

SHUTTING DOWN POLETTI: HUMAN RIGHTS LESSONS FROM ENVIRONMENTAL VICTORIES

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*"I firmly believe that this State does not need to abuse its most vulnerable citizens to keep the lights on."*¹

ABSTRACT

Human rights enjoy a presumption of inviolability² that at least arguably "trumps"³ other public goods.⁴ To the extent that sustainable development has become bogged down in conventional economic thinking, a human rights analysis may offer a way to cut through "business-as-usual" thinking. International human rights offers society's most vulnerable inhabitants an additional route of legal recourse for environmental harms, one that protects them even in the face of state law to the contrary. As such, human rights can create a space for developing innovative solutions to thorny social problems like environmental injustice,⁵ particularly the unequal distribution of environmental harms across society. Because the human right to a healthy environment is

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¹ *Public Hearing on Issues Involving Decisions Made by the Power Authority of New York State to Site Gas Turbine Generators in the City of New York*, 2001 Leg., 194th Sess. 10 (N.Y. 2001) [hereinafter Hearing Transcript] (statement of Assemb. Paul D. Tonko, Chairman, Assemb. Comm. on Energy).

² See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491, 498 (2008) (noting that courts evaluating anti-terrorism Security Council resolutions have considered human rights to be preemptory norms against which the Security Council resolutions must be evaluated). Countless scholars have described various human rights as non-derogable. See, e.g., RACHEL BALL, HUMAN RIGHTS LAW CENTRE, ABSOLUTE AND NON-DEROGABLE RIGHTS IN INTERNATIONAL LAW 1–2 (2011). Even the Restatement (Third) of the Foreign Relations Law of the United States identifies quite a few human rights norms as having attained preemptory status. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702 (AM. LAW INST. 1987).

³ No pun intended.

⁴ LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990). The International Court of Justice has not embraced this view, at least with regard to the principle that the court's jurisdiction rests on consent. See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, 87, ¶ 3 (Feb. 3) (separate opinion by ad hoc Dugard, J.).

⁵ I have elsewhere made this argument in the context of climate change. See Rebecca M. Bratspies, *The Climate for Human Rights*, 72 U. MIAMI L. REV. 308 (2018).

“claimed not granted,”⁶ there is value in examining what environmental activists actually do on the ground, and how they shape their environmental claims. This principle remains true even for actors who do not make human rights claims, and do not even view themselves as human rights actors. This article examines one such situation, using the successful campaign to shut the Charles A. Poletti Power Plant to glean human rights and environmental advocacy lessons for those who would vindicate environmental rights in an unequal world.

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INTRODUCTION

In 2013, the New York Power Authority (NYPA) razed the Charles A. Poletti Power Plant, handing a big victory to environmental advocates in New York City. By shuttering and then dismantling the plant, NYPA removed what one local elected official had characterized as a “symbol of the pollution that haunted [the] neighborhood for too long.”⁷ This characterization was an apt one. The Poletti Plant had for years been the single-biggest polluter in New York City, emitting more pollution than all sources in Brooklyn, Manhattan, Staten Island, and The Bronx combined. In 2000, the Poletti plant alone spewed 263,376 tons of pollutants into the airshed—more air emissions than the rest of the city combined.⁸ One local leader claimed that “the pollution is so bad here

⁶ Rebecca Bratspies, *Claimed Not Granted: Finding a Human Right to a Healthy Environment*, 26 TRANSNAT’L L. & CONTEMP. PROBS. 263, 272 (2017).

⁷ Michael Florio, *Charles Poletti Power Plant Loses a Smoke Stack as Deconstruction is in Sight*, ASTORIA POST (May 7, 2014) (quoting State Sen. Mike Gianaris).

⁸ Richard Pérez-Peña, *State to Close Queens Plant That is Biggest Polluter in City*, N.Y. TIMES, Sept. 5, 2002, at B5.

that no birds will nest [in Astoria].”⁹ Not surprisingly, the surrounding community of Astoria was part of New York City’s “asthma alley”¹⁰—a band of elevated asthma rates that stretches from the Bronx through Queens. The Poletti plant posed a particular risk to the thousands of children in Astoria’s three major public housing projects, including Queensbridge Houses—the largest public housing project in the United States.¹¹ The story of shutting down the Poletti is a tale worth telling, and a potential template for successfully instantiating the human right to a healthy environment. Yet, rather than becoming a rallying cry spurring other communities to action, the Poletti victory has faded into history. This is a mistake. Environmentalists need to celebrate their victories—both to learn from them, and to inspire other communities fighting for environmental protection and environmental justice.

This article begins that process by telling the story of the Poletti fight and victory. Part I of this article lays some context by providing background on Astoria, Queens generally, and the Poletti Plant specifically. Part II describes the legal fight to shutter the Poletti Plant, and situates that fight in the contemporaneous battle over energy deregulation in New York. Part III gleans lessons from the victorious legal and regulatory campaign and suggests how those lessons can be usefully deployed by environmental and human rights advocates going forward. Finally, Part IV concludes with some lingering questions about how issues of race and class influenced the Poletti victory.

I. THE CHARLES A. POLETTI POWER PLANT IN ASTORIA, QUEENS

Astoria is a neighborhood in the Northeast portion of Queens, New York. Queens as a whole is currently home to 2.36 million people,¹²

⁹ Jason D. Antos, *Poletti Plant Closes*, QUEENS GAZETTE (Feb. 3, 2010), http://www.qgazette.com/news/2010-02-03/Front_Page/Poletti_Plant_Closes.html (quoting George Stamatiades, president of the Central Astoria Local Development Coalition (CALDC) and vice chair of Community Board 1).

¹⁰ Corey Kilgannon, *Plans for New Power Plants Spur Fears in Asthma Alley*, N.Y. TIMES, Oct. 24, 1999, at CY11. *Accord* Hearing Transcript, *supra* note 1, at 467 (statement of Rep. Joseph Crowley).

¹¹ Anca Giurgulescu, *Queensbridge, NYC: Inside America's Largest Public Housing Project*, UNTAPPED CITIES (July 1, 2013), <https://untappedcities.com/2013/07/01/queensbridge-nyc-inside-americas-largest-public-housing-project/>.

¹² U.S. CENSUS BUREAU, QUICK FACTS: QUEENS COUNTY, NY, <https://www.census.gov/quickfacts/table/AGE275210/36081> (estimating population as of July 1, 2017).

a slight increase from the year 2000, when this dispute took place.¹³ For perspective, this means that Queens has a larger population than fifteen states.¹⁴ Nearly half of Queens' residents are listed as "foreign born" in the census,¹⁵ making Queens one of the most diverse places on Earth.¹⁶ And, were Queens a stand-alone city, it would be the fourth largest in the country.¹⁷ In 2000, when the events described in this article occurred, the Astoria/Long Island City area had a population of roughly 140,000.¹⁸ Sitting between the East River and LaGuardia airport, the Astoria/Long Island City area covers 1,800 square acres.¹⁹

Astoria was, and is, home to four major power generating facilities, which collectively supply more than 60% of New York City's electricity.²⁰ Thus, the Charles A. Poletti Power Plant was just one of the major generating facilities sited in this neighborhood. Others included NRG²¹ and Astoria Generating,²² both co-located with the Poletti facility,

¹³ U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, 683 tbl.DP-1 (2001), <https://www.census.gov/prod/cen2000/dp1/2kh36.pdf> (estimating a population of 2,229,379 in 2000).

¹⁴ *U.S. States Ranked by Population 2018*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/states/>.

¹⁵ QUICK FACTS: QUEENS COUNTY, NY, *supra* note 12 (estimating that 47.5% of Queens County residents from 2012-2016 were foreign born persons).

¹⁶ Gus Lubin, *Queens Has More Languages than Anywhere in the World—Here's Where They're Found*, BUSINESS INSIDER (Feb. 15, 2017), <https://www.businessinsider.com/queens-languages-map-2017-2>; see also N.Y.C. Econ. Dev. Corp., *Astoria: An International Culinary Destination*, NYCEDC (Apr. 17, 2014), <https://www.nycedc.com/blog-entry/astoria-international-culinary-destination> (quoting National Geographic); Lisa L. Colangelo, *Queens One of 'Most Diverse Places on Earth,' New Figures Show*, N.Y. DAILY NEWS (July 12, 2009), <http://www.nydailynews.com/new-york/queens/queens-diverse-places-earth-new-figures-show-article-1.430744>.

¹⁷ N.Y.C. Dep't of City Planning, *New York City Population*, NYC PLANNING (July 15, 2015), <https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page>.

¹⁸ N.Y.C. Dep't of City Planning, *Total Population and Persons Per Acre: New York City Neighborhood Tabulation Areas, 2010*, NYC PLANNING (Feb. 2012), http://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2010/t_pl_p5_nta.pdf. This chart divides the population into Astoria, Old Astoria, and Ravenswood-Queensbridge-Long Island City. Because the lines between these neighborhoods are fuzzy at best, and because they are all one airshed, I have combined the population for purposes of this discussion. In 2018, Long Island City has emerged as a distinct, very trendy, neighborhood, but that was not the case in 2000.

¹⁹ *Id.*

²⁰ Hearing Transcript, *supra* note 1, at 469 (statement of Rep. Joseph Crowley); see also TIM WOOLF ET AL., SYNAPSE ENERGY ECONOMICS, INC., *Air Quality in Queens County* 40 (2003) (noting that the total capacity of the four facilities was 4884 MW).

²¹ The NRG facility consisted of twenty-one gas combustion turbines that ranged in size from sixteen to fifty MW. WOOLF ET AL., *supra* note 20.

²² Astoria Generating, owned by Reliant Energy, had four major steam generating units, which collectively generated 1275 MW of power. *Id.*

and Ravenswood,²³ known locally as Big Allis.²⁴ Electricity generation contributes to the overwhelming majority of Queens air pollution attributable to stationary sources. In addition, Astoria is also subject to significant pollution from mobile sources, ranging from LaGuardia airport, to two major highways, including a toll bridge that routinely had cars idling in traffic jams. Air pollution has been linked to a wide range of adverse health outcomes. Indeed, the New York Health Department estimates small particulate pollution (PM_{2.5}) in New York City causes more than 3,000 deaths each year, as well as 2,000 hospital admissions for lung and heart conditions, and approximately 6,000 emergency department visits for asthma in children and adults.²⁵

The Charles A. Poletti Power Plant was an 885 megawatt (MW) generating facility owned by the New York Power Authority (NYPA). Beginning operation in 1977, it bore the name of New York State's 46th Governor, Charles A. Poletti.²⁶ In 1955, New York Governor Averell Harriman appointed Poletti to the New York State Power Authority, which was then under the leadership of Robert Moses.²⁷ So, when the Astoria generating facility was named in Poletti's honor, it had a lot to live up to. Sadly, the facility was far less impressive than its namesake. Not only did NYPA lose tens of millions of dollars each year running the

²³ Ravenswood, owned by KeySpan had three steam generating units that collectively generated 1719 MW, including one massive unit known as Big Allis that single-handedly generated 980 MW. Ravenswood also had 17 combustion turbines that generated an additional 415 MW. *Id.*

²⁴ During this time-period (1995-2000), the Ravenswood Plant was one of the fifty plants with the greatest increase in carbon dioxide emissions in the United States. REBECCA STANFIELD, DARKENING SKIES: TRENDS TOWARD INCREASED POWER PLANT EMISSIONS 6, tbl. 2 (2002).

²⁵ N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, AIR POLLUTION AND THE HEALTH OF NEW YORKERS 3 tbl.1 (Lise Millay Stevens, ed.), <https://www1.nyc.gov/assets/doh/downloads/pdf/eode/eode-air-quality-impact.pdf>.

²⁶ Charles Poletti graduated from Harvard Law School, served on the New York State Supreme Court, and was elected New York's Lieutenant Governor alongside Governor Herbert H. Lehman. *See Charles Poletti*, HALL OF GOVERNORS, <https://hallofgovernors.ny.gov/CharlesPoletti>. Poletti had the distinction of being the first Italian-American governor in the United States (albeit serving only the last month of Lehman's term after Lehman resigned to lead the United Nations relief and rehabilitation efforts during World War II). *Id.* Just days after his stint as governor, Poletti was named a special assistant to War Secretary Henry L. Stimson. *Poletti Takes Post as Stimson Aide*, N.Y. TIMES, Jan. 3, 1943, at 1. Commissioned as a Lieutenant-Colonel, Poletti was tasked with restoring essential public services in Allied-occupied Italy. Richard Goldstein, *Charles Poletti Dies at 99; Aided War-Ravaged Italy*, N.Y. TIMES, Aug. 10, 2002, at A11.

²⁷ *Poletti is Named to Power Board*, N.Y. TIMES, Mar. 2, 1955, at 16.

825 MW Poletti facility,²⁸ but the Poletti facility was one of the dirtiest plants in the United States.²⁹ Indeed, by the time Charles Poletti died in 2002, NYPA was mired in litigation with angry neighbors bent on shutting the dirty, polluting facility. In the early 2000s, New York was in the throes of energy deregulation, which made for a “pretty chaotic moment.”³⁰ Across New York City, there were thirteen proposals for new, repowered, or expanded power plants.³¹ Four of those proposals were for new capacity in Astoria/Long Island City, including a proposed new 500 MW facility at the Poletti plant.³²

When NYPA proposed the new 500 MW Poletti facility, Astoria was a moderate nonattainment zone for carbon monoxide and PM10, and a severe nonattainment zone for ozone.³³ The City’s top three industrial polluters were all located in Astoria/Long Island City. The Poletti Plant was the single biggest polluter,³⁴ with nearby LaGuardia Airport ranking sixth, and Kennedy Airport fourth. NRDC estimated that together, these five polluters pumped 5800 pounds of pollutants into Queen’s airshed each hour.³⁵ Queens ranked in the worst 10% of US counties in terms of

²⁸ STATE OF NEW YORK OFFICE OF THE STATE COMPTROLLER DIVISION OF MANAGEMENT AUDIT, NEW YORK POWER AUTHORITY MANAGEMENT AND OPERATIONS REPORT 95-S-110 21-23 (1996) [hereinafter NYPA AUDIT].

²⁹ *Poletti Power Project*, SCORECARD, http://scorecard.goodguide.com/env-releases/cap/ranking.tcl?facility_id=36081-PANY, (last visited Feb. 9, 2019). Indeed the *New York Times* reported that the Poletti facility was “the largest source of toxic air, ground or water emissions in New York City, at more than 250,000 pounds per year—more than all reported sources in Brooklyn, Manhattan and the Bronx, combined.” Perez-Pena, *supra* note 8.

³⁰ Kirk Johnson, *The Energy Rush — A Special Report: Promise and Peril in New York Power Plans*, N.Y. TIMES, Aug. 14, 2000, at B5 (quoting Gerald Norlander, executive director of the Public Utility Law Project).

³¹ *Id.* at A1.

³² Hearing Transcript, *supra* note 1, at 469 (statement of Rep. Joseph Crowley). Two of the proposals were from Orion Power Holdings—one to resurrect Astoria Generating No. 2, which had been built in the 1950s and was the city’s dirtiest, least efficient facility by the time it closed in 1993; the other to expand power generating capacity at Astoria Generating No. 3 by 499 MW. Johnson, *supra* note 30, at A1, B5. The third was for Keyspan Energy Ravenswood. The fourth was the Poletti proposal. In addition to the Poletti expansion, as part of the Power Now! Project NYPA also proposed locating two 44 MW peak power turbines in Long Island City, directly adjacent to the Queensbridge Housing Project. *See e.g.*, UPROSE v. Power Authority of New York, 285 A.D.2d 603 (2001).

³³ Power Authority of the State of New York, Combined Cycle Project in Astoria, Queens: Application for Certification of a Major Electric Generating Facility under Article X of the New York State Public Service Law, § 4.1 (June 2000), <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=99-F-1627> [hereinafter Article X Application].

³⁴ Daniel Henrick, *Queens Bad Air Worsens—Sharp Rise in Toxic Emissions from Power Plants*, QUEENS CHRONICLE (July 10, 2003).

³⁵ *Pataki Orders 50 Percent Pollution Cut at Power Plants*, QNS.com (Oct. 21, 1999).

air pollutant exposures.³⁶ The health effects from this pollution were unmistakable—child asthma hospitalization rates were skyrocketing, and deaths from heart disease were significantly higher than in the rest of the City.³⁷ Ambient PM_{2.5} levels in the neighborhood were already above EPA’s proposed National Ambient Air Quality Standard (NAAQs), which indicated that Astoria would be a non-attainment zone for that standard as well.³⁸ Given that none of the air monitors were located in Astoria, and that the nearest monitors were all located kilometers from the Poletti Plant, these rankings likely understated the more localized pollution rates in the Astoria neighborhood.³⁹ More precise figures are not available because NYPA received an exemption from the Clean Air Act’s general requirement that a facility conduct localized pre-construction ambient air quality monitoring.⁴⁰

The Poletti Plant was a significant contributor to that pollution. In 1998, the plant emitted more than 358,000 pounds of pollutants.⁴¹ Local asthma rates, especially childhood asthma rates, were sky high.⁴² Despite this immense pollution load, NYPA proposed adding a new 500 MW facility alongside the Poletti Plant.⁴³ The Authority also proposed two “temporary” turbines for the Astoria/Long Island City border as part of a purported emergency plan to site similar turbines at six locations across the City, all to be placed in already overburdened communities of color. Thus, the two plans would have made Astoria’s already polluted airshed even worse. In deciding that it did not need to conduct a full environmental impact assessment, NYPA assumed a 70% reduction in the Poletti Plant’s operations after the new 500 MW facility was up and

³⁶ *Scorecard Pollution Locator: Criteria Air Pollutant Report: Queens County NY*, SCORECARD http://scorecard.goodguide.com/env-releases/cap/county.tcl?fips_county_code=36081#maps (last visited Feb. 9, 2019).

³⁷ WOOLF ET AL., *supra* note 20, at 18–19.

³⁸ *Id.* at 24.

³⁹ Article X Application, *supra* note 33, at 5.2.3.

⁴⁰ *Id.* at 5.3.4(a). Interestingly, NYPA’s assessment of especially vulnerable facilities, called special receptors, appears to have omitted PS122, the public school closest to the facility. *Id.* at tbl. 5.11.

⁴¹ That included 3446 tons of nitrogen oxides, with nearby Ravenswood emitting another 3800 tons and Astoria Generating emitting over 4000 tons. STANFIELD, *supra* note 24, app. 4 at 9.

⁴² STANFIELD, *supra* note 24, app. 6 at 5. The decrease was attributable to the 1990 Clean Air Act amendments, which placed a national cap on SO₂ emissions. Clean Air Act, Title IV, 42 U.S.C. 7651(b); *see also* Gabriel Chan, Robert Stavins, Robert Stowe, and Richard Sweeney, *The SO₂ Allowance Trading System and the Clean Air Act Amendments of 1990: Reflections on Twenty Years of Policy Innovation* 7-9 (2012).

⁴³ Article X Application, *supra* note 33.

running. While NYPA spun this as a response to community concerns about air pollution,⁴⁴ this reduction was actually a necessary component of the emissions offsets⁴⁵ required before NYPA could construct a facility in a nonattainment zone.⁴⁶

Moreover, NYPA used a series of assumptions that understated the impact of its plans. For example, in assessing the potential health impacts of pollutants from the new facility, NYPA used a standard reference body of a person weighing 70 kg (154 lbs) with an inhalation rate of 20 m³/day.⁴⁷ While these assumptions were sanctioned by New York State's Department of Health, they clearly fail to capture the risks that these pollutants might pose for children and many smaller adults. This choice was particularly problematic because small particulates emitted by power plants were known to be particularly hazardous to small children. For example, babies living in cities with high levels of particulate pollution faced a 26% greater risk of Sudden Infant Death Syndrome (SIDS).⁴⁸

At the time of the Poletti fight, there was clear and growing evidence linking small particulate pollution to a range of serious health

⁴⁴ See, e.g., NYPA letter to the Hon. Janet Hand Diexler, Secretary New York Board of Electric Generation Siting and the Environment 5 (Dec. 29, 2000) (claiming that "NYPA has heard the concerns over air quality. As a result of these concerns, NYPA has made a policy commitment to reduce the existing plant's capacity factor by 70%, resulting in lower emissions from the Poletti site").

⁴⁵ N.Y. COMP. CODES R. & REGS. tit. 6, § 231-1.1(5) defines emissions offset as "[e]missions reductions which are obtained to provide reasonable progress toward attainment of ambient air quality standards in exchange for approval of an application for a permit to construct for a new air contamination source project in a nonattainment area." Section 231.1.5(e) provides that "[e]mission offsets must be sufficient to provide a net air quality benefit when offsets of particulates, sulfur dioxide, carbon monoxide and/or nitrogen oxides are required. A net air quality benefit is achieved when the air quality impact of the applicable air contamination source project does not exceed the significant impacts shown in section 231-1.10 of this Subpart." *Id.*

⁴⁶ Under N.Y. COMP. CODES R. & REGS. tit. 6, § 231-1.5, emission offsets are "required for any air contaminant for which the area is designated as a nonattainment area" whenever a proposed project would otherwise result in a net increase of that contaminant. Those emissions offsets "must be sufficient to provide a net air quality benefit." *Id.* at 231-1.5(c).

⁴⁷ Article X Application, *supra* note 33, § 5.5.1(a). This assumed a typical adult inhalation rate of 12-20 breaths per minute. *Id.* For comparison, infants typically have a respiration rate of 30-60 breaths per minute, with toddlers under three at 24-40 breaths per minute. New York Dep't of Health, *Pediatric Respiratory Rates*, <https://www.health.ny.gov/professionals/ems/pdf/assmttools.pdf>.

⁴⁸ Tracey J. Woodruff et al., *The Relationship Between Selected Causes of Postneonatal Infant Mortality and Particulate Air Pollution in the United States*, 105 ENVTL. HEALTH PERSP. 608, 610 (June 1997).

problems, including asthma, heart attacks,⁴⁹ pulmonary and cardiovascular disease,⁵⁰ cancer,⁵¹ chronic bronchitis, and premature mortality.⁵² Multiple studies concluded that particulate pollution from power plants caused tens of thousands of premature deaths,⁵³ with children, the elderly, and people with pre-existing lung or heart problems most at risk. The evidence connecting particulate pollution to increased mortality and morbidity has only become more compelling in the intervening years,⁵⁴ but the point is that at the time of the Poletti fight, it

⁴⁹ See, e.g., Diane R. Gold et al., *Ambient Pollution and Heart Rate Variability*, 101 CIRCULATION 1267 (Mar. 21, 2000).

⁵⁰ C. Arden Pope III & Douglas W. Dockery, *Acute Health Effects of PM-10 Pollution on Symptomatic and Asymptomatic Children*, 145 AM. REV. RESPIR. DISEASE 1123 (1992); Joel Schwartz et al., *Acute Effects of Summer Air Pollution on Respiratory Symptom Reporting in Children*, 150 AM. J. RESPIR. CRIT. CARE MED. 1234 (1994); Suresh. H. Moolgavkar, *Air Pollution and Hospital Admissions for Chronic Obstructive Pulmonary Disease in Three Metropolitan Areas in the United States*, 12 INHALATION TOXICOL. 75-90 (2000).

⁵¹ Aaron J. Cohen & C. Arden Pope III, *Lung Cancer and Pollution*, 103 ENVTL. HEALTH PERSP. 219 (Nov. 1995).

⁵² See generally DEBORAH SHPRENTZ, *BREATH TAKING: PREMATURE MORTALITY DUE TO PARTICULATE AIR POLLUTION IN 239 AMERICAN CITIES* (1996). Nevertheless, NYPA sought to cast doubt on the connection between air pollution and disease, characterizing the overwhelming body of evidence for that connection as “several studies” which “suggested . . . that asthma may be exacerbated following periods of high ozone pollution, and that asthmatics are more sensitive to the effects of O₃, S₀₂, PM and NO_x.” Article X Application, *supra* note 33, at § 5.7. NYPA then asserted that “[a]n equal number of studies have been unable to link air pollution to an increase in asthma rates.” *Id.* Thus, NYPA suggested that “possible respiratory health effects associated with air pollutants will require considerably more investigation.” *Id.*

⁵³ ABT ASSOCIATES, *THE PARTICULATE-RELATED HEALTH BENEFITS OF REDUCING POWER PLANT EMISSIONS* (Oct. 2000). This study concluded that more than half of those deaths could be avoided through better pollution control. *Id.* at 6-3 to 6-14.; see also RICHARD WILSON & JOHN D. SPENGLER, *PARTICLES IN OUR AIR: CONCENTRATIONS AND HEALTH EFFECTS* 212 (1996). Indeed, one more recent study concluded that reductions in PM_{2.5} concentrations during the 1980s and 1990s accounted for approximately 15% of the overall increase in life expectancy during that period. C. Arden Pope et al., *Fine-Particulate Air Pollution and Life Expectancy in the United States*, 360 NEW ENG. J. MED. 376-86. (2009).

⁵⁴ See George D. Thurston et al., *Ambient Particulate Matter Air Pollution Exposure and Mortality in the NIH-AARP Diet and Health Cohort*, 124 ENVTL. HEALTH PERSP. 484 (2016); U.S. CENTERS FOR DISEASE CONTROL AND PREVENTION, *HEALTH IMPACTS OF FINE PARTICLES IN AIR*, <http://ephrtracking.cdc.gov/showAirHIA.action>; N.Y.C. HEALTH, *NEW YORK CITY TRENDS IN AIR POLLUTION AND ITS HEALTH CONSEQUENCES* (2013). See generally Susan C. Anenberg et al., *An Estimate of the Global Burden of Anthropogenic Ozone and Fine Particulate Matter on Premature Human Mortality Using Atmospheric Modeling*, 118 ENVTL. HEALTH PERSP. 1189 (2010) (concluding that PM_{2.5} and O₃ “contribute substantially” to global premature mortality); Aaron J. Cohen et al., *The Global Burden of Disease Due to Outdoor Air Pollution*, 68 J. TOXICOL. & ENVTL. HEALTH 1301 (2005); Aaron J. Cohen et al., *Urban Air Pollution, in COMPARATIVE QUANTIFICATION OF HEALTH RISKS: GLOBAL AND REGIONAL BURDEN OF DISEASE DUE TO SELECTED MAJOR RISK FACTORS*, Vol. 2. (Majid Ezzati et al. eds., 2004).

was clear that PM_{2.5} posed serious health risks.⁵⁵ Nevertheless, NYPA's 500 MW application did not even mention PM_{2.5}.

This omission was even more striking given the regulatory backdrop. EPA had been regulating PM₁₀ (larger particulate matter) since the 1970s,⁵⁶ with regulation becoming dramatically more stringent in the 1990s.⁵⁷ The Poletti Plant therefore had an emissions limitation based on the NAAQS for PM₁₀. In 1997, responding to growing evidence of the hazards posed by smaller particulates, the EPA promulgated a National Ambient Air Quality Standard for PM_{2.5},⁵⁸ setting a daily standard of 65 micrograms per cubic meter (µg/m³) and an annual standard of 15 µg/m³.⁵⁹ This new PM_{2.5} standard was promptly challenged by the trucking industry, which argued both that the standards were arbitrary and that the relevant portion of Clean Air Act authorizing EPA to set National Ambient Air Quality Standards was itself unconstitutional.⁶⁰ During most of the Poletti dispute, the United States Supreme Court was considering the constitutionality of the Clean Air Act language granting EPA the authority to set NAAQs.⁶¹ It took EPA until 2002 to establish the monitoring and data collecting network necessary to designate non-attainment areas and to begin the compliance process.⁶² While EPA expected that most of Queens would be defined as a PM_{2.5} nonattainment zone,⁶³ and independent experts identified PM_{2.5} as a major public health

⁵⁵ Neal Fann et al., *Estimating the National Public Health Burden Associated with Exposure to Ambient PM_{2.5} and Ozone*, 32 RISK ANALYSIS 81 (2012) (asserting that 10% of deaths in Los Angeles are attributable to PM_{2.5}).

⁵⁶ National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8,186-7 (Apr. 30, 1971).

⁵⁷ U.S. EPA, PARTICULATE MATTER (PM) STANDARDS – TABLE OF HISTORICAL PM NAAQS, https://www3.epa.gov/ttn/naaqs/standards/pm/s_pm_history.html.

⁵⁸ Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, 62 Fed. Reg. 38,421 (July 18, 1997); National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997).

⁵⁹ On October 17, 2006, EPA revised the daily standard downward from 65 to 35 µg/m³. National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,114 (Oct. 17, 2006). In 2013, EPA lowered that annual standard from 15.0 to 12.0 µg/m³. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086 (Jan. 15, 2013).

⁶⁰ *Am. Trucking Ass'n v. EPA*, 175 F.3d 1027, 1033–34 (D.C. Cir. 1999).

⁶¹ In 2001, the Supreme Court concluded that the Clean Air Act provisions in question were constitutional. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001). The D.C. Circuit then upheld the PM_{2.5} standards as rational and supported by the rulemaking record. *Am. Trucking Ass'n v. EPA*, 283 F.3d 355 (D.C. Cir. 2002).

⁶² This monitoring network was required by the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178 §§ 6101-02, 112 Stat. 107, 463-65 (1998).

⁶³ SYNAPSE ENERGY, AIR QUALITY IN QUEENS COUNTY S-5 (2003).

threat,⁶⁴ designations had not yet been made. Taking advantage of the regulatory confusion, NYPA made no mention of PM_{2.5} in its application and offered no assessment of the PM_{2.5} emissions associated with its proposed facility. This choice turned out to be a critical mistake, one that the facility's opponents seized and turned to their advantage.

II. THE LEGAL AND ADMINISTRATIVE CAMPAIGN TO SHUT POLETTI

The Poletti campaign involved a coalition between the Natural Resources Defense Council (a national environmental group), New York Public Interest Research Group (a New York environmental group), and a community-based NGO called the Coalition Helping Organize a Kleaner Environment (CHOKE).⁶⁵ While the national and state lawyers were obviously critical for the advocacy, local residents were at the head of the campaign and were generally identified in the press as the leaders. The campaign did not merely oppose the Poletti facility, but sought a voice in all local siting decisions and identified cleaner air as its goal. Having a forward-looking coalition headed by local leaders put pressure on local politicians to take a position in line with their constituents' wishes. Indeed, all of the local politicians supported the campaign—from City Council members to the Queens Borough President, to the local congressional delegation. The coalition managed to bring together homeowners and public housing leaders under one banner. This sense of public unity built a vocal local contingent in support of change.⁶⁶ Ordinary rate-payers, neighbors, and voters showed up at meetings,⁶⁷ wrote letters, passed out leaflets, and generally worked to achieve their shared goal of cleaner air for the community. Throughout its campaign, the coalition maintained a three-point position: 1) NYPA must prove that New York City actually needs new power before building more plants; 2) If new plants are built, there must be a system for retiring older filthy

⁶⁴ *Id.* at S-7.

⁶⁵ For convenience, I will refer to this coalition as the CHOKE coalition.

⁶⁶ Indeed, community pressure prompted the state assembly to hold a hearing on the matter. At the hearing, these community voices were highly visible, with speakers including representatives from CHOKE, NYPIRG, Communities United for Responsible Energy, El Puente, Queensbridge Tenant Association, and NYC Environmental Justice Alliance, so name a few. Hearing Transcript, *supra* note 1.

⁶⁷ E.E. Lippincott, *Locals, Pols & Shulman Declare War on NYPA Plan at LIC Rally*, QUEENS CHRONICLE (Jan. 11, 2001), http://www.qchron.com/editions/western/locals-pols-shulman-declare-war-on-nypa-plan-at-lic/article_b193c23e-f52b-5e0e-9175-612ca45ede5c.html.

plants, or at least bringing them up to modern standards; and 3) Plants must be dispersed fairly across the city so that no neighborhood has undue burden.⁶⁸

Community support allowed the coalition to leverage state-wide and national legal resources to pursue a two-pronged advocacy strategy involving both state court litigation and a state administrative challenge. The coalition intervened in the administrative permitting process for the new 500 MW facility.⁶⁹ As interveners, the CHOKE coalition obtained a platform to challenge NYPA's application for a "certificate of environmental compatibility and public need"⁷⁰—a legal prerequisite for the new facility. The CHOKE coalition was awarded intervener funding under Section 164, which enabled them to conduct discovery and hire independent experts.⁷¹ As parties, members of the CHOKE coalition were served with every document in the licensing proceeding, but also had the opportunity to submit briefing,⁷² and to submit expert testimony to the proceedings.⁷³ The CHOKE coalition used this platform to argue that the Astoria community was already overburdened with polluting facilities,

⁶⁸ Hearing Transcript, *supra* note 1, at 475 (Testimony of Peter Vallone Jr.).

⁶⁹ Letter from NYPIRG to Hon. Janet H. Dexler, Secretary of the New York Power Authority (Sept. 21, 2000); Letter from CHOKE to Hon. Debra Renner, Acting Secretary of the New York Power Authority, (Aug. 30, 2000); Letter from NRDC to Hon. Debra Renner, Acting Secretary of the New York Power Authority (Aug. 24, 2000). All three of these documents are available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=99-F-1627> (Exhibits 212, 213, 214). The parties intervened pursuant to Section 166 of the Public Service Law and 16 NYCRR Section 4.3.

⁷⁰ In the Matter of the Application by New York Power Authority for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a Nominal 500 Megawatt Electric Generating Facility adjacent to the Existing Charles Poletti Power Project in the Astoria Section of the Borough of Queens, New York, 99-F-1627 (2000), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={F5FD9318-7ED4-4096-A2D6-A6A140AE3F5C}>.

⁷¹ New York State Board on Electric Generation Siting and the Environment, Ruling Granting Queens and CHOKE Funds to Review Application and Conduct Discovery, 99-F-1627 (2001). New York State Board on Electric Generation Siting and the Environment, Ruling Granting Queens and CHOKE Additional Funds to Analyze Issues, 99-F-1627 (June 12, 2001).

⁷² See, e.g., Joint Post-Hearing Brief to the New York State Board on Electric Generation Siting and the Environment on PM2.5 Issues, 99-F-1627 (2002) [hereafter CHOKE Joint Brief].

⁷³ See, e.g., Testimony of Dr. George Thurston, Daniel Gutman and David Schissel submitted on behalf of CHOKE, NRDC and NYPIRG, 99-F-1627 (2002) [hereafter CHOKE Testimony]; Rebuttal Testimony of Dr. George Thurston and Daniel Gutman, submitted on behalf of CHOKE, NRDC and NYPIRG, 99-F-1627 (2002). The funding for hiring these experts came from NYPA pursuant to Section 164(6)(a)(b) of the then-existing Public Service Act. That Act expired in 2003. It took New York until 2011 to replace the expired siting law. New York eventually amended the Siting Law in a fashion designed to improve public participation and to expand the availability of such funds. N.Y. PUB. SERV. LAW § 164(4) (2011).

and that the additional 169 tons of PM_{2.5} that the new plant would emit, when combined with the 252 tons that the Poletti plant already emitted, would jeopardize public health and environmental safety.⁷⁴

While that proceeding was ongoing, the coalition joined with other environmental groups to attack the New York Power Authority from a different angle. In late 2000, the Power Authority had announced expedited plans to install eleven additional natural gas turbine units around New York City.⁷⁵ This plan was nominally in response to an expected power generation shortage for the summer of 2001. Warning of a possible “summer of calamity,” the Power Authority elected to cut some regulatory corners in its quest to add generating capacity in New York City.⁷⁶ The main goal was to avoid an extended siting evaluation under Article X of the Public Service Law,⁷⁷ a process that would take at least a year. Article X applied only to “major electric generating facilities” which Section 160(2) of the Law defined as “an electric generating facility with a generating capacity of eighty thousand kilowatts or more.”⁷⁸ Thus, under Article X as it existed in 2000, 80 MW was a threshold triggering environmental review. Each of the proposed new generating units could generate 44 MW of power, and the majority of the units were to be placed in pairs at multiple sites around New York City. Thus, the paired units could together generate 88 MW of power. These paired units therefore should have required an Article X siting process. However, in their quest for speed, the Power Authority elected to take a shortcut. By promising that each paired unit would be configured to generate only 79.9 MW of electricity—0.1 MW below the

⁷⁴ CHOKE Testimony, *supra* note 72, at 1; CHOKE Joint Brief, *supra* note 71, at 1. On July 19, 2001, the hearing examiner refused to allow the Coalition this opportunity. However, the two state court rulings described in the next paragraphs persuaded the Siting Board to overrule the hearing examiner. On January 24, 2002, the Siting Board issued an Order Concerning Interlocutory Appeals from Article X Issues Ruling directing additional briefing about the public health impacts of PM_{2.5}.

⁷⁵ See e.g., *New York Faces Prospect of its Own Energy Troubles*, N.Y. TIMES (Feb. 25, 2001).

⁷⁶ Eugene W. Zeltmann, Letter to the Editor, N.Y. TIMES, Mar. 22, 2001.

⁷⁷ 1992 N.Y. Laws 3382 [hereinafter *Article X*]. This law lapsed at the end of 2002. See Max Schultz, *New York Unplugged? Building Energy Capacity and Curbing Energy Rates in the Empire State*, Special Report SR6-08 5-6 (Mar. 2008). Article X was amended and reauthorized in 2011. See the Power NY Act of 2011 (A.8510/S.5844), L. 2011, c. 388 (effective Aug. 4, 2011).

⁷⁸ *Article X*, *supra* note 77. In 2011, New York amended Article X to define a major facility as any facility generating 25 MW or more. See New York State Public Service Law Article X: Siting of Major Electric Generating Facilities, N.Y. PUB. SERV. LAW §160(2) (2011).

80 MW threshold triggering environmental review—NYPA managed to persuade the Siting Board that no Article X process was required.⁷⁹

Once it had avoided Article X, the Power Authority, acting as the designated lead agency under New York's State Environmental Quality Review Act (SEQRA),⁸⁰ concluded that there would be no negative environmental impacts from siting the eleven turbines, and that the cumulative impacts of the proposed turbines would be insignificant.⁸¹ There was an immediate public backlash.⁸² Legislators accused the Power Authority of cutting regulatory corners and dodging environmental review,⁸³ subverting the spirit and letter of the law in a "mad rush" to install these turbines.⁸⁴ Indeed, internal agency documents explicitly discussed looking for "loopholes" to avoid a full siting review.⁸⁵ The *New York Times* criticized the project as having been "complicated by the secrecy, speed and dubious tactics used to pursue it."⁸⁶

The Power Authority's primary response to this backlash was to invoke California's experience with rolling blackouts in the summer of 2000.⁸⁷ NYPA alleged (incorrectly) that the blackouts were due a failure

⁷⁹ Declaratory Ruling Concerning Standards For Defining Generating Capacity, 00-F-1934 at 9 (2000) (finding that if NYPA "makes a legally binding commitment . . . that the units will not be operated at a total net generating capacity of 80 MW or more . . . the generating facility so constructed and so operated will not be a major electric generating facility subject to . . . article X of the Public Service Law.").

⁸⁰ *Id.*

⁸¹ See JULIE SZE, NOXIOUS NEW YORK 164–65 (2006) (describing the process and the community outrage it sparked). These findings, called a Negative Declaration and Determination of Non-Significance, were required under the State Environmental Quality Review Act to allow construction to move forward without further environmental review. N.Y. COMP. CODES R. & REGS. tit. 6 §617.7(a)(2).

⁸² The turbines required Air Permits. DEC held an eight-day public comment period. Despite the abbreviated window for participation, hundreds of people attended public hearings, with 130 people providing oral comments and over 600 submitting written comments. *Silvercup Studios v. Power Auth. of New York*, No. 2858/01, 5 (N.Y. Sup. Ct. 2001) (Golia, J.).

⁸³ *The Turbine Mess*, N.Y. TIMES, Mar. 20, 2001, at A24.

⁸⁴ Hearing Transcript, *supra* note 1, at 9–10.

⁸⁵ See *id.* at 50–53.

⁸⁶ *The Turbine Mess*, *supra* note 83. Community concerns proved prescient—the Staten Island turbine violated its permitted emissions limits every time it started up or shut down for nearly two years, without any disclosure to the community. In response to these violations, in January 2003, the State Department of Environmental Quality relaxed the environmental stringency of the operating requirements via a consent order with NYPA. Letter from Staten Island Borough President James P. Molinaro to Erin M. Crotty, Comm'r of the N.Y. Dep't of Env'tl. Conservation (May 20, 2004).

⁸⁷ Hearing Transcript, *supra* note 1, at 21.

to build power plants,⁸⁸ and accused those opposing its turbine plan opponents of short-sighted NIMBYism⁸⁹ that put New York City at risk.⁹⁰ Indeed, NYPA's mantra was that every day's delay in their generator plan brought New York closer to California.⁹¹ In making this oft-repeated claim, NYPA resolutely ignored the credible allegations, later proven to be true, that California's blackouts were due to market manipulation, rather than an actual shortage of generating capacity.⁹² Indeed, Assembly Member Paul Tanko, who chaired the Energy Committee, chided NYPA for using California as "a smokescreen"⁹³ and emphasized that California's crisis was not due to lack of physical generating capacity but because a significant percentage of that capacity had been taken off-line,⁹⁴ thereby creating an artificial shortage.

Two lawsuits challenged the turbine scheme, alleging that NYPA violated SEQRA by failing to adequately consider the environmental impacts of its decision. One lawsuit was brought by UPROSE, a legendary Brooklyn-based advocacy organization, attacked the overall turbine siting plan;⁹⁵ the other by CHOKE and Nina Adams in

⁸⁸ See *Fordham Environmental Law Journal Symposium: Featured Address of Michael N. Gianaris*, 13 FORDHAM ENVTL. L. J. 445, 447–48 (2002) (refuting this claim) [hereafter *Gianaris Fordham Remarks*].

⁸⁹ NIMBY is an acronym for "Not in My Backyard," a derogatory term for "opposition to the locating of something considered undesirable (such as a prison or incinerator) in one's neighborhood." *NIMBY*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/NIMBY>. In other words, NIMBYism is short-hand for a selfish parochialism that impedes the attainment of societal goals. Accusations of NIMBYism are frequently deployed as a weapon against environmental justice communities to obscure the very real justice and equity issues in the distribution of projects like the turbines. See e.g., Kate Burningham, *Using the Language of NIMBY: A Topic For Research, Not an Activity for Researchers*, 5 LOCAL ENVIRONMENT 55, 56–60 (2000).

⁹⁰ See e.g., *Groups File Lawsuit Over Power Plants*, ASSOCIATED PRESS, Feb. 8, 2001.

⁹¹ James Covert, *NY Power Authority Wins Approval for Final NYC Plant*, DOW JONES, Feb. 20, 2001 (quoting NYPA spokesperson Steve Schoenholz); *Groups File Lawsuit Over Power Plants*, ASSOCIATED PRESS, Feb. 8, 2001; see also *Gianaris Fordham Remarks*, *supra* note 88, at 450 (decrying this tactic). Then-Mayor Rudy Giuliani seconded this tactic, using a radio address to accuse turbine opponents of risking people's lives. James C. McKinley Jr. & Diane Cardwell, *Court Clears Plan to Build Power Plants*, N.Y. TIMES, April 7, 2001, at B1.

⁹² See, e.g., FED. ENERGY REGULATORY COMM'N, DKT NO. PA02-2-000, STAFF REPORT: PRICE MANIPULATION IN WESTERN MARKETS (2000). Indeed, after finding that Enron engaged in unlawful conduct, FERC forced Enron to disgorge \$1.6 billion in ill-gotten gains. Enron Power Marketing, Inc., 119 F.E.R.C. 63,013 (2007), <https://www.ferc.gov/industries/electric/industry/wec/gaming-initial-decision.pdf>.

⁹³ Hearing Transcript, *supra* note 1, at 8.

⁹⁴ *Id.* at 172.

⁹⁵ UPROSE is the oldest Latino community-based group in Brooklyn. It has been a leader in the fight for environmental justice and social justice for decades. See UPROSE, <https://www.uprose.org/mission> (last visited Feb. 17, 2019). UPROSE led the litigation, but

her capacity as President of the Queensbridge Tenant's Association, in conjunction with local politicians and Silvercup Studio, challenged only the Long Island City siting.⁹⁶ Both actions alleged that NYPA's actions violated SEQRA. UPROSE lost at the trial level. However, on appeal, the Appellate Division unanimously reversed, finding that NYPA failed to adequately consider the environmental impacts of the turbine plan.⁹⁷ The court concluded that there were potential environmental impacts sufficient to require an environmental impact statement. In particular, the court explicitly directed NYPA to assess the impacts from PM_{2.5}.⁹⁸ In the second case, *Matter of Silvercup v. NYPA*, the trial judge found that NYPA had failed to take the requisite "hard look"⁹⁹ at the relevant neighborhood character, visual impact, archeological and environmental concerns.¹⁰⁰ Noting that NYPA had "conducted its review with an eye toward approving the project and commencing construction"¹⁰¹ the *Silvercup* decision chastised NYPA for characterizing the area as industrial while "giving scant recognition to the residential recreational and community uses that exist in the area."¹⁰² The court also found that NYPA had given archeological and historical preservation concerns short shrift,¹⁰³ as well as a range of environmental concerns.¹⁰⁴ The court therefore ordered NYPA to prepare a full environmental impact

many other environmental justice groups, including Poletti Coalition member NYPIRG joined as co-plaintiffs. See *UPROSE v. New York Power Authority*, 2001 WL 34690105 (N.Y.A.D. 2 Dept.) (Brief of Petitioner-Appellant).

⁹⁶ Silvercup Studio had specific concerns about how the turbines would impact its newly built film studio in Astoria/Long Island City. E.E. Lippencott, *A Landmark's Lustre May Not Be Restored*, N.Y. TIMES (Feb. 18, 2001).

⁹⁷ *UPROSE v. N.Y. Power Auth.*, 729 N.Y.S.2d 42, 46 (N.Y. App. Div. 2001).

⁹⁸ *Id.* at 608.

⁹⁹ *Jackson v. N. Y. State Urban Dev. Corp.*, 494 N.E.2d 429, 436 (N.Y. 1986). As a point of interest, NYPA's outside counsel Stephen Kass represented the respondents in this case. *Id.*

¹⁰⁰ *Silvercup Studios v. Power Auth. of N.Y.*, No. 2858/01 (Mar. 29, 2001) (Golia, J.) (unpublished), http://www.courts.state.ny.us/library/queens/decisions_01-02.shtml

¹⁰¹ *Id.* at 33.

¹⁰² *Id.* at 34.

¹⁰³ *Id.* at 36–37. In particular, the court noted that NYPA only conducted an archeological assessment after issuing the Negative Declaration. *Id.* at 37.

¹⁰⁴ For example, in response to questioning by Assemblymember Gianaris, DEC Deputy Commissioner Glenn Bruening testified that DEC had not been involved with site assessment for known hazardous soil contamination at the Long Island City site prior to NYPA's issuance of the negative declaration. Hearing Testimony, *supra* note 1, at 409. Mr. Bruening also testified that ensuring community participation had not been part of DEC's environmental justice analysis. *Id.* at 415. Mr. Zeltmann testified that the environmental justice analysis was done after NYPA had selected and purchased the sites, *id.* at 205–06, and thus could have played no role in siting the facilities.

statement and issued a permanent injunction directing NYPA to cease all construction at the Long Island City site.¹⁰⁵ On appeal, the New York Appellate Division revoked the injunction, but affirmed the holding that NYPA's turbine plan illegally bypassed environmental rules under the State Environmental Quality Review Act (SEQRA).¹⁰⁶ As a result, the court ordered NYPA to prepare an environmental impact statement.¹⁰⁷

The CHOKE coalition participated in both the *UPROSE* and *Silvercup* litigations, and then used those decisions to its advantage in the Poletti licensing proceeding. Although the hearing examiners rejected coalition demands that NYPA assess PM_{2.5} impacts,¹⁰⁸ the CHOKE coalition appealed this decision. They persuaded the Siting Board to order an evidentiary hearing on the public health impacts of PM_{2.5} as part of the licensing hearing for the new proposed 500 MW facility.¹⁰⁹ The Siting Board directed that this evidentiary hearing address four questions: 1) the known sources of PM_{2.5} emissions; 2) the state of science regarding PM_{2.5} and its health effects; 3) the expected PM_{2.5} concentrations around the proposed facility, including any contributions from the proposed and existing facility; and 4) available mitigation and control strategies.¹¹⁰ At the three-day hearing, the CHOKE coalition had the opportunity to present briefing,¹¹¹ testimony, and exhibits.¹¹² The evidence introduced at this administrative proceeding raised a real possibility that NYPA might not obtain their permit. This possibility gave the CHOKE coalition leverage that they used to strike a deal with NYPA. In exchange for a withdrawal of coalition objections to the new 500 MW plant, the Power Authority committed to a six- to eight-year timetable for shutting down the dirty Poletti Plant, converting to cleaner

¹⁰⁵ *Silvercup Studios*, No. 2858/01, 40.

¹⁰⁶ *Silvercup Studios v. Power Auth.* of N. Y., 285 A.D.2d 598, 729 (N.Y. App. Div. 2001).

¹⁰⁷ *Id.*; *UPROSE*, 285 A.D.2d at 607.

¹⁰⁸ Article X Issues Ruling on Application of the New York Power Authority for a Certificate of Environmental Compatibility and Public Need to Construct and Operate a 500 Megawatt Combined Cycle, Combustion Turbine Electric Generating Facility at its Existing Charles Poletti Power Project in Astoria, Borough of Queens, No. 99-F-1627 (July 19, 2001) (New York State Board on Electric Generation Siting and the Environment), <https://www.dec.ny.gov/hearings/11583.html>.

¹⁰⁹ Order Concerning Interlocutory Appeals from Article X Issues Ruling, No. 99-F-1627 (Jan. 24, 2002) (New York State Board on Electric Generation Siting and the Environment).

¹¹⁰ *Id.* at 3-4.

¹¹¹ CHOKE Post-Hearing Brief, No. 99-F-1627 (New York State Board on Electric Generation Siting and the Environment) (Apr. 12, 2002).

¹¹² See generally Filed Documents, No. 99-F-1627 (New York State Board on Electric Generation Siting and the Environment) (Apr. 3-5, 2002) (listing testimony filed and exhibits accepted).

fuel and reducing the Poletti Plant's operation in the interim, and making significant investments in the community.¹¹³ With a legally binding commitment that NYPA "cease operation of the Existing Poletti Facility permanently by January 31, 2010,"¹¹⁴ the Siting Board issued NYPA the Certificate of Environmental Compatibility and Public Need it sought for the new 500 MW facility.¹¹⁵ And, eight years later, at 11:59 p.m. on January 31, 2010, NYPA permanently ceased operations at the Poletti Plant.¹¹⁶ Two years later, the Poletti Plant was demolished;¹¹⁷ thereby ensuring that it could never be reopened.¹¹⁸

While there are still too many power plants in Astoria, shuttering Poletti was a big victory for the CHOKe coalition. The dirtiest plant in New York City was closed. In its stead, a facility reputed to be one of the cleanest supplied New York City's energy needs.¹¹⁹ Perhaps learning from poor Poletti's tarnished name, the new 500 MW replacement facility was simply called Astoria I. Shutting Poletti dramatically reduced particulate matter pollution in Astoria.¹²⁰ Indeed, by 2015, PM_{2.5} in Astoria/Long Island City was below EPA's lowered annual PM_{2.5} threshold of 12 ug/m³,¹²¹ and the American Lung Association awarded Queens a passing grade for particulate pollution.¹²² Average annual

¹¹³ Supplemental Stipulation between the New York Power Authority and the City of New York, Matter No. 99-F-1627, 17–23 (New York State Board on Electric Generation Siting and the Environment) (Sept. 12, 2002). NYPA agreed to conduct a cumulative air impact analysis. *See id.* at 9.

¹¹⁴ *Id.* at 8.

¹¹⁵ Order Granting a Certificate of Environmental Compatibility and Public Need Subject to Conditions, Matter No. 99-F-1627, 22 (New York State Board on Electric Generation Siting and the Environment) (Oct. 2, 2002).

¹¹⁶ Antos, *supra* note 9.

¹¹⁷ Michael Florio, *Charles Poletti Power Plant Loses a Smoke Stack as Deconstruction is in Sight*, ASTORIA POST (May 7, 2014); Jeanmarie Evely, *Former Poletti Power Plant to be Torn Down in 2013*, DNA.INFO (Dec. 20, 2012, 8:07 AM).

¹¹⁸ *See* Costa Constantinides, Editorial, *Dismantle Poletti*, QUEENS GAZETTE (Apr. 25, 2012). Mr. Constantinides is the current City Council representative for Astoria and chairs the City Council Committee on the Environment.

¹¹⁹ Antos, *supra* note 9.

¹²⁰ AMERICAN LUNG ASSOCIATION, STATE OF THE AIR: NEW YORK 2015, <http://www.stateoftheair.org/2015/states/new-york/queens.html> (showing decrease of 4.2 µg/m³ in annual average concentration of particle pollution between 2002 and 2015).

¹²¹ Jeremy Hinsdale, *By the Numbers: Air Quality and Pollution in New York City*, EARTH INSTITUTE (June 6, 2016), <http://blogs.ei.columbia.edu/2016/06/06/air-quality-pollution-new-york-city/>

¹²² AMERICAN LUNG ASSOCIATION, *supra* note 120. However, Queens still received an F for ozone pollution.

concentration of PM_{2.5} plummeted, as did the number of days when PM_{2.5} concentrations exceeded the 24 NAAQS.¹²³

III. LEARNING FROM POLETTI: LESSONS FOR HUMAN RIGHTS ADVOCATES

Shutting down the Poletti Plant improved the quality of life in the Astoria/Long Island City neighborhoods. That, in itself, was an accomplishment. But, lessons from the Poletti fight can pay many other dividends beside the obvious environmental one. Environmentalists and human rights campaigners tend to conduct extensive post-mortems on their losses, but rarely their victories, perhaps because those victories are so often partial and contingent. It is time to break that pattern. The fight to shut Poletti offers a number of important lessons that should be textbook examples for what environmental advocates *should* do. Below are a series of lessons advocates can take from the Poletti campaign, and use in the ongoing fight to protect other overburdened communities.

A. CHANGE THE NARRATIVE

In 2000, New York was in the throes of energy deregulation.¹²⁴ It was a period of chaos and uncertainty.¹²⁵ No one really knew how the relatively sudden privatization of energy generation capacity would work in New York. NYPA capitalized on that uncertainty, repeatedly warning of looming blackouts.¹²⁶ NYPA produced newsletters stating that the turbines were “necessary to help assure that the lights don’t go out next summer.”¹²⁷ In this messaging, NYPA effectively deployed California, with its rolling blackouts, as an example to be avoided. NYPA grew fond

¹²³ *Id.*

¹²⁴ Press Release, New York Independent System Operator, New York Independent System Operator Announces Program to Protect Electric Markets and Consumers from Unwarranted Price Escalations (Oct. 19, 2000), http://www.nyiso.com/public/webdocs/media_room/press_releases/2000/nr_10_19_00_program_prot_un_pr_esc.pdf.

¹²⁵ An audit released by the State Comptroller’s office in 2001 offered a scathing critique of NYPA “question[ing] the willingness of NYPA officials to be held publicly accountable and to receive constructive criticism.” NEW YORK STATE OFFICE OF THE COMPTROLLER, NEW YORK POWER AUTHORITY MANAGEMENT AND OPERATIONS REPORT 2000-S-61, exec. summary 4 (2001) [hereafter 2001 AUDIT].

¹²⁶ See, e.g., E.E. Lippincott, *Anti-NYPA Suit Appeal Won By Plaintiffs—But Turbines Still Run*, QUEENS CHRONICLE (July 26, 2001) (quoting NYPA spokesperson as referring to NYPA’s plans to “avoid blackouts on hot days”).

¹²⁷ NYPA, POWERNOW! IN-CITY GENERATING PROJECT NEWSLETTER, undated, on file with author.

of saying that any challenge to its plans risked putting New York one day closer to California-style blackouts.¹²⁸ For example, NYPA's CEO Eugene Zeltmann invoked President Lincoln and characterized the eleven turbines as "New York's 'last, best hope' to keep the lights on this summer."¹²⁹ In response to questioning about whether New York faced "a serious potential for a California type blackout,"¹³⁰ Zeltmann responded, "That's what we are trying to avoid. That's what this is all about."¹³¹ Just saying "California" became a short-hand for "New York needs more power generating capacity now."¹³² The beauty of this California shorthand was that it could be (and was) ritually invoked to justify a whole range of energy development projects.¹³³ Through a single-minded advocacy for increased generating capacity, NYPA tried to position the CHOKe Coalition, and other environmental justice advocates as akin to Luddites willing to sacrifice the public's well-being to satisfy their own narrow interest.¹³⁴

The CHOKe coalition met this narrative head on, calling NYPA's rhetoric a "misinformation campaign intended to scare the daylight out of New Yorkers."¹³⁵ Instead, the CHOKe coalition offered

¹²⁸ The authority repeatedly asserted that "[e]very day's delay will push New York City one day closer to California." Kirk Johnson, *Critics of Power Generators Sue, Citing Threat to Environment*, N.Y. TIMES, Feb. 8, 2001, at B4.

¹²⁹ Hearing Transcript, *supra* note 1, at 171 (Zeltmann). New York has certainly experienced blackouts. Indeed, in 2006, despite generating a majority of New York City's power, the neighborhoods of Astoria and Long Island City suffered a nine-day blackout. Ken Belson, *Con Ed Apologizes for 2006 Blackout*, N.Y. TIMES (Aug. 21, 2008, 11:39 AM), <https://cityroom.blogs.nytimes.com/2008/08/21/con-ed-apologizes-for-2006-blackout/>; REPORT OF THE QUEENS POWER OUTAGE TASK FORCE (2007), http://www.dps.ny.gov/06E0894/06E0894_TaskForceReport.pdf. However, those outages were all due to a failing power distribution system rather than an actual power shortage. *Id.* at 16–18, 24–26.

¹³⁰ Hearing Transcript, *supra* note 1, at 285 (question posed by Assemblymember Boyle).

¹³¹ *Id.* at 286 (testimony of Zeltmann).

¹³² Alex Berenson, *New York Faces Prospect of Its Own Energy Troubles*, N.Y. TIMES (Feb. 25, 2001), <https://www.nytimes.com/2001/02/25/nyregion/new-york-faces-prospect-of-its-own-energy-troubles.html> (quoting one lawyer as urging that New York move quickly to approve new transmission lines and power plants to "sidestep disaster. Otherwise, . . . you just step back and wait until it's your turn, like California.").

¹³³ Even the State Comptroller's office fell victim to this same shorthand. 2001 Audit, *supra* note 124, at 15–16.

¹³⁴ *Groups File Lawsuit Over Power Plants*, ASSOCIATED PRESS (Feb. 8, 2001) (quoting NYPA as characterizing the lawsuits as "a dangerous step" and adding that "[e]very day's delay will push New York City one day closer to California."); *see also*, James. C. McKinley Jr. & Diana Cardwell, *Court Clears Plan to Build Power Plants*, N.Y. TIMES (April 7, 2001) (quoting then-Mayor Giuliani chastising plan opponents as willing to risk human lives, saying "People actually die. You have a risk to human life.").

¹³⁵ *Gianaris Fordham Remarks*, *supra* note 88, at 450.

an equally powerful counter narrative of an agency manipulating facts and figures in a single-minded quest to justify new plants.¹³⁶ First, the coalition pushed back hard on the claim that there was a looming power shortage.¹³⁷ They continually asserted that NYPA had failed to demonstrate a need for additional power,¹³⁸ nor had it considered alternatives like increased conservation.¹³⁹ CHOKE's counter-narrative found confirmation in a New York State Comptroller audit, which expressed concern that NYPA's plans risked generating 1000 MW *more* power than its New York City customers required.¹⁴⁰ The comptroller also concluded that in making its expansion plans, NYPA relied on "information that was unreliable and incomplete"¹⁴¹ and could not confirm that NYPA considered all reasonable alternatives before deciding to build the 500 MW facility.¹⁴² Moreover, in response to legislative questioning, NYPA was forced to acknowledge that it had not seriously considered conservation measures as an alternative to building new facilities,¹⁴³ nor had it thoroughly vetted the data used to conclude that New York faced an imminent power shortage.¹⁴⁴ In fact, according to contemporaneous Public Service Commission estimates, conservation could have reduced New York City's peak power demand by 250-300 MW,¹⁴⁵ and an additional 157 MW could have been generated from existing capacity.¹⁴⁶ NYPA was also forced to acknowledge that it had evidence showing that New York power generators were engaging in the

¹³⁶ *Id.*

¹³⁷ See Panel III: *Electric Generators In New York City: Balancing the Energy and Environmental Needs of the Community*, 13 FORDHAM ENVTL. L. REV. 531, 534 (2002) [hereinafter *Fordham Panel*] (quoting CHOKE attorney Peter Vallone Jr.).

¹³⁸ See *id.* ("C.H.O.K.E.s position is very simple. Number one, prove we need new power. As Assemblyman [sic] Gianaris said, that has not even been proved."); see also Hearing Transcript, *supra* note 1, at 475 (testimony of Peter Vallone Jr. on behalf of C.H.O.K.E.).

¹³⁹ See *Gianaris Fordham Remarks*, *supra* note 88, at 449 (listing what NYPA had omitted from its calculations and asserting "there was really never a real scare in the summer of 2001 that the lights were going to go out in New York. That was just a fiction that was promulgated mostly by the various authorities that run energy policy in this state. I think it was a travesty.").

¹⁴⁰ 2001 AUDIT, *supra* note 125, at 14.

¹⁴¹ NEW YORK STATE OFFICE OF THE COMPTROLLER, NEW YORK POWER AUTHORITY POWER GENERATION IN THE NEW YORK CITY AREA REPORT 2001-S-64 3 (2004) [hereafter 2004 AUDIT].

¹⁴² *Id.* at 12-14.

¹⁴³ Hearing Transcript, *supra* note 1, at 60-66 (testimony of Maureen Helmer & Howard Tarler on behalf of the Public Service Commission).

¹⁴⁴ *Id.* at 85-92 (questioning of Helmer & Tarler by Assembly Member Gianaris).

¹⁴⁵ *Id.* at 63-66 (testimony of Helmer and Tarler).

¹⁴⁶ *Id.* at 85-91.

kinds of supply manipulation that Enron had used to artificially reduce supply in California.¹⁴⁷

Second, the CHOKe coalition argued that even if new power generation was necessary, the burden of producing it needed to be shared across the city as a whole. This core environmental justice lesson resonated not only in the Poletti fight, but also in the parallel fight against the siting of eleven temporary turbines around New York City. The Power Authority claimed that all the turbines were sited in industrial areas.¹⁴⁸ Indeed, NYPA claimed that they “were not looking in residential neighborhoods for any of these sites for reasons that are perfectly obvious.”¹⁴⁹ However, the two turbines in Long Island City were sited roughly one block from Queensbridge Houses, the nation’s largest public housing project, with over 3,300 apartments.¹⁵⁰ NYPA decided that the turbines “were consistent with the nature of the surrounding area” because Queensbridge Houses were already adjacent to industrial uses.¹⁵¹ The turbines slated for Williamsburg were also in a residential area—next to a park, and around the corner from a school.¹⁵² The turbine placed in Staten Island was across the street from homes.¹⁵³

NYPA’s selection of these sites raised profound environmental justice concerns. As Astoria/Long Island City’s Assembly Member Michael Gianaris pointed out, NYPA’s rationale rested on the fact that “there are already power plants located there across the street from a

¹⁴⁷ See *New York Faces Prospect of Its Own Energy Troubles*, N.Y. TIMES, Feb. 25, 2001, at A1.

¹⁴⁸ Matthew L. Wald, *Power Agency Details Plans for Electric Turbines in City*, N.Y. TIMES, Nov. 22, 2000, at B7; Hearing Transcript, *supra* note 1, at 114 (testimony of Public Service Commissioner Helmer).

¹⁴⁹ Hearing Transcript, *supra* note 1, at 264 (NYPA Special Counsel Kass).

¹⁵⁰ *Id.* at 126. NYPA’s special counsel claimed that Queensbridge Houses were separated from the turbine site by the 59th Street bridge. *Id.* at 255–56. This statement was remarkably deceptive. While the housing project is on the north side of the Bridge and the turbine site on the south side, the bridge runs east-west, not north south. Queensbridge Houses were actually only separated from the turbine by the width of the bridge, not its length. *Id.*

¹⁵¹ *Id.* at 254–55 (remarks by Assemblymember Gianaris). It is worth noting that many of the areas NYPA selected were actually zoned for light industry, and it was only NYPA’s status as a state agency exempt from local control that allowed the plan to go forward. A private actor would not have been able to obtain the necessary zoning approvals. See Testimony of Staten Island Borough President Guy V. Molinari, Pouch Terminal Site for the New York City Power Authority’s In-City Generation Project Public Hearing 3–4 (Dec. 20, 2001) [hereinafter *Molinari Remarks*].

¹⁵² Hearing Transcript, *supra* note 1, at 148 (remarks of Stephen Kass), 310–14 (remarks of Assemblymember Lentol).

¹⁵³ *Molinari Remarks*, *supra* note 151, at 3–5.

residential use.”¹⁵⁴ Williamsburg’s Assembly Member Joseph Lentol concurred, noting that “[w]e understand that they are in industrialized zones. My community has been under development for so many years and this is the type of development we are getting.”¹⁵⁵ Emphasizing that people live directly across the street from the Staten Island location, Borough President Guy Molinari accused NYPA of “ignoring” and “demeaning” those residents by concluding that because there were current nearby industrial uses “residents are less likely to be significantly affected by the development of a power plant.”¹⁵⁶

All three politicians put their fingers on an overarching problem. NYPA’s reasoning perpetuates injustice by ensuring that already burdened communities will become ever-more burdened. Past environmental injustices lay the groundwork for present and future environmental injustice. Each time there is a siting decision, the rational choice is to site the same noxious uses in the same communities that already have such facilities: time, after time, after time. Any given individual siting decision may, on its own, be justifiable, reasonable, and logical. However, together these decisions combine to create a path dependency of environmental injustice.

Changing this pattern involves rejecting modes of thinking that assume the status quo as a neutral starting point. The CHOKe coalition showed us how to do this. By insisting that power generating facilities should be spread across the entire New York City community, the CHOKe coalition argued that environmental “bads” should be shared by those who benefit from their use. After all, the power these plants generated was shared across the entire New York City community. Yet, while benefits were shared, the burdens of pollution were borne by just a few predominantly poor or minority communities. Or stated differently, by insisting that power siting decisions and planning processes must prioritize environmental justice, the CHOKe coalition offered an alternative narrative for how New York City should think about power generation.

¹⁵⁴ Hearing Transcript, *supra* note 1, at 257–58.

¹⁵⁵ *Id.* at 114.

¹⁵⁶ Molinari Remarks, *supra* note 151, at 3–4.

B. COALITIONS AND PARTNERSHIPS ARE KEY

The CHOKE coalition also modeled an important organizing lesson for environmental and human rights activists—successful advocacy is bottom-up and must focus on demands that originate from, and resonate within, the affected community. The CHOKE organization itself included Tenant Association leaders from the major public housing facilities,¹⁵⁷ representatives from local private housing cooperatives,¹⁵⁸ and local homeowners and other residents.¹⁵⁹ When possible, CHOKE also made common cause with local businesses. Homeowners and public housing residents joined forces, making the CHOKE coalition unusually broad-based and locally driven. Hundreds of angry citizens turned out for rallies and meetings,¹⁶⁰ prompting the New York Assembly to hold a special hearing on NYPA's activities. While the legal proceedings were obviously critical to the outcome, those proceedings occurred against a context of social mobilization.

The CHOKE coalition also reached beyond the local to make common cause with other environmental organizations. The coalition model is instructive: local spokespeople led the way,¹⁶¹ but they were supported by resources, expertise, and advocacy from state-wide and national groups. Local, state, and national groups all worked together. This community and legal coalition leveraged their partnerships to reach out to less traditional partners. For example, in 2002 Fordham Environmental Law Journal hosted a daylong symposium titled *Energy and the Environment in New York State: Balancing Society's Need for Energy While Protecting and Preserving the Environment*. Speakers

¹⁵⁷ Queensbridge Houses was represented by Queensbridge Tenants Association President Rita Normandeau and by activist Areathia Winns. Hearing Transcript *supra* note 1, at 481.

¹⁵⁸ The generally recognized leader of CHOKE was Anthony Gigantiello, the long-time president of North Queensview Homes Cooperative, a private middle-income housing development located between the Poletti and Ravenswood power plants. E.E. Lippincott, *Keyspan Officially Seeks to Build New L.I.C. Power Plant*, Queens Chronicle (Aug. 10, 2000).

¹⁵⁹ Rose Marie Poveromo, President of the United Community Civic Association, represented homeowners and businesses. John Lauinger, *Astoria Leaders Want The Plug Pulled on Plans on Power Plant*, DAILY NEWS (Apr. 14, 2009).

¹⁶⁰ Jennifer Warren, *Residents Oppose New Power Plants in LIC*, TIMES LEDGER (Dec. 21, 2000), <https://www.timesledger.com/stories/2000/51/20001221-archive42.html> (describing a crowd of 300 at a community meeting); Josh Kaufman, *Does Power Kill? Balancing the Energy Environment*, QUEENS TRIBUNE (Apr. 20, 2000), <http://queenstribune.com/does-the-power-kill-balancing-the-energy-environment/> (describing a crowd of 200 at a CHOKE meeting).

¹⁶¹ For the importance of local involvement, see JAMES C. SCOTT, *SEEING LIKE A STATE* (1999) (making the case that successful social programs must recognize that local, practical knowledge is as important as formally recognized expertise).

included: Assembly Member Gianaris, NYPA special counsel Steven Kass, NYPIRG attorney Lisa Garcia, Reliant Resources Manager Liam Baker, and CHOKE attorney Peter Vallone Jr.¹⁶² The symposium took place during the pendency of the litigation. By bringing industry representatives, politicians, scholars, and activists together for an academic conversation, the symposium created space for a different kind of dialogue. This kind of activist/academic partnership can be a model for critical academic engagement with local concerns, promoting dialogue, and enhancing public discourse.

The inclusive and politically active CHOKE coalition got local politicians on their side. Indeed, the area's elected officials spoke with one voice. Community board members, city council members, state legislators, and local congressional representatives all lined up to oppose NYPA's plan to expand the Poletti facility. Indeed, during the pendency of the campaign, Peter Vallone, Jr. parlayed his position as CHOKE's pro bono counsel into an electoral victory for the city council seat representing Astoria.¹⁶³ Later, Aravella Simotas, the *Fordham Environmental Law Review* editor who organized Fordham's Poletti Symposium and wrote her law review comment on the fight,¹⁶⁴ also ran for office. Since 2011, Simotas has represented the Astoria/Long Island City area in the New York State Assembly.¹⁶⁵ In that role, Simotas chaired the Smart Power Coalition, which continued the Poletti fight by advocating that Astoria's remaining dirty power generating facilities be replaced with cleaner ones.¹⁶⁶ The current Astoria City Council Member, Costa Constantinides, chairs the City Council Environmental

¹⁶² *Fordham Panel*, *supra* note 137.

¹⁶³ Ted Phillips, *When a House is Not a Home*, VILLAGE VOICE (Aug. 21, 2001). Peter Vallone Jr.'s succeeded his father, Peter Vallone Sr., who held the same City Council seat representing Astoria since the 1970s. VALLONE LAW FIRM: PETER F. VALLONE, SR., https://web.archive.org/web/20090926062629/http://www.vallonelaw.com/Peter_ValloneSr.htm (last visited Feb. 17, 2019). Vallone Jr. served twelve years in that position before being elected to a judgeship. Joyce Vetere Milowski & Dan Miller, *Vallone Jr. Sworn In As Civil Court Judge*, QUEENS GAZETTE (Jan. 13 2016).

¹⁶⁴ Aravella Simotas, *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 Responsible Energy Policy*, 13 FORDHAM ENVTL. L. REV. 605 (2001).

¹⁶⁵ ASSEMBLYMEMBER ARAVELLA SIMOTAS, N.Y. ASSEMBLY, <http://assembly.state.ny.us/mem/Aravella-Simotas> (last visited Feb. 18, 2019).

¹⁶⁶ Clare Trepasso, *Coalition Forms to Support Astoria Energy Plant's Bid to Repower*, DAILY NEWS (May 8, 2012), <http://www.nydailynews.com/new-york/queens/coalition-forms-support-astoria-energy-plant-bid-repower-article-1.1074623>.

Committee.¹⁶⁷ He has made environmental justice the centerpiece of his tenure,¹⁶⁸ with clean energy a particular focus of concern.¹⁶⁹ These political outcomes offer an important reminder that voting must be part of any environmental advocacy strategy. Environmental and human rights activists must direct their activities toward political and social change. Litigation strategies are far more effective when backed by an agenda for concomitant political transformation.

IV. CONCLUSION: JUSTICE IS A MOVING, MULTIFACETED TARGET

The Poletti Plant is long gone—it was shut down in 2010¹⁷⁰ and fully dismantled in 2015.¹⁷¹ In 2017, the CUNY Center for Urban Environmental Reform memorialized the struggle to shut Poletti by publishing the graphic novel *Bina's Plant*, a fictionalized version of the campaign to shut the Poletti. *Bina's Plant* will be used for environmental justice education in New York City schools and with community groups. The book will ensure that the story of the Poletti victory lives on to inspire a new generation of environmental leaders.

Shutting the Poletti was definitely an environmental success story. In 2017, the New York City Health Department reported that air pollution in New York City was at an all-time low. Particulate matter pollution had fallen 18% in under a decade, and sulfur dioxides levels

¹⁶⁷ DISTRICT 22: COSTA CONSTANTINIDES, N.Y. CITY COUNCIL, <https://council.nyc.gov/district-22/> (last visited Feb. 18, 2019).

¹⁶⁸ Press Release, Office of Costa Constantinides, City Council Passes Most Comprehensive Environmental Justice Legislation in Nation (Apr. 5, 2017), <https://council.nyc.gov/costa-constantinides/2017/04/05/230/>. Specifically, Constantinides sponsored Int. 359, *A Local Law to Amend the Administrative Code of New York, in Relation to Requiring a Study of Environmental Justice Areas and the Establishment of an Environmental Justice Portal*, which was signed into law on April 25, 2017. He also worked to support the companion bill Int. 886, *A Local Law to Amend the Administrative Code of New York, in Relation to Identifying and Addressing Environmental Justice Issues*. Both bills can be accessed at <http://legistar.council.nyc.gov/Legislation.aspx>.

¹⁶⁹ For example, in 2018, Constantinides sponsored two wind energy bills and an energy efficiency bill. He also shepherded through a series of bills promoting solar energy, increased energy efficiency, more stringent fuel standards for buildings and power plants, and energy auditing. All these bills are all available from <http://legistar.council.nyc.gov/Legislation.aspx>.

¹⁷⁰ Press Release, NYPA, NYPA to Cease Operations of Queens Power Plant on January 31st (Jan. 29, 2010), <https://www.nypa.gov/news/press-releases/2010/20100129-queens-power-plant-cease-operations>.

¹⁷¹ Minutes of the Regular Meeting of the Power Authority of the State of New York, Exhibits E, F, G: (Mar. 26, 2015).

had plummeted 84%.¹⁷² A 2014 report indicated that asthma deaths had fallen significantly.¹⁷³ Better air quality, along with better Medicaid coverage for asthma medicines, and growing public awareness has made a difference.

The campaign to shut Poletti was deeply entwined with the simultaneous campaign to block the siting of turbines in environmental justice neighborhoods. Together, the two campaigns created one of those rare moments when the larger public can actually “see” the structural nature of environmental racism.¹⁷⁴ Reading the two campaigns together, their biggest lesson may be that we need a more intersectional conception of pollution in which its deeply racialized distribution is fully recognized.¹⁷⁵

Too often, institutionalized racism poses a barrier to achieving the kind of cooperation that was so successful in the Poletti campaign. De facto segregation and racialized voting can leave poor and minority communities isolated in their battles against pollution. Air quality in those communities can stagnate or decrease, even as rest of the city improves. For example, even though New York City now has the cleanest air since monitoring began,¹⁷⁶ asthma rates are still unacceptably high in parts of the Bronx and Manhattan,¹⁷⁷ with black and Latina/o children hardest hit.¹⁷⁸

There is no question that Western Queens was (and is) unduly burdened by pollution from power plants working night and day to feed the insatiable energy demand of wealthier (and whiter) Manhattan.¹⁷⁹

¹⁷² Erin Durkin, *NYC Air Pollution at All-Time Low, Data Reveals*, N.Y. DAILY NEWS (Apr. 20, 2017), <http://www.nydailynews.com/new-york/new-york-city-air-pollution-all-time-data-reveals-article-1.3077440>.

¹⁷³ STATE OF NEW YORK COMPTROLLER, *THE PREVALENCE AND COST OF ASTHMA IN NEW YORK STATE 3* (Apr. 2014).

¹⁷⁴ For a thorough discussion of what this means, see JAMES C. SCOTT, *SEEING LIKE A STATE* (1999).

¹⁷⁵ Laura Pulido, *Flint, Environmental Racism, and Racial Capitalism*, 27 *CAPITALISM NATURE SOCIALISM* 1–16 (2016).

¹⁷⁶ Press Release, Office of the Mayor, *New York City’s Air is Cleaner Than It Has Ever Been Since Monitoring Began*, (Apr. 19, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/204-18/new-york-city-s-air-cleaner-it-has-ever-been-since-monitoring-began>.

¹⁷⁷ N.Y.C. HEALTH, CMTY. HEALTH PROFILES 2015: MANHATTAN CMTY. DISTRICT 11: EAST HARLEM (2015) (measuring child asthma rates in Mott Haven, Melrose and the Bronx compared to the rest of New York).

¹⁷⁸ *Id.*

¹⁷⁹ For an instructive visual representation of how power consumption varies across New York City, see David Funkouser, *Power Play: an Energy Map of New York City*, STATE OF THE PLANET (Feb. 12, 2012), <http://blogs.ei.columbia.edu/2012/02/13/power-play-an-energy-map-of-new->

There is also no question that structural inequality helped channel additional power plant developments into Astoria rather than into Manhattan. Indeed, in the contemporaneous dispute over the siting of power turbines in environmental justice communities, the New York Power Authority's lawyer went so far as to explain, in all earnestness, that there was no possible spot for power generation in Manhattan below 96th street.¹⁸⁰ His words can be taken as an environmental justice primer of sorts, revealing the remorseless logic that views the further burdening an already-overburdened community as inevitable and natural.

Even so, invoking the label "environmental justice" on behalf of Astoria, a majority white, largely middle-class neighborhood, seems somehow presumptuous. Environmental justice was historically a struggle against environmental racism. Environmental justice scholars like Robert Bullard¹⁸¹ and activists like Peggy Shepard¹⁸² laid bare a systemic, and profoundly structural racial inequality vis-à-vis the environment. Calling the Poletti fight an environmental justice fight might elide the profoundly racialized nature of environmental inequality in the United States. This is a question of immediate relevance in New York City. For the past decade, wealthy Manhattanites fighting against a waste transfer station slated for the Upper East Side in a move *toward* equalizing environmental burdens across the city have repeatedly characterized their opposition, without irony, as an environmental justice campaign.¹⁸³

Moreover, in the years since the Poletti Plant was shut, another neighborhood concern has emerged in Astoria. It turns out that the cleaner environment has taken a different toll on the community.

york-city/. A more recent map put together using real-time energy data paints a similar picture. *An Interactive Energy Map of the City of New York*, ADVANCED ENERGY INTELLIGENCE (Mar. 2017), <http://www.aeintelligence.com/news/140-an-interactive-energy-map-of-the-city-of-new-york>. This dynamic was obvious at the time of the Poletti and turbine fights. For example, the New York State Comptroller noted that the Poletti Plant's importance rests on the fact that it has a "direct transmission link to Manhattan. This link is very important because it allows the plant to be used as if it were situated in the Manhattan load center." NYPA AUDIT, *supra* note 28, at 21.

¹⁸⁰ *Fordham Panel*, *supra* note 137, at 550–51 (remarks of Stephen Kass, special counsel to NYPA).

¹⁸¹ Robert Bullard is a prolific scholar and author of many key environmental justice books, including his seminal work *DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY* (1990) and more recently, *THE WRONG COMPLEXION FOR PROTECTION* (2012).

¹⁸² Peggy Shepard is co-founder and executive director of WEACT for Environmental Justice, an environmental justice organization that has changed the face of New York City. Meredith Spencer, *The Justice Department*, MISSION 164-69 (Feb. 2018).

¹⁸³ Mireya Navarro, *In Fight Against Trash Station, Upper East Side Cites Injustice*, N.Y. TIMES, June 30, 2011, at A16.

Gentrification has become rife in Astoria, with property values increasing by well over 75% in the years since the Poletti Plant was shuttered,¹⁸⁴ and rents rising steadily.¹⁸⁵ Long-time residents are finding themselves priced out of the neighborhood they fought to improve. Thus, the Poletti victory should be both a celebration and a reminder. Environmental justice victories are rare enough that they need to be savored, but it is vital that the benefits of those victories redound to all citizens.

¹⁸⁴ *Home Pricing in Astoria*, N.Y. TIMES REAL ESTATE, <https://www.nytimes.com/real-estate/guide/queens/astoria> (last visited Feb. 18, 2018); N.Y. CITY ECON. DEV. CORP., NEIGHBORHOOD TRENDS & INSIGHTS, ASTORIA, QUEENS 5 (2014), https://www.nycedc.com/sites/default/files/filemanager/Resources/Economic_Data/neighborhood_trends/Astoria_Trends_04152004.pdf.

¹⁸⁵ See Mariela Quintana, *Neighborhood Profile: Astoria, the Sum of All Parts*, STREETEASY.COM (May 12, 2015), <https://streeteasy.com/blog/neighborhood-profile-astoria-the-sum-of-all-parts/>.