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Strategic Lawsuits against Public Participation (SLAPP) Address

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I would like to thank Nicholas Robinson and the Center for Environmental Legal Studies of Pace University School of Law for organizing this very important colloquium on the issue of retaliatory lawsuits against environmental activists.

Strategic Lawsuits Against Public Participation, or SLAPP suits, are fundamentally different from other types of lawsuits because they seek to stifle legitimate political expression. The potential ramifications of these SLAPP suits demand special attention because they represent an attack on the first amendment rights which are at the heart of our democracy.

The problem of retaliatory lawsuits is an extremely complex one, particularly because of the various forms these suits take. They range from obviously frivolous allegations which involve blatant attacks on constitutionally protected free speech and the right to petition the government for redress of grievances, to much more subtle attacks involving allegations of malicious prosecution or interference with business rela-

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tionships. This conference is extremely valuable because it is bringing together thoughtful people who have been analyzing this issue as well as critical information concerning the full range of SLAPP style suits which have been filed against citizen activists and government planning officials in our state. Only with this background will we be able to develop adequate tools to deal with this problem.

Before discussing the pernicious consequences of retaliatory lawsuits in the environmental arena, I want to emphasize that citizens are legally guaranteed the right to intervene in land use and zoning decisions, and that their active participation is absolutely crucial to our goal of protecting the environment. First and foremost, the United States Constitution establishes the right of every American to petition the government for the redress of grievances,[1] a principle which certainly applies to citizen participation in government decisions on planning issues. In addition, most state and local laws relating to zoning and land use explicitly provide for public participation. In particular, the public's role has been enshrined in the State Environmental Quality Review Act (SEQRA) where the Legislature declared that, "[e]very citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment."[2]

SEQRA is also the law which requires that an environmental impact study be conducted for any project "which may have a significant effect on the environment."[3] By "environment" the law refers not only to land, air, water, wildlife, marine life, flora, and fauna, but also to historic or aesthetic resources and even community or neighborhood character.[4] To invite the public's scrutiny, the law says that the environmental study "should be written in a concise manner capable of being read and understood by the public."[5] A public hear-

1. U.S. CONST. amend. I.

2. N.Y. ENVTL. CONSERV. LAW § 8-0103(2) (McKinney 1984).

3. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984).

4. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984). Chinese Staff and Workers Ass'n v. City of New York, 68 N.Y.2d 359, 365, 502 N.E.2d 176, 180, 509 N.Y.S.2d 499, 503 (1986).

5. N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984).

ing inviting views of members of the public on the study is generally required before the project can proceed.[6] As a result of this review process, projects are frequently changed, negative impacts are mitigated, and some projects are cancelled altogether.

Many community groups, despite a lack of resources, nevertheless participate in an extended way in the environmental review process. Out of about 350 lawsuits challenging projects under SEQRA, at least one-third were brought by citizens' organizations. A number of these citizen suits have established essential principles of early review and strict adherence to the procedures laid out in SEQRA. These principals have served as crucial tools in making projects safer for the environment.[7]

Not only is the principle of citizen participation in environmental planning firmly established in our laws, it is also essential to ensure that governmental efforts at environmental protection are fully effective. Since the early 1970's, citizen activists have played a central role in alerting the public to the importance of preserving our environment and in assisting the government to enforce laws which protect the environment. The path-breaking role of citizens' organizations has been particularly evident here in New York State. It was the courageous efforts of Lois Gibbs and the Love Canal Homeowners Association that awakened the nation to the true dimensions of the toxic waste crisis and helped spur stronger federal and state efforts to address it.[8] It was the Hudson River Fishermen's Association that first blew the whistle on Exxon, exposing the fact that its big oil tankers were dumping contaminated water into the Hudson River;[9] Scenic Hudson and other groups were born in opposition to the controversial plan to destroy scenic Storm King Mountain with a power plant;[10] and the Clean Air Campaign won a landmark court case to

6. N.Y. ENVTL. CONSERV. LAW § 8-0109(4) (McKinney 1984).

7. Rye Town/King Civic Ass'n v. Town of Rye, 82 A.D.2d 474, 442 N.Y.S.2d 67 (2d Dep't 1981).

8. A. LEVINE, LOVE CANAL: SCIENCE, POLITICS & PEOPLE 30 (1982).

9. N.Y. Times, Oct. 15, 1983, at 1, col. 3.

10. de Rham v. Diamond, 32 N.Y.2d 34, 295 N.E.2d 763, 343 N.Y.S.2d 84 (1973).

stop the Westway Highway project in New York City.[11] These early warnings from citizen activists frequently have alerted my office and the State Department of Environmental Conservation to pressing environmental problems, and helped to shape our enforcement agenda.

Not too far from here, residents of Orange County helped close the Tuxedo landfill, which was operating in violation of environmental laws. Residents called my office and other government agencies, complaining about the terrible odor — like rotten eggs — which came from the landfill. They could not open their windows or even sit in their own backyards. Some families claimed that the smell made their children sick. When we sued the landfill operator and owner, several of these citizens joined us in court to testify about this public nuisance and potential health hazard. They helped to persuade the judge to shut the landfill and order a bond of $4.5 million to insure proper closure.[12] It is now on the state's list of hazardous waste sites and is scheduled to be cleaned up.

In the Syracuse area, the Sierra Club, the Atlantic States Legal Foundation, and other citizens' groups have helped to galvanize public opinion and draw attention to the pressing need to clean up Onondaga Lake. As a result, my office has sued Allied-Signal Corporation to pay for cleaning up over eighty tons of mercury and a three-to-four-foot layer of calcite on the bottom of the lake.[13]

Members of a community are often the first people to recognize an environmental problem and the impact of that problem on their families. That is one of the reasons why, in 1985 and 1988, I held nearly thirty environmental forums throughout the state so that I could learn directly about local concerns. It was the citizen complaints at these public environmental forums that first brought the dangers of lawn spray pesticides to our attention.

After we looked into the problem, we were spurred to

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11. Sierra Club v. United States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985).

12. State v. Barone, 74 N.Y.2d 332, 546 N.E.2d 398, 547 N.Y.S.2d 269 (1980).

13. State v. Allied Signal, Inc., No. 89 Civ. 815 (S.D.N.Y. filed June 27, 1989).

take firm steps to regulate and control the misuse of deadly pesticides in New York State. My office brought a case against ChemLawn, the largest lawn care company in the country, alleging that their advertising brochures concerning the safety of the pesticides they use are false and misleading.[14] Most recently we brought a public nuisance action against the manufacturer of the pesticide Dacthal seeking to require the company to put filters on private wells in Suffolk County which were contaminated by the pesticide.[15]

If the citizens who brought the pesticide danger, contaminated lakes, and toxic dump sites to our attention had been scared to speak out for fear of a retaliatory lawsuits, government might not have been able to move as promptly and forcefully against these public health hazards.

As you can see, the efforts of ordinary New Yorkers are absolutely vital to helping us enforce the law and protect the environment. I am deeply concerned that recent retaliatory lawsuits will jeopardize this important resource and eventually undermine the rights of citizens to participate in their government.

Let me mention just a few examples of the use of these pernicious lawsuits that attempt to intimidate citizen activists. On Long Island, shortly after my office sued a company called Brookhaven Aggregates for environmental violations at its construction and demolition debris landfill,[16] the company filed suit against a resident who lived across from the landfill. The resident had put up a sign outside his house that stated, "dumping is ruining the environment." The company rushed to court claiming that this and other statements against the dump constituted defamation.[17]

In another case, a Long Island ecologist was sued by a developer after her environmental organization challenged a

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14. People v. ChemLawn Services Corp., No. 88-40533 (N.Y. Sup. Ct., N.Y. County filed Feb. 17, 1988).

15. State v. Fermenta Plant Protection Co., No. 89-20401 (N.Y. Sup. Ct., Suffolk County). On file with the Office of the Attorney General of the State of New York.

16. Brookhaven Aggregates, Ltd. v. Ledogar, No. 85-5157 (N.Y. Sup. Ct., Suffolk County filed Dec. 10, 1985).

17. *Id.*

town planning board decision regarding one of the developer's projects.[18] When the environmental group's lawsuit was dismissed for missing a statute of limitations, the developer sued the ecologist personally for malicious prosecution.[19] The ecologist was apparently singled out by the developer because she headed the environmental organization's board.

Retaliatory lawsuits seeking damages have been filed when New Yorkers exercised their first amendment rights of expression, or rights under state and federal law to petition the government for redress of grievances. More than 300 citizens were sued by Warren and Washington Counties for utilizing the state legal process to challenge a local government's plan to build a resource recovery facility.[20] Other local environmental groups have been threatened with damage actions when they opposed local development projects in legitimate forums such as public hearings.

I should add that private citizens are not the only victims of these vengeful lawsuits. A retaliatory lawsuit seeking several million dollars in damages was brought against members of a local planning board who were seeking information from a developer pursuant to SEQRA.[21] Department of Environmental Conservation officials were sued for damages after they closed down a construction and demolition site that had no permit.[22] Two attorneys on my staff and I were sued for $20 million when we brought a case to clean up the Shore Realty hazardous waste site in Nassau County.[23] I can assure you that such a case would have absolutely no effect on our determination to do our job to protect the public from unnecessary exposure to toxic substances like pesticides and to force those who contaminate the environment to restore it. However,

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18. Simmons v. Blumer, No. 90-907 (N.Y. Sup. Ct., Suffolk County filed Jan. 31, 1990).

19. *Id.*

20. Schultz v. Washington County, No. 59-240 (N.Y. Sup. Ct., Washington County, 3d Dep't filed Jan. 18, 1990).

21. Stephens v. Town of Dover, No. 89 Civ. 3840 (S.D.N.Y. Nov. 20, 1987).

22. McPhilomy v. Department of Envtl. Conservation, No. 88 Civ. 8943 (S.D.N.Y. July 31, 1989).

23. State v. Saleh, No. 85 Civ. 2270 (E.D.N.Y. filed June 19, 1985) (defendant's cross-claim).

these suits could well have a chilling effect on individual citizens or local officials who have access to fewer financial and legal resources to defend themselves.

New York is not the only state where these retaliatory lawsuits have been a problem. In Maine, the Patten Corporation, a huge developer of rural lands, filed a $1 million lawsuit against the Town of Hartford for placing a six-month moratorium on development.[24] Since the town had less than $25,000 in its treasury, the Patten lawsuit could well be viewed as a personal damage action against the 5,000 residents of the town. Efforts to punish and deter citizen activism have not been restricted to the area of environmental protection. As Professors Pring and Canan have noted, these retaliatory suits have been brought against citizen activists in a variety of areas including civil rights, civil liberties, health, safety and welfare, and consumer protection. Although they are on the upsurge in the environmental area, these kinds of suits are not an entirely new phenomenon. In the 1960's such lawsuits were filed against civil rights activists who instituted a boycott of white merchants in Clairborne County, Mississippi to pressure government and business leaders to end racially discriminatory practices.[25] Those brave civil rights activists prevailed despite these tactics and helped to ensure that the civil rights laws of the 1960's were passed and enforced. Today, we must find ways to ensure that citizen activists are able to prevail in their efforts to spur the passage and enforcement of vital environmental laws without being harassed by SLAPP suits.

The fact that these retaliatory lawsuits rarely succeed is almost irrelevant. They can still do damage — even if the plaintiffs lose, they win. Because of the cost of legal defense, SLAPP suits are extremely harmful, particularly to citizen activists who must hire their own lawyers to defend themselves in lengthy and enormously costly court proceedings. Personal damage actions against local officials, such as members of local planning boards, have in some communities had the impact of discouraging citizens from serving in elected or ap-

24. Stipp, *Rural Ruckus*, Wall St. J., June 24, 1988, at 10, col. 2.
25. NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982).

pointed positions.

In 1965, in the context of a civil rights case, the United States Supreme Court first spoke of "the chilling effect" on the exercise of first amendment rights. The Court noted that "the threat of sanctions may deter . . . almost as potently as the actual application of sanctions."[26] Obviously, the threat of multi-million dollar lawsuits can "chill" citizen activists and local government officials from fully exercising their rights to participate in environmental decision making processes.

As a society, we obviously cannot permit our citizens and government officials to be placed under such pressure that their actions and decisions — or their very willingness to be public servants — are governed by concerns for their personal financial survival. Participation on community planning boards forms the backbone of our environmental planning process. It is crucial that this valuable planning tool not be damaged by scaring off qualified individuals from serving on these local boards.

Not only should we move swiftly to find ways to prevent the use of our legal system to harass and intimidate citizen environmentalists and local planning officials, but we should also take steps to encourage *expanded* citizen participation in resolving environmental problems. Because of the important role citizens play in environmental enforcement, my office has long supported a measure that would further empower citizens' organizations in the fight for a cleaner environment by giving concerned citizens the right to sue for violations of state air, water and solid waste laws. Citizens already have the right to bring suit under most of the federal environmental laws such as the Clean Air Act,[27] the Clean Water Act,[28] the Solid Waste Disposal Act,[29] and now under the Comprehensive Environmental Response, Conservation, and Liability Act, the Superfund law, as well.[30] Legislation is sorely needed

26. Drombroski v. Pfister, 380 U.S. 479, 486 (1965) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

27. 42 U.S.C. § 7604 (1989).

28. 33 U.S.C. § 1365 (1987 & Supp. 1989).

29. 42 U.S.C. § 6972 (1982 & Supp. 1989).

30. 42 U.S.C. § 9659 (1989).

to extend this right to the state level for the simple reason that there are many more environmental threats than federal or state government agencies can address on their own.

There are numerous local situations involving pollution or toxic waste sites which could be resolved more quickly if concerned citizens had the right to bring suit. Basically, our bill would establish a partnership between government enforcers and concerned citizens. Those cases which government has chosen not to initiate due to other pressing environmental priorities could then be brought by private citizens who could seek injunctions to stop illegal discharges of pollutants or seek funds from responsible parties for the cleanup of toxic waste sites in their communities. It would truly be ironic, once the citizens' suit bill became law, if the very people who were granted standing to sue to enforce environmental laws were then sued themselves in retaliatory lawsuits.

Citizen activism has been the cornerstone of social justice in our society. In the environmental area, it is the cornerstone of our very survival as a planet. It is therefore crucial to protect those individuals and groups who are working so hard to preserve our environment.

As I have already mentioned, this is a complex problem, and for that reason it will require a multi-faceted response. Because SLAPP suits can take several different forms, no one judicial or legislative remedy can adequately address the scope of the problem. I am indebted to Professor Nicholas Robinson for sharing with me some of his thoughts on the issue developed as part of a recent State Bar Association discussion of SLAPP suits. He has pinpointed a number of paths worth exploring as we seek the best ways to limit these vengeful, intimidating lawsuits against citizen activists and local planning officials.

One key to limiting SLAPP suits is to foster stricter judicial standards for assessing, and promptly dismissing, suits that are based on a desire to intimidate citizen activists for their efforts to influence government policy decisions or punish local planning officials for their votes on development and zoning issues. In this respect we should encourage discussion within the judiciary of the need for heightened and strict

scrutiny of these suits along the lines suggested in the Colorado Supreme Court's decision in *POME v. District Court*.[31] The *POME* decision establishes a three part test which plaintiffs must meet when suing citizens in connection with legitimate efforts to influence government decision making. The Colorado court calls for the retaliatory suit to be promptly dismissed if the plaintiffs cannot prove at the outset that: 1) the citizen activist's petitioning claims lack either a factual or legal basis; 2) the citizen activist's claims were primarily intended to harass the plaintiff, *and* 3) the citizen activist's actions had the capacity to adversely affect a legal interest of the plaintiff.[32] Hopefully, educational efforts like this conference will alert the judiciary in this state to watch out for SLAPP style suits and dismiss them promptly before they have their intended intimidating effect. In addition, we may want to educate the judiciary concerning the phenomenon of SLAPP suits through forums such as federal and state judicial conferences.

Stemming the tide of retaliatory suits may call for legislative reforms as well. One bill that is already being developed seeks to extend protection from individual civil liability to local government officials, including planning board members, in matters arising out of actions taken in their official decision making capacity. Although local officials such as planning board members may already be covered by principles of immunity, legislative clarification of that fact could be very helpful. Another possible approach would be to legislate protection for citizens against civil suits based on statements they make in connection with governmental proceedings. My office is studying the issue and considering developing or supporting a legislative remedy that would afford citizen activists and citizen organizations greater protection from frivolous, retaliatory suits. Any such remedy must address the need for these suits to be dismissed promptly, before they entail unnecessary time and expense on the part of the citizens who have been targeted. My office would be glad to work with groups such as

31. 677 P.2d 1361 (Colo. 1984).
32. *Id.* at 1370.

this one and the State Bar Association in fashioning appropriate legislation.

Measures must be taken to fully protect individual citizens at the outset of a retaliatory suit, when they may not have funds for a lawyer to get the suit dismissed. One exciting and innovative response to this aspect of the problem has been Suffolk County's path-breaking effort to develop a county funded "citizens' legal defense fund" which would provide money up front for the legal costs of citizens forced to defend themselves against unwarranted retaliatory lawsuits. The fund is now in the process of being set up, and we should watch this promising approach as a possible model for action by other localities, and perhaps on the state level as well. In fending off SLAPP suits, citizens' groups should be encouraged to recoup their attorneys fees from the plaintiffs by using available tools such as Rule 11 of the Federal Rules of Civil Procedure[33] and the analogous New York rules which were recently promulgated.[34] These rules provide for appropriate sanctions against both attorneys and plaintiffs who bring frivolous lawsuits, including reasonable costs of defending against such suits and attorneys fees. Citizens whose defense against a retaliatory suit is paid for by a state or local defense fund could seek to recover costs under Rule 11 and the corresponding state rules as a way of replenishing the fund.

Even as we look for ways to revise existing law, my office and environmental groups should be looking for ways to assist individuals who are sued. These groups certainly do not have anywhere near the kind of resources that their opponents have. While we may not be able to ease their financial burden, in selected cases we might be able to submit *amicus* briefs to the court on their behalf. We should instill in the legal community the notion that defending a citizen of modest means against a SLAPP suit could be considered a means of providing much needed and fulfilling *pro bono* service. Moreover, we ought to applaud those of our colleagues who are already vol-

33. FED. R. CIV. P. 11.

34. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 130-1.1 to 130-1.5 (1989).

untarily providing *pro bono* representation to environmental activists in these kinds of cases, and urge others to follow their example. There may be other steps we can take to support the work of citizen environmentalists as well.

The message is clear. If we do not act, and retaliatory suits become more common, we risk losing a vital partner in environmental enforcement — the public. We simply must not allow their voice to be silenced.