

Developments in Federal  
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## Enforcing the Right to Breathe: Continuing the Fight for Environmental Justice in Public Housing

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*to Breathe: Environmental Justice in Public Housing*, an article describing how environmental lawyers and grassroots community groups collaborated to achieve a landmark settlement in *Baez v. New York City Housing Authority*, 13 Civ. 8916 (WHP) (S.D.N.Y.), a federal class action lawsuit on behalf of New York City Housing Authority (NYCHA) tenants suffering from asthma exacerbated by mold and excessive moisture in their apartments. This article describes the tireless efforts of lawyers and community leaders to enforce that settlement order, highlighting the challenges inherent in institutional reform litigation as well as new strategies developed to achieve healthy housing for low-income tenants.

### **Baez: Combatting the Mold and Moisture Problems in New York City Public Housing**

Approximately 400,000 New Yorkers live in public housing developments operated by NYCHA, the largest public housing authority in North America.<sup>1</sup> Many of these tenants have been suffering for years from rampant mold, water damage, leaks, flooding, and other excessive moisture problems in their

In the December 2015 issue of *Environmental Law in New York*, Albert Huang and Sara Imperiale co-authored *The Right*

<sup>1</sup> N.Y.C. Hous. Auth., *NYCHA 2018 Fact Sheet*, [https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet\\_2018\\_Final.pdf](https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet_2018_Final.pdf) (last visited Apr. 2, 2019); see also Luis Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html> (“Public housing in New York City has become synonymous with the dilapidated living conditions many of its more than 400,000 residents have endured in recent years.”); Jake Blumgart, *The Ghost Tenants of New York City*, SLATE (Mar. 3, 2016), <https://slate.com/business/2016/03/new-york-city-public-housing-could-have-more-than-100000-ghost-tenants-living-off-the-books-heres-why.html> (“Although 400,000 people officially live in New York City’s traditional public housing units, it’s estimated that as many as 100,000 to 200,000 more reside there secretly.”); Mark Jacobson, *The Land That Time and Money Forgot*, N.Y. MAG. (Sept. 9, 2012), <http://nymag.com/news/features/housing-projects-2012-9/> (“The population of Nychaland is usually cited at 400,000, but this number is universally regarded as too low, since most everyone knows someone living ‘off lease.’ One NYCHA employee says that ‘600,000 is more like it.’”).

apartments.<sup>2</sup> As has been documented extensively in the media as well as by community organizers and tenant leaders, NYCHA has repeatedly failed to address these problems in a timely and effective manner.<sup>3</sup> Tenants have been forced to wait months and even years for repairs, and all too often any repairs eventually completed nevertheless fail to prevent the problems from recurring.<sup>4</sup>

In December 2013, the National Center for Law and Economic Justice (NCLEJ) and Natural Resources Defense Council (NRDC) filed the *Baez* case in federal district court on behalf of institutional plaintiffs Upper Manhattan Together, Inc. (Manhattan Together) and South Bronx Churches Sponsoring Committee, Inc. (South Bronx Churches) as well as a class of NYCHA tenants suffering from asthma. The complaint alleged that NYCHA's failures to abate mold and excessive moisture and to provide reasonable accommodations to tenants with asthma denied residents an equal and meaningful opportunity to use, benefit from, and enjoy public housing in violation of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, the Fair Housing Amendments Act of 1988, and the New York State Human Rights Law.<sup>5</sup>

On April 17, 2014, Judge Pauley of the federal district court for the Southern District of New York entered a class action settlement order (the Original Consent Decree) obligating NYCHA to abate mold and excessive moisture and their root causes in a timely and effective manner. Among other things, the consent decree required NYCHA to complete "simple" repairs for mold and moisture problems within an average of seven days, and "complex" repairs within an average of 15 days (excluding capital improvements). The order also required NYCHA to provide quarterly reports measuring its average repair completion times and mold reoccurrence rates.

### Moving to Enforce the Original Consent Decree

By April 2015, a year after the court entered the Original Consent Decree, it had become apparent that NYCHA had not lived up to its court-ordered obligations. The reoccurrence rate of mold in apartments across the city remained unacceptably high,

and tenants continued to report that NYCHA was responding to mold complaints with ineffective, cosmetic repairs. With the support of a team of pro bono lawyers led by Steven M. Edwards<sup>6</sup> and Erin M. Meyer,<sup>7</sup> and with voluminous evidence gathered by the volunteer leaders and organizers of Manhattan Together and South Bronx Churches, NRDC and NCLEJ filed a motion to enforce and for contempt against NYCHA.<sup>8</sup> In the enforcement motion, the plaintiffs requested a court-appointed third-party monitor and the institution of prospective penalties should NYCHA continue to violate the order.

In December 2015, Judge Pauley granted in part and denied in part the plaintiffs' enforcement motion. The court found that "NYCHA has been out of compliance with the [Original] Consent Decree from the day it was entered" and that "NYCHA's justifications for its failure to comply are inadequate, and the attitude of NYCHA officials appears to be one of indifference."<sup>9</sup> The court declined to impose contempt sanctions but granted the plaintiffs' request to appoint a Special Master to enforce the Original Consent Decree.

### The Special Master: An Innovative Approach to Busting Mold

In January 2016, the plaintiffs submitted to the court a proposed order of reference setting forth the Special Master's powers and duties.<sup>10</sup> This proposal contemplated a Special Master with the power to impose monetary penalties, issue findings of contempt, conduct discovery and evidentiary hearings, order NYCHA to take or refrain from taking action, and recommend both system-wide relief as well as relief to individual NYCHA tenants.

The court, however, was "reluctant to cede any adjudicatory functions to a Special Master" and determined instead that "NYCHA's failure to comply with the [Original] Consent Decree merit[ed] an innovative approach before launching the equivalent of a monitorship."<sup>11</sup>

On February 1, 2016, the court appointed Professor Francis McGovern as the Special Master. From there, the parties embarked on a more than two-year journey toward the development of what

<sup>2</sup> See, e.g., Declaration of Maria O., 13 Civ. 8916 (SDNY), ECF No. 41; Declaration of Valerie M., 13 Civ. 8916 (SDNY), ECF No. 42; Declaration of Magdalena D., 13 Civ. 8916 (SDNY), ECF No. 43; Declaration of Alisha P., 13 Civ. 8916 (SDNY), ECF No. 45; Declaration of Felipa Cruz, 13 Civ. 8916 (SDNY), ECF No. 46; Declaration of Wanda R., 13 Civ. 8916 (SDNY), ECF No. 48; Declaration of Judy A., 13 Civ. 8916 (SDNY), ECF No. 49.

<sup>3</sup> See, e.g., Declaration of Michael Stanley, 13 Civ. 8916 (SDNY), ECF No. 40, ¶¶ 8–9 [hereinafter First Stanley Decl.]; Declaration of Michael Stanley, 13 Civ. 8916 (SDNY), ECF No. 200 [hereinafter Second Stanley Decl.].

<sup>4</sup> See, e.g., Declaration of Ray Lopez, 13 Civ. 8916 (SDNY), ECF No. 39, ¶¶ 11, 20–23; First Stanley Decl., *supra* note 3, ¶ 10.

<sup>5</sup> Compl., 13 Civ. 8916 (SDNY), ECF No. 1.

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<sup>7</sup> Formerly a Senior Associate at Hogan Lovells US LLP and currently Pro Bono Counsel at Proskauer Rose LLP.

<sup>8</sup> Mem. of Law in Supp. of Mot. to Comply, 13 Civ. 8916 (SDNY), ECF No. 44.

<sup>9</sup> *Baez v. N.Y.C. Hous. Auth.*, 2015 U.S. Dist. LEXIS 167640, at \*5 (S.D.N.Y. Dec. 15, 2015).

<sup>10</sup> Pls.' Proposal Concerning Appointment of a Special Master, Ex. 4, 13 Civ. 8916 (SDNY), ECF No. 92-4; Declaration of Steven Edwards, 13 Civ. 8916 (SDNY), ECF No. 201, ¶ 5 [hereinafter Edwards Decl.].

<sup>11</sup> Order, 13 Civ. 8916 (SDNY), ECF No. 93, at 1.

the Special Master named “Mold Busters,” an innovative program designed to bring NYCHA into compliance with the Original Consent Decree by identifying the root causes of mold and excessive moisture and the best techniques to abate those root causes.

With the Special Master at the helm, the parties endeavored to drive change through social science, building engineering, data analysis, and technological developments. To begin this process, the Special Master hired Microecologies, a company specializing in the investigation of indoor health hazards and staffed by indoor environmental health experts, to inspect a number of apartments across various NYCHA developments to identify the most common root causes of mold.

With those root causes identified, Microecologies and the parties developed a set of remediation protocols (the Revised Standard Procedure) specific to each root cause. The prescribed remediation methods for each root cause also took into account factors specific to each apartment, including the room in which the mold is located, the square footage of mold, the type of substrate material, the type of ventilation available, and the moisture reading as determined by a moisture meter.<sup>12</sup>

Next, NYCHA’s information technology department developed an application (the Mold Busters app) for the handheld electronic devices used by NYCHA’s property maintenance supervisors to guide them through the process of conducting initial inspections for mold, identifying the root causes, and selecting the appropriate remediation methods. Through a series of automated prompts, the Mold Busters app instructs the supervisor to document the amount and location of the mold, the moisture meter reading, the humidity level, the volume of air flow of any available mechanical vents, the probable root causes, and other relevant factors. Depending on the data entered and root causes selected at this first stage, the Mold Busters app predetermines which remediation methods would be best suited to abate the mold problem. From there, the app automatically generates work orders for the types of tradespersons necessary to make the repairs called for by the selected remediation method.<sup>13</sup>

With the Mold Busters app ready for field testing, the Special Master determined that NYCHA should test the new app and remediation methods in a one-year “pilot study” to be launched in May 2017. The pilot study’s randomized sample of NYCHA building developments was selected by Associate Professor Matthew Perzanowski, of the Environmental Health Sciences Department of Columbia University’s Mailman School of Public

Health, who took into account the differences in building materials, sizes, locations, and ventilation systems. Microecologies was tasked with training the property maintenance supervisors in the selected developments on how to use the app and a new set of tools, including a moisture meter, anemometer, hygrometer, and borescope, to conduct initial inspections, diagnose the root causes of the mold, and select the best remediation methods. Professor Perzanowski then reviewed data collected from the study in an effort to determine whether the new app, tools, and remediation protocols were, in fact, reducing mold reoccurrence rates as compared to developments that were not included in the pilot study.<sup>14</sup> The data collected in the pilot study from August 1, 2017, through March 31, 2018, indicated a statistically significant reduction in reoccurrence rates among developments without sheetrock and among developments with mechanical ventilation where the new methods had been implemented. Professor Perzanowski’s analysis also suggested that mold reoccurrence was higher in developments that lacked adequate ventilation and lower in developments in which the roof fans were being run 24 hours per day.<sup>15</sup>

### The United States Attorney: Increasing the Pressure on NYCHA through Civil Investigation

Meanwhile, in April 2015, plaintiffs Manhattan Together and South Bronx Churches met with representatives of the United States Attorney’s Office for the Southern District of New York (the USAO) regarding mold, excessive moisture, and other hazardous conditions in NYCHA apartments. The community and tenant leaders of Manhattan Together and South Bronx Churches informed the USAO of the *Baez* case status and urged the USAO to investigate the environmental health hazards in NYCHA housing. In addition, members of Manhattan Together and South Bronx Churches provided USAO attorneys with tours of several NYCHA apartments to see the conditions first-hand.<sup>16</sup>

In March 2016, about a month after Judge Pauley appointed Professor McGovern as the Special Master, the USAO sought an order directing NYCHA to produce information in response to a civil investigative demand as part of its broad investigation of the health and safety conditions in NYCHA, including mold, water damage, water leaks, lead paint, and vermin.<sup>17</sup>

Throughout the course of the USAO’s investigation, which spanned more than two years, the plaintiffs had many meetings

<sup>12</sup> NYCHA Standard Procedure Manual SP 040:14:1, Mold/Mildew Control in NYCHA Residential Buildings, 13 Civ. 8916 (SDNY), ECF No. 222 [hereinafter Revised Standard Procedure].

<sup>13</sup> Revised Standard Procedure, *supra* note 12.

<sup>14</sup> Edwards Decl., *supra* note 10, ¶¶ 12–13; Declaration of Erin Meyer, 13 Civ. 8916 (SDNY), ECF No. 203, ¶ 7 & Ex. 1 [hereinafter Meyer Decl.]; Pls.’ Mem. in Supp. of Their Mot. for an Order Approving Modified Am. Stipulation and Order of Settlement, 13 Civ. 8916 (SDNY), ECF No. 204, at 9–10.

<sup>15</sup> Meyer Decl., *supra* note 14, Ex. 7.

<sup>16</sup> See Letter from Pls. to Hon. William H. Pauley, III (July 9, 2018), 13 Civ. 8916 (SDNY), ECF No. 183, at 2 [hereinafter Pauley Letter].

<sup>17</sup> Letter from U.S. Att’y (Mar. 16, 2016), 16 MC 00112-P1 (SDNY), ECF No. 1.

and conversations with the USAO attorneys and produced thousands of pages of information to them in an effort to achieve the common objective of eliminating mold and excessive moisture in NYCHA apartments.<sup>18</sup>

### Holding NYCHA Accountable: Forensic Data Analysis

By January 2018, nearly two years after the Special Master was appointed, rampant mold and excessive moisture remained a reality in NYCHA housing. The tenant leaders of Manhattan Together and South Bronx Churches continued to report that mold repairs were taking far longer than the seven-day and 15-day time frames, despite the fact that NYCHA had claimed to be in compliance with these time parameters in each of its quarterly reports.

Because the tenants' lived experiences were not aligned with NYCHA's self-reported compliance, the plaintiffs enlisted the pro bono support of forensic data analysts at Stout Risius Ross, LLC (Stout) to verify the accuracy of NYCHA's quarterly reports. Stout's analysis revealed that NYCHA's quarterly reports had erroneously understated NYCHA's average completion times for simple and complex mold repairs due to NYCHA's failure to include certain mold work orders in its calculations. The analysis also showed that NYCHA was not in compliance with the Original Consent Decree's 15-day time parameter for complex repairs.<sup>19</sup>

When the plaintiffs presented Stout's findings to NYCHA and the Special Master, the Special Master directed NYCHA to investigate and explain the errors in the quarterly reports. NYCHA then admitted that there were "significant gaps" in the reports.<sup>20</sup>

### Holding NYCHA Accountable: The Revised Consent Decree

In February 2018, NYCHA informed the plaintiffs and the Special Master that they would not be able to implement the new Mold Busters program across all NYCHA developments until 2020, long after the Original Consent Decree was set to expire on April 17, 2018.

Faced with four years of continuous breaches, the Original Consent Decree's impending expiration, and nothing from NYCHA other than a nonbinding commitment to roll out the

Mold Busters program by 2020, the plaintiffs presented NYCHA with a proposed order for injunctive relief and, alternatively, an offer to negotiate an amended consent decree in lieu of motion practice. NYCHA chose the latter option, and for the next two months, the parties engaged in intense negotiations under the auspices of the Special Master.

In April 2018, the parties reached agreement on the terms of a proposed amended consent decree, and the Special Master submitted the proposed decree to the court. In response to questions raised by the court, the parties prepared and filed a slightly modified version of the proposed consent decree (the Revised Consent Decree) on July 24, 2018.<sup>21</sup>

The key provisions of the Revised Consent Decree are as follows:

1. An Independent Ombudsperson will be appointed to provide immediate relief to residents suffering from NYCHA's breaches. The Ombudsperson will receive and investigate complaints from individual residents regarding mold and excessive moisture issues and can order NYCHA to provide specific relief, including requiring NYCHA to complete certain repairs by a given deadline, hiring an outside contractor at NYCHA's expense, or ordering that an inspection be done by the Independent Mold Analyst (discussed below). If the Ombudsperson finds that NYCHA has failed to use its best efforts or has acted in bad faith, and that such breaches are systematic, the Ombudsperson can order other appropriate relief, such as a fine payable to the court.<sup>22</sup>
2. The "effective remediation of mold and excessive moisture" is explicitly defined as "the completion of repairs to remove mold and abate excessive moisture, prevent their reoccurrence, and eliminate the causes of mold and excessive moisture at their source," and NYCHA is explicitly obligated to effectively remediate mold and excessive moisture.<sup>23</sup> Whereas the Original Consent Decree did not establish a limit on NYCHA's mold reoccurrence rate, this definition makes clear that NYCHA is obligated to achieve a mold reoccurrence rate of zero.
3. NYCHA is obligated to complete simple mold and excessive moisture repairs in seven days and more complex repairs in 15 days. Where NYCHA has exceeded the seven- or 15-day timeframe, it must use its best efforts to complete the repairs as quickly as possible.<sup>24</sup>

<sup>18</sup> See Pauley Letter, *supra* note 16.

<sup>19</sup> Joint Report in Connection with July 10 Conference, 13 Civ. 8916 (SDNY), ECF No. 173, at 11–14; Declaration of Neil Steinkamp, 13 Civ. 8916 (SDNY), ECF No. 199, ¶¶ 12–18 [hereinafter Steinkamp Decl.]; Meyer Decl., *supra* note 14, ¶¶ 16–17.

<sup>20</sup> Meyer Decl., *supra* note 14, Ex. 10.

<sup>21</sup> Proposed Modified Am. Stipulation and Order of Settlement, 13 Civ. 8916 (SDNY), ECF No. 193-1.

<sup>22</sup> Modified Am. Stipulation and Order of Settlement, 13 Civ. 8916 (SDNY), ECF No. 220, ¶¶ 22–27 [hereinafter Revised Consent Decree].

<sup>23</sup> Revised Consent Decree, *supra* note 22, ¶¶ 1(f), 2.

<sup>24</sup> Revised Consent Decree, *supra* note 22, ¶ 3.



4. NYCHA must follow the Mold Busters remediation protocols as set forth in the Revised Standard Procedure, including use of moisture meters and fungicidal paint, and must run all building roof fans 24 hours per day and replace malfunctioning roof fans within specific time parameters.<sup>25</sup>
5. Specific deadlines are established to achieve the full implementation of the Mold Busters program NYCHA-wide, including deadlines for re-training NYCHA's staff, redesigning NYCHA's quarterly reports, and implementing the Revised Standard Procedure across all developments.<sup>26</sup>
6. An Independent Data Analyst qualified in forensic data analysis will be appointed to design new quarterly reports that accurately disclose NYCHA's level of compliance with the Revised Consent Decree and to monitor the accuracy of those reports going forward.<sup>27</sup>
7. An Independent Mold Analyst will be appointed to perform quality assurance inspections of randomly selected NYCHA apartments on a quarterly basis and report whether NYCHA is properly implementing the Mold Busters protocols and effectively abating the root causes of mold. The Independent Mold Analyst will also investigate mold problems in particular apartments at the direction of the Ombudsperson or Special Master.<sup>28</sup>
8. Unlike the Original Consent Decree, which had a specific expiration date and had to be extended twice, the Revised Consent Decree provides that the burden is on NYCHA to vacate the decree by showing that it has complied and that the decree is no longer needed. This provision aims to prevent NYCHA from waiting out the clock as a means of avoiding its obligations under the decree.<sup>29</sup>

### The USAO's Complaint and Proposed Consent Decree

On June 11, 2018, the USAO filed a complaint against NYCHA in the federal district court for the Southern District of New York as the culmination of its investigation of NYCHA's misconduct. The complaint alleged various violations of basic health and safety regulations of the U.S. Department of Housing and Urban Development (HUD) and accused NYCHA of repeatedly making false statements to HUD and the public. The complaint described

NYCHA's failures to provide residents with decent, safe, and sanitary housing as required by HUD regulations, citing lack of heat, broken elevators, pests, lead paint, mold, and water leaks.<sup>30</sup> On the same day, the USAO and NYCHA proposed a consent decree in which NYCHA admitted that its mold reoccurrence rate is at least 30% and that thousands of residents suffer from mold growth in their apartments each year.<sup>31</sup>

Now presiding over the USAO's case as well as *Baez*, Judge Pauley solicited public comments from interested individuals and organizations to assist him in determining whether to approve the USAO's proposed consent decree, the *Baez* Revised Consent Decree, or both consent decrees. The court also permitted the *Baez* plaintiffs to make a motion for approval of the Revised Consent Decree. The court ordered that public comments and the motion be filed no later than August 2018.<sup>32</sup>

### Marshalling the Evidence and Public Support for the Revised Consent Decree

Throughout the public comment period of July and August 2018, the leaders and community organizers of Manhattan Together and South Bronx Churches redoubled their efforts to ensure that tenants would be informed of their potential rights under the Revised Consent Decree and able to make their voices heard. With the assistance of NRDC and pro bono co-counsel, Manhattan Together and South Bronx Churches set up three legal clinics at locations in the community where they advised groups of NYCHA tenants about the terms of the Revised Consent Decree and assisted more than 75 tenants in preparing and filing public comment letters for the court's consideration.

In August 2018, the plaintiffs filed a motion to approve the Revised Consent Decree with voluminous declarations and exhibits explaining why the Revised Consent Decree was fair, reasonable, adequate, and in the best interests of the class.<sup>33</sup> Included in the evidence submitted was a declaration from Neil Steinkamp, the forensic data analyst who had uncovered the inaccuracies in NYCHA's quarterly reports; a declaration from Michael Stanley, a community organizer with Manhattan Together and South Bronx Churches who described the ongoing mold and excessive moisture problems documented by these organizations in hundreds of NYCHA apartments since the Original Consent Decree was entered; and a public comment letter from named plaintiff Felipa Cruz, and her husband Oscar Cruz, who voiced their support for the Revised Consent Decree

<sup>25</sup> Revised Consent Decree, *supra* note 22, ¶¶ 4, 11.

<sup>26</sup> Revised Consent Decree, *supra* note 22, ¶ 7.

<sup>27</sup> Revised Consent Decree, *supra* note 22, ¶¶ 14–18.

<sup>28</sup> Revised Consent Decree, *supra* note 22, ¶¶ 19–21.

<sup>29</sup> Revised Consent Decree, *supra* note 22, ¶ 28.

<sup>30</sup> Compl., 18 Civ. 5213 (WHP) (SDNY), ECF No. 1.

<sup>31</sup> Proposed Consent Decree, 18 Civ. 5213 (SDNY), ECF No. 5-1, at 2.

<sup>32</sup> Order Regarding Public Comment on the Proposed Settlements, 13 Civ. 8916 (SDNY), ECF No. 190.

<sup>33</sup> Pls.' Mem. in Supp. of Their Mot. for an Order Approving Modified Am. Stipulation and Order of Settlement, 13 Civ. 8916 (SDNY), ECF No. 204.

in light of their ongoing water leak issues that had reoccurred as recently as July 2018.<sup>34</sup>

### The Public Fairness Hearing: The Community Speaks Truth to Power

After receiving more than 700 public comment letters, more than 500 of which were from tenants and other concerned members of the public who decried the mold and excessive moisture problems in NYCHA housing, the court held a public fairness hearing on September 26, 2018, at which more than 60 individuals provided live testimony about the environmental health hazards in NYCHA housing and urged the court to order much-needed relief. In an emotional and extraordinary hearing that spanned several hours, NYCHA tenants testified to Judge Pauley in front of NYCHA executives, government officials, lawyers, and a courtroom so packed that an overflow room was necessary to accommodate all who wished to participate in the hearing. Expressing anger, frustration, fear, and sadness, one by one the tenants described the terrible toll that mold, water leaks, and other environmental injustices have taken on their health and well-being and that of their neighbors and families.<sup>35</sup> These testimonies were amplified outside the courtroom by numerous news outlets; while local reporters had been covering NYCHA's transgressions on a weekly basis for more than a year, this hearing garnered national news media attention as well.<sup>36</sup>

### The Court So-Orders the Revised Consent Decree

On November 29, 2018, the court granted the *Baez* plaintiffs' motion to approve the Revised Consent Decree.<sup>37</sup> The court "concluded that NYCHA's continuing failure to perform under the [Original] Consent Decree threatens the achievement of the decree's goals" and determined that the Revised Consent Decree, in "requiring NYCHA to address mold reoccurrence explicitly and to implement revised protocols and procedures with the Special Master and Independent Mold Analyst's assistance," is "suitably tailored to NYCHA's worsening mold reoccurrence rate and NYCHA's excuse that the [Original] Consent Decree did not include any formal obligation to address mold reoccurrence."<sup>38</sup> The court further found that the addition of an Independent Data Analyst was "proper to address

rampant inaccuracies in [NYCHA's quarterly] reports"; the addition of an Ombudsperson tasked with addressing tenant concerns over mold remediation efforts was "satisfactorily directed toward NYCHA's inability to complete fifteen-day repairs in a timely fashion as well as NYCHA's rising mold reoccurrence rate"; and "the removal of the [Original] Consent Decree's sunset provision disincentivizes NYCHA from stalling until the Consent Decree expires."<sup>39</sup>

Also in November 2018, the court declined to enter the USAO's proposed consent decree on the basis that the proposed decree contained "fatal procedural flaws, including formless injunctive relief and enforcement mechanisms."<sup>40</sup> On January 31, 2019, the federal government opted to enter into a separate agreement with NYCHA and the City of New York that calls for the appointment of a non-judicial monitor (HUD Monitor) and the creation of a Compliance Department, an Environmental Health and Safety Department, and a Quality Assurance Unit to remedy NYCHA's noncompliance with HUD regulations.<sup>41</sup> The agreement specifies that the HUD Monitor shall coordinate with the Special Master appointed in *Baez* and that NYCHA remains obligated to comply with the terms of any orders entered in *Baez*. On February 28, 2019, Bart M. Schwartz of Guidepost Solutions LLC was appointed as the HUD Monitor.

At the time of this writing, the Special Master is prepared to recommend for the court's approval candidates for the Independent Data Analyst, Independent Mold Analyst, and Ombudsperson positions. After the court has appointed individuals to each of these positions, the parties and the Special Master will collaborate with each of them to launch their respective roles and responsibilities under the Revised Consent Decree.

### *Baez*: Lessons in Institutional Reform Litigation

It has been a long road to this point and the future is still uncertain, but the plaintiffs remain dedicated to holding NYCHA accountable through the new enforcement mechanisms available under the Revised Consent Decree and in collaboration with the HUD Monitor. If NYCHA implements its Mold Busters program properly across all developments, the protocols have the potential to reduce mold reoccurrence and enable NYCHA to achieve compliance with its court-ordered obligations to eliminate mold and excessive moisture in a timely and effective manner.

<sup>34</sup> Steinkamp Decl., *supra* note 19; Second Stanley Decl., *supra* note 3; Meyer Decl., *supra* note 14, ¶27.

<sup>35</sup> Tr. of Hr'g (Sept. 26, 2018), 13 Civ. 8916 (SDNY), ECF No. 215.

<sup>36</sup> See, e.g., Luis Ferré-Sadurní, *Mold, Lead, Leaks and Broken Locks. Tenants Vent Fury at Housing Authority*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/nyregion/housing-authority-nyc-monitor.html>; Katie Honan & Melanie Grayce West, *NYCHA Residents Decry Living Conditions*, W.S.J. (Sept. 26, 2018), <https://www.wsj.com/articles/nycha-residents-decry-living-conditions-1538003414>; Greg B. Smith, *Dozens of NYCHA Tenants Beg Judge to Help Fix Troubled Agency*, N.Y. DAILY NEWS (Sept. 26, 2018), <http://www.nydailynews.com/new-york/ny-metro-nycha-daylong-court-hearing-20180926-story.html>.

<sup>37</sup> *Baez v. N.Y.C. Hous. Auth.*, 2018 U.S. Dist. LEXIS 202477 (S.D.N.Y. Nov. 29, 2018).

<sup>38</sup> *Baez*, 2018 U.S. Dist. LEXIS 202477, at \*13–15.

<sup>39</sup> *Baez*, 2018 U.S. Dist. LEXIS 202477, at \*15–16.

<sup>40</sup> *United States v. N.Y.C. Hous. Auth.*, 347 F. Supp. 3d 182, 216 (S.D.N.Y. 2018).

<sup>41</sup> Agreement by and Between U.S. Department of Housing and Urban Development, the New York City Housing Authority, and New York City (Jan. 31, 2019), <https://www.hud.gov/sites/dfiles/PA/documents/HUD-NYCHA-Agreement013119.pdf>.

By training NYCHA's staff in best practices for mold remediation and using an innovative Mold Busters app that automatically creates the proper work orders for each type of root cause, the plaintiffs hope that NYCHA will be able to reduce human error and identify with increased accuracy the root causes of mold and the proper repair techniques. Because ineffective repairs result in mold reoccurrence that harms tenants' health while also wasting crucial time and NYCHA's limited resources, the ultimate goal is a win-win situation in which NYCHA tenants attain mold-free housing and NYCHA conserves resources by effectively abating each mold problem the first time it arises.

In addition, the Revised Consent Decree offers relief on an individual basis for the first time to tenants who had little choice under the Original Consent Decree but to resort to filing actions in housing court when NYCHA had failed to make adequate mold repairs. While for years the community organizers and members of Manhattan Together and South Bronx Churches operated at their maximum bandwidth to advocate for hundreds of specific residents in certain developments, the Ombudsperson will have greater capacity to advocate for many more individual tenants across the city. Under the Revised Consent Decree, while the Special Master continues to focus on creating systemic reform and corrective action NYCHA-wide, the Ombudsperson will be able to focus on the needs of individual tenants and compel NYCHA to provide relief and make repairs in individual apartments.

On a "micro" level, *Baez* represents a case study in designing and implementing a novel methodology for addressing an environmental health crisis in public housing. If the Mold Busters program envisioned by *Baez* succeeds as a model for eradicating one type of health hazard in NYCHA housing, it may be an approach that can be replicated to address additional environmental health and habitability conditions at NYCHA and other large public housing authorities across the country.

Through *Baez*, community organizers, tenants, nonprofit organizations, public interest lawyers, pro bono lawyers, indoor environmental health experts, data analysts, building engineers, public health experts, academics, journalists, and many others have joined forces in the effort to achieve healthy housing for NYCHA tenants. On a "macro" level, the *Baez* case illustrates the inherent challenges of reforming a large institution through litigation and, in particular, the importance of forming coalitions of advocates and experts across multiple disciplines to press upon various levers of power—the courts, the government, the media, and the public at large—to create systemic change.

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## LEGAL DEVELOPMENTS

### ADMINISTRATION

#### Federal Court Said NRDC Lacked Standing to Challenge EPA Directive on Advisory Committee Membership

The federal district court for the Southern District of New York ruled that Natural Resources Defense Council (NRDC) did not have standing to challenge a directive issued by the administrator of the U.S. Environmental Protection Agency (EPA) that barred individuals who received EPA research grants from simultaneously serving on one of EPA's federal advisory committees. NRDC alleged, in the words of the court, that the directive—"under the guise of promoting independence and removing financial conflicts of interest—functionally targets qualified scientists from academic, non-profit, and other independent institutions" and "serves as a pretext to skew representation on the advisory committees in favor of individuals employed or funded by industries that the EPA regulates." The court found that NRDC failed to allege an injury in fact. In particular, the court said NRDC had not asserted a cognizable injury based on alleged harm to NRDC's objective of ensuring scientific integrity in EPA regulatory processes. The court said NRDC did not allege that it had diverted resources from its activities because of the directive. The court also concluded that it was not evident that the directive would impair NRDC's ability to pursue advocacy and litigation activities and rejected the argument that the directive would remove the most qualified scientists from the committees and thereby impair NRDC's interest in ensuring that advisory committees performed their roles. In addition, the court found that NRDC had not established standing based on injuries to its members. First, the court said NRDC members' declarations that the directive harmed their reputations by implying bias or lack of objectivity lacked specificity. Second, although EPA conceded at oral argument that NRDC members who relinquished committee memberships or EPA grants had suffered a constitutional injury, the court found that the NRDC members' declarations did not establish that the members had sustained such injuries at the time NRDC filed this lawsuit. The court further found that allegations that the directive would hinder NRDC members who held one benefit from competing for the other benefit did not allege a sufficiently imminent harm. The court dismissed NRDC's claims without prejudice. *Natural Resources Defense Council v. Wheeler*, 2019 U.S. Dist. LEXIS 47233 (S.D.N.Y. Mar. 21, 2019).