

# ENVIRONMENTAL LAW IN NEW YORK

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## Citizen Enforcers or Bothersome Meddlers? A Plaintiff's Perspective on the Orange County Landfill Case

by Scott A. Thornton and Michael R. Edelstein

### I. INTRODUCTION

On February 17, 1999, United States District Judge Colleen McMahon penned her signature on an Order approving the final settlement of what she herself termed "the infamous case in the Southern District" – the eight year old federal environmental litigation entitled *Orange Environment, Inc. v. County of Orange*.<sup>1</sup> Thus ended the almost decade long struggle between local environmentalists and the Orange County government over the operation, closure and proposed expansion of the Orange County Landfill along the banks of the Walkkill River in the Town of Goshen, Orange County, New York.<sup>2</sup>

This Clean Water Act (CWA)<sup>3</sup> and Resource Conservation and Recovery Act (RCRA)<sup>4</sup> citizen suit was filed by Orange Environment, Inc. (OEI), a county-wide environmental membership organization, on December 30, 1991.<sup>5</sup> Despite the almost herculean effort expended by this relatively small citizen's group and its attorneys in bringing the suit to its now successful conclusion, this litigation was and will remain important in many ways. First, it has broken new ground in defining the respective roles of citizen enforcers and administrative agencies involved in concurrent environmental enforcement efforts in the context of the statutory preemptions of the CWA and RCRA.<sup>6</sup> Second, it has confirmed that mere administrative enforcement is not a substitute for permitting under the CWA with all its guarantees of public input and participation.<sup>7</sup> Third, it has affirmed the proposition that the CWA and RCRA demand absolute compliance with their pollution prohibitions no matter who is prosecuting the claims.<sup>8</sup> Finally, its settlement has resulted in substantial

positive gains for the Walkkill River and its environs after years of landfilling and degradation. What follows is the tale of this particular lawsuit with all its twists and turns, mistakes and insights, triumphs and defeats.

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August 19, 1999

"Environmental Assessments for Real Property Transfers," sponsored by Environmental Resource Center, Buffalo, New York. Information: 1-800-5ERC ext. 222.

September 14-15, 1999

"Phase II Environmental Site Assessment Process," sponsored by ASTM, New York City. Information: Eileen Finn, (610) 832-9686.

## WORTH READING

Dennis Aprill, *Paths Less Traveled: The Adirondack Experience for Walkers, Hikers and Climbers of All Ages* (Pinto Press 1999).

John M. Armentano, "Real Estate Update: Home Rule Powers Should Permit Municipalities to Act," *New York Law Journal*, Mar. 24, 1999, at 5:2.

Robert H. Brickner, "Riding a Shooting Star" [Star Recycling in Brooklyn], *Waste Age*, Mar. 1999, at 63.

John Cahill, "New York State's Superfund Program," *Albany Law Environmental Outlook*, Vol. 4, No. 2 (Winter 1999), at 11.

"Cannonsville Reservoir: Special Issue," 14 *Lake and Reservoir Management* 125 (1998).

Scott Denton, "A Forest Grows in Brooklyn: Restoring the Woodlands of Prospect Park," *New York State Conservationist*, Vol. 53, No. 4 (Feb. 1999), at 4.

S.W. Effler, et al., "Turbidity and Particle Signatures Imparted by Runoff Events in Ashokan Reservoir, NY," 14 *Lake and Reservoir Management* 254 (1998).

Michael B. Gerrard, "New York State's Brownfields Programs: More and Less Than Meets the Eye," *Albany Law Environmental Outlook*, Vol. 4, No. 2 (Winter 1999), at 18.

Peter Goetz, "Building Facade Law Gets Face Lift," *New York Law Journal*, Mar. 29, 1999, at S1:2.

Stephen L. Kass and Jean M. McCarroll, "Environmental Law: Standing in Citizen Suits: Part I," *New York Law Journal*, Feb. 26, 1999, at 3:1.

Ira Kustin, "Limiting Architects' Liability for Indoor Air Pollution and Sick Building Syndrome," *New York University Environmental Law Journal*, Vol. 7, No. 1 (1999), at 119.

Peter Lorey and Charles T. Driscoll, "Historical Trends of Mercury Deposition in Adirondack Lakes," *Environmental Science & Technology*, Vol. 33, No. 5 (1999), at 718.

John R. Nolon, "Regional Land Use Strategies Work at the Grassroots Level," *New York Law Journal*, Feb. 19, 1999, at 5:2.

Kenneth J. Pokalsky, "Reforming New York State's

Superfund," *Albany Law Environmental Outlook*, Vol. 4, No. 2 (Winter 1999), at 32.

Bernadette Quemerais et al., "Sources and Fluxes of Mercury in the St. Lawrence River," *Environmental Science & Technology*, Vol. 33, No. 6 (1999), at 840.

Klara B. Sauer, "Where Are We in Cleaning Up Contaminated Sites?" *Albany Law Environmental Outlook*, Vol. 4, No. 2 (Winter 1999), at 35.

Christopher S. Van Houten, "The New York/New Jersey Harbor: A Dredging Crisis?" 23 *Seton Hall Legis. J.* 219 (1998).

Philip Weinberg, "Are Standing Requirements Becoming a Great Barrier Reef Against Environmental Actions," *New York University Environmental Law Journal*, Vol. 7, No. 1 (1999), at 1.

John M. Wilson, II, "Local Control Over the Siting of Cellular Towers," *Municipal Lawyer*, Vol. 13, No. 1 (Jan/Feb. 1999), at 1.

Kevin M. Young, "Superfund Reform Where Less Is More," *Albany Law Environmental Outlook*, Vol. 4, No. 2 (Winter 1999), at 24.

## Citizen Enforcers or Bothersome Meddlers? A Plaintiff's Perspective on the Orange County Landfill Case

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### II. ORANGE ENVIRONMENT, INC. (OEI)

Founded in 1982, OEI is a grass-roots organization aiming to protect the integrity of the environment and communities of the Orange County region. As such, OEI has long focused on protecting the north-flowing Wallkill River, which meanders through the heart of Orange County in its journey from northern New Jersey to Kingston, New York where it flows into the Hudson. Because of this interest, the organization was drawn into several administrative and legal battles over the permitting and operation of two landfills within two miles of each other along the banks of the Wallkill – the Al Turi landfill and the Orange County Landfill.<sup>9</sup> Heightening the importance of these landfill battles for OEI is the presence of the Southern Wallkill Valley Aquifer underlying the southern portion of the Wallkill Valley and more specifically both the Orange County and Turi landfill sites.

With some 1,500 members county-wide, OEI is preeminently an organization concentrating on planning, research, educational and organizing activities. However, it is ready to selectively use administrative hearings or legal actions to represent the public interest regarding critical environmental issues. For the enhancement of the Wallkill, OEI introduced an ongoing program of research and planning in the mid-1980s called the Wallkill River Action Plan (WRAP), with the idea that the interior streams of the county might someday serve as hybrid greenway corridors

(mixing preservation of critical areas, recreational access, farms and parks). A key focus of WRAP has been to change attitudes about the Wallkill River, long the dumping ground of the county, and to re-educate the public about its value. Another facet has been to change policy and practice in order to protect water quality and ecological integrity of the river and aquifer.

### III. THE ORANGE COUNTY LANDFILL

The Orange County Landfill is located on an approximately 301-acre parcel in the Town of Goshen, Orange County, New York. It lies just off New York Route 17M, approximately four miles west of the Village of Goshen and five miles south of the City of Middletown. The landfill property is surrounded on three sides by various parts of the Wallkill River, a major tributary of the Hudson River.<sup>10</sup> The Cheechunk Canal, a man-made channel constructed in the 1840s, now carries the major portion of the flow of the Wallkill past the southeast side of landfill site. The Old Channel of the Wallkill River, the original river bed, flows along the south and northwestern portions of the property.

On March 8, 1973, Orange County purchased this site for future use as a waste disposal facility. At the time, Orange County was developing a solid waste management plan to consolidate the number of smaller municipal landfills operating in the county. The landfill at the Goshen site was to be the linchpin of the plan, meeting county waste disposal needs well into the 21st century. Orange County submitted plans for the landfill to the New York State Department of Environmental Conservation (DEC) on July 6, 1973. The plans called for three separate landfill areas on the property. Each area was to be a maximum of 40 feet tall and the three areas totaled 245 acres. DEC issued a permit to construct this landfill on May 23, 1974.

The site began operation on September 30, 1974 in the landfill area adjacent to the Cheechunk Canal. However, Orange County did not follow its operational plan for long. Instead of proceeding to the rotational fill plan permitted by DEC, the County remained on the first fill area and did not stop filling until eighteen years later. In what was to become a familiar pattern, DEC took no action in response to this early violation of the operating plan. Soon after operations began, uncontrolled leachate discharges became evident. The first DEC recorded leachate discharge from the landfill into the adjacent Wallkill River occurred in 1975, less than a year after the site opened. Again, there was no DEC enforcement activity.

As early as 1976, the water monitoring wells around the landfill began to exhibit signs of groundwater contamination from iron, phenols and sulfates. In 1979, evidence of hazardous waste disposal at the Orange County Landfill began to appear. An Environmental Protection Agency (EPA) preliminary site assessment in 1980 identified the disposal of acid etching materials at the landfill on March 30, 1979.<sup>11</sup> Throughout the early 1980s, DEC monitors and inspectors continued to visit the site and document leachate discharges into the Wallkill and other operational problems, but no enforcement actions ensued.<sup>12</sup>

In 1981, DEC issued an operating permit through August 1983

for the landfill under the new state landfill regulations.<sup>13</sup> In this permit, DEC added a specific prohibition against leachate discharges to the Wallkill River without a State Pollutant Discharge Elimination System (SPDES) permit and required the design, by Orange County, of a perimeter leachate collection system for the landfill by January 1982. However, Orange County did not submit the plans for this interim collection system until 1987. On August 22, 1983, ten days after the expiration of its operating permit, the County asked DEC for an extension of the expired permit. With no public discussion or participation, DEC granted the request and extended the operating permit for almost another year.<sup>14</sup> The landfill's permit finally expired on June 30, 1984. Yet the site operated for another seven and a-half years without one. Despite numerous objections from OEI and others, there would be no further public review process or public input relating to this continued and unpermitted use of the Orange County Landfill even though the landfill had been now listed on the New York State Hazardous Waste Disposal Site Registry as a Class 2a inactive hazardous waste site.<sup>15</sup>

At the beginning of 1985, the County began formulating the ill-fated plans to expand the landfill to other undeveloped areas on the site. However, DEC's new policy on landfill development over groundwater aquifers that, in effect, would permit limited landfill development over aquifers only upon an exceptional showing of need for the facility, now stood in the way.<sup>16</sup> Deteriorating conditions at the existing landfill also complicated expansion plans. This finally resulted in a December 1986, Order on Consent (1986 Order) between DEC and Orange County. The 1986 Order cited numerous violations of the expired 1981 operating permit, including (1) the discharge of leachate into the Wallkill River without a SPDES permit, (2) the failure to carry out the required groundwater monitoring program, and (3) the failure to even submit the design plans for an interim leachate collection system.

In return for allowing Orange County the indeterminate continued use of this unlined, polluting landfill, DEC required the County to complete the conditions called for more than five years earlier by the 1981 operating permit. By displacing a permit renewal application with its attendant public participation and environmental impact review DEC, in effect, permitted the continued use of this landfill for an undisclosed period of time without even levying one penalty for the myriad of violations ongoing at the landfill site.<sup>17</sup> However, DEC required the County to complete (1) a sub-surface investigation report for the site, (2) a lifespan determination allowing for vertical expansion and (3) design plans for an interim leachate collection system.

In the interim, the troubled operations at the existing landfill continued. In early 1987, the County requested, and DEC quickly agreed to, extensions of the compliance deadlines set out in the 1986 Order. After delayed submittal of the plans, an interim leachate collection system was finally installed on the eastern side of the landfill in June-July 1988. Less than a year after issuing the 1986 Order, ever worsening operating conditions compelled DEC to commence another enforcement action

against the County in November 1987.<sup>18</sup> The landfill still evidenced uncontrolled leachate on-site, discharges of leachate, blowing garbage and dust, and methane gas escaping from the site. In addition, not only did the County laterally expand the landfill onto areas previously free of garbage, but the County expanded the landfill vertically as well.

Amidst these problems, the County submitted an application for an 154-acre expansion of the landfill in the summer of 1987. The regional DEC staff opposed the application on grounds stemming from design problems to questions of groundwater impact and interference with the remediation of the existing landfill. OEI intervened in the adjudicatory hearing and opposed the application on grounds that no consideration was given by Orange County to alternatives to this extensive expansion, including issues of waste reduction and recycling. Thus commenced an extensive administrative hearing which culminated in the decision by DEC Commissioner Jorling to deny the application.<sup>19</sup> The expansion battle was not over yet, though.

Behind the scenes, the County and DEC were already working on another, smaller scale expansion application to be constructed on the western most side of the landfill property along the banks of the old Channel of the Wallkill River. The County submitted a formal application for this 75-acre expansion in December 1988. Although containing a purportedly complete environmental review of the proposed expansion area, none of the application materials identified the presence of some fifty acres of federally regulated wetlands on the site.<sup>20</sup> That omission and its subsequent consequences would ultimately doom the expansion and prevent it from ever receiving any waste despite construction costs of some \$52 million.<sup>21</sup> Brought late into the process, OEI vainly argued against this newly situated expansion, citing wetlands issues on the site. Nonetheless, without any further administrative hearings, DEC issued a permit to construct the landfill expansion in July 1989. Orange County began construction a month later without ever having obtained a CWA Sec. 404 wetlands permit from the United States Army Corps of Engineers (Army Corps).<sup>22</sup>

Incredibly, as the expansion permitting process proceeded, conditions at the existing landfill seemed to get worse. In a letter dated February 28, 1989, DEC Regional Director Paul Keller outlined to then County Executive Louis Heimbach "serious issues" regarding the operation of the landfill. Keller noted that the leachate collection system had not been fully implemented and that leachate continues to discharge into the Wallkill River. He added that "[a]t this point, it could be argued quite credibly that the County's persistent failure to control the leachate from the existing landfill demonstrates that the County is incapable of properly managing a landfill, and that the County should therefore not be issued any new permit." Despite the threat, the expansion permit was issued some five months later.

At the same time that the expansion permit was issued, DEC and Orange County signed a second Order on Consent, dated July 7, 1989 (1989 Order), relating to the continuing operating violations at the landfill. The 1989 Order cited the County for numerous violations of both Part 360 regulations and the terms

of the 1986 Order. The violations included leachate discharges, delayed implementation of an interim leachate collection system, continued problems with intermediate cover and blowing trash, and an illegal lateral expansion of the landfill. Also, DEC fined the County \$375,000 for its environmental violations: \$300,000 of this fine was suspended upon the successful completion of an environmental credit project and the remaining \$75,000 was paid directly to DEC. The 1989 Order also contained a stipulated penalty provision of \$25,000 per day, per violation for future leachate discharges. However, this was another threat that amounted to nothing. In the next two years, despite the stipulated penalties provision in the 1989 Order, DEC did not issue a single violation notice for the twenty six leachate discharges its own on-site monitor recorded.

In March 1990, nine months after the issuance of the expansion permit which required the monitor's presence, a DEC monitor began working and observing at the Orange County Landfill. The DEC monitor was on-site an average of three days a week, *i.e.*, half the time the landfill was open. From March 1990 to September 1991, the monitor filled out weekly composite monitoring reports for the DEC. In 1990, the DEC monitor recorded nineteen separate leachate discharges into surface waters from the landfill. DEC monitor reports for 1991 reveal continuing leachate discharges occurring at the landfill and ongoing discussions related to improving the interim collection system. Mr. Myers recorded seventy-one instances of leachate discharges to surface waters or uncontrolled leachate at the landfill out of ninety-two reports. No enforcement action was commenced.

Enough was enough. OEI, by now thoroughly appalled by conditions at the landfill and the lax enforcement efforts of DEC and armed with newly discovered evidence that the expansion was being built illegally on federally regulated wetlands, decided to pursue its rights as citizen enforcers under the CWA and RCRA.<sup>23</sup> The years of fruitless talk with the County and DEC were over. OEI would try and get the site under control on its own. On October 18, 1991, OEI served a pre-suit notice of intent on Orange County and the involved administrative agencies pursuant to CWA Sec. 505 and RCRA Sec. 6972,<sup>24</sup> identifying the leachate discharges and the suspected wetlands violations.

The notice finally spurred some further agency action. Almost two months after receiving the notice letter, EPA and Army Corps officials inspected the expansion site on December 12, 1991, to begin their own investigation of the wetlands issue. In addition, on November 1, 1991, two weeks after OEI's notice, DEC informed the County that "it has determined that sufficient evidence exists to commence enforcement action based upon various violations of ECL Article 27 at the landfill." OEI filed its citizen suit action on December 30, 1991.

#### IV. THE CITIZEN'S SUIT

The complaint alleged that Orange County, via weeps and streams at the Orange County Landfill, had discharged pollutants, including landfill leachate, into the Wallkill River without a permit issued pursuant to the CWA.<sup>25</sup> OEI also alleged that

the County filled some fifty acres of federally regulated wetlands without a permit issued pursuant to CWA § 404 during the construction of the landfill expansion. Under RCRA, OEI alleged that (a) the County landfill was violating the open dumping provisions of RCRA,<sup>26</sup> through its continuing leachate discharges and through its contamination of groundwater surrounding the landfill with hazardous pollutants and that (b) the continued release into the environment of hazardous pollutants from the Orange County Landfill represented an imminent and substantial endangerment to health or the environment.<sup>27</sup> The battle was on.

The County, faced with this new player in the environmental enforcement game, now ironically turned to DEC and EPA for salvation – the very agencies it had long spurned and ignored. Assuming a posture that it would steadfastly hold through some seven years of litigation, the County now became the administrative agencies' best and most cooperative friend. Whatever the agency wanted, the County would agree to, as long as it prevented OEI from prosecuting its citizen suit. It would deal with the agencies, but not the "impertinent eco-fanatics" at OEI. The polluter would now become the victim.

On January 15, 1992, DEC and the County signed yet another Order on Consent (1992 Order) relating to operations at the Orange County Landfill. The 1992 Order cited the County for the illegal vertical expansion of the landfill, which DEC had discovered two years earlier, and listed a number of other operational violations including uncontrolled leachate on-site, improperly covered garbage, and blowing trash or uncontrolled dust. Additionally, the County was cited for nine [out of a total of 26 known] instances of leachate discharge into the Walkkill River recorded by the DEC on-site monitor in 1990 and 1991.

The 1992 Order finalized the closure of the existing landfill and levied a civil penalty assessment in the amount of \$25,000 (with \$75,000 suspended upon continued compliance with the Order). The 1992 Order also directed Orange County to undertake a \$75,000 environmental credit project which, to date, it has never completed. In October 1992, citing four additional leachate discharges, DEC requested that the County pay \$25,000 of the suspended penalties from the 1992 Order.

On January 31, 1992, the Orange County Landfill closed after almost eighteen years of operation and over seven million cubic yards of garbage landfilled. However, the cessation of waste disposal did not stop the leachate discharges. In 1992, out of fifty-eight reports, the DEC monitor recorded thirty-two instances of uncontrolled leachate or discharging leachate on-site. In April 1992, DEC finally reclassified the Orange County Landfill to a Class 2 Inactive Hazardous Waste Site, although it had begun no enforcement action. In January 1993, the County and DEC executed yet another Order on Consent (1993 Order) which provided for a Remedial Program for an Inactive Hazardous Waste Disposal site at the Orange County Landfill.<sup>28</sup>

As for the wetlands issue, in January 1992, Orange County suspended its construction of the landfill expansion pending resolution of the federal permitting question with the planned construction only 80% complete.<sup>29</sup> On February 3, 1992, EPA

formally notified the County that it was investigating the illegal filling of wetlands at the expansion site. Soon thereafter, EPA and the County began secretly negotiating the terms of a CWA Section 309(a) Administrative Compliance Order (EPA Order).<sup>30</sup> The EPA Order was executed on July 30, 1992.

After admitting that it had illegally filled 49 acres of federal wetlands in the expansion site, the County was ordered to complete a 98-acre wetlands creation and/or enhancement project off-site. In exchange, EPA would not itself require that the illegal fill be removed from the site. However, the Order also stated that it

in no way limits the authority of the Secretary of the Army, acting through the Chief of Engineers, to issue, to deny, or to specify any conditions in any permit, or to otherwise carry out his functions relating to the issuance of permits for the discharge of dredged or fill material under section 404 of the Act. This ORDER does not constitute a waiver from compliance or modification of the Act.

Following the issuance of the EPA Order, DEC issued an operating permit for the landfill expansion.<sup>31</sup> Relying on the plain language of the statute, plaintiffs now moved to enjoin any on-site activity until the County first obtained what OEI believed was still required – a Section 404 permit for the expansion construction fill.

## V. OEI II:<sup>32</sup> DOES ENFORCEMENT EQUAL PERMITTING?

In December 1992, the parties put off the planned evidentiary hearing on OEI's injunction motion and, instead, cross-moved for summary judgment on the sole issue of whether or not the County could proceed to utilize the landfill expansion without a Section 404 wetlands permit from the Army Corps. It was an issue of first impression – what was the import of a CWA Compliance Order in relation to the permitting mandates of the Act?<sup>33</sup> Imbedded in that issue were important questions related to the respective enforcement and permitting powers of EPA and the Army Corps with regard to wetlands under the CWA and the proper role of citizen suits in the face of simultaneous agency enforcement.<sup>34</sup>

In January 1993, the district court sided with OEI and held that a CWA Compliance Order does not obviate the permitting requirements of Section 404.<sup>35</sup> In reaching its decision, the court necessarily reached all the issues articulated above. District Judge Gerard L. Goettel found that "[t]here is no general preemption of citizen suits by all EPA enforcement activities."<sup>36</sup> As for the respective roles of EPA and the Army Corps with respect to wetlands under the Act, the court carefully distinguished the role of permitting (exclusively the purview of the Army Corps) and enforcement (shared responsibility between the Army Corps and EPA) and concluded decidedly that the enforcement which occurred here could not subvert the statutorily mandated permit process.<sup>37</sup> "[T]he CWA's requirement that all discharges covered by the statute must have a NPDES permit is unconditional and absolute. Any discharge except

pursuant to a permit is illegal."<sup>38</sup> The court went on to find that "[n]othing in the language of the EPA's Compliance Order justifies interfering with this principle."<sup>39</sup> Enforcement does not equal permitting and, as such, the public's right to participate in the permit process would not be subverted. As Judge Goettel concluded: "[d]enying citizens any opportunity to register their opinions, submit evidence, or challenge the environmental conclusions reached by the government or permit applicants would enable potentially harmful activities to proceed with government approval without ever having been tested in the crucible of public scrutiny."<sup>40</sup> The County was now effectively enjoined from proceeding with the expansion unless it obtained the Section 404 permit it had so purposely avoided.

What next ensued was a political circus which can only be described as farcical. In the wake of Judge Goettel's ruling and the prospect of months of Army Corps permitting hearings, then County Executive Mary McPhillips, a Democrat, officially killed the expansion project and initiated settlement discussions with the plaintiffs. The Republican ruled County Legislature objected to that decision, hired its own attorney, and sought to intervene in the OEI suit as a separate party defendant. The district court denied the intervention motion and the Second Circuit affirmed the decision.<sup>41</sup> At the same time, the negotiated settlement with OEI was rejected by the Legislature.<sup>42</sup> The litigation had reached a stalemate which was only broken when McPhillips lost her re-election bid in November 1993. A Republican, Joseph Rampe, was elected as the next county executive and he was determined to press on with the litigation with new attorneys, no matter what the cost or realities.<sup>43</sup>

## VI. OEI V: WHO CAN ENFORCE CWA AND RCRA - OEI, DEC OR BOTH?

In February 1994, the County's defense strategy now turned to the claims relating to the clean-up of the now closed Orange County landfill which was then in the early stages of the New York State Superfund remedial process. The County moved to dismiss or for summary judgment on all of OEI's claims relating to the existing landfill, arguing that the statutory preemptions of the CWA and RCRA precluded the citizen's suit in the face of past and current DEC enforcement activities. In short, OEI should not be allowed to prosecute the same pollution violations as the DEC even if those violations continued unabated. In response, OEI cross-moved for summary judgment, claiming that substantial evidence existed of the County's continuing pollution discharges which, if proven, made them liable for civil penalties and injunctive relief under CWA and RCRA.

In an August 1994 decision, Judge Goettel resolved the statutory preemption questions in favor of OEI, with one contested exception, and denied the cross-motions for summary judgment, citing too many expert disputes.<sup>44</sup> After a long and detailed description of the operational history of the landfill, the court first turned to the provisions of Sec. 309(g)(6) of the CWA, the administrative action preemption section. Under the CWA, citizen suits could not be maintained where a state administrative agency is diligently prosecuting an administrative penalty action.<sup>45</sup> Here, the court found that although DEC's efforts had

not succeeded, it had at least been trying to combat the continuing pollution at the site. Indeed, Judge Goettel concluded that "part of the DEC's difficulty in the earlier stages of its enforcement efforts was caused by the recalcitrant and cavalier attitude adopted by the County."<sup>46</sup> However, the court did not go so far as the County had argued and also dismiss OEI's claims for injunctive and declaratory relief under the CWA. The Section 309(g)(6)(A) preclusions only applied to civil penalty claims and not claims for injunctive relief. Citing to another Southern District decision, *Coalition for a Liveable Westside, Inc. v. New York Dep't of Envtl Protection*<sup>47</sup> and the plain language of the Act, the court stated that "[w]hile plaintiffs should not be allowed to seek civil penalties for the same violations for the same violations that the DEC is prosecuting, the DEC's failure to secure the County's compliance with the CWA has spurred the plaintiffs' suit for declaratory and injunctive relief."<sup>48</sup> The injunctive claims would stay.

On the cross-motions for summary judgment under the CWA, the court first rejected the County's claims that OEI's suit should be dismissed as "moot," finding that it had not met the burden of proving that it was "absolutely clear" that no further CWA violations would occur. Judge Goettel stated that

arguably a good deal of the progress that has been made so far [with the remediation process] may have resulted from the plaintiffs' suit. Were we now to hold that the plaintiffs' suit is moot, we might remove the very pressure that has pushed the County this far prior to any substantial implementation of their remediation plan.<sup>49</sup> The court denied OEI's motion for summary judgment pending further evidence on the success of the County's remediation work.<sup>50</sup>

The court next turned to the RCRA claims.<sup>51</sup> On the "open dumping" claim, the court first examined the applicable regulations which governed the landfill.<sup>52</sup> Next, it examined the county's claim that it is operating under a schedule of compliance which exempts it from any open dumping sanctions. Here, the court found that the County had "failed to establish conclusively that they are operating under a DEC schedule which will ultimately bring them into full compliance with Sec. 6945(a)" because there was evidence that landfill leachate discharges would continue even after their remediation plan was complete.<sup>53</sup>

Finally, the court reached OEI's "imminent and substantial endangerment claim." In deciding the County's motions, the court was forced to examine each of the state action preclusion provisions contained at RCRA Sec. 6972(b)(2)(C). First, the court held that subsection (b)(2)(c)(i) applies only to state "actions" commenced in a court and not to mere administrative actions. Therefore, DEC's enforcement efforts here did not meet this standard.<sup>54</sup> Next, the court had to explore the relationship between CERCLA and the DEC's state "Superfund" clean-up of the landfill because the County posited that DEC's remediation efforts were analogous to a CERCLA "removal" action and, thus, the subsection (b)(2)(c)(ii) and (iii) preclusions barred OEI's suit. Judge Goettel rejected the analogy and held that

"because the state did not enter into a cooperative agreement with the EPA, pursuant to [CERCLA 42 U.S.C.] Sec. 9604(d), [the] defendants' contention that DEC was engaging in a removal action and/or incurred costs to initiate an RI/FS and was diligently proceeding with a remedial action under Sec. 9604 when plaintiffs' action was commenced must fail."<sup>55</sup> This meant OEI's suit could now go forward notwithstanding DEC's remediation efforts.

Lastly, the court decided OEI's summary judgment motion on the "imminent and substantial endangerment" claim. After examining OEI's evidence that a number of hazardous pollutants, including iron, manganese, sulfate, arsenic, lead, barium, chromium, phenols, trichloroethane, toluene, chlorobenzene, ethylbenzene, xylenes, benzoic acid and DDT, had been detected in the landfill's leachate, Judge Goettel nonetheless denied the motion. Although he reiterated that the statute only required a showing that the landfill *may* present an "imminent and substantial endangerment" to human health or the environment, disputes among the experts as to the extent and seriousness of the pollution contamination precluded summary judgment.<sup>56</sup> A trial would be needed.

After this decision was rendered, the parties again began settlement talks which again resulted in an agreement which was again ultimately rejected by the County Legislature. At this juncture, it seemed unlikely that the legislature would ever approve any settlement involving OEI. Instead, monies continued to be showered by the legislature into the defense of a case that both the county executive and OEI were willing to settle. Absurd as it was, the legislature appeared intent on pursuing the litigation as some kind of punishment for OEI until it either went bankrupt or simply gave up. But, OEI and its attorneys would not give up.

## VII. OEI VI: WHEN IS IT TOO LATE FOR REMOVAL AND RESTORATION?

After the rejection of the latest settlement agreement in September 1995, OEI decided to bring the County back into court and resolve the issue which seemed to them to be preventing resolution of the suit – the remediation of the wetlands at the now abandoned expansion site. Throughout 1994 and 1995, the County had been busy completing the off-site enhancement and/or creation of some 100 acres of replacement wetlands on a site adjacent to the landfill property pursuant to the EPA Compliance Order. However, OEI wanted the still unpermitted expansion fill removed as a continuing violation of the CWA and the underlying wetlands restored. Back in 1993, the court had left unresolved the issue of whether or not the expansion construction fill would have to be removed if the County never obtained the Section 404 permit (a situation that at the time appeared remote given the County's determination to open the expansion).

In October 1995, OEI filed a motion for a preliminary and permanent injunction seeking the restoration of the buried expansion site wetlands. The County cross-moved for summary judgment on the basis that the fulfillment of its obligations under

the EPA Order had now brought them into compliance with the CWA and rendered OEI's injunctive claims moot.<sup>57</sup> After making plainly evident the court's frustration that the case had not been settled long ago, Judge Goettel rebuked OEI and granted the County's cross-motion, holding that the unpermitted fill was not a continuing violation of the Act. The court reasoned that "[t]he fact that the remediation order here does not meet the desires of the private parties is not crucial."<sup>58</sup> OEI had simply waited too long to push its injunctive claims for removal and restoration. In this instance, duplicative injunctive orders, as well as duplicative penalty actions, were not allowable under the CWA.

The case was transferred to another Southern District judge for trial of the remaining claims.<sup>59</sup> Despite the decision, no settlement was in sight. The County would proceed to finish off OEI. Massive discovery ensued under the supervision of three separate district judges as the case was transferred from one judge to another.<sup>60</sup> Unrelenting mounds of paper flowed from the County as it threatened to push OEI to the breaking point. Expert discovery became onerous and highly contested with a multitude of motions being filed seeking to exclude experts and/or portions of their proposed testimony. Discovery finally lurched to a close in February 1998.<sup>61</sup>

In April 1998, the County yet again filed motions to dismiss or for summary judgment on all of OEI's remaining claims. Some seven years into the case, the County now (1) argued for application of *Burford* abstention and primary jurisdiction doctrines<sup>62</sup> to dismiss OEI's existing federal claims, (2) argued that "mootness" demanded the dismissal of OEI's civil penalties claim for the wetlands violations, (3) argued deficient notice and failure to state a claim on the "open dumping" claim, and, (4) finally, argued for summary judgment on the "imminent and substantial endangerment" claim.<sup>63</sup> By this time in 1998, some six years after the landfill had closed, the DEC remediation process was winding to a close. However, OEI still maintained that the remedies selected by DEC would not and could not prevent further pollution from the landfill.

In a report and recommendation issued in August 1998, Magistrate Judge Smith first pointedly criticized the extraordinarily late timing of such motions, given the massive amount of resources expended by both the parties and the court over the past seven years.<sup>64</sup> Then, she proceeded to summarily reject each of the belated arguments raised by the County. The case would now proceed to trial.

In November 1998, Judge McMahon affirmed and adopted the magistrate's opinion in its entirety and set the matter for trial with a definite April 1999 date. The end was fast approaching and it became apparent that the County did not want a trial after all. The County began to quickly negotiate a settlement with OEI. The settlement was finalized within weeks and approved by the legislature in early December 1998. The settlement provided for some limited restoration of the expansion area, the placement of additional monitoring wells around the existing landfill, the creation of a \$750,000 improvement fund for the Wallkill River and the payment of OEI's attorneys

fees and expert costs. All told, the litigation cost Orange County over five million dollars (excluding the \$52 million lost in the abandoned expansion) between settlement costs (\$2 million) and payments to its own defense firms (\$3 million).

### VIII. CONCLUSION

While ultimately victorious in the litigation, OEI did not emerge unscathed. The extensive resources required to fight the County's prolonged and well-financed defense severely restricted OEI's operations and its ability to meaningfully participate in other equally pressing environmental issues in Orange County. Further, its relations with the County government remain strained and will likely take years to revitalize, again hindering OEI's capacity to promote its views on a county level through discourse and not litigation.

As for the landfill site, the suit stopped the expansion project and the prospect of further landfilling on an already badly degraded site. It pushed the County to quickly work with the DEC and EPA to resolve its environmental problems if for no

other reason than to hinder OEI's suit. Finally, it resulted in several positive gains for the environment surrounding the landfill: (1) the Wallkill River will benefit for years to come from the projects financed through the settlement created improvement fund; (2) the new monitoring wells will help further identify leachate flow paths from the existing landfill and will hopefully result a more effective remedial plan; and, (3) lastly, the expansion site will be restored to some semblance of a natural environment, instead of the abandoned wasteland it had been.

For future citizen suits, the case has left several important decisions which reiterate the vital role that citizen enforcement of the CWA and RCRA plays in addressing ongoing pollution problems. While not in complete control in the face of concurrent agency action, citizen enforcers can, nonetheless, strictly hold both the involved agencies and the polluters to the standards and processes mandated by the statutes. Some might see that role as "bothersome meddling," but sometimes just that sort of effort can make a very important difference in how well and how fast a pollution problem is resolved.

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<sup>1</sup> Conf. Transcript at 5, Ins. 17-18, *Orange Environment, Inc. v. County of Orange*, 91 CIV 8688 (S.D.N.Y. November 13, 1998).

<sup>2</sup> See *Orange Environment, Inc. v. County of Orange*, 145 F.R.D. 320 (S.D.N.Y. 1992) (OEI I); *Orange Environment, Inc. v. County of Orange*, 811 F. Supp. 926 (S.D.N.Y. 1993) (OEI II); *Orange Environment, Inc. v. County of Orange*, 817 F. Supp. 1051 (S.D.N.Y. 1993) (OEI III); *Orange Environment, Inc. v. County of Orange*, 2 F.3d 1235 (2d Cir. 1993) (OEI IV); *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003 (S.D.N.Y. 1994) (OEI V); and *Orange Environment, Inc. v. County of Orange*, 923 F. Supp. 529 (S.D.N.Y. 1996) (OEI VI).

<sup>3</sup> 33 U.S.C. §§ 1251 *et seq.*

<sup>4</sup> 42 U.S.C. §§ 6901 *et seq.*

<sup>5</sup> Arthur and Sandra Soons, neighboring landowners, joined OEI as plaintiffs with federal claims mirroring those of the citizen's group. The Soonses also brought pendant common law claims relating to the alleged damage sustained to their property from the County's landfill activities. In July 1992, Hudson Riverkeeper Fund, Inc., a regional Hudson Valley environmental group, was allowed to intervene in the action as a plaintiff-intervenor. Their federal claims also mirrored those brought by OEI.

<sup>6</sup> See 811 F. Supp. at 932-933 (OEI II); 860 F. Supp. at 1017-1018 (OEI V).

(Matthew Bender & Co., Inc.)

<sup>7</sup> 811 F. Supp. at 934-936 (OEI II).

<sup>8</sup> 811 F. Supp. at 929-930 (OEI II); 860 F. Supp. at 1018-19, 1028-29 (OEI V).

<sup>9</sup> Recently OEI intervened in the NYSDEC administrative hearing process regarding the application of Al Turi Landfill to expand its currently permitted landfill. In a hearing report issued in February 1999, DEC Administrative Law Judge Edward Buhrmaster recommended denial of this expansion proposal because of the recent criminal convictions of the landfill's owners. In *Re Application of Al Turi Landfill, Inc.*, DEC Application No. 3-3330-00002-21, NYSDEC Decision, 1999 NY ENV LEXIS 6 (February 11, 1999). In the early 1980's, DEC had approved Turi's initial landfill expansion despite opposition from the same citizen activists who later founded Orange Environment. In *Re Application of Al Turi Landfill, Inc.*, DEC Application No. X36S04, NYSDEC Decision, 1981 NY ENV LEXIS 5 (February 27, 1981).

<sup>10</sup> Background information on the Orange County Landfill is taken principally from the following decisions: *In re Application of the Orange County Dep't of Public Works*, DEC Project No. 3-3330-37-3, NYSDEC Decision, 1988 NY ENV LEXIS 28 (July 20, 1988); and, *Orange Environment, Inc. v. County of Orange*, 860 F. Supp. 1003 (S.D.N.Y. 1994) (OEI V).

<sup>11</sup> The report indicated that the landfill site was classified "A" in the DEC's Technical Report, "Toxic Substances in New York's Environment," May 1979.

The classification meant that additional field studies were needed to assess the environmental risks posed by the site. The EPA studies went no further.

<sup>12</sup> In 1980-81, DEC monitors visited the site and issued seven inspection reports, five of which recorded leachate discharges into the Walkkill and six of which recorded uncontrolled leachate at the site. 860 F. Supp. at 1009 (OEI V).

<sup>13</sup> N.Y. Comp. Codes R. & Regs. tit. 6, § 360.

<sup>14</sup> In 1983, OEI succeeding in getting the County and DEC to sit down with interested citizens and discuss issues relating to the operation of the landfill, including its ongoing leachate problems. This informal process, known as OCSLIP (Orange County Sanitary Landfill Interested Persons) continued on and off until the start of the expansion application's administrative hearing in 1987. Under the 1989 expansion permit, OCSLIP was formally revived as a special permit condition. However, the monthly discussions were to little avail since OEI could not get either the County to correct its operational problems, nor get the DEC to force them to do so.

<sup>15</sup> The 2a classification signaled that the DEC suspected that hazardous wastes had been disposed at the site. Despite the admonition that "[a]s soon as possible after a suspected inactive hazardous waste disposal site is reported to DEC, the Department initiates the process of site investigation, and if needed, remediation," the site was not reclassified for over eight years and it continued to receive waste, including hazardous waste, for the entire period.

<sup>16</sup> NYSDEC Commissioner's Organization and Delegation Memorandum, #85-38, dated August 23, 1985. The document contained DEC's final policy on "Landfills and Sensitive Aquifers." The directive declared that "it shall be the policy of the [DEC] that new landfills and expansions of existing landfills may be cited over primary or principal aquifers [such as the Southern Walkkill Valley aquifer] . . . only upon a demonstration that there is a compelling and overriding public need to do so."

<sup>17</sup> In 1984, the DEC had issued an enforcement directive titled "Order on Consent Enforcement Policy." NYSDEC Enforcement Directive, No. 1.1 (July 20, 1984). As amended in 1986, 1989, and 1990, the document reflects DEC policies relating to the use and enforcement of Consent Orders. The directive states that "Consent Orders are not permits and are not a means to bypass or otherwise circumvent the legal process and protections associated with the permit system. The Department's permit issuance mechanisms were created to ensure environmental impact review and opportunity for public involvement, among other things. Hence, because of the different purposes of these regulatory mechanisms it is inappropriate to issue Enforcement Consent Orders that allow either the commencement or expansion of an unpermitted activity or the long-term unabated continuation of an unpermitted activity. Rather, Consent Orders are designed to bridge noncomplying activities into compliance and must be limited in time and scope."

The policy directive also lists the necessary elements of Consent Orders. They include, *inter alia*, remedial programs requiring the Respondent to mitigate any environmental damage resulting from the violations and compliance schedules which set out "monitorable milestone dates that correct all violations and leads to full regulatory compliance, by the soonest feasible date; and requires the implementation of any other remedy, by dates certain." With its ambiguous deadlines and open-ended permitting of an unabated polluting facility, the 1986 Order did not meet even the DEC's own Order on Consent Enforcement Policy. It certainly did not stop the pollution of Walkkill River or the Southern Walkkill Valley Aquifer.

<sup>18</sup> This enforcement action was eventually consolidated with the then pending administrative hearing for the landfill expansion permit application and subsequently adjourned at DEC request. The enforcement action was ultimately settled through another Order on Consent in July 1989.

<sup>19</sup> *In re* Application of the Orange County Dep't of Public Works, DEC Project No. 3-3330-37-3, 1988 NY ENV LEXIS 28, NYSDEC Decision (July 20, 1988).

<sup>20</sup> During discovery, OEI obtained documents from the County's engineering firm for the expansion project indicating that federal wetlands were identified as being present on the site and that some pre-construction notification needed to be given to the Army Corps. See 811 F. Supp. at 928 (OEI II).

<sup>21</sup> "How a County Buried \$52 Million: A Landfill Site Falls Afoul of Environmental Concerns." N.Y. Times, July 16, 1994, at 23.

<sup>22</sup> *But see*, Resource Investments, Inc. v. Army Dep't, 151 F.3d, 1162 (9th Cir. 1998) (Army Corps lacked authority to require companies that obtained state permit to construct solid waste landfill to also obtain CWA Sec. 404 wetlands permit). See also 33 U.S.C. § 1344.

<sup>23</sup> The federal wetlands issue was first identified by the author, then a third year law student at Pace University School of Law and a member of the OEI Board, during an Army Corps public hearing on a proposed Orange County Water Loop in September 1991. Suspicious of wet conditions at the expansion and evidence of increased flooding along the banks of the old Channel of the Walkkill River, Scott Thornton asked a participating Army Corps official about the expansion project and whether or not any federal permits had been obtained. He was told that the County never applied for any permits for the project.

<sup>24</sup> See 33 U.S.C. § 1365; 42 U.S.C. § 6972.

<sup>25</sup> 33 U.S.C. §§ 1311(a), 1342.

<sup>26</sup> 42 U.S.C. §§ 6944, 6945.

<sup>27</sup> 42 U.S.C. § 6972(1)(B).

<sup>28</sup> The stated goal of the 1993 Order was for the County "to develop and implement an inactive hazardous waste disposal site remedial program for the site that shall include a Remedial Investigation/Feasibility Study (RI/FS), design and implementation of the selected remedial alternative, and operation, maintenance and monitoring of the selected remedial alternative."

<sup>29</sup> Orange Environment, Inc. v. County of Orange, 811 F. Supp. 926, 928 (S.D.N.Y. 1993) (OEI II).

<sup>30</sup> See 33 U.S.C. § 1319(a).

<sup>31</sup> Driving the County's frenzy to begin landfilling in the expansion as soon as possible was the operating permit's short expiration date (June 1994) which was imposed in conformance with Commissioner Jorling's July 1988 administrative decision which limited any future expansion on the landfill site to a five-year life span as mandated by the DEC's aquifer policy. Here, the clock started with the July 1989 issuance of the expansion construction permit. Further complicating the County's predicament was the fact that the current operating and construction permits were not renewable and any extension of the closure date would require an entirely new permit application.

<sup>32</sup> Orange Environment, Inc. v. County of Orange, 145 F.R.D. 320 (S.D.N.Y. 1992) (OEI I) was a decision issued in the fall of 1992 during a discovery dispute between EPA and OEI. The issue involved the right of the agency to refuse to produce a duly subpoenaed witness in a federal civil action. OEI had subpoenaed for deposition an EPA wetlands specialist who had participated in EPA's 49-acre wetland determination. Judge Goettel quashed the subpoena pursuant to the dictates of 40 C.F.R. §2.402.

<sup>33</sup> 811 F. Supp. at 933 (OEI II).

<sup>34</sup> 811 F. Supp. at 930, 932 (OEI II).

<sup>35</sup> 811 F. Supp. at 930, 936 (OEI II).

<sup>36</sup> 811 F. Supp. at 932 (OEI II).

<sup>37</sup> 811 F. Supp. at 930-931 (OEI II).

<sup>38</sup> 811 F. Supp. at 934 (OEI II).

<sup>39</sup> 811 F. Supp. at 934 (OEI II).

<sup>40</sup> 811 F. Supp. at 935 (OEI II).

<sup>41</sup> See Orange Environment, Inc. v. County of Orange, 817 F. Supp. 1051 (S.D.N.Y. 1993) (OEI III), *aff'd*, 2 F.3d 1235 (2d Cir. 1993) (OEI IV).

<sup>42</sup> These continuing inter-governmental struggles soon jeopardized the County's compliance with the EPA Order. After completing the initial two steps of that Order, the County had failed to assume timely ownership of a wetlands mitigation site. In response, EPA began drafting an Amended Order which would extend the deadlines of the original Order.

<sup>43</sup> Rampe went so far as to submit a Section 404, after-the-fact permit application for the landfill expansion soon after taking office. However, in June 1994, as the DEC's construction and operation permits were expiring, Rampe finally realized that time had run out and he too announced that the expansion

project was finished. The Army Corps application was effectively withdrawn, although the Legislature still made several vain attempts to push it forward on its own. *See* Orange Environment, Inc. v. County of Orange, 923 F. Supp. 529, 534 (S.D.N.Y. 1996) (OEI VI).

<sup>44</sup> Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003, 1030 (S.D.N.Y. 1994) (OEI V).

<sup>45</sup> 33 U.S.C. Sec.1319(g)(6)(A).

<sup>46</sup> 860 F. Supp. at 1017 (OEI V).

<sup>47</sup> *Coalition for a Liveable Westside, Inc. v. New York Dep't of Envtl Protection*, 830 F. Supp. 194 (S.D.N.Y. 1994).

<sup>48</sup> Orange Environment, Inc. v. County of Orange, 860 F. Supp. at 1018 (OEI V).

<sup>49</sup> 860 F. Supp. at 1019 (OEI V).

<sup>50</sup> 860 F. Supp. at 1020 (OEI V).

<sup>51</sup> In the motions, OEI conceded that its first and second RCRA claims under Subtitle C (the hazardous waste permitting and operating standards) were no longer actionable once DEC had obtained final authority to implement them. 860 F. Supp. at 1020-1021 (OEI V). *But see*, Long Island Soundkeeper Fund, Inc. v. Athletic Club of New York, 42 ERC (BNA) 1421 (S.D.N.Y. 1996).

<sup>52</sup> Prior to 1993, RCRA's open dumping regulations were found at 40 C.F.R. Part 257. In October 1993, EPA promulgated another set of implementing regulations for municipal solid waste landfills at 40 C.F.R. Part 258. Citing insufficient evidence to determine the applicability of either part, the court denied summary judgment. (OEI V) 860 F. Supp. at 1022-23.

<sup>53</sup> 860 F. Supp. at 1023 (OEI V).

<sup>54</sup> 860 F. Supp. at 1024-1025 (OEI V).

<sup>55</sup> 860 F. Supp. at 1025 (OEI V).

<sup>56</sup> 860 F. Supp. at 1028-1029 (OEI V).

<sup>57</sup> Orange Environment, Inc. v. County of Orange, 923 F. Supp. 529, 534-535 (S.D.N.Y. 1996) (OEI VI).

<sup>58</sup> 923 F. Supp. at 539 (OEI VI) (*citing* Hudson River Fisherman's Assoc. v. Westchester County, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988) (The "thrust of the CWA is to provide society with a remedy against polluters in the interest of protecting the environment. If the government's action achieves that end, the fact that . . . any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh.")).

<sup>59</sup> Judge Goettel had by this time taken senior status and moved to the District of Connecticut, necessitating the transfer of the case to a trial judge still sitting in the Southern District of New York. 923 F. Supp. at 541 (OEI VI).

<sup>60</sup> In the span of some two years (Oct. 1996 – Oct. 1998), the case was assigned to five different district judges. This unfortunate situation occurred because of the rotation of certain district judges in the White Plains courthouse.

<sup>61</sup> In the late winter of 1998, another round of settlement negotiations began with the mediation help of Regional DEC Director Marc Moran. At the point that a framework for an agreement was in place, the legislature decided to "shelve it" because it had just spent enormous monies for its attorneys to put together their latest dismissal motions.

<sup>62</sup> *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct.1098, 87 L. Ed. 1424(1943)

<sup>63</sup> *See* Orange Environment, Inc. v. County of Orange, No. 91 CIV 8688 (S.D.N.Y. Aug. 21, 1998) (magistrate's report and recommendation).

<sup>64</sup> *Id.* at 1.



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