local court and, unfortunately, the appeal was overturned, so it did not work under the Civil Rights Act.

As I said, the State of New York DEC is thinking about implementing some type of regulations. I know in the State Energy Plan the State also mentioned that environmental justice is a concern and that we need to start looking at it. We just do not know how the State of New York is going to implement that, if at all.

The other issue is PM-2.5. One of the things that came out of the *NYPA* case, the twelve turbines that were sited for the New York City Metropolitan Area — one was actually in Brentwood — is we noted the same thing, that these twelve turbines happened to be located in low-income communities of color. Four of them are in the South Bronx; three of them are in Brooklyn in Greenpoint and Sunset Park; two of them in Long Island City; and the one in Brentwood, which happens to be the second-highest Hispanic population in New York State.

I will not talk about the *NYPA* case.

What we found is that they did not do a study of fine particulate matter, which is often called PM-2.5. What is PM-2.5? It is particles of 2.5 microns or smaller. They basically come from fuel combustion in diesel engines, power plants, industrial facilities, and other types of facilities.

In the late-1980s, the EPA put out the National Ambient Air Quality Standard saying that the agencies had to start looking at the health impacts from particulate matter of 10 microns or less. And so when they were siting a facility, they had to look at — you know, when you have your NAA that everyone keeps talking about, the area of non-attainment or attainment — basically if you had an area that was non-attainment for PM-10, you had to make sure that your facility was not going to exceed the limits of PM-10, or exacerbate that. So you had to either not build the facility or mitigate it or find emission reduction credits for that non-attainment area.

In the early-1990s, they started doing studies and they found that PM-10 was actually not protective of human health and that actually you had to go below the PM-10 Standard. In 1997, the US-EPA set a new Standard to regulate PM-2.5 as part of the National Ambient Air Quality Standards under the Clean Air Act, which was a very good thing.

Finally, there were all these studies that came out saying PM-2.5 exacerbates or is linked to asthma attacks, chronic bronchitis, respiratory illnesses, cardiovascular disease, premature death, and just recently a report came out linking PM-2.5 to lung cancer. So this was a very good thing.

But what happened is after the EPA set the standard, many of the states found it difficult to implement the standard because they did not know which areas were attainment or non-attainment. So they said, "Well, we have to do three years of monitoring and then we

have to identify the areas that are attainment and non-attainment" — you know, all the regulatory stuff that they had to go through.

So NYPIRG and some of the community groups that we have been working with throughout the State, including C.H.O.K.E., we decided to sue the New York Power Authority and ask them to look at the public health impacts of PM-2.5 outside of the regulatory system.

One thing is DEC has to issue a permit, the Clean Air Act Permit, or Title V Permit, whichever permit they have to issue.

The other situation is, under the State Environmental Quality Review Act, or under Article X for the new power plants, you have to look at the probable health impacts from this facility.

So the fact that the Clean Air Act has not been able to implement this standard yet does not take away from the fact that PM-2.5 has all of these known health impacts.

It was an uphill battle in the *Uprose* case. We cited the eleven power plants that were part of the NYPA project, showing that these facilities were in areas where the asthma rates were already high, where there was already a clustering of industrial facilities, and that any increase in PM-2.5 would cause an adverse health impact, and that under "SEQRA," the State Environmental Quality Review Act, you had to at least address those issues and look at them in an environmental impact statement.

The good news was that in the Appellate Division in the Second Department, the State finally found that yes, there are probable impacts that are caused by PM-2.5, and that when a facility is being built that the State has to address these probable impacts.

One of the important factors that comes out of that is that a lot of the same neighborhoods that we would consider EJ communities also had some of the already known highest particulate matter rates. For instance, in Brooklyn, Bronx, and Manhattan, they already exceeded the EPA Standard.

So these are the two issues that I think in New York City are of grave concern, and I hope that, under Article X, that the agencies start looking closely at PM-2.5. And also, I hope that in the future the State and the City agencies really consider environmental justice, or at least the cumulative impact of these polluting facilities.

I happened to focus on power plants. One of the interesting things is that everyone is talking about Queens, but what no one is talking about is that those facilities in Queens are also less than a half-mile from the Bronx, which right across the river has four other power plants and is sited for a 1,000-megawatt power plant and has twenty

waste transfer stations and all these other polluting facilities. So in that cumulative air impact analysis that would be done if we had that kind of standard, you would see that all these polluting facilities are definitely affecting public health.

I hope that in the future more agencies will do EJ analysis or do a repowering, like Orion, and help to clean up the air in the inner city.

Thank you.

MS. SIMOTAS: Our final panelist is Stephen Kass.

MR. KASS: Good afternoon.

Well, I am the last panelist in the last session on a Friday afternoon.

I have listened with interest, and I have heard three or four different subjects being spoken about: environmental justice (EJ), PM-2.5, the Article X process, and the NYPA project for which I was counsel and am still. I will try to cover all of those fairly quickly.

Environmental justice is an important issue, and I take a back seat to absolutely no one on the subject. I spent the last twenty-five years involved in legal service issues as well, and I actually did do an article on the draft DEC environmental justice document, which was in the *Law Journal* two or three weeks ago, commenting on that.

Environmental justice is a tricky issue. I mean, everyone can say, and believe, that we should not be overburdening poor communities or communities predominately of color with adverse noxious uses, and that makes a lot of sense. How we get from here to there and what balancing of interests and what procedures we use is much more difficult.

The SEQRA process does not work all that well for it because the SEQRA process looks at the incremental impacts of a given proposed action, which Lisa talked about.

It is not true that the SEQRA process does not take into account cumulative impacts. It does, because, as all of you know — you are all experts on this subject and have thought about it — the SEQRA process requires you to do an analysis of existing environmental conditions.

So the first thing you do in the air quality area is you find out what the background monitors have been showing over the last three-to-five years in the neighborhood that will be impacted. And you do the same thing with traffic and you do the same thing with all other potential areas of impact. So you are supposed to be reflecting the existing operating sources when you are applying those background conditions. And then you answer that and identify the impacts of

your new proposal. Well, that is fine, and that does give you some ideas.

If you are going to have a significant impact, which is usually defined by those standards, you do have to either mitigate it if you can, or look at alternatives which do not have those adverse impacts. So SEQRA is pretty good — I am very impressed by this great statute myself — for looking at impacts of what you are proposing.

It does not really give you any remedial action, though it gives you a fair amount of information about the existing background conditions, or the As-of-Right uses which do not involve any discretionary environmental issues, which are the things that really characterize the environmental burden in the community. So SEQRA is very limited in that regard.

What we really need to do — and we should not kid ourselves that we can fix it. I criticized the DEC guidelines because they simply proposed a more stringent level of what is called threshold review and public comment and additional comment periods when DEC is involved as the lead agency, which is virtually never.

If you are really serious about it, you have got to have this applied to all State and municipal actions. But even then, you are only looking at that being done through an Executive Order at the State level or through legislation at the State level, or at the municipal level probably. But even then, you are only looking at the incremental impact.

If we are really serious about dealing with environmental justice issues, we ought to be using the SEQRA process as well as a variety of other reporting devices required under SEQRA and other Federal and State statutes, community rights in those statutes, to begin to address public resources to underlying conditions, rather than imposing very draconian solutions for investors or delays of new investments. Because some of the new investments in environmentally stretched areas are a lot better environmentally than the existing uses. Also, they may be good projects. Also, they may provide employment. Also, they may help with other problems, such as transportation.

There is another issue. We ought really when we think about environmental justice — and here I will probably lose some friends — not be thinking about identifying those areas that are predominantly communities of color, communities of concern, or low-income communities, and then saying "in those communities we will impose a higher environmental standard." That leads inevitably to all the

kinds of squabbles that have split apart what I used to think was a progressive coalition, for all the reasons that you all know. You know, who is a minority? By how much? EPA says 48 percent. In the urban areas of New York, that does not help.

What we ought to be doing if we are serious about addressing EJ issues is working the other way. We ought to be identifying the communities that are environmentally stretched, because that is what we are talking about in environmental justice. Many of those environmentally stretched areas will be significantly characterized by minority or low-income populations, but not always. If it is an environmentally stretched area, we ought to be pumping resources into dealing with those underlying conditions.

We might want to have a more stringent definition of "significant impact" of a particular project. But that is not going to solve the problem, and we should not kid ourselves into thinking that that is a meaningful response. In fact, it can cause problems by discouraging otherwise-useful investments in environmentally stretched areas.

That is my thinking on that. We can talk about that some more.

Now, it happens that there has been a lot of disinformation about the NYPA project, some from this very podium, though always well-intentioned.

NYPA tried to do many of the things that most of you in this room would want to do yourself if you were making decisions as to how to deal with providing power in a short-term crisis. We are not here to discuss whether or not there was a crisis in power availability for New York City last summer. I believe there was. I have seen lots of figures to show that there was. Some people think there was not.

I will tell you that the NYPA units were all called upon during June — in August particularly, but even in June — to make up the difference between demand and available supply.

And they also had a tremendous impact in keeping price from fluctuating. Now, that may not be the same as survival. However, you would be surprised at the number of people for whom utility bills are important, and most of them are not rich people, who have that concern.

Now, just posit that there was a need. If you believe that there was a need and you had to put plants in quickly, you had to produce 400 megawatts of additional power, where would you do it and what kind of equipment would you do it with? Leaving aside conservation and the like of those responsible, how would you meet the demand for additional capacity? Would you put them all in one place?

First of all, would you build a large power plant? No, you couldn't, if you needed power within one year. You couldn't do it because the Article X licensing process takes a year once you're into it and a year before, so it's two years for an Article X proceeding and then it's two years to build a plant. So that is not a meaningful response. So the only way you can do it is by putting in small generators of one sort of another that are not subject to Article X.

What kind would you do? Would you put diesel generators in or buy diesel generators? Last summer, DEC gave emergency permission for people to generate power from of diesel generators. Those are terrible, I think you'd agree with that. I don't think you'd want to do that.

If you could, you would want to do natural gas because that is the least-polluting form of fossil fuel and they can be done quickly. But if you wanted to, you would also want to put what is known as selective catalytic reduction (SCR) or some other form of end-product at the end of your emissions, your tailpipe, for your natural gas turbines — those are the state-of-the-art facilities — so that you could reduce the emissions to the minimal, through the best-known way of accomplishing it, through a quickly installed, single-cycle turbine.

That is what NYPA did. It opted to buy all natural gas, not dual-fuel, turbines and to spend $5 million per turbine for SCR components to go with them.

Then, where would you put them? Would you put them all in one borough, or would you try to distribute them around? NYPA chose to distribute them around, not to put them all in one borough. This turned out to be a politically terrible thing to do, in *real politik* terms, because you had a coalition of people against you all over the City.

Ed Lowe [phonetic], the grand UDC, wanted for many years to build some low-income housing in Westchester. He picked Harrison — I happen to live in Harrison — in Purchase, not far from where I live — 900 units of low-income housing on a campus. President Haddon [phonetic] thought it was a great idea.

But Harrison turned out, 1,000-to-three, and defeated the project and forced an amendment to the UDC statute — limiting its own rights and power, believe it or not, for that one purpose.

So Lowe [phonetic] came back and said, "Fine, 900 units in nine towns." Then he was dead — everybody was opposed to it, not just one town.

NYPA distributed its ten units in the City of New York in four boroughs. Why not Manhattan? They tried to. They could not find

a place. We can discuss that if you want separately, but for this purpose please accept my judgment that there was no feasible place to put it in New York south of 96th Street. That is true.

And so it put four in the Bronx; it put three in Brooklyn; and it put only two in Queens — only two in Queens — because Queens had all these other units; and it put one in Staten Island; and one out on Long Island. So it distributed them as best it could — not perfectly.

Where would you put them? I think you would try to pick existing manufacturing zones. You would not want to pick commercial or residential zones. By the way, there are a lot of people of color who live in residential zones. You know, it is not just black versus white. So they put them in manufacturing zones as best they could, and they picked the best places they could.

And, of course, you have to have them near gas and you have to have them near substations for operational reasons. So that is what they did. So they did the best they could.

And then, because they could only identify two sites in the Bronx, one in Queens, two in Brooklyn, and one in Staten Island, six sites altogether, that really met the criteria of being close to gas, close to substations, in manufacturing zones, and where they were not going to have a significant adverse effect, they bunched a couple of them up. And so at four of the six sites they put two turbines, each one capable of generating 47 megawatts of power — 3 megawatts were required to run the station, 44 megawatts net. Each was capable of doing that.

But they could not find ten different sites in New York City that would not cause significant problems, and so they doubled up four of the sites and made them two units each. They emitted 88 megawatts. That would have required an Article X review.

They said, "Let's see if we can't limit their output to 79.9 megawatts, in accordance with the PSC and the FERC previous precedents. We will give up 10 percent of the power" — and, by the way, each of these ten units cost about $50 million — "We will give up 10 percent of our power." This is not taxpayer money; it's their own generated money that comes through in rate utility cost. "We'll give up 10 percent of our power. We'll go from 88 megawatts down to below 80 in order to reduce the number of sites." And they did that. For that they were criticized as well, because now you're avoiding Article X.

By the way, how many people in the room, other than the people up here, have participated in an Article X proceeding as a member of the public? One. Count them, one.

How many people in the room have participated in environmental impact statement reviews as a member of the public?

PARTICIPANT: On these plants?

MR. KASS: No, any environmental impact, any EIS review ever, as a member of the public. One, two, three. Nobody else? What are you doing here if you haven't done that?

PARTICIPANT: Just studying.

MR. KASS: That's it, studying?

MR. VALLONE: They didn't know about it.

MR. KASS: How about any SEQRA process? Anybody ever participate in that?

It is very easy to do. What do you do? You go to the public hearing, you raise your hand, you come up, you make comments, you sit back down. And then, by the way, you sue. That is what people do, too.

Now, that is not the way you participate in Article X. Article X is not actually open in the same way. You have to become a party. You have to have counsel. You have to have consultants. There are some good consultants in this very room. They are expensive usually. And you have to make a showing that you are going to participate and raise substantive and significant issues. You are going to have to sit there for day after day after day doing this, and reading testimony and cross-examining. It is a much higher threshold for the community and the public to participate in an Article X review.

So I think the thought that "you're screwing Article X and going through SEQRA" is a questionable assertion.

Beyond that, Article X is run by an administrative law judge. SEQRA is a proceeding where the lead agency has to take into account and has to affirmatively respond in writing to all the public comments that come in, and it has to make findings on the basis of those in its final review. It is not a perfect statute, but it has much more accessibility and flexibility than Article X, really.

Lisa said that it is recognized that NYPA did do voluntarily an environmental justice analysis — first time. It did that because it wanted to show that it was thinking about this, and it was encouraged by a couple of senior staff officials who had a particular interest in this view. It did it, as well as distributing the plants and putting state-of-the-art controls in them.

It found that its projects were not going to have a significant impact in any of the areas, but it disclosed that most — not all, most — of the areas were predominantly of color or low-income. That is not entirely surprising in New York because they were manufacturing areas. If you draw a one-mile radius, as we did, around any manufacturing site in the City of New York, you are going to find a lot of low-income people. That has to do with a lot of different things, including transportation and housing and employment.

But NYPA did something else. NYPA, on its own, did do a PM-2.5 fine particulate analysis as part of its SEQRA review. Not only had no one in the State ever done it, but it was well before anybody brought a lawsuit. But there were several important court decisions and DEC decisions holding we did not have to. We did not have to do it. NYPA cited those and then said, "We are going to look at PM-2.5 as best we can on the limited background information that is available." And it did, and it put it into its review.

The lower court in the challenge to that said: "(A) you didn't have to; and (b) you did it anyway, and you found that you were not going to have any significant impact on fine particulate matter, because, after all, you are using the least-polluting form of generation."

The Appellate Division misunderstood that. The Appellate Division said, "NYPA, go back and do it." We had done it. All right, so we went back and did it again. And we did perform an environmental impact statement, which was out and subject to public review and comment, and found exactly what we had found before: that there was not any significant, indeed, any perceptible, effect from those units because their emissions were so clean. That is not an asset. It cost a lot of money, a tremendous amount of money.