

# Center for Constitutional Rights

A NON-PROFIT LEGAL/EDUCATIONAL ORGANIZATION COMMITTED TO THE CREATIVE USE OF LAW AS A POSITIVE FORCE FOR SOCIAL CHANGE.

## **Testimony before the Environment Committee of the New York City Council on the Public Health Concerns Resulting from Exposures in the Wake of the Collapse of the World Trade Center Towers**

**Submitted by**

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### **Testimony**

Good Morning. My name is Nicole Pollier. I am a third-year law student at CUNY Law School. I work with Barbara Olshansky, the Assistant Legal Director of the Center for Constitutional Rights and Adjunct Law Professor at CUNY Law School, and am here today to submit testimony on behalf of the Center. The Center for Constitutional Rights would like to thank the Environment Committee for convening this important hearing and for providing us with this opportunity to testify on the public health conditions created by the collapse of the World Trade Center Towers and surrounding buildings.

The Center for Constitutional Rights (the "Center") is a non-profit legal, education, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. The Center was founded in 1966 by attorneys whose legal work on behalf of the leaders of the Southern civil rights movement convinced them of the need for a permanent, privately-funded legal center to work in support of popular movements for social justice. Since its beginnings, the Center has practiced a unique kind of civil and human rights law. The Center works in partnership with community-based labor, environmental, religious, immigration, and other civil rights organizations, both here in the United States and abroad, to protect and advance civil and human rights. To

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CONTINUING THE LEGACY OF THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE

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that end, the Center uses litigation strategically to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and the least access to legal and other resources, and to strengthen the civil rights and human rights advocacy movements.

The Center appears before the Committee today to express its **serious** concern over the health and well-being of the workers and law enforcement officers involved in the clean-up and criminal investigation processes, the owners of businesses in the downtown area, and those people that live in Battery Park City, Chinatown, Little Italy, Tribeca and other neighborhoods below Canal Street. Today we hope to provide the Committee with as clear a picture as possible of the conditions faced by the people who are working very long days trying to uncover lost family members and friends, and to make some specific recommendations intended to lessen the risks faced by them.

### **Factual Background to the Current Environmental and Public Health Crisis**

According to the report issued by the National Institute of Environmental Health Sciences (“NIEHS”) on October 22, 2001, the operations at the World Trade Center (“WTC”) disaster site continue to be conducted on a 24-hour basis.<sup>1</sup> Rotating through this continual operation on a daily basis are more 5000 City and private sector workers, including employees of the New York City Police Department, the Fire Department, the Sanitation Department, the construction industry, and FEMA Urban Search and Rescue Teams.<sup>2</sup> These numbers do not include employees from other companies such as Con Edison, Verizon, and others, nor do they include federal personnel from the Environmental Protection Agency (“EPA”), the Occupational Safety and Health Administration (“OSHA”), or other federal agencies dispatched to the site. Estimates of the total number of individuals working at the site on a daily basis thus range from 6000 to 8000.

Control over the site has been vested in the Fire Department. Under the City of New York Emergency Response Plan, the Fire Department is responsible for managing responses to building collapse incidents. Presumably, the responsibility was given to the Fire Department because of the Department’s expertise in search and rescue operations. Responsibility for developing an environmental safety and health plan for the WTC disaster site was subcontracted out to a private company, Bechtel. Bechtel was awarded a 90-day contract to develop a comprehensive safety and health plan. As part of this contract, Bechtel circulated two draft World Trade Center Emergency Project Environmental Safety and Health Plans, however, neither of these drafts contained plans for logistics, demolition, asbestos removal, spill prevention, storm water pollution prevention.<sup>3</sup> No final ES&H Plan was ever issued by Bechtel.

We learned yesterday that Bechtel has bowed out of its role, and that a new company will shortly be replacing it. In the meantime, **there is still no environmental safety and health plan in effect at**

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<sup>1</sup>NIEHS Report at 6. A copy of the NIEHS Report is attached hereto as Exhibit 1.

<sup>2</sup>*Id.* at 7.

<sup>3</sup>*Id.* at 8.

**the World Trade Center disaster site.** According to the NIEHS report, “there was no evidence or even suggestion that any safety and health program was operative at the site, indeed the very opposite seemed to be the case.”<sup>4</sup> The lack of an operating safety and health program has been confirmed by the workers we have spoken to and various government officials.

Although neither of the draft ES&H plans included information on quantities, they did list the following materials as present in several WTC structures. **Crysotile asbestos** was used as pipe insulation in both WTC towers, up to the 40<sup>th</sup> floor in one tower, and up to the 20<sup>th</sup> floor in the other tower. In addition, present at the site are the following chemicals: **PCBs, Crystalline Silica, Carbon Monoxide, Diesel fuel, Formaldehyde, Zinc Oxide, Mercury, Arsenic, Nickel, Lead, Cadmium fumes, Chromates, Benzene, HCL, Hydrogen Sulfide, Gasoline, Freon, and spray paints and thinners.**

Despite the known presence of these toxic chemicals, all agencies involved with the search, rescue and recovery efforts have acknowledged that virtually **none of the people working at the WTC disaster site are or have been wearing any personal protective equipment.**<sup>5</sup> While respirators, cartridges, hard hats, tyvek overalls, and other equipment are available at the site, no organized training has been undertaken. The NIEHS study included the following observations about compliance with health and safety measures:

As a general statement, no uniform level of personal protective equipment usage is evident. Most workers, but not all, are wearing hard hats. It is estimated that perhaps 50% are wearing eye protection, whether safety eyewear was not determinable. Most workers appear to be wearing work boots, whether safety boots was not determinable. Clothing varies from long work pants and shirts to short pants and tee shirts. Respiratory protection is rare....Perhaps 5-10% of the workers are wearing disposable dust masks. Workers were observed at or near the top of the debris pile in the smoke plume emanating from the pile in tee shirts, without hard hats, eye wear or respirators....Police and military personnel on the site were not equipped with personal protective equipment.<sup>6</sup>

In addition, workers leaving the site are not decontaminated, nor do they use the washing stations that have been set up at the perimeter of the site by volunteer organizations.<sup>7</sup> Workers continue to work under these conditions on 12-hour shifts despite exhaustion. According to the NIEHS Study, the intensity of the effort and long work hours has resulted in a very high rate of injury and illness among the workers.<sup>8</sup>

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<sup>4</sup>*Id.* at 14.

<sup>5</sup>*Id.* at 10; *see* telephone conversation between Barbara Olshansky and Laura Kenny, Labor Liaison for OSHA’s New York Regional Office.

<sup>6</sup>NIEHS Study at 13.

<sup>7</sup>*Id.* at 14.

<sup>8</sup>*Id.* at 24.

This utter lack of compliance with health and safety measures is due – at least in part – to the absence of contractor safety and health personnel, and the fact that OSHA compliance officers present have been limited by that agency to providing only technical assistance and support at the site.

All involved have agreed that the WTC disaster site is a very dangerous site. The debris pile remains several stories high and is very unstable; many areas continue to burn.<sup>9</sup> The immediate WTC area is surrounded by other buildings which are burned, severely damaged, and partially collapsed. Many volatile and hazardous materials are utilized on the site, including gasoline and compressed gas, and are not stored or moved properly.<sup>10</sup> A thick layer of dust is everywhere, and vehicles leaving the site with debris are not decontaminated and do not have covers.

### **What the Lack of an Environmental Health and Safety Site Plan Means**

Environmental Health and Safety plans contain specific regulatory standards under which operations must take place, assess the level of risks being faced by those involved in the operations, and contain specific training and protection requirements. In this case, **the absence of a plan prevented NIEHS officials from evaluating safety and health issues and assessing monitoring and exposure data.**<sup>11</sup>

More importantly, without the direct oversight and enforcement by experienced federal agencies such as NIEHS and OSHA, even the draft plans – which have not been implemented – contained serious deficiencies, including among others: the complete lack of overall safety and health site coordination by all employers and agencies, the lack of an organizational structure to ensure attention to workers' concerns, and the lack of any avenue for participation by workers or their representatives in safety and health planning.<sup>12</sup> Both of the Draft Plans previously circulated contemplated that the four individual prime contractors for the site would develop their own environmental health and safety plans incorporating elements from the overall Site Program. To date, no one has seen any draft of the contractor plans.

Even more troubling is the fact that the Draft Plans only required that site workers be given site orientation training. **The issue of whether any safety and health training would be provided was left to the individual contractors.**<sup>13</sup> **This is so despite the fact that there are hazards present on the site, such as asbestos, benzene, and lead, for which specific OSHA standards apply and require specific training.**

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<sup>9</sup>*Id.* at 13.

<sup>10</sup>*Id.* at 14.

<sup>11</sup>NIEHS Study at 9-10.

<sup>12</sup>*Id.* at 16.

<sup>13</sup>*Id.* at 17.

And perhaps most troubling of all is the fact that a determination has apparently been made that the WTC disaster site will **not** be operated under the provisions of 29 C.F.R. 1910.120. This is the OSHA Hazardous Waste Operations and Emergency Response Standard which provides a comprehensive basis for worker training, medical surveillance, exposure monitoring, and worker protection levels that are set based upon actual worksite monitoring data.<sup>14</sup> Occupational Safety and Health experts contacted by the Center all agree that the decision not to conduct the clean-up under this OSHA standard is entirely inappropriate given the nature of the activities to be conducted at the site, the inventory of hazardous materials on the site, the fact that the debris pile is unstable and makes it impossible to determine when exposures to these materials will occur, and the presence of many hazardous materials in the personal monitoring data already obtained by NIEHS.<sup>15</sup>

Finally, all of these deficiencies have been exacerbated by **deliberate decisions by the New York City Department of Engineering and Construction to refuse to supply labor representatives with copies of the Draft Plan and to refuse to permit them to participate in the safety and health program development process.**<sup>16</sup>

**The Utter Lack of Enforcement of Occupational Safety and Health Laws,  
Regulations, and Procedures**

While the designation of the Fire Department was appropriate at the beginning of this crisis, once a determination was made that no one could have survived beyond a certain date, on that date, the activity at the site should have been re-designated as a recovery operation. However, as far as the Center has been able to ascertain, as of today, the activity at the site remains an initial search and rescue management operation under the control of the Mayor's Emergency Operations Center.

This designation has serious ramifications for the issue of compliance with Occupational Safety and Health laws. **The Occupations Safety and Health Administration has taken the official position that it does not have authority to enforce the OSH Act or any the agency's regulations or standards. This means that while OSHA has been playing a consultative role as a technical advisor, there have been no mandated training sessions, and no enforcement of personal protective equipment requirements or exposure monitoring requirements.**

The Center has researched this issue and discussed the matter with OSHA officials and has concluded that there is no legal basis whatsoever for the agency's failure to assert jurisdiction and "suspend" its enforcement authority. **There is simply nothing in the OSH Act, the Code of Federal**

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<sup>14</sup>By comparison, the typical health standards compliance approach in the construction industry increases worker protections only after there has been a demonstration of increased exposures to toxic materials.

<sup>15</sup>NIEHS Study at 22.

<sup>16</sup>*Id.* at 17.

**Regulations, or any directives issued by the agency which permit it to evade its Congressionally mandated responsibilities.**

The authorities relied upon by OSHA<sup>17</sup> for its refusal to begin enforcement more than six weeks after the disaster are statements from the Field Inspection Reference Manual stating that “OSHA does not have authority to direct rescue operations–this is the responsibility of the employer and/or of local political subdivisions or State agencies.”<sup>18</sup>

OSHA’s reliance on this language is entirely mistaken. First, language in a reference manual does not – and indeed cannot – create an authorization for a federal agency to ignore its federal jurisdictional mandate. Second, the workers at the site are no longer involved in any direct rescue operations. Third, the single additional authority cited by OSHA officials, a 1991 directive entitled “OSHA Response to Significant Events of Potentially Catastrophic Consequences,” completely undermines their position. Paragraph F of that directive states: “The OSH Act *requires* that OSHA respond to catastrophic events, whether or not subject to the NCP. *OSHA must be an active and forceful protector of employee safety and health during the clean-up, removal, storage and investigation phases of these incidents*, while maintaining a visible but limited role during the initial response phase.” (Emphasis supplied). This provision further states that “[c]ommunication and coordination among federal and local agencies during their response to catastrophic events becomes crucial for operational as well as political considerations.” **This language unquestionably demonstrates that the agency and the federal government contemplated that OSHA would play a significant role in handling catastrophic events.** There is no excuse whatsoever for the agency’s refusal to assume its statutorily-mandated duties.

**Why The City Needs to Act Now To Help Its Heroes, Workers, and Residents**

Asbestos has been definitively determined by EPA, the United States Department of Health and Human Services, and the World Health Organization to be a human carcinogen. There are two types of cancer caused by exposure to asbestos: lung cancer and mesothelioma, a cancer of the thin lining surrounding the lung or abdominal cavity. Because of these risks, in 1989, EPA banned all new uses of asbestos, and established regulations regarding the release of asbestos from factories and during building demolition or renovation in order to prevent it from getting into the environment.<sup>19</sup>

Chrysotile Asbestos, the form of asbestos used for pipe insulation in the World Trade Center towers, is probably one of the most dangerous forms of the mineral with regard to the potential for

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<sup>17</sup>Information provided in a memorandum from OSHA provided to Barbara Olshansky on October 11, 2001, on file with the author.

<sup>18</sup>See OSHA Field Inspection Reference Manual, CPL 2.103, Chapter II, Section B.2.e.

<sup>19</sup>See “Asbestos ToxFAQs,” Agency for Toxic Substances and Disease Registry, Division of Toxicology, CAS # 1332-21-4 (September 2001). A copy of the Asbestos ToxFAQs is attached hereto as Exhibit 2.

causing exposure-related disease. It takes only one fiber of Chrysotile Asbestos to cause mesothelioma. Given the long days (ranging from 8 - 20 working hours) put in by workers at the disaster site, the amount of asbestos found in bulk samples and in the air analyzed by EPA and others,<sup>20</sup> and the type of asbestos the workers have been and are being exposed to, the probability is very high that many of the workers will contract cancer within the next 10 to 20 years. For example, EPA Asbestos Air Monitoring Data plainly show numerous instances of in which its standard of 70 structures per square millimeter was significantly exceeded.<sup>21</sup>

Furthermore, Chrysotile Asbestos is only one of many toxic agents (including other known carcinogens) present at the site. Workers' exposure to this toxic combination of particulate matter and gases is by now well-documented. Many, many of those who have been working so hard to put the City back together are already feeling ill. Yet we do not know – because there are no studies yet on these toxic combinations – what other health effects in addition to lung cancers are likely from the cumulative and multiple exposures workers have suffered to date. According to industrial health specialists who have examined the dust from the site, the pulverization of material from the explosions and collapse have created a finer asbestos dust than has been assessed in industrial health studies to date.

There is no reason to make the risk any greater for those serving our City by continuing these levels of exposure. We are morally obligated to provide the training, equipment, counseling and enforcement necessary to ensure that the workers at the disaster site are protected from all future exposures. We have the technology to protect people, we have the equipment available; there is simply no excuse for permitting these conditions to continue.

### **Specific Recommendations**

**The Center strongly urges the Committee to take a public stand on the need to move officially out of the rescue phase and the need for OSHA to exercise its enforcement powers. Training is needed for workers in many areas, including training for asbestos, lead, confined spaces, general construction safety, personal protective equipment, respiratory protection, fall protection, and hazard communication. Personal exposure monitoring must be put into place, and provisions for medical surveillance need to be established and implements. In addition, any environmental health and safety site plan must be fashioned in compliance with the HAZWOPER standard discussed above. Finally, the City must take responsibility for providing accurate information and equipment to the general public that is at risk for exposures to the hazardous materials present at the site, and in the dust and air that is circulating in the downtown area.**

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<sup>20</sup>Data posted by EPA indicating the results from its asbestos in bulk tests at the WTC disaster site indicate that the dust at various times contained as much as 4% Chrysotile Asbestos. *See* EPA Asbestos in Bulk Monitoring Results attached hereto as Exhibit 3. If a substance contains more than 1% asbestos, it is designated an “asbestos-containing material” and must be handled as a hazardous material.

<sup>21</sup>*See* EPA Asbestos Air Monitoring Results, attached hereto as Exhibit 4.

Thank you very much for your attention and your critical work in bringing these issues to light.