



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 27 2002

FINDINGS TO DATE, RECOMMENDATIONS TO DATE, AND SECOND ROUND OF INTERROGATORIES

TO: Jane M. Kenny
Administrator Region II

FROM: Robert J. Martin *RJM*
National Ombudsman

SUBJECT: National Ombudsman World Trade Center Hazardous Waste Case

BACKGROUND

On September 11, 2001, lower Manhattan was subjected to an unprecedented terrorist attack on American soil. Specifically, buildings in lower Manhattan including the twin World Trade Center towers were destroyed and thousand of tons of waste material, hazardous material, and hazardous waste including but not limited to asbestos, lead, mercury, cadmium, PCBs, benzene, chromium, etc. were dispersed into the environment of lower Manhattan. EPA has documented over the years that uncontrolled release of these quantities and types of hazardous materials into the environment poses an imminent and substantial threat to the public health and the environment. Evidence adduced in my hearings demonstrates that the Agency initiated the National Contingency Plan (NCP) by mobilizing EPA On-Scene Coordinators (OSCs) from all over the country to lower Manhattan to sample indoor and outdoor air, dust and water to, among other things, determine the levels of contamination.

Further, the United States Geological Survey (USGS) testified that the plume of contaminated dust from the attacks was highly caustic with pH readings at least as high as 12.1. A clear reading of the definition of hazardous waste under the Resource Conservation and Recovery Act (RCRA), leads to the reasonable conclusion that all of the material released from the attack may be a hazardous waste.

The Director of the Occupational Safety and Health Administration, has concluded that all dust from the World Trade Center attack must be presumed to be asbestos containing material (ACM). Thus any cleanup of this dust, should have been and must now be performed in full compliance with the OSHA regulations including but not limited to 29 CFR 1910 and 1926.

In the first National Ombudsman hearing on this case convened in New York City on February 23, 2002, Dr. Thomas Cahill provided expert testimony concerning the results of his air pollution testing in lower Manhattan a month after the attack one mile north of "ground zero" and 15 stories above ground level. Dr. Cahill heads the "DELTA Group" which is a group of scientists convened by the United States Department of Energy to monitor major air pollution incidents around the world. Dr. Cahill and the "DELTA Group" confirmed that the pollution from very fine particulates in the air was greater than the air pollution they had measured from the Kuwaiti oil field fires, set during the Gulf War.

Based upon the foregoing expert testimony I made a threshold recommendation on February 27, 2002 that EPA undertake remedial actions to protect the public health and environment of children and young adults who are attending schools in and around "ground zero." Following this recommendation, it was revealed that children and young adults were going to school with an inadequate filtration system in the school to protect the students' health and that lead re-contamination was occurring. Further, it was disclosed that children and young adults were let outside to play during school hours in direct violation of the Board of Education's instructions to keep the children and young adults inside to protect their health. See, Transcript, Second National Ombudsman Hearing. March 11, 2002.

Pending your deliberation of my threshold recommendation to protect the children in the schools, I note with grave concern that children remain exposed to contaminants. In order to aid your consideration of more specific recommendations relating to the schools, inter alia, I offer the ensuing Findings of Fact, which are reasonable inferences drawn from the expert and direct evidence provided at the National Ombudsman Hearings in New York City. I entrust these recommendations to you in the expectation that the abandonment of the citizens of New York City who have been and continue to be affected by the World Trade Center attack will be ended. EPA can and should provide the help which these people need and deserve.

FINDINGS OF FACT

• Use of the EPA National Contingency Plan (NCP) and On-Scene Coordinators (OSCs)

One month before the terrorist attacks of September 11th, 2001, in August of 2001, the United States Office of Management and Budget issued an Annual Report to Congress on Combating Terrorism. This Report documented that EPA has a critical role in responding to hazardous materials emergencies and openly communicating investigative findings with those affected by a terrorist act. The report provides that EPA has "expertise in performing off-site monitoring, extent of contamination surveys, working with health officials to establish safe cleanup levels, conducting protective cleanup actions, and communicating technical information/data to impacted citizens is important for a successful Federal response to an act of terrorism that involves a release of chemical, biological, or radioactive material." Furthermore, the report notes that, "EPA's first responders (On-Scene Coordinators or OSCs) from all 10 regions have been actively involved with local, State, and Federal authorities in responding to threats of terrorism. See, OMB Report at Pg 48. **EPA's response to such threats is an extension of its existing hazardous materials response capability developed over more than 30 years as a leader of the National Response System (emphasis supplied).**"

EPA has neither fully used its legal authorities nor its existing hazardous materials response capabilities as a leader of the National Response System to aid the victims of the terrorist attack (apartment residents, school children, rescue workers, building owners, etc.). During the last thirty years as a leader of the National Response System, EPA has used the National Contingency Plan as a framework to perform indoor air testing and remediation where there have been releases of hazardous material into homes, schools, and/or offices throughout the United States. EPA has not undertaken such activities, however, in response to the terrorist attack of September 11th in New York City.

- Two EPA On-Scene Coordinators were involved in the decision of Oct 9th, 2001 to re-open Stuyvesant High School in lower Manhattan based on indoor air samples taken by EPA at the school. Further these two EPA On Scene Coordinators were present at an Oct. 9th, 2001 meeting and an Oct. 5th, 2001 meeting with all stakeholders where the decision to re-open the school was made.

Presumably, the On-Scene Coordinators involvement in taking indoor air samples and participation in the decision-making around school re-open demonstrates that at least up until October 9th, EPA was executing authorities under the National Contingency Plan in response to the terrorist attack and consistent with the procedures expressed in the OMB narrative.

In the National Ombudsman hearing of March 11th, the Director of the New York City Board of Education Environment and Safety Division testified that one of the EPA On-Scene Coordinators (OSCs), Charlie Fitzsimmons, was present at both aforementioned meetings and stated that EPA had sampled for hazardous material and all EPA test results were at "acceptable levels" but they have not shared the results with us. This testimony is confirmed by sign-in sheets at the October 9th, 2001 meeting with the school board and other stakeholders.

This does not comport with the statement provided by OSC Fitzsimmons' Supervisor, Doug Lair, to me in writing on March 11th 2002 remarking that OSC Fitzsimmons had spent only "two weeks in New York City in September" and that "he has minimal knowledge of the World Trade Center response activities conducted beyond the two weeks he spent there." Given Mr. Fitzsimmons' documented participation in decision-making around the reopening of the Stuyvesant School in October 2001, Mr. Lair's written statement to me lacks credibility.

• Indoor Air Testing and Remediation—Presidential Directive PDD 62

EPA has and is presently communicating that they are **not responsible** for indoor air testing and remediation as a result of the contamination created by the World Trade Center terrorist attack. Notwithstanding these statements, Administrator Christine Todd Whitman's testimony to the Senate Appropriations Subcommittee on VA, HUD and Independent Agencies on November 28, 2001 directly conflicts with EPA's policy to date in response to the World Trade Center terrorist attack. Specifically, Administrator Whitman told Congress, "Under the provisions of PDD 62, signed by President Clinton in 1998, the EPA is assigned lead responsibility for **cleaning up buildings** and other sites contaminated by **chemical** or biological agents as a result of an act of terrorism (emphasis supplied). This responsibility draws on our decades of experience in cleaning up sites contaminated by toxins through prior practices or accidents."

Moreover, four (4) days before the terrorist attack on the World Trade Center, on September 7th, 2001 in a town meeting in Libby, Montana (another city contaminated from the uncontrolled release of asbestos) Administrator Whitman stated, "it has never been our plan to look to you to pay for any part of this cleanup, including the cleanup of residential properties." Administrator Whitman further went on to say that EPA is taking a "legal step to protect you from future liability, whether or not we end up listing Libby on the NPL. We will be providing home owners with legal guarantees—called 'A No Action Assurance'—that will protect them from EPA's ever seeking to have them assume the cost of cleanup. Similarly, local businesses in Libby that did not know about the hazards... will also receive this guarantee." After the terrorist attack on New York City, EPA in carrying out its responsibilities, however, has declined to remove the burden and responsibility for cleaning up buildings contaminated from the affected individual building owners, residents, office workers, and school system. The magnitude of this burden is immense as are the corresponding risks of imminent and substantial hazards faced by the public.

- **EPA has not fully discharged its duties under PDD (Presidential Directive) 62, the National Contingency Plan (NCP), and the 2001 OMB Annual Report to Congress on Combating Terrorism. EPA has abandoned its responsibilities for cleaning up buildings (both inside and out) that are contaminated, or that are being re-contaminated, as a result of the uncontrolled chemical releases from the World Trade Center terrorist attack.**

- **Stuyvesant High School Remediation**

In the first and second National Ombudsman hearings on the World Trade Center hazardous waste case it was noted that Stuyvesant High School was being re-contaminated by hazardous materials. On February 22nd, 2002, after a detailed assessment of environmental data, Dr. David O. Carpenter from the School of Public Health at the University of Albany concluded that the Stuyvesant "building has not yet been proven safe." On February 28th, 2002 New York City School Board member Irving Hamer Jr. recommended cleaning of the air ducts in Stuyvesant High School during spring break beginning March 28th, 2002. The Ombudsman hearing documented the fact that upgrading of the ventilation systems and installing high efficiency filtration at the Stuyvesant High School to accommodate 90-95% minimum efficiency filters would reduce the risk to the children from the hazardous materials created by the World Trade Center terrorist attack.

RECOMMENDATIONS

Recommendation #1

EPA Region II should, pursuant to authorities under Presidential Directive PDD 62, and the National Contingency Plan (NCP) immediately clean the ducts and upgrade the ventilation systems to install high efficiency filtration at the Stuyvesant High School during spring break.

Recommendation #2

EPA Region II should execute authorities under Presidential Directive PDD 62, the National Contingency Plan (NCP), and consistent with Administrator Whitman's statement in Libby, Montana four days before the World Trade Center terrorist attack, issue legal guarantees to all building owners, building managers, local businesses, the New York City Board of Education, and condominium and coop owners to protect them from assuming the costs of cleanup from the terrorist attack on the World Trade Center.

Recommendation #3

Consistent with Presidential Directive PDD 62, the National Contingency Plan (NCP), and Administrator Whitman's statement in Libby, Montana four days before the World Trade Center terrorist attack, EPA Region II should cleanup all buildings impacted by the World Trade Center terrorist attack together with corresponding remediation at "ground zero."

INTERROGATORIES

1. Please identify any and all individuals who were involved in the decision not to fully execute the authorities under Presidential Directive PDD 62 as it related to EPA's actions to remediate the effects of the chemical contamination in lower Manhattan from the World Trade Center terrorist attack.
2. When was this decision made?
3. Who made the decision to send back home the On-Scene Coordinators from around the country who presumably were carrying out the provisions of the National Contingency Plan (NCP) and Presidential Directive PDD 62?
4. When was this decision made? When was this decision implemented?
5. When did EPA Region II first become aware of the results of the United States Geological Survey (USGS) assessment of the pH level of the air and dust in lower Manhattan performed in September of 2001 after the World Trade Center terrorist attack?
6. When was this information provided to the public and in what form?

RESPONSE

I would be grateful if you would respond via telefax and U.S. Mail by close of business
Wednesday April 3, 2002 to:

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