



LOST LIBERTIES

ASHCROFT AND THE ASSAULT ON PERSONAL FREEDOM

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The Public Health Fallout from September 11:

Official Deception and Long-Term Damage

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The environmental and public health nightmare that began in New York City on September 11, 2001 was unprecedented in nature, and its scope is still being discovered – mainly without the help of the Bush Administration’s environmental agencies. The persistent “WTC cough”, hundreds of new cases of asthma, the broad wind-borne dissemination of toxic elements, a by-now unmanageable spread of toxic dust initially carried out of the World Trade Center and debris-collection sites by rescue workers and since spread by former rescue vehicles like city buses and fire trucks – these are some of the reasons why, at this writing, more than 500 firefighters have sustained permanent disabilities that have forced them to retire,² why 25 percent of nurses examined at a downtown hospital in March 2002 had serious respiratory disorders,³ and why these cases are the tip of a very large iceberg.

The way the Environmental Protection Agency responded in the crisis was, sadly, an opportunity to glimpse the Bush Administration’s larger attitude toward environmental policy and toward public access to key environmental information. The EPA, which misled the public about the health impact of asbestos found in the ambient air and also failed to investigate or respond thoroughly on a range of crucial issues, led other federal, state and local authorities to rest easily with their own misdirected policies, affecting the long-term health of no one knows how many New Yorkers. In the context of the Bush Administration’s broader hostility to civil liberties, and its particular, determined retreat from environmental protections and engagement, the environmental/public health story of the World Trade Center collapse is a chilling reminder of the damage that unaccountable government can do – damage that in this case will linger for generations.

To protect an environment, including its inhabitants, requires that people have a say about the issues that affect their lives, and that the press and citizen groups hold the government to account for its stewardship of air, soil, and water. This public participation should not be hindered by political differences or undue pressure for a particular form of patriotism. At the cornerstone of urban environmentalism are the principles of self-determination and equal protection, a free-flowing exchange of information and ideas at all levels of governance. This is not merely the wish-list of the neighborhood activist. The Freedom of Information Act (FOIA) was enacted for just this purpose. The comparable New York State regulation provides a compelling preamble:

The people’s right to know the process of government decision and the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality. . . Any conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records.

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² “Firefighters Newsletter,” Barasch, McGarry, Salzman, Penson and Lim, December 2002.

³ Conversation with Dr. David Parkinson of the Long Island Occupational and Environmental Health Clinic in Port Jefferson, New York, July 2002. Dr. Parkinson had examined the nurses where they work at NYU-Beekman Hospital in

These principles are all the more essential in a public emergency.

Another underlying precept of environmentalism is the inter-relatedness of seemingly disparate ecosystems. As researchers document PCBs migrating from urban hazardous waste sites to Arctic sea ice algae and making their way into the breast milk of Inuit women, so we must apply this concept to our cities. Toxins leaching into the ground water at the Ground Zero excavation must be assumed to have a relationship with the Hudson River, just two blocks away. As the US Geologic Survey researches winds transporting Saharan red sand to the Caribbean islands and eventually Texas, so may we assume that the steady, black plume rising for weeks from the former World Trade Center had an impact on the millions of people living in its path -- certainly in Brooklyn, Manhattan, Queens, Staten Island and Long Island, and probably beyond.

Policymakers at the EPA, and the manufacturers of literally thousands of common office and building fixtures in lower Manhattan, could not have predicted the wholesale and cataclysmic demolition of some fifteen million square feet of office space. But it would be overly simplistic to attribute the actions of public health and environmental officials to confusion under pressure, at least after the first few days. It has become evident that federal, state and city agency actions and decisions were closely tied to economic and political motivations that placed other goals ahead of public health, and that these decisions led agencies to withhold critical health information from even the communities most at risk. The principles of environmental justice – the right to clean air, water and other resources – were sacrificed early and then over and over, to the interests of political recovery and the bottom line.

The risks of wholesale liability loomed large. Much of the World Trade Center complex was demolished into a fine powder that spread as far as wind and water might take it; the reach of possible public health consequences, with their requirements for government response and compensation, was initially incalculable. Firefighters and police officers, iron workers and operating engineers, medical personnel and many others, were originally thought to be limited by law to consideration under Workers' Compensation and similar programs – that is, they could collect based on the limited liability of their employers in exchange for “no-fault” determinations. But those surrounding the disaster – survivors and residents – had no such limitations. In the larger affected area, beyond Ground Zero, as dictated by the principle of inter-relatedness, millions of potential victims were placed at risk and could conceivably make demands for public aid or compensation.

Through its air-quality testing choices and its management of information to the public, the EPA sought to limit the government's responsibility, and liability, even at the cost of exposing people to health risks they had a right to know about and the option to avoid. This was made possible, in part, by the laziness of the local press, which should have investigated inconsistencies and demanded transparency. But the principal fault lies with those charged with carrying out environmental law and protecting the public.

Fire and Ash

_____As the twin towers collapsed, thousands of fleeing workers and area residents were coated with a thick, white dust that quickly began to irritate their skin and lungs. Grey clouds of highly corrosive material containing concrete particles, asbestos, finely crushed windows and fiberglass and heavy metals choked the streets. Gasping survivors

downtown Manhattan.

gulped down the toxin-laden dust as the entire area - buildings, streets, and ground, interiors and exteriors – was blanketed with fallout. Once the rescue effort could be organized, an arbitrary dividing line, first at 14th Street in Manhattan, was then moved quickly southward to Canal Street and finally to Chambers Street, only five blocks from the northern perimeter of Ground Zero. The luxury developments of Battery Park City were evacuated, and residents fled much of the area below Canal Street as large parts of lower Manhattan were without power, water and telephone service.

Immediately landlords lost rental income; the retail, entertainment and tourism economies of the city shut down; the real estate market took a nosedive. Schools, the financial markets, government agencies, and all but the most necessary places of business closed. Roads, subways, bridges and tunnels connected to this area would remain closed, or with limited access, for months. Layoffs began, and what had been worrisome signs of recession before September 11 intensified. At the same time, the nation began an outpouring of affection for the city that had perhaps not been seen since the Giants won the pennant in '51. Whatever our grief was locally -- and it was great -- we in New York sensed that we were not alone.

It became somebody's job to make sure the secondary economic and political tragedy did not eclipse the WTC fire and collapse itself. A "clean" environmental bill of health for what was left of lower Manhattan was the way to get the city and the country back to work. The push was on to shift the public's understandable shock to an uneasy restoration of order, including the difficult task of trying to keep decimated financial markets from fleeing what was now deemed a major target of our enemies, and attracting back tourists. While the world mourned, the clock began ticking to re-open the New York Stock Exchange, a block away from the disaster site.

At the site itself, an inferno burned on, despite continuous streams of water from several directions and the government's continuous reassurances that the fire would soon die out. With the exception of a single day, when the wind turned north, the huge plume of black smoke emerging from Ground Zero drifted southeast, day after day, over much of lower Manhattan, Brooklyn and southern Queens.

As the EPA and its colleague state and city agencies like to insist, precisely what was in that plume will never be known; capturing the smoke for testing presented obvious hazards. But common materials of modern offices – synthetic fabrics, plastics, laminates and building supplies containing formaldehyde; fluorescent lamps containing mercury; the di-electric fluids that encase electrical cables; approximately four pounds of lead from each computer; PCBs from capacitors, electrical cable insulation, and transformers – were clearly elements in highly toxic fires and dust storms. The plume contained, at the very least, toxic lead, asbestos, volatile organic compounds, dioxins, mercury, nickel, vanadium, sulphur, PAHs, PCBs, and furans.

And there was more. The World Trade Center had housed many facilities specific to the tenant government agencies, including a Secret Service shooting range that kept millions of rounds of lead ammunition on hand. An array of hazardous chemicals was stored in a U.S. Customs lab, including thousands of pounds of arsenic, lead, mercury, and chromium, among other toxic substances.⁴ The City of New York maintained an emergency generator at its command center located at 7 WTC, with a large, above-ground fuel storage tank that had been exempted from

⁴ Toxic Targeting, Inc., "Toxic Targeting Computerized Report – WTC Complex New York New York 10048, September 11, 2001," September 18, 2001. Produced for the New York City Department of Design Construction.

violation of local building codes. And more still: some 130,000 gallons of PCB-contaminated transformer oil at an electrical substation at 7 WTC likely contributed to its collapse and to the toxic residue later found in the area.

On September 13, against a backdrop of mounting patriotism, EPA chief Christine Todd Whitman helicoptered into the city to deliver to television cameras the most uplifting news New Yorkers could hope for in those terrible days. As governor of New Jersey, Whitman had amassed a track record of effectively subordinating environmental concerns to those of industry, but in this extraordinary situation, her message was reassuring. Whitman reported that the EPA was “greatly relieved to have learned that there appear to be no significant levels of asbestos dust in the air in New York City.”⁵ The news came as welcome contrast to the grim reports of the thousands of body bags that Mayor Giuliani had ordered in. “We are working closely with rescue crews to ensure that all appropriate precautions are taken,” said Whitman. “We will continue to monitor closely.”⁶

That monitoring appeared to produce even better news, as Whitman reported on September 21, after the financial markets had reopened. She was relieved, she said, to be able to say “that a host of potential contaminants are either not detectable or are below the Agency’s concern levels...Results we have just received on drinking water quality show that not only is asbestos not detectable, but also we cannot detect any bacterial contamination, PCBs or pesticides.”⁷ This appeared to be enough for most news outlets in the city and nationally. With a few notable exceptions, warning of possible respiratory exacerbation for individuals with already compromised systems, the news media latched onto the good news with servile uniformity.

In the meantime, hundreds upon hundreds of rescue workers – firefighters, police, iron workers, operating engineers, and others -- entered and left what became known as Ground Zero, aiding in the rescue effort. They were surrounded by concentric rings of aid workers who provided food, clothing and support, many of them volunteers from all over the country. As the fire raged on for weeks, a self-contained city sprang up below Canal Street: makeshift command centers and relief stations were set up in Stuyvesant High School and other local schools, in fire-houses and local hotels and any other public spaces that could be commandeered. A dismal order gradually replaced the initial, impassioned chaos.

The Ground Zero workers were surrounded by a foul, corrosive and irritating odor that permeated lower Manhattan, provoking the widely reported “WTC cough.” The hacking cough, which plagued many New Yorkers well beyond the immediate area for months, was just one sign that residents’ long-term health was being compromised. According to Dr. Stephen M. Levin, medical director of a major center on environmental and occupational medicine, “Some of the asthma contracted by New Yorkers will persist for the rest of their lives.”⁸

⁵ EPA press release, “EPA Initiates Emergency Response Activities, Reassures Public About Environmental Hazards,” September 13, 2001, http://www.epa.gov/wtc/stories/headline_091301.htm

⁶ *Ibid.*

⁷ EPA press release, “NYC Monitoring Efforts Continue to Show Safe Drinking Water and Air,” September 21, 2001, http://www.epa.gov/wtc/stories/headline2_092101.htm

⁸ Stephen Levin, medical director, Mount Sinai- Selikoff Center for Occupational and Environmental Medicine, quoted in Christine Haughney, “Health Effects at World Trade Center Debated,” *Washington Post*, January 6, 2003, p.1.

After the search for survivors waned and workers at the site shifted into a recovery mode, the priority established by the EPA, the Occupational Safety and Health Administration (OSHA), and the Federal Emergency and Management Agency (FEMA) in deference to commercial downtown interests became the cleanup of the streets' exterior areas. John L. Henshaw, assistant secretary of labor for OSHA -- in an understated comment that would characterize the agencies' disinformation all down the line -- advised, "Keeping the streets clean and being careful not to track dust into buildings will help protect workers from remaining debris."⁹

But in the meantime, the most rudimentary elements of proper handling of a toxic disaster were being ignored. In one instance, which would have been laughable in other circumstances, the EPA publicized sending in vacuum trucks, but the trucks were sent without the HEPA filters necessary to suck up the dust.¹⁰ Further, the EPA did not carry out serious testing of the dust, as described below, and did only minimal and spotty testing of ambient air much beyond Ground Zero, despite the evident dispersal of dust in the wind; there was, in other words, only the most limited attempt to determine the nature and scope of the health risk to the city's population before cleanup advisories were issued. And EPA, OSHA, and the city's Department of Health did not provide much in the way of personal protective gear and respirators to the workers at Ground Zero and debris-removal areas; a study by the National Institute of Environmental Health Sciences determined that, to the extent that workers got protection, it was mainly due to the activism of the operating engineers' union, not the appropriate -- and much wealthier -- government agencies.¹¹

At this critical juncture -- in a move that has since been criticized soundly by such diverse observers as the City Council¹², accountability advocate Congressman Jerrold Nadler,¹³ and the *Wall Street Journal* -- the EPA determined that it was only responsible for cleaning and decontaminating the outsides of buildings in lower Manhattan, not for the cleanup of building interiors where people worked and lived. The EPA delegated the interiors of buildings to the overwhelmed and beleaguered N.Y.C. Department of Environmental Protection (DEP); the DEP was supposed to help residents ensure the safety of their homes with trained cleaning personnel, proper de-contamination equipment, and the like. The EPA's position in this case contradicted both its own recent experience and the law that governs it. Just days before September 11, in the town of Libby, Montana, the EPA had taken complete responsibility to clean all the homes of that former asbestos mining center -- where, as it happened, asbestos levels, while patently unsafe, were lower than those found by independent sampling in lower Manhattan.¹⁴ The EPA

⁹EPA press release, "EPA, OSHA Update Asbestos Data, Continue to Reassure Public about Contamination Fears," September 16, 2001, http://www.epa.gov/wtc/stories/headline_091601.htm

¹⁰ Kenneth R. Bazeinet, "WTC Trucks Had Wrong Dust Filters," *New York Daily News*, August 14, 2002.

¹¹ NIEHS WETP National Clearing House for Worker Safety and Health Training, press release, "NIEHS WETP Response to the World Trade Center (WTC) Disaster: Initial WETP Grantee and Preliminary Assessment of Training Needs," October 23, 2001.

¹² N.Y.C. Council, "Report from the Committee on Environmental Protection: Air Quality and Environmental Impacts due to the World Trade Center Disaster," December 2001.

¹³ White Paper "Lower Manhattan Air Quality," March 2002.

¹⁴ Remarks of EPA Administrator Christine Todd Whitman at Town Hall meeting, Libby, Montana, September 7, 2001. <http://yosemite.epa.gov/administrator/speeches.nsf> . Also, USEPA Region VII memorandum, from Christopher Weiss, senior toxicologist, to Paul Peronard, on-scene coordinator: "Amphibole Mineral Fibers in Source materials in

had taken total responsibility for the Libby cleanup because, under the Clean Air Act's NESHAP standards, the federal government is required to ensure that people are not exposed to asbestos at dangerous levels, especially in airborne or friable (readily convertible to airborne) forms. The EPA also fast-tracked Libby to a place on the National Priorities List as a Superfund site, because the governor of Montana requested it; as a result, Libby does not have to wait years for EPA to assess its hazards and make comparative cost-benefit judgments. But the World Trade Center collapse did not get this kind of treatment; Governor Pataki did not request it, and the EPA did not undertake it voluntarily.

As the *Wall Street Journal* would report eight months later, the DEP, in turn, also passed the buck, allowing landlords to determine if their own buildings were clean without the DEP testing to check.¹⁵ In a memo to New York City landlords dated May 11, 2002—two days after the *Journal* article -- the DEP tried to back-pedal by demanding that landlords provide “copies of the environmental hazards assessments including bulk sample [samples of tests on dust] results and air monitoring results and a summary of clean-up activities” for their buildings.¹⁶ As of January 2003, only ninety landlords had responded to the DEP's demand,¹⁷ and the DEP had not stepped up pressure on them to comply. The Clean Air Act and New York City asbestos laws require a certain quality of clean-up effort where asbestos is discovered, but with the EPA saying the air was clean, as discussed below, and with the DEP taking no action to test buildings, landlords were allowed to superficially assuage the clean-up issue with improper cleaning methods and in the process, destroyed easily accessible evidence of toxins. New Yorkers were left at the mercy of their landlords to determine whether their homes or workplaces were safe.

The city's health department (DOH) did as badly or worse. When the department surveyed downtown residents for a January 2002 study, 59 percent of respondents indicated that they had received information about how to clean their apartments of the WTC dust, under protocols issued by the health department itself. The DOH protocols, issued on September 17, 2001, advised residents facing re-entry into their apartments around Ground Zero, “The best way to remove dust is to use a wet rag or wet mop...Where dust is thick, directly wet the dust with water and remove it in layers with wet rag and mops.”¹⁸ Nowhere in the advisory did the health department inform that the “dust” inside these homes might well contain asbestos and myriad other toxic substances; nor did the protocols suggest that professional testing and de-contamination (otherwise known as abatement) should be sought, for residents' protection and as required by law if the dust contained more than 1 percent asbestos.¹⁹ It was this advisory that the EPA repeatedly cited in referring concerned residents to local authorities for guidance on cleaning building interiors.

The remains of the WTC complex were removed along various routes to the closed Fresh Kills landfill in Staten Island: truck convoys passed through the Brooklyn Battery Tunnel through Red Hook (with wind blowing dust

Residential and Commercial Areas of Libby Pose an Imminent and Substantial Endangerment to Public Health,” December 20, 2001.

¹⁵ Jim Carlton, “Buck-Passing Delayed EPA in 9/11 Cleanup,” *Wall Street Journal*, May 9, 2002.

¹⁶ R. Radhakrishnan, PE, director, Asbestos Control Program, NYC DEP, “Notice to Building Owners Located South of 14th Street, Manhattan”, May 11, 2002.

¹⁷ Conversation with Russell Peunies, attorney, DEP Legal Affairs Bureau, January 24, 2003.

¹⁸ Flyer, DOH, “Recommendations for People Re-Occupying Commercial Buildings and Residents Re-entering their Homes,” undated – at www.ci.nyc.ny.us/html/doh/html/alerts/wtc.3.html

¹⁹ This is required under the Clean Air Act's National Emissions Standards for Hazardous Air Pollutants (NESHAP) Regulations (40 CFR, Part 61) and under the Asbestos School Hazard Detection and Control Act (ASHERA), OSHA

off the tops of the trucks' contents), and barges moved on the Hudson River. In Fresh Kills, New York City detectives and FBI personnel sifted through the debris. A report produced by an industrial hygienist for the NYC Detectives' Endowment Association, and passed to my organization, found that while respirators were available to these workers from OSHA upon request, the agency had not provided training and fitting as necessary in their use, nor had the detectives received "quality information . . . on what the health and safety hazards might be and what controls are being implemented to reduce these hazards."²⁰ Several of the detectives were felled by the noxious fumes that rose off the landfill.

Firefighters' and detectives' associations, since immediately after the disaster, had been approaching the organization I direct, the New York Environmental Law and Justice Project, to ask for advice and share information. We were receiving a stream of statements from rescue workers and their unions, increasingly worried about exposures. At the same time, office workers and neighborhood residents near Ground Zero were complaining of eyes tearing and skin itching. They spoke of the dust that covered their furnishings and floors, of being denied the right to wear a mask indoors at their city jobs for fear of creating "panic," of clogged air filters in newly-bought home filtering machines, and awakening at night in spasms of coughing. They talked about needing asthma inhalers and nebulizers for the first time and reported that non-union contractors were being hired by landlords to "clean up" in a haphazard fashion. These people were finding it very hard to get precise, practical information from city and federal agencies. Meanwhile residents were tracking whatever dust was on their clothes around to their jobs, schools and other locations. And what incensed rescue and clean-up workers most was that they were not given even basic advice on how to limit their own and their families' exposure. Thousands of workers -- who displayed bravery beyond measure -- were exposed to a surfeit of toxic substances, while very few were encouraged to wear the scant personal protective gear available, and even fewer were advised of the potential hazards they were unknowingly tracking home to their families on their clothes and effects.

In late November 2001, Dr. Stephen Levin of the prestigious Mount Sinai-I.J. Selikoff Center for Occupational and Environmental Medicine testified before the New York State Assembly's Standing Committees on Environmental Conservation, Health, and Labor. He noted then that conditions "seen in adults who have been at *or near*" (emphasis added) the WTC site "for as little as twenty-four to thirty-six hours" included "reactive airways disease, new onset or exacerbation of pre-existing asthma, RADS [reactive airway dysfunction syndrome], sinusitis, irritant rhinitis, persistent cough, and diffuse irritation of nasal mucosal surfaces." Particularly among first-responders "or individuals who were hit by the cloud of dust and debris" following the collapse, Dr. Levin found "a dramatic increase in GERD [gastro-esophageal reflux] symptoms," which in some people are life-threatening.²¹ As of late January 2003, Dr. Levin had examined some 3,500 rescue workers and volunteers, starting immediately after the

Standards 20 CFR 1926.1101

²⁰ "Preliminary Report on Health and Safety Evaluation of the Fresh Kills Landfill Project Supporting the WTC Disaster Recovery," by Emilcott Associates for the NYC Detectives' Endowment Association, September 27, 2001. OSHA's respiratory protection standard 29CFR1910.134 requires fit-testing of all tight-fitting respirators.

²¹ Testimony, New York State Assembly Standing Committees on Environmental Conservation, Health and Labor, November 26, 2001.

WTC collapse, and found that half suffered from either serious respiratory disorders and/or psychological distress.²²

The obvious questions should have been: What was in this dust and smoke, what is causing the present ailments, and what long-term health effects might result? But the EPA, in an abdication of its responsibility, did at most insufficient testing of the area, and very limited – and unpublicized -- testing of interiors. The agency began testing the ambient air within a few days of the attack, and continued for several weeks. But it circumscribed the range of its monitoring arbitrarily – with almost no air sampling in Brooklyn, for example, though that borough got the full impact of wind-borne fallout from the burning plume. Paul Bartlett, Queens College environmental scientist and an international expert in the dispersion of toxic substances, found EPA and other agencies’ monitoring inadequate to determine the degree and extent of exposure. According to Bartlett, their “detection limits are aimed at threshold levels for occupational exposure. They aren’t treating this as a disaster, so they’re not asking to what extent and how far are people being exposed or who is possibly being affected by the release of chemicals. They’re just checking what emissions are exceeding regulations.”²³

What testing EPA did do was initially withheld from the scientists and medical community, labor unions with men on-site, and local leadership. When pressed to back up assertions that all was well, the EPA tended to point, for support, to the New York City Department of Environmental Protection, the local agency with responsibility for hazardous waste cleanup and disposal. But the DEP – ill equipped for a disaster of these dimensions but unwilling to admit it – refused to release its data in timely fashion even to a joint committee of the state legislature. Moreover, when that data was finally obtained and made public by the Environmental Law and Justice Project, in November 2001 through a state Freedom of Information Law request, it revealed that the DEP had conducted testing without using the highest-quality equipment available, such that its results were always less refined and informative than they should have been about the true risks and potential impact.

To be fair, on September 11 no one could comprehend the full severity and repercussions of what had happened. But as the weeks passed, the agencies’ evasions became policy. Medical experts were seeing health effects but could not properly diagnose or help patients because they did not have adequate information. Environmental scientists were expecting to learn the components of the fallout in order to make immediate decisions that would affect cleanup, recovery and future systemic planning. And meanwhile, the EPA and OSHA kept saying there was no problem.

The EPA’s Testing and Reporting

It was not until three weeks after September 11 that the EPA website began posting a “representative sampling” of air-monitoring results, from various places in lower Manhattan. In those three weeks, the agency was testing the ambient air but not releasing the results, and it was not testing settled dust with the highest-scrutiny techniques available but choosing, instead, cheaper and non-aggressive techniques that, predictably, yielded lower results. Nor was it testing air inside offices or apartments near Ground Zero, where people were told it was safe to return within three days of the disaster.

²² Conversation with Dr. Stephen Levin, January 24, 2003.

²³ Quoted in Michael Ellison, “Heroes of Ground Zero At Risk Breathing Toxic Cocktail,” *Guardian*, October 27, 2001.

One thing the EPA did report, in the days just after September 11, was that its own headquarters at 290 Broadway – a few blocks from Ground Zero – had been tested and found safe for asbestos. The tests had reportedly shown the presence of airborne asbestos but at “less than one-tenth of the maximum level allowed in workplaces by the Occupational Safety and Health Administration.”²⁴ Bonnie Bellow, regional spokeswoman for the EPA, would announce on Friday, September 14 that, according to tests the previous day, “There’s nothing at this point that indicates that business can’t resume in the Wall Street area on Monday as well.”²⁵ The agency also noted, however, that parts of its building had later undergone thorough asbestos cleaning. The logical question arose: If all is well, why was 290 Broadway undergoing an asbestos abatement? This question was not posed by the press, though, and EPA did not clarify the contradiction on its own.

Neither did EPA reveal a key fact about its headquarters cleanup: it had hired an industrial hygienist to use a particular type of high-sensitivity sampling method, called micro-vacuum, which sucks out even the tiniest particles and subjects them to highest-scrutiny analysis.²⁶ This seems only responsible, and indeed it was. But the EPA, in failing to reveal the facts, was then able to take a position that micro-vac testing was unnecessary for schools and residences in lower Manhattan. Not only did EPA fail to *require* the use of the most thorough tests to seek evidence of asbestos and other toxic substances in the lower Manhattan; it actively discounted results obtained when the micro-vac was used independently in the neighborhood. At 105 Duane Street, residents hired a certified industrial hygienist who used micro-vac on December 3 and found 555,000 asbestos structures per square centimeter in samples from the air-supply vent (at least fifty times the recommended safe level). The EPA criticized the testing method and contended the finding was an aberration. The landlord then failed to do a proper abatement on the building, based on EPA and DEP assurances that the test results could be ignored. Actions like this prompted an EPA scientist, Cate Jenkins, to criticize the agency in a series of memos that circulated in the scientific community and became well known to organized downtown residents.²⁷

The EPA was not the only agency withholding relevant health-affecting information, putting out positive spin, and giving residents instructions and guidance that fell short of what was legally required. A U.S. Department of Health and Human Services “fact” sheet on dust and debris issued September 16 advised: “The most immediate hazards to health and well-being are from unstable buildings, broken glass, jagged metal and other harmful things.” In response to the question, “What is in the dust?” the flyer advised, “We expect that materials that would be present would be at concentrations lower than those normally associated with health hazards,” and made no mention whatsoever of asbestos, lead, concrete, fiberglass, or any of the other known toxic substances contained in WTC building components and contents, defining dust only as “fine particles that originally made up materials of the WTC and the aircraft that struck it.”

²⁴ Dr. Cate Jenkins, “3/6/02 Draft: Asbestos in Settled Dust and Soils,” March 6, 2002. Dr. Jenkins, PhD, is an environmental scientist with the Waste Identification Branch, HWID, Office of Solid Waste, at US EPA.

²⁵ Quoted in Dan Fagin, “Tests Not a Danger Here,” *Newsday*, September 15, 2001.

²⁶ This information only came out a month later, with the release of documents requested under FOIA.

²⁷ Dr. Cate Jenkins, memo March 6, 2002 and memo “Libby v. Manhattan Different Asbestos Testing Methods,” February 14, 2002.

Given the official agencies' determination to be upbeat, and the evidence of people's endangerment, it became important to take some independent samples, which I did for the Environmental Law and Justice Project on September 19, at Vesey and Liberty Streets on the outer perimeter of Ground Zero.²⁸ ATC Associates, a laboratory that had been used by New York City and its Board of Education, analyzed the samples. Four samples indicated content of between 1 percent and 5 percent chrysotile asbestos -- that is, up to five times the level at which the law requires immediate de-contamination -- and a very high level of fiberglass, which the National Toxicology Program defines as a "likely carcinogen." (Soon after the Law Project's results became public, the New York State Department of Health threatened local labs with loss of their licenses if they processed any more "independent sampling," according to a lab director who received such a warning.²⁹)

On September 24, the Law Project hand-distributed these findings to the local area's residents and emergency workers, in a fact sheet produced with the help of Monona Rossol, an experienced industrial hygienist. Although the EPA, Mayor Giuliani and the city's health department called the Law Project's warnings alarmist, some members of the media began to call. One in particular, Juan Gonzalez of the *Daily News*, began to follow the environmental story closely and to publish what he could.

_____ When EPA began posting a "representative sampling" of air-quality monitoring data on its website, on October 3, the postings involved three grades of filtering of information: first, the EPA had tested narrowly as to location and as to matter tested, as noted above; given that the samples posted were selective and so few, and taken mostly outdoors rather than indoors, they did not give an accurate picture of what people were exposed to. Second, the postings were a selection from the total pool of EPA data available -- all of which should have been made available for scientific, health-agency, journalistic and public-health communities to examine. Third, the EPA's explication of the selective data it posted was disingenuous and scientifically misleading, and as with the other filtering this minimized the findings of dangerous toxins. For example, the website featured a significant number (27 out of 442) of ambient air samples taken in September that registered above the current AHERA (Asbestos Hazard Emergency Response Act) standard for permissible exposure levels, which is 70 structures per millimeter squared. The agency explained these as "spikes" in toxicity, momentary aberrations, even though its own testing was too spotty to establish whether such results would have been aberrations or not. And it argued that they should be averaged into the rest of the data, such that the results would not exceed AHERA or other regulatory limits, even though that is not how toxicity works: beyond certain levels, even short-term exposure to certain toxics is alarmingly dangerous.

The accompanying EPA press release on October 3 also contained some troubling inconsistencies. The agency continued to argue that the public's health was not at risk, advising yet again that testing "found no evidence of any significant public health hazard to residents or visitors to the New York metropolitan area." The agency further recommended, "There is no need for concern among the general public, but residents and business owners should follow recommended procedures for cleaning up homes and businesses if dust has entered."

In that press release the EPA advised the public that it had "been evaluating samples of air against an

²⁸ I used a plastic spoon and zip-loc bags, but this method does not affect the quality of the sampling in terms of discovering its toxic content. (I also dressed in protective gear.)

²⁹ Conversation with local lab director, late September 2001. And conversation with Dr. Robert Simon, director, ETI

extremely stringent standard, the AHERA standard.” The statement went on to stress that “levels of asbestos above the AHERA standard do not imply that there is an immediate health threat to the public.” Indeed, it said, “asbestos exposure becomes a health concern when high concentrations of asbestos fibers are inhaled over a long period.” Quite apart from misrepresenting the asbestos threat, as explained further below, the EPA misused the AHERA standard, which is intended for evaluating *after* a cleanup has taken place.

The results of the bulk sampling data, as posted on the website, were also worrisome. Forty-eight of 177 bulk samples collected by EPA contained more than 1 percent asbestos, but on the website the EPA did not report how much more. And the press release glossed this over, stating blandly, “The existence of dust that contains more than 1 percent of asbestos does not in itself constitute a significant health hazard – ambient air samples are more accurate measures of actual exposure potential, and asbestos is primarily considered hazardous after long-term exposure – but dust samples do provide important information about potential exposure.”

These statements directly contradict scientific knowledge and the EPA’s own rules, established in 1986 pursuant to the Toxic Substances Control Act. Those rules state, first of all, “Available evidence supports the conclusion that there is no safe level of exposure to asbestos. This conclusion is consistent with present theory of cancer etiology and is further supported by the many documented cases where low or short-term exposure has been shown to cause asbestos-related disease.”³⁰

The rules go on to state:

Most occupational studies have been conducted on populations exposed to high airborne concentrations of asbestos for long periods of time. However, short-term exposures have also been shown to increase the risk of lung cancer and mesothelioma. In addition, there are many documented cases of mesothelioma linked to extremely brief exposures to high concentrations....³¹

In sum, according to EPA’s own rules, there are no safe levels of exposure to asbestos, but in its press releases the agency advised that the asbestos-laden samples posed no danger. The public was being told that only long-term, high levels of exposure were dangerous, while EPA rules make clear that even short-term and low levels of asbestos exposure cannot be classified as safe.

News outlets like the *New York Times* and *New York Post* fell into line with confirmations of the EPA story. As later reported in *The American Prospect* by media reporter Alyssa Katz, the *Times* ran no fewer than thirteen stories emphasizing the safety of the site between September 12 and February 24, 2002.³² The Environmental Law and Justice Project wrote a letter to the *Times*, which was published in mid-October 2001, describing the results of our

Lab, Fairfax, Virginia, September 29, 2001. Dr. Simon’s lab had also confirmed our test results.

³⁰ 51 FR 15728

³¹ *Ibid.*

³² Alyssa Katz, “Toxic Haste: New York’s Media Rush to Judgment on New York’s Air,” *The American Prospect*, February 25, 2002.

samples, including the presence of up to 5 percent asbestos in the dust. But there were no follow-up calls from the press.

Where were the media? As *Daily News* reporter Juan Gonzalez details in his compelling book, *Fallout: The Environmental Consequences of the World Trade Center Collapse*, there was substantial pressure on the press to self-censor in the aftermath of September 11. He writes, for example, of the demotion of a *Daily News* editor who had attempted to assemble a team to report on the environmental hazards around Ground Zero. Gonzalez told *The American Prospect's* Katz, "In 25 years as a reporter, I've never faced as much scrutiny or as much difficulty getting stories in the paper as I have had around this issue."³³

The media's portrait of a scientific public-health consensus was, actually, way off the mark, and it would not have been difficult to find inconsistencies if reporters had been encouraged to investigate. In November 2001, OSHA made a presentation for the Standing Committees on Environmental Conservation, Health and Labor of New York's State Assembly, where it reported that, based on its sampling results at the WTC site, the agency was "confident that asbestos does not pose an airborne hazard to workers."³⁴ Yet the National Institute of Environmental Health Sciences, though its Worker Education and Training Program, had already issued a report in October that cited "significant risks that have been and continue to be faced by these on-site and recovery workers." The NIEHS report stated: "... the exposure data, as well as the potential for serious exposure to toxic materials (including asbestos) among the construction response workers, raises significant concerns" and found Ground Zero "to be a very dangerous working environment where many workers lack the hazard-specific training required under current OSHA standards."³⁵ Among that study's sources was a city Department of Health "WTC Disaster Site Worker Injury and Illness Surveillance Update;" that is, the city's own surveys were showing hazards. Because of reports like this one, the information was circulating at some levels; but it was not being provided to rescue workers and city residents who needed to protect themselves.

Speaking of this period, Bruce Lippy, an industrial hygienist with the operating engineers' union's National Hazmat Program, later stated that "60 percent of our samples were greater than the EPA clearance level . . ." ³⁶ And the city's health department reported in January 2002 that 50 percent of residents in lower Manhattan continued to experience symptoms likely related to the World Trade Center disaster, such as nose, throat and eye irritation. ³⁷ As of January 2003, over 1,000 claims have been filed against the City of New York by firefighters who sustain respiratory damage and/or were exposed to dangerous toxic substances as a result of the city's failure to provide them with

³³. Ibid

³⁴ Testimony, Patricia Clark, regional administrator, US Department of Labor, OSHA, before the New York State Assembly Standing Committees, November 26, 2001.

³⁵ NIEHS WETP report, op.cit..

³⁶ Quoted in James L. Nash, "Cleaning Up after 9/11: Respirators, Power and Politics," *Occupational Hazards*, May 10, 2002.

³⁷ NYC Department of Health press release, "NYC Department of Health Releases Community Needs Assessment of Lower Manhattan," January 11, 2002.

respirators during rescue and recovery efforts at the WTC.³⁸

FOIA: What Federal, State and City Agencies Knew

On September 21, 2001, the Environmental Law and Justice Project requested, under the Freedom of Information Act, all monitoring data studies and reports of air, dust, and bulk, including but not limited to hazardous materials and water samples taken in lower Manhattan and Staten Island landfills in response to the WTC collapse. On October 19, the Project picked up more than 600 pages of testing results from EPA monitoring points and stations, primarily located at or near Ground Zero. What the documents revealed was that, in spite of their assurances to the contrary, EPA, OSHA and the various other health and environmental agencies – which met weekly throughout the crisis -- knew of the dangers present at Ground Zero and beyond, on the ground and in the air. EPA's own data listed findings above regulated levels -- information not posted on its website. (Later, the agency would claim this was an oversight.)

The documents also revealed that analyses prepared for the EPA by scientists were held back from publication, though their findings were highly relevant to health care providers trying to diagnose and treat those with acute symptoms, to say nothing of the public at large, which deserved to know its own risks. Among the reports that were withheld or delayed was one by Paul J. Liroy, which was based on testing done within a week of the WTC collapse but which was not released until April 2002. The testing was conducted at EPA's own labs in Kansas City and involved bulk samples of settled dust and smoke gathered on September 16 and 17. The labs found metals, radionuclides, ionic species, asbestos (in concentrations ranging from 0.8 percent to 3 percent), PAHs, PCBs, and a host of other toxic substances that can cause cancer and/or respiratory and/or debilitating illnesses.³⁹

The documents also revealed how high the concentration of dangerous contaminants remained even three weeks after the towers' collapse. After people were back in the area at EPA's urging, living and working full-time, the documents show that the following results were coming from the agency's downtown stations.

EPA Daily Summary, September 21: "Dust Samples: Twenty-four dust samples were analyzed between September 19 and 20, which included samples from the general area of Stuyvesant High School and Battery Park. Twelve of the 24 samples showed asbestos levels slightly above the EPA levels of concern."

EPA Daily Summary, September 26: "AIR: Non-FIXED Samples in New York City Dioxin- Analysis of four air samples showed all samples were at or above EPA's removal action guidelines, which is [sic] based on a 30-year, 24-hour exposure risk scenario. However, there is no short-term exposure problem. These samples were captured at the plume still emanating from fires within the World Trade Centers debris pile. We expect that these levels measured will only persist for a few weeks until the fires are extinguished."

³⁸ Barash, McGarry, Salzman, Penson, & Lim, "Firefighters Newsletter," Vol. I, December 2002.

³⁹ Paul J. Liroy et.al., "Characterization of the Dust/Smoke Aerosol that Settled East of the World Trade Center(WTC) in Lower Manhattan after the Collapse of the WTC 11 September 2001," *Environmental Health Perspectives*, July 2002, pp. 703-712.

EPA Daily Summary, October 4: "Ambient Air Sampling: Metals - 10 samples were taken on October 2 within the vicinity of the emergency response operations. Of these chromium results for 4 samples exceeded EPA's removal guideline"

EPA Daily Summary, October 14: "Dioxin - Ten samples were collected on October 2 and analyzed for dioxin/furans. Four of the samples showed results above the guideline level at which EPA would take some type of action to reduce people's exposure."

EPA Daily Summary, October 14: "Carbon monoxide - A direct reading of carbon monoxide was detected at 19 parts per million (ppm) at one location (Greenwich and Liberty). This is above the National Ambient Air Quality Standard (NAAQS) 8-hour average of 9 ppm, but is below the NAASQ 1-hour average of 35 ppm and the OSHA permissible level of 50 ppm.."

EPA Daily Summary, Ambient Air Sampling "VOCs [volatile organic compounds]- .. Benzene was detected at three locations above the OSHA limit in the plume on the debris pile. Benzene was not detected at three parameter locations."

EPA Daily Summary, Ambient Air Sampling, October 15: "VOCs - Sampling for volatile organic compounds (VOCs) was conducted on Oct. 13 and Oct. 14 in the smoke plume within the debris pile at ground zero. Benzene exceeded the OSHA time-weighted average permissible level at two locations, on both days. Benzene was not detected in the breathing zone (approx. 5-6 feet above ground) at 3 locations several blocks from ground zero."

We forwarded the information to Juan Gonzalez, of the New York *Daily News*, whose reporting reached the front page next day.⁴⁰ This data was also immediately placed on the Law Project's website, which was visited by hundreds of government agencies, scientific groups and medical institutions over the next several months.

Additional requests for documents were filed, under New York State's Freedom of Information Law (FOIL), with both the state's Department of Environmental Conservation (DEC) and the city's Department of Health (DOH). Among information requested of the DEC was air monitoring data from stations in the city and mobile units near the WTC, for asbestos, fiberglass, cellulose, particulates and other toxic and hazardous materials. DEC initially declined to provide any information, stating, "Your FOIL request...is at this time being denied due to on-going criminal investigation."⁴¹ Only after an appeal and repeated demands did the Environmental Law and Justice Project obtain the relevant documents on November 13, 2001. They indicated, among other things, that during spot testing the DEC's monitors became clogged with dust; the monitors should have been replaced or re-set, but they were not. This was the agency to which the EPA had delegated oversight of interiors of buildings.

The city health department's testing results, when finally released after appeals, were even more disturbing.

⁴⁰ The newspaper's front page carried Gonzalez's article on October 26, with the headline "Toxic Zone."

⁴¹ Email from Louise Munster, Freedom of Information Officer, NYS DEC, Region 1, to the Environmental Law and

The DOH documents showed that when the offices of City Hall workers – the mayor’s deputy chief of staff, for example -- and others in downtown Manhattan were tested, an “overload” of dust was found. Normal procedure requires that the testing machines be recalibrated and the tests be re-done so that the overload material can be analyzed for asbestos and other toxic, but the DOH did not conduct further tests. And it did not tell the public about the overload dust finding. On its website, such results were merely listed as “n.a.”

Decontamination and Downtown Health

During 2002, as the WTC site was cleared and the city returned to some version of normalcy, environmental and health concerns seemed limited to the people living near Ground Zero and the rescue workers who remained ill, like the hundreds of firefighters who either took medical leave or continued working with new respiratory problems. The rest of the city went on with life, but downtown, long-term concerns developed into a long-term, unhappy dialogue with city, state and federal agencies. This is not to say that New Yorkers in general were sanguine: a poll taken in March 2002 found that 70 percent did not believe the EPA’s assurances about Ground Zero air safety.⁴² But downtown New Yorkers – most of whom had returned to their homes well before the end of 2001 -- were even more skeptical, and, increasingly organized, were pressing hard for both information and remedial action.

Parents of children enrolled in lower Manhattan schools such as P.S. 58, Stuyvesant High School, and the Borough of Manhattan Community College, for example, had serious concerns about the safety of the buildings where the young people spent their days. The buildings had been commandeered as emergency quarters from September 11 onwards, and required decontamination. Such corporate giants as Shearson Lehman, in abating their own affected property at the World Financial Center, had opted to completely dispose of all fibrous materials, from couches to carpets to rugs. By contrast, despite threatened lawsuits and protests from lower Manhattan citizen groups, the city’s Department of Education throughout 2002 opted not to take the same thorough measures in area schools. When parents at Stuyvesant High School hired an environmental engineer to use the ultrasonication method – an EPA-approved⁴³, low-cost, sophisticated test for carpets and other woven fabrics, which are reservoirs for asbestos and a source of continued release of asbestos particles – they found 60,000 to 2.5 million structures of asbestos per square centimeter in school carpets, an extraordinarily high concentration.⁴⁴ This was *after* the school had undergone an EPA-backed abatement. The Department of Education called the parents’ test results “inconclusive,”⁴⁵ choosing instead to dicker about what “background levels” of asbestos were acceptable for exposing young people.

The EPA’s refusal to handle abatements on the insides of residential buildings became a focus of community activism. In April 2002, in part to keep pressure on EPA to meet its responsibilities, my organization tested a residential loft building -- just north of the Chambers Street cleanup boundary set by EPA -- which happened to house a day care center, and found asbestos. Initially the EPA’s response was “Not our department.” But when an EPA official relented and agreed to cooperate with DEP in taking samples from the building, it found asbestos in

Justice Project, September 24, 2001.

⁴² *Daily News*/New York 1 poll, at http://www.732-2m2m.com/tt/2002March_articles.htm

⁴³ EPA method number 600/j-93/167

⁴⁴ Howard Bader, environmental engineer, quoted in Cate Jenkins memorandum, “Stuyvesant High School Testing,” August 29, 2002.

⁴⁵ Conversation with Deputy Schools Chancellor Klasfeld, September 4, 2002.

concentrations up to 5 percent – five times the cut-off level for immediate abatement. (By contrast, the DEP found zero asbestos at the same site – utilizing the same technology it, and private companies, had utilized since September 11 – which suggests that all along its testing methodology must have been seriously inadequate and its results therefore wildly optimistic.) In a victory for downtown residents, the EPA announced ten days later that it would undertake the substantial cleanup of all requested apartments south of Canal Street, thus expanding its zone of responsibility northward by ten blocks and finally acknowledging its responsibility for interiors. This was a \$5-10 million obligation it had tried to shirk for nine months.

The efficacy of the EPA-funded cleanup remained controversial, however, challenged by tenant organizations such as 9/11 Environmental Action as well as by Congressman Nadler and State Senator David Patterson, EPA scientist Cate Jenkins, Joel Shufro of the New York Committee on Occupational Safety and Health (NYCOSH), former Councilwoman Katherine Freed, Dr. Marjorie Clark of Lehman College, attorney Barbara Olshansky with the Center for Constitutional Rights, and others. Many felt it was too little and very much too late. And it did not include office buildings and their tenants. Meanwhile, the DEP, as noted above, was embarrassed into demanding reports on cleanups from landlords, in May 2002,⁴⁶ but neither enforced its demand nor checked on building conditions itself.

Then there was the management of contaminated city vehicles: faced with a devastating loss of personnel and equipment, the city quickly reclaimed any trucks, fire engines and buses that had initially been used to respond to the disaster. In April 2002, the Uniformed Firefighters Association, concerned about members' exposure, asked the Environmental Law and Justice Project to conduct testing on fire engines; our testing showed up to 5 percent chrysotile asbestos on vehicles that had *already* been “decontaminated” by a city contractor. In our capacity as environmental counsel to the firefighters, the Law Project obtained an internal FDNY memo which, in August 2002 – nearly a year after the disaster, plenty of time for agencies to share basic public-health information – informed Fire Department tour commanders city-wide that caked WTC debris on respirators and apparatus (this includes trucks) “does not constitute an immediate health hazard. Asbestos is only a hazard when it becomes friable and airborne.”⁴⁷ This statement is extremely misleading. The asbestos found on the trucks (and respirators) is already WTC dust and can easily become broken up into breathable particles when disturbed by fire-fighting activity.

The memo continued: “OSHA does not have any exposure limits for this time type of exposure, as it is not a hazard.”⁴⁸ Unfortunately for those who have to wear these supposedly non-hazardous respirators, the Law Project -- in random testing of oxygen tanks and masks that are stored on fire trucks and worn by firefighters to enter burning buildings – found dust containing asbestos. Why is this not being remedied?

City buses used to transport rescue workers to and from Ground Zero are another area of concern, as they do not appear to have undergone proper abatement. Officials of the Transit Workers Union have reported to the Environmental Law and Justice Project that, so far as they have been able to discover, the city has not conducted a

⁴⁶ NYC DEP memo to New York City landlords dated May 11, 2002.

⁴⁷ Memo from Salvatore J. Cassano, chief of operations, NYFD Bureau of Operations, August 2, 2002.

⁴⁸ *Ibid.*

thorough abatement on these vehicles, which were returned to service transporting city residents and reportedly continue in use at this writing. Further, a spokesman for the Army Corps of Engineers informed us that other government vehicles used in the rescue effort do not appear to have undergone proper abatement.⁴⁹ Why not, now that the immediate emergency is over and a long-term view of the consequences should be the top priority for the responsible agencies?

It is not alarmist to ask such questions, but merely sensible. And policymakers should be pursuing solutions to these problems, even if it means admitting that mistakes were made, because that is how to improve response for any future emergency, and it is the only way to retrieve the public's confidence.

The Bigger Picture

Accompanying the environmental and public health disaster in New York City is an erosion of civil liberties nationwide since September 11. The USA PATRIOT Act permits the government to shroud itself in secrecy and restrict civil liberties in the war on terrorism. Undercutting the right of citizens to obtain crucial information and to be partners in this complicated process, volumes of information critical to environmental activism and policy are being "scrubbed" from government websites in the name of deterring terrorism, including EPA website postings of key guidelines and databases.⁵⁰ For example, the National Advisory Committee for Acute Exposure Guidelines Levels (AEGs) for Hazardous Substances, managed by the EPA, will no longer post exposure guidelines for short-term emergency exposure levels. In March 2002 the EPA announced that it would limit public access to -- and data posted on -- the Envirofacts databases, a directory of toxic sites nationwide and the toxicity of the substances found there.

Freedom of Information Act requests, meanwhile, have been presented as competing with our security, such that we may lose our capacity to learn what we are breathing. Attorney General Ashcroft, in a Department of Justice memorandum on FOIA issued just weeks after September 11, contrasted "full compliance" with the FOIA with the "fundamental values that are held by our society" -- defined as "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information, and not least, preserving personal privacy."⁵¹ The public's right to know cannot compete.

At the same time, the EPA's inaction around September 11 set a dangerous precedent by undermining the authority of all environmental statutes. In the midst of a disaster that necessitated extensive action, the EPA, New York State's DEC and the city's DEP enforced the law less aggressively than in periods of normalcy. As of this writing, the DEP has issued only three asbestos violations for lower Manhattan since September 11.⁵²

Among the environmental laws that are at risk, in this climate, are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁵³; the Resource Conservation Recovery Act (RCRA); the

⁴⁹Conversation with Lt. Colonel Douglas W. Sarvel, Army Corps of Engineers - NY District, October 2002.

⁵⁰ OMB Watch keeps a list of information removed from government websites. See www.ombwatch.org/article/archive/104.

⁵¹ Attorney General John Ashcroft, Memorandum for Heads of all Federal Departments and Agencies -- at http://www.epic.org/open_gov/foiagallery/memorandum.html

⁵² Conversation with Russell Pecunies, January 24, 2003.

⁵³ 42 USC Sec 9601-9674 CERCLA empowers the EPA to act to prevent environmental contamination and to ensure

Community Right-to- Know Act⁵⁴, and the National Contingency Plan, which gives the EPA powers, in an emergency, that the agency failed to make use of in responding to September 11.⁵⁵ Under the National Contingency Plan, the President is authorized to act whenever a hazardous substance is released into the environment which may present an imminent danger to the public health or welfare. The Administration, under law, could have pulled out all the stops to test, analyze and remediate the toxic results of the WTC collapse – and could have required state and local agencies to do the same – but, although the appropriate technology was available and although billions of dollars had already been set aside for the New York recovery effort, it chose not to do so.

Further, in a new use of an old office, the White House has attacked independent scientific inquiry within the federal purview, by subjecting any agency regulation or collection of information to a review process by the Office of Information and Regulatory Affairs, within the Office of Management and Budget. For example, in December 2002, after the EPA's cleanup of Libby, Montana, the OMB thwarted the EPA's plan to alert Americans nationwide about the dangers of Zonolite insulation – manufactured in Libby -- which contains highly cancerous fibers and is present in fifteen to thirty-five million American homes. The OMB cited cost reasons for not alerting the public to this hazard.⁵⁶

In another bureaucratic maneuver with large implications, the EPA administrator is now authorized -- by an executive order dated May 6, 2002 -- to classify information as "secret."⁵⁷ This new power threatens the release of such information as was obtained on the toxic fallout of the WTC collapse. And within the EPA, dissent and self-evaluation have become a lot harder: the Office of the Ombudsman, charged with the agency's internal oversight and for many years quite independent, has had its wing clipped. After publicly questioning the agency's decisions around the World Trade Center disaster, exposing the inaction of the EPA, and cooperating with the inquiry of officials like Congressman Jerrold Nadler, in late November 2001 Ombudsman Robert Martin and his chief investigator, Hugh Kaufman, were told that the office was to be placed under the direct control of the EPA Inspector General. This would effectively end the ombudsman's autonomy, as he or she now must clear all public statements before they are issued.⁵⁸ Martin resigned.

These setbacks for transparency are part of a wider political agenda in which the weakening of EPA's role in protecting the environment and enforcing protective laws is a foregone conclusion. In February 2002, the director of

that, when contamination occurs, it is thoroughly cleaned up, both with short-term measures and with long-term remedial action to provide a permanent remedy.

⁵⁴ See J. Echeverria and Julie Kaplan, *Poisonous Procedural "Reform": In Defense of Environmental Right to Know*, Georgetown Environmental Law and Policy Institute, gelpi@law.georgetown.edu

⁵⁵ The National Contingency Plan gives the EPA and other agencies great powers to collect data and mitigate environmental trauma. 42 USC 9604. 40 CFR 300. Acknowledging the EPA's power and responsibility in the WTC crisis, Whitman testified to the Senate Appropriations Committee that her agency is "assigned lead responsibility for cleaning up buildings and other sites contaminated by chemical or biological agents as a result of terrorism." Testimony, November 28, 2001.

⁵⁶ Andrew Schneider, "White House Office Blocked EPA's Asbestos Cleanup Plan," *St. Louis Post-Dispatch*, December 29, 2002, p. A1.

⁵⁷ Designation Under Executive Order 12958 Federal Register, Vol. 67, No.90

⁵⁸ Robert Martin, resignation letter to Gov. Whitman, April 22, 2002.

the agency's Office of Regulatory Enforcement, Eric V. Schaeffer, resigned in protest, charging that the EPA was "fighting a White House that seems determined to weaken the rules we are trying to enforce."⁵⁹ A week later, he testified before the Senate Governmental Affairs Committee that the EPA was weakening air pollution standards to appease the energy industry, in violation of the Clean Air Act. Energy companies, he pointed out, release one-fourth of the five million tons of sulphur dioxide emitted annually and two million tons of nitrogen oxide – producing acid rain and choking smog that each year lead to 10,600 deaths; 5,400 cases of chronic bronchitis; childhood asthma; and over 1.5 million lost work days.⁶⁰ EPA used to penalize these companies. But as Schaeffer predicted in his testimony, in November 2002 the EPA announced changes in pollution standards for power plants, changes that weaken emission controls. A nongovernmental study published in 2002 found a "steep decline" in environmental enforcement and fines under the Bush administration.⁶¹

Important as environmental rules, standards and enforcement are to public health, access to complete and accurate information is even more essential, because it is the guarantee of official accountability. In this regard, it is especially worrisome that so-called "whistle-blower" provisions will become vestigial law - leaving little room for dissent and challenge in the face of improper action. As the *Washington Post* reported in October 2002, "President Bush's interpretation of the new corporate accountability law that deals with whistle-blower disclosures to Congress" was used by the U.S. Labor Department's solicitor to deny protected status to a government lawyer who sought to pass reports on toxic materials on federally owned land to a U.S. Congressman.⁶²

For private workers – and virtually all the WTC cleanup work has now been privatized – there are no protections whatsoever if they wish to publicize inadequate cleanup methods or inadequate protective measures. Not only does New York State have an extremely weak whistle-blower law, but these private sources of information are not covered by it; they are at the mercy of employers.

It is only in a climate of open government that responsibilities for public health and environmental protection can be taken up with the vigor and dedication that were needed to face the tragedy of September 11, 2001. Demands for transparency from independent activists, journalists, and the public at large are not only protected by the Constitution, they are a requirement of mature citizenship. The health fallout from World Trade Center disaster will be with us for many years to come, and the fallout in terms of mistrust of the environmental authorities represents a challenge that should motivate us all.

⁵⁹ Eric Schaeffer's resignation letter is at www.ewg.org/reports/epa/schaefferltr.html

⁶⁰ Testimony, March 7, 2002.

⁶¹ ABT Associates, "Particulate Related Health Impacts of Eight Electric Utility Systems," prepared for the Rockefeller Family Fund, at www.rfundorganization.com. Eric Schaeffer now heads this organization's environmental enforcement project.

⁶² Christopher Lee "Whistle-Blower Case at Issue: Senators Decry Intervention by Labor Department Solicitor," *Washington Post*, October 25, 2002, p. A27



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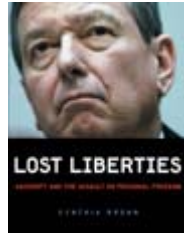
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Synopsis

"To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists."

—Attorney General John Ashcroft

Thirteen leading experts confront the justice department's assault on civil liberties.

In the wake of September 11, John Ashcroft's Justice Department has presided over an unprecedented assault on the civil liberties established in the Bill of Rights. Enacted in haste and, at times, in partial secrecy, the legislation and orders have not been carefully examined, and their implications are only now beginning to surface. Not since the internment of Japanese-Americans during the 1940s have we witnessed such abridgement of American rights.

While the loss of liberties has been met with apathy by the press and public alike, the lawyers and analysts in *Lost Liberties* provide a detailed, comprehensive look at the USA Patriot Act, chronicling the destructive impact of crackdowns on thousands of Americans and revisiting the ugly history of political repression in times of crisis.

Featuring original contributions from David Cole, Michael Tomasky, Nancy Chang, Kenneth Roth, and Anthony Romero, *Lost Liberties* will be a critical text for those who want to know in advance the long-term implications of these drastic measures.

Cynthia Brown, former program director of Human Rights Watch, is now a freelance consultant and editor based in New York.

Some of the fundamental changes to Americans' legal rights by the Bush administration and the USA Patriot Act following the September 11, 2001, terror attacks; from the Associated Press, September 5, 2002:

- Freedom from Unreasonable Searches — Government may search and seize Americans' papers and effects without

probable cause to assist terror investigation.

- Right to a Speedy and Public Trial — Government may jail Americans indefinitely without a trial.

- Right to Liberty — Americans may be jailed without being charged or being able to confront witnesses against them.

- Freedom of Association — Government may monitor religious and political institutions without suspecting criminal activity.

- Freedom of Information — Government has closed once-public immigration hearings, secretly detained hundreds of people without charges, and encouraged bureaucrats to resist public records requests.



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