



HARMFUL LEGACY OF POLLUTION AND DECEPTION AT GROUND ZERO:  
*HOW POST 9/11 DISASTER POLICY ENDANGERS AMERICA*

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## INTRODUCTION

In the aftermath of the World Trade Center (WTC) attack, our government's improper environmental response prolonged and worsened the toxic exposures suffered by rescue and recovery workers and other people in the affected area. The federal government persisted in this bad approach to disaster response despite early warnings and even after it became clear that people were getting ill. This report finds that our government used a similarly improper approach in its Hurricane Katrina disaster response, and that it has recently adopted new policies making it even more likely that improper disaster response will occur and more difficult to hold governmental officials accountable.

The September 11, 2001 attack was not the first disaster or toxic release this country has ever experienced. Over the years, our country has faced earthquakes, fires, explosions, chemical leaks and oil spills. Our government – until recently – has responded with laws and regulations designed to protect the response workers and clean up hazards. These laws already allow reasonable flexibility in emergencies, while keeping the focus on protecting human health and safety. Indeed, our government has, in the past, been seen as the standard-bearer – the expert in how to do things right to protect workers and the public from toxic hazards. When the 2001 attack occurred, we had this infrastructure of laws and agencies in place. It wasn't used. Sierra Club's first report about the disaster, *Pollution and Deception at Ground Zero*, described these events and the resulting harmful impacts.

The Sierra Club's second report, *Pollution and Deception at Ground Zero Revisited: Why It Could Happen Again*, found that instead of correcting its failures to protect human health in the WTC disaster response, the Bush administration converted those bad approaches into national policy for all future national disaster response.<sup>1</sup> So when Sierra Club members living in the Katrina disaster area reported that federal testing was inadequate, test reports were misleading, and many response workers were unprotected, the concerns raised in our report were coming true right before our eyes.

Today, five years after the World Trade Center attack, our federal government still has not taken sufficient actions to help those who were sickened by toxic 9/11 exposures or to investigate and clean up any remaining contamination from the disaster. And rather than strengthen its disaster response plans to better protect human health, the federal government is taking steps to make things even worse. This report documents continuing missteps that further endanger human life and health:

- The Bush administration has failed to admit that its environmental response to the toxic aftermath of the WTC disaster was severely inadequate and its risk communications irresponsible. **And it used the same failed approach in the Katrina disaster – the first incident at which its post-9/11, flawed new National Response Plan was implemented.**
- Instead of fixing these problems, the Bush administration is making the situation worse, instituting a new policy that would weaken health protection after a disaster caused by radiological contamination (such as a “dirty bomb” or illegal nuclear device). **Why should our federal government treat the contamination caused by terrorists more leniently than contamination caused by business negligence or an accident?**
- The Department of Homeland Security is expanding its activities into areas that encroach on the duties of the Environmental Protection Agency and Occupational Safety and Health Administration, while also issuing directives that make it more insulated from public disclosure and Congressional oversight. **This includes a directive instructing employees to destroy certain types of unclassified documents “when they are no longer needed.”**

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<sup>1</sup> That report was in the final editing process just as the Hurricane Katrina disaster hit.

This report urges Congress to:

Assess the impact of directives issued by the Department of Homeland Security that insulate the agency from Congressional oversight and identify ways to address the need for accountability.

This report further advocates that the Bush Administration must:

- Acknowledge the failure of its 9/11 disaster response and change its disaster planning policies and guidelines to protect the public properly in future incidents;
- Take action to restore the authority of the Environmental Protection Agency and Occupational Safety and Health Administration to protect the public in the aftermath of a disaster;
- Establish proper funding to address the unmet health-related needs of Ground Zero rescue and recovery workers and other people exposed to the 9/11 pollution; and
- Establish strong programs to address the environmental impacts of the Hurricane Katrina disaster and assess the health impacts of the disaster.

Americans deserve disaster management that makes protecting human lives and health its top priority. The federal government has failed to achieve this. It failed at Ground Zero and it failed at Katrina. And now, it has adopted new policies that make this situation even worse.

#### **I. “DÉJÀ VU ALL OVER AGAIN” – OUR FEDERAL GOVERNMENT HAS NOT ACKNOWLEDGED ITS 9/11 DISASTER RESPONSE FAILURES; RATHER, IT REPEATED THEM IN ITS HURRICANE KATRINA DISASTER RESPONSE**

In any significant release of hazardous substances, whether from a national disaster or not, the Environmental Protection Agency (EPA), has the authority to respond.<sup>2</sup> In doing so, the agency must first determine two basic things:

- What is in the toxic release? And,
- Where did it go?

This is commonly called “characterizing the site.” The approach is based not only in common sense, but also in statute and regulations. Such “characterization” work is regularly carried out at Superfund sites under the *National Contingency Plan* for toxic assessment and cleanup.<sup>3</sup> Yet EPA utterly failed to do it at Ground Zero – a fact deplored by U.S. Representative Jerrold Nadler in his notable “White Paper” on 9/11 disaster response.<sup>4</sup> The fact that EPA and the Occupational Safety and Health Administration (OSHA) failed to follow already existing protocols for addressing toxic releases was

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<sup>2</sup> As Sierra Club’s prior reports explained, EPA has broad powers to respond to the release of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), known as the “Superfund Law.” At Ground Zero, EPA also had a mandatory duty under Presidential Decision Directive 62 of 1998 to clean up. In addition, the President can direct EPA to respond to a toxic release. CERCLA states, “The president may respond to any release or threat of release if, in the president’s discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.” 40 USC 9604(a)(4). See *Pollution and Deception at Ground Zero*, pp. 92-96.

<sup>3</sup> National Contingency Plan, 40 CFR § 300. See CERCLA, 40 U.S.C. §9604; and 40 CFR §§ 300.400(d)(1) and (d)(2).

<sup>4</sup> U.S. Rep. Jerrold Nadler, *White Paper: Lower Manhattan Air Quality* (Apr. 12, 2002)(hereafter, *Nadler White Paper*), pp. 12-13.

bad enough, but what made the situation even more egregious is that the federal government failed to change its conduct even after facts were disclosed showing that its conduct either failed to reveal the extent of contamination or failed to protect people against hazards. It then chose to follow a similar course of conduct in its response to the Hurricane Katrina disaster. In both disasters, the federal government did inadequate, unsystematic testing; misled the public by comparing its test results to inappropriate guidelines or benchmarks; abandoned its responsibility to investigate and address indoor contamination; and failed to enforce its own established regulations for worker safety.

The federal government's new motto appears to be, "The greater the number of people exposed, the less we will do to protect them."

**A. EPA Fails to Determine the Range of Contamination from Ground Zero – and from Hurricane Katrina**

Normally, at a contaminated site, EPA – or the polluter, under mandate from EPA – would create a grid diagram of the area and test at regular geographic intervals, moving outward from the source of contamination in roughly concentric circles, to determine how far the contamination has spread. This did not occur at Ground Zero or in the Katrina disaster.

The WTC disaster unleashed pulverized cement dust, asbestos, lead, glass fibers and other materials. The site also burned at uneven temperatures, releasing dioxins, furans, polycyclic aromatic hydrocarbons, and toxic particles. Contaminants escaped from the site for at least three months after the attack, as Ground Zero continued to smoke and release odors that many described as “acrid.”

The approach to testing should have been fairly straightforward since there was one major source of pollution. Systematic testing moving outward from that site, following already existing procedures under federal law, could have revealed the extent and locations of risks. EPA failed to do it. It did only very limited testing of the outdoor environment. It did not even touch the indoor environment until about a year after the disaster event – and then only in reaction to unrelenting public pressure. The outcry came early and loud. The EPA Ombudsman held a hearing in New York City, challenging the paucity and quality of EPA testing in the aftermath of the disaster.<sup>5</sup> U.S. Representative Jerrold Nadler’s *White Paper*, first released on March 8, 2002,<sup>6</sup> similarly criticized EPA’s inadequate testing and called for a proper investigation of the contamination. The EPA Inspector General agreed on the need for “systematic and representative sampling to determine the likely outer boundary of WTC contamination.”<sup>7</sup> Yet, to this day, EPA has failed to conduct proper testing to identify the spread of contamination accurately and conduct proper cleanup.

The Katrina disaster involved different types of pollution than the WTC disaster. Pollution impacts included, but were not limited to, spills of petroleum and other hazardous materials, infiltration of hazardous waste sites, the spread of bacteria and other pathogens, and the creation of mold.<sup>8</sup> Contamination was spread both through air and water, and the damage was widespread yet uneven, with many potential hazards. EPA should have carried out an environmental assessment, rather than simply taking spot samples, and conducted a hazard ranking of the affected area,

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<sup>5</sup> See, EPA National Ombudsman, First Investigative Hearing on WTC Hazardous Waste Contamination, hosted by U.S. Rep. Jerrold Nadler, Transcript (Feb. 21, 2002)(hereafter, *EPA Ombudsman Hearing Transcript Feb. 21, 2002*), pp. 113-118 and 640-648.

<sup>6</sup> See, U.S. Representative Jerrold Nadler, News Release, “Rep. Nadler Issues First ‘White Paper’ on Disgraceful and Illegal EPA Response to Post-9/11 Air Quality Issues in Lower Manhattan” (March 8, 2002).

<sup>7</sup> EPA Inspector General, *EPA’s Response to the World Trade Center Collapse: Challenges, Successes and Areas for Improvement* (Aug. 21, 2003)(hereafter, *IG Report*), p. 52.

<sup>8</sup> See, U.S.E.P.A., “Environmental Protection Agency’s Role in Debris Removal Activities in Response to Hurricanes Katrina and Rita,” attached to letter from Susan Parker Bodine, Asst. Admin., U.S.E.P.A., to Hon. James Jeffords, U.S. Senate (July 17, 2006).

following already existing procedures under federal law. Yet, Dr. Beverly Wright, Director of the Deep South Center on Environmental Justice at Dillard University, reported to Congress in late September 2005 that EPA had taken far too few samples in floodwaters and that it had focused on downtown New Orleans, “far from hot spots in outlying areas.”<sup>9</sup> EPA Science Advisory Board members raised concern that the agency did not have an emergency plan in place and did not test for many immediate health threats, such as certain pathogens, which often contaminated floodwaters.<sup>10</sup> Also, while EPA avoided some of the very broad assurances it had issued after the WTC disaster, it improperly based assurances on poor risk analysis. When EPA reported that 18 sediment samples had revealed diesel and fuel oils constituting as much as a tenth by weight of some samples, and elevated levels of arsenic and lead, acting EPA science adviser William Farland stated that he did not feel the sediment contamination suggested a significant public health risk, “as long as people are careful to remove the sediment, keeping it from getting on their bare skin and clean it off if they do.”<sup>11</sup> The statement ignored potential exposure through inhalation as the sediment dried and became loose dust.

The irony was not lost on U.S. Representative Jerrold Nadler, whose district includes the WTC site. He sent a letter on September 21, 2005 to President Bush, pointing out the disturbing parallels between EPA’s response at the WTC and the Hurricane Katrina disaster area. Similarly, the National Council for Occupational Safety and Health, the AFL-CIO, the United Church of Christ, the New York Committee for Occupational Safety and Health, the Sierra Club and others sent a letter on October 6, 2005 to Congress urging that EPA should conduct comprehensive testing to characterize the environmental hazards from Hurricane Katrina.<sup>12</sup>

Despite such public outcry, the federal government did not marshal its resources to provide adequate information on Hurricane Katrina contamination to the public. Over two months later, the Sustainability Subcommittee of the “Bring New Orleans Back” Planning Committee reported that while the joint environmental assessment summary released by EPA and the Louisiana Department of Environmental Quality disclosed that some “localized areas” had elevated levels of arsenic, polycyclic aromatic hydrocarbons (PAHs), and fuel contaminants exceeding EPA risk criteria,<sup>13</sup> the government did not describe the precise locations of these areas or what cleanup would occur.<sup>14</sup> While it became possible to obtain EPA test data on the internet, if a disaster area resident had access to a working computer, plain language information and recommendations on areas with toxic risks was not readily available.<sup>15</sup> By failing to provide useful information and recommendations on the risk of reoccupying an area, EPA simply left people in the dark. This led *Nature* magazine to comment:

The Environmental Protection Agency is ducking a frank assessment of New Orleans after Katrina. . . . It is saying nothing on the advisability of returning to the ruined city, arguing instead that its job is just to run tests and pass on data to local officials, who will make of them what they will. For what was once the world’s foremost environmental agency, this simply isn’t good enough.<sup>16</sup>

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<sup>9</sup> Beverly Wright, Ph.D., Director, Deep South Center for Environmental Justice, “Testimony Before the Subcommittee on Environment and Hazardous Materials Committee on Energy and Commerce, U.S. House of Representatives” (Sept. 29, 2005), p. 9.

<sup>10</sup> Emma Marris, “Advisers Knock Katrina Health Tests,” *Nature* 437:1216-1217 (Oct. 27, 2005).

<sup>11</sup> John Heilprin, “Fuel Oils in Sediment in New Orleans,” *Associated Press* (Sept. 16, 2005).

<sup>12</sup> Letter to Congress from the National Council for Occupational Safety and Health, AFL-CIO, the United Church of Christ, the New York Committee for Occupational Safety and Health, the Sierra Club and others urging enforcement of workplace and environmental laws and rules in the hurricane disaster area (Oct. 6, 2005).

<sup>13</sup> U.S.E.P.A. and Louisiana Dept. of Environmental Quality, *Environmental Assessment Summary for Areas of Jefferson, Orleans, St. Bernard and Plaquemines Parishes Flooded as a Result of Hurricane Katrina* (Dec. 9, 2005)(hereafter, *EPA/DEQ Environmental Assessment Summary Dec. 2005*)(available at: [www.deq.louisiana.gov/portal/portals/0/news/pdf/LDEQDEC9EnvAssesSum.pdf](http://www.deq.louisiana.gov/portal/portals/0/news/pdf/LDEQDEC9EnvAssesSum.pdf)), p. 3.

<sup>14</sup> Sustainability Subcommittee, “Bring New Orleans Back” Commission, *Environmental Health Issues Impacting on City Planning, Rebuilding & Re-habitation: Suggested Policies in Developing the New Orleans Master City Plan* (Dec. 19, 2005), p. 15.

<sup>15</sup> Telephone interview of Dr. Wilma Subra, chemist (Sept. 6, 2006).

<sup>16</sup> “Is the City Safe?” *Nature* 427:1207-1208 (Oct. 27, 2005).

This was not a proper reaction to the 2003 EPA Inspector General's report on EPA's WTC disaster response. Simply avoiding overly broad assurances, or making assurances but throwing in "caveats" or qualifications, is not sufficient. As the Inspector General's report emphasized, "EPA needs to be prepared to assert its opinion and judgment on matters that impact human health and the environment, regardless of who else is involved or may share responsibility. Ultimately, the public, Congress, and others expect EPA to monitor and resolve environmental issues."<sup>17</sup> EPA has a duty to obtain and analyze the necessary information, and provide it to the public.

**B. Private Tests Found More Contamination Problems than Government Tests in the WTC Disaster Area – and the Hurricane Katrina Disaster Area**

One of the most disturbing developments during the WTC disaster response was the fact that private tests repeatedly found higher levels of hazards than government tests. As explained in *Pollution and Deception at Ground Zero*, EPA used an older "Polarized Light Microscopy" (PLM) method rather than the more modern Transmission Electron Microscopy (TEM) method to analyze dust samples for asbestos fibers.<sup>18</sup> TEM equipment is much better at identifying the thinner, as well as shorter, asbestos fibers that occurred in Ground Zero dust.<sup>19</sup> In doing so, EPA failed to follow its own best practices, as it touted in its response to the asbestos contamination in Libby, Montana,<sup>20</sup> even though EPA was actually dealing with the same asbestos, because the World Trade Center was insulated with asbestos that came from the mines in Libby.<sup>21</sup>

The New York Environmental Law & Justice Project took outdoor WTC dust samples from several sites in lower Manhattan a few days after the attack. The results, based on a TEM analysis, generally showed higher levels of asbestos than EPA had been reporting.<sup>22</sup> *The New York Daily News* published the results on September 28, 2001, **yet EPA failed to change its testing protocols.** Even when the Ground Zero Elected Officials Task Force, which included Representative Jerrold Nadler, released test results in an October 12, 2001 report finding indoor asbestos dust at a level 64 times the typical urban indoor level in a heavily exposed apartment,<sup>23</sup> EPA did not change its testing protocols. This meant that it continued to understate the risk from asbestos in WTC dust.

Tests of ultra-fine particles found that the emissions from Ground Zero included a mix of toxic gasses and ultra-fine "particulates" (a technical term for airborne dust) never seen before. Dr. Thomas Cahill, professor *emeritus* of physics and engineering at the University of California at Davis, reported that his air samples, taken from a rooftop a mile north-northeast of Ground Zero, showed "unprecedented ambient levels" of fine particulate matter, sulfur, acidic aerosols, heavy metals and other dangerous compounds. The results were higher than those he measured at the Kuwaiti oil field fires of the 1991 Gulf War.<sup>24</sup> EPA did not report tests of ultra-fine particles.

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<sup>17</sup> *IG Report*, p. 68.

<sup>18</sup> See *Pollution and Deception at Ground Zero*, pp. 44-50.

<sup>19</sup> Bruce Lippy, Jeffrey Boggs and Christopher Lambesis, "Controversy: The Small Fiber," *Asbestos Issues* (Mar. 1989)

<sup>20</sup> U.S.E.P.A., "EPA Fact Sheet: Asbestos Sampling in Libby, MT, Fact Sheet Number 3" (May 2000)(explains advantages of TEM).

<sup>21</sup> See, Andrew Schneider and David McCumber, *An Air that Kills: How the Asbestos Poisoning of Libby, Montana, Uncovered a National Scandal* (New York: G.P. Putnam's Sons, 2004), pp. 2 and 334-36.

<sup>22</sup> Juan Gonzalez, "Health Hazards in Air Worry Trade Center Workers," *Daily News* (Sept. 28, 2001). Attorney Kupferman later managed to convince the City Dept. of Environmental Protection and EPA to test a split sample of dust taken from a site about seven blocks from Ground Zero, using the two different methods. The PLM method revealed no asbestos; the TEM method revealed two to five percent asbestos, exceeding the threshold definition for asbestos-containing material. NYC Dept. of Environmental Protection, Asbestos Control Program Laboratory, "Asbestos Analytical Report," Data Analyzed Apr. 17, 2002; EMSL Analytical, Inc., "Asbestos Analysis of Non-friable Organically Bound Materials by TEM via NYS ELAP Method 198.4," to U.S.E.P.A., Analysis Date Apr. 18, 2002.

<sup>23</sup> Eric Chatfield and John Kominsky, *Summary Report: Characterization of Particulate Found in Apartments After Destruction of World Trade Center* (prepared for the Ground Zero Elected Officials Task Force)(Oct. 12, 2001), p. 32, Table 18, and p. 34, Table 20.

<sup>24</sup> Dr. Cahill reported that some metals – arsenic, beryllium, copper, mercury, nickel, selenium, and vanadium – occurred at

It should be noted that even when government-funded tests did reveal hazards, they never became the subject of an EPA press release. EPA never issued a press release alerting Ground Zero workers or the public that the WTC dust was highly caustic even though it had received tests by the U.S. Geological survey on September 27, 2001.<sup>25</sup> EPA never issued a press release warning about potential exposure to Polycyclic Aromatic Hydrocarbons (PAHs) even though EPA scientists had conducted tests over five days in late September and early October 2001, finding certain types of PAHs to be about six times higher than average values measured during a bad Los Angeles smog episode, and finding one compound that had never before been reported in ambient air.<sup>26</sup> Neither the Department of Health Services (DHS) nor EPA issued a press release when a survey conducted in December 2001 of DHS office workers in a building about seven blocks from Ground Zero found that half of the employees who reported shortness of breath or wheezing after 9/11, at rates much higher than a control group in Dallas – still had symptoms nearly four months after the attack.<sup>27</sup>

A similar phenomenon of private tests finding contamination not disclosed by EPA has occurred in the Katrina disaster. While comparable EPA and private data usually have been consistent, private tests have highlighted shortfalls in the location and parameters of EPA testing. In early October 2005, the Louisiana Environmental Action Network and others released the results of sediment sampling supervised by chemist Dr. Wilma Subra, which found elevated levels of arsenic and a toxic petroleum constituent, benzo(a)pyrene. Dr. Subra warned, “Babies shouldn’t go in, pregnant women shouldn’t go in, elderly shouldn’t go in.”<sup>28</sup> A round of tests by the Louisiana Bucket Brigade found benzo(a)pyrene at 33 times higher than EPA residential standard at a school in the New Orleans suburb of Chalmett. EPA’s spokesman would not comment on that testing, but an EPA scientist said that the eight soil samples that EPA had taken at another Chalmett school “came back clean.”<sup>29</sup> The Natural Resources Defense Council (NRDC) also did sediment testing in the New Orleans area.<sup>30</sup> In late 2005, the Sierra Club released test data from Dr. Subra on high levels of dioxin and chromium in sediment samples near the DuPont plant in DeLisle, Mississippi. Importantly, Dr. Subra’s testing also found that the dry sludge contained harmful bacteria that were still viable, raising concerns about the health risks of dust inhalation.<sup>31</sup> EPA had not released any test results for bacteria in dry sludge.<sup>32</sup> In mid-December 2005, Texas Tech University scientists released sediment test results from New Orleans that found lead, arsenic and seven toxic semivolatile organic compounds that exceeded EPA Region 6 guidelines.<sup>33</sup> Because the contamination problems appeared to have

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“unprecedented levels in the very fine size range.” Dr. Cahill took more than 8,000 air samples, starting October 3, 2001, from the rooftop of 201 Varick Street in Manhattan. Thomas Cahill, *et al.*, “Analysis of Aerosols from the World Trade Center Collapse Site, New York October 2 to October 30, 2001,” *Aerosol Sci. & Tech.* 38:165-183 (2004), p. 182.

<sup>25</sup> See, Air Quality Research Subcommittee, Office of Science & Technology (White House), *Preliminary Survey of Air Quality and Related Health Studies Conducted in the Vicinity of Ground Zero* (Dec. 2002), App. B, p. B-10. *Pollution and Deception at Ground Zero*, pp. 16-17. Internal documents gained via a Sierra Club Freedom of Information request revealed that EPA staff referred to receiving the data in an October 8, 2001 conference call. U.S.E.P.A., “8:00 AM Conference Call, Region II – Conference Call Summary: October 8, 2001”(EPA60).

<sup>26</sup> The results were published in 2003. See, Erick Swartz, *et al.*, “Polycyclic Aromatic Hydrocarbons and Other Semivolatile Organic Compounds Collected in NYC in Response to the Events of 9/11,” *Envtl. Sci. Technol.* 37:3537-3546 (2003). The unusual PAH was 1,3-diphenylpropane-[1’,1’-(1,3-propanediyl)bis-benzene]. Sampling occurred on Sept. 26 and Oct. 4, 6, 10, and 20, 2001. EPA also reports that results of PAH taken on Sept. 22, 2001 “were below EPA’s level of concern,” U.S.E.P.A., Daily Summary: Sa., Sept. 22, 2001).

<sup>27</sup> The study was quietly published in a scientific journal in 2002. Douglas Trout, *et al.*, “Health Effects and Occupational Exposures Among Office Workers Near the World Trade Center Disaster Site,” *J. Occup. Environ. Med.* 44:601-605 (July 2002).

<sup>28</sup> They found benzo(a)pyrene in the Lower Ninth Ward at 195 parts per million (ppm), three times higher than EPA’s residential standard, and Arsenic at more than 13 times EPA’s residential standard at one site and 28 times higher at another site, and other toxic compounds. See Mike Dunn, “Sampling Shows Contamination: Chemist Opposes Return,” *The Advocate* (Baton Rouge)(Oct. 7, 2005); see also Robert Travis Scott, “Group Wants Warning About Health Risks,” *Times-Picayune* (Oct. 7, 2005).

<sup>29</sup> Manuel Torres, “Bucket Brigade Warns of Toxins in St. Bernard,” *Times-Picayune* (Oct. 26, 2005).

<sup>30</sup> NRDC, “New Orleans Area Quality Test Results” (samples from Oct./Nov. 2005)([www.nrdc.org/health/effects/katrinadata/sediment.asp](http://www.nrdc.org/health/effects/katrinadata/sediment.asp))

<sup>31</sup> The pathogens included E. coli, salmonella, and staphylococcus. Sierra Club, Press Release: “New Tests Show Unsafe Pollution Levels Affecting Mississippi, Alabama Communities” (Dec. 5, 2005). Cain Burdeau, “Environmentalists: Contamination Found Across the Gulf Coast,” *Associated Press* (Dec. 5, 2005).

<sup>32</sup> Telephone interview of Dr. Wilma Subra, chemist (Sept. 6, 2006).

<sup>33</sup> Steven M. Presley, *et al.*, “Assessment of Pathogens and Toxicants in New Orleans, LA Following Hurricane Katrina,” *Environ. Sci.*

been widely but sporadically distributed, the head researcher urged government to conduct thousands more sediment tests before issuing any “all-clear” on long-term health risks.<sup>34</sup> In April 2006, EPA finally declared that 14 neighborhoods in the New Orleans area had dangerous lead levels and a residential area near the old Agriculture Street landfill had high levels of benzo(a)pyrene.<sup>35</sup> In late 2006, university researchers and an NRDC expert published test results finding that the mean outdoor airborne mold spore concentration in flooded areas in Fall 2005 had been roughly double the level in non-flooded areas, and the mean indoor mold spore concentration in flooded areas had been five times higher than the outdoor concentration.<sup>36</sup> EPA apparently did not report mold test results.<sup>37</sup> Oddly, while the federal government sometimes did not appear to welcome testing or analysis by independent scientists and groups, it listed contact information for the Murphy Oil Corporation, Bass Enterprises, the Shell Oil Company, Chevron and Dynergy – companies that reported spills of oil from the disaster – in a news release, describing them as “our industry partners.”<sup>38</sup>

### C. **EPA Misled the Public by Comparing Test Results to Inappropriate Standards in its Response to the WTC Disaster – and the Hurricane Katrina Disaster**

In its response to the WTC disaster, EPA based its safety assurances to the public on “benchmarks” that did not meet EPA’s own standards for risk assessment. The EPA Inspector General, for example, criticized EPA for using the NESHAP 1% asbestos content as a health guideline for loose asbestos in dust.<sup>39</sup> The one percent asbestos definition is designed to apply to the material that generates the dust, not the dust itself. EPA itself said in a June 18, 2001 factsheet issued by Region 8 in response to the Libby contamination, “Levels of 1% or less *could* present a risk where there is enough activity to stir up soil and cause asbestos fibers to become airborne.”<sup>40</sup> (*Emphasis in original text.*) Given the agency’s own expertise and prior statement to Libby residents, this conduct indicates an attempt to under-emphasize risk and provide unsupported safety assurances to the public.

In a similar vein, EPA assured people returning to Katrina disaster areas about hazards from benzene pollution based on a one-day exposure standard, when people would really be at risk of exposure for much longer. After conducting screening tests in the New Orleans metropolitan area on September 12 and 13, 2005, it stated, “The screening results indicated that chemical concentrations in most areas are below ATSDR health standards of concern.”<sup>41</sup> EPA did qualify this statement. It stated that these results did not represent all air conditions in the area, and that, “general conclusions should not be made regarding air safety based on results from this snapshot of data.”<sup>42</sup> While the qualifying statement was an improvement over its recklessly broad assurances of safety issued after the WTC disaster, EPA nevertheless was repeating its 9/11 conduct by misleadingly comparing its test results to an inappropriate benchmark for measuring health risk. As NRDC testified to Congress, EPA tests

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*Technol.* 40(2):468-474 (Jan. 15, 2006). See, “Post-Katrina: Lead in Disturbed Soil May Pose Heightened Health Risk,” *American Chemical Society* (online newsletter)(Dec. 15, 2005). Their peer-reviewed results were based on soil samples taken in mid-September.

<sup>34</sup> Matthew Brown and John Pope, “Researchers Doubt Clean-Soil Findings,” *Times Picayune* (Dec. 15, 2005).

<sup>35</sup> The extent to which the testing revealed pre-existing or post-hurricane conditions was not clear, but it was the first time that EPA had acknowledged contamination problems in neighborhoods other than St. Bernard Parish’s Murphy Oil spill area. Matthew Brown, “High Levels of Lead Found in N.O. Area – Carcinogen Reported Near Former Landfill,” *Times-Picayune* (Apr. 5, 2006).

<sup>36</sup> Gina Solomon, Mervi Hjelmroos-Koski, Miriam Rotkin-Ellman, and S. Katharine Hammond, “Airborne Mold and Endotoxin Concentrations in New Orleans, Louisiana, after Flooding, October through November 2005,” *Envtl. Health Persp.* 14(9):1381-1386, 1384 (Sept. 2006). The academic researchers were from the University of Colorado, Boulder and University of California, Berkeley;

<sup>37</sup> Telephone interview of Dr. Wilma Subra (Sept. 6, 2006).

<sup>38</sup> U.S. Dept. of Homeland Security and U.S. Coast Guard, Press Release: “Hurricane Katrina Pollution Response Efforts” (Sept. 9, 2005)([www.d8publicaffairs.com/external/?cid=1008&fuseaction=external.viewDocument&documentID=83013](http://www.d8publicaffairs.com/external/?cid=1008&fuseaction=external.viewDocument&documentID=83013)).

<sup>39</sup> *IG Report*, p. 133.

<sup>40</sup> U.S.E.P.A., Region 8, “Ask EPA!! Questions and Answers About Asbestos and EPA’s Libby Investigation” (June 18, 2001)([www.epa.gov/region8/superfund/libby/qsafe.html](http://www.epa.gov/region8/superfund/libby/qsafe.html)).

<sup>41</sup> U.S.E.P.A., “Hurricane Katrina Response: Air Screening Data – Trace Atmospheric Gas Analyzer,” including “Mobile Monitoring (TAGA-1) results for 9/13/05” and “Mobile Monitoring (TAGA-1) Results for 9/12/05” ([www.epa.gov/katrina/testresults/air/taga.html](http://www.epa.gov/katrina/testresults/air/taga.html)), p. 1.

<sup>42</sup> *Id.* See also, “EPA Finds Low Chemical Concentrations in Initial Air Tests in New Orleans,” *Waste News* (Sept. 19, 2005).

revealed Benzene levels more than two times higher than the federal guideline for intermediate (2 week) exposure, a level of 4 ppb, in 25% of the samples it took in New Orleans,<sup>43</sup> but on its website, EPA compared its measurements to the acute exposure standard of 50 ppb, which applies to exposures of only 24 hours or less.<sup>44</sup> The result for Katrina disaster area residents – as had occurred for New York residents – was a misleading assurance of safety.

**D. EPA Abandoned Its Mandate to Address Toxic Indoor Contamination in its Response to the WTC Disaster Response – and the Hurricane Katrina Disaster**

EPA never did conduct proper testing and cleanup of indoor spaces after the September 11<sup>th</sup> attack despite its authority to do so.<sup>45</sup> Community people are still trying to get EPA to conduct systematic testing of indoor contamination from 9/11. When an expert technical review panel was launched in March 2005 by the White House Council on Environmental Quality, at the insistence of Senator Hillary Clinton, to review indoor testing and unmet health needs, it appeared for a time that some meaningful progress might be possible. But in December 2005, the community suffered yet another setback. The expert technical panel was summarily dismissed. EPA scaled its indoor plan back dramatically and made testing and cleanup only voluntary and sporadic.<sup>46</sup> The voluntary aspect of the plan works a particular hardship on employees, who cannot force employers to agree to testing.

In the Katrina disaster, EPA has taken an even weaker position than it did in the WTC disaster, so far failing to conduct testing in any homes or similar indoor spaces at all despite repeated requests. The Sustainability Subcommittee of the ‘Bring New Orleans Back’ Planning Committee expressed concern in its December 2005 report that EPA only conducted sampling in streets and public areas, not on private property.<sup>47</sup> This was true even though Louisiana State University chemist Dr. Louis Thibodeaux, who was working with EPA’s Science Advisory Board on recommendations for sediment testing, had publicly urged EPA in September 2005 to test the sediment washed into flooded homes, urging that people would be exposed as they clean up their homes.<sup>48</sup> EPA did not even test for airborne mold spores indoors after the Centers for Disease Control and Prevention (CDC) found that an estimated 46 percent of homes in the New Orleans area had some mold contamination and approximately 17 percent had heavy mold contamination.<sup>49</sup>

In abandoning its duty to address indoor contamination, EPA was, in effect, leaving it to the public to clean up that mess. Most families have no training in handling toxic materials. EPA’s approach to warning the public in the Katrina disaster regarding toxic hazards was similar to its approach in the WTC disaster. Its press release stated, “In handling materials that are believed to be

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<sup>43</sup> Testimony of Erik Olson, Natural Resources Defense Council, before Subcommittee on Environment and Hazardous Materials of the Committee on Energy and Commerce, U.S. House of Representatives (Sept. 29, 2005), pp. 3-5, referring to guidelines set by the National Institute of Environmental Health Sciences (NIEHS). NRDC later produced an in-depth analysis of EPA’s sediment data, which found that most districts in New Orleans contained concentrations of arsenic, lead, diesel fuel or cancer-causing benzo(a)pyrene that were “above levels that would normally trigger investigation and possible soil cleanup in the state of Louisiana. Gina Solomon, M.D., M.P.H. and Miriam Rotkin-Ellman, *Contaminants in New Orleans Sediment* (Feb. 2006), p. 1.

<sup>44</sup> See, U.S.E.P.A., “Hurricane Katrina Response: Air Screening Data – Trace Atmospheric Gas Analyzer,” including “Mobile Monitoring (TAGA-1) results for 9/13/05” and “Mobile Monitoring (TAGA-1) Results for 9/12/05,” *supra*, p. 2.

<sup>45</sup> EPA had clear authority under CERCLA and also under a special Presidential Directive to address indoor contamination from terrorist attacks, as explained in Sierra Club’s first *Pollution and Deception at Ground Zero* report,

<sup>46</sup> Letter from Senator Hillary Clinton and U.S. Representative Jerrold Nadler to David Walker, U.S. Comptroller General, GAO, urging it to investigate EPA’s “failure to establish an effective, science-based testing and clean-up plan” for the WTC disaster area (Dec. 13, 2005).

<sup>47</sup> Sustainability Subcommittee, *supra*, pp. 15-16, referring to *EPA/DEQ Environmental Assessment Summary Dec. 2005*, p. 3.

<sup>48</sup> Mike Dunne, “Experts Size Up contaminants: Water Full of Bacteria, No ‘Toxic Soup,’” *The Advocate* (Baton Rouge)(Sept. 21, 2005).

<sup>49</sup> The CDC conducted air sampling in 20 of the 112 post-hurricane New Orleans homes that it examined. The mean level of indoor bacterial endotoxins (generally associated with mold) were more than 20 times higher than average. It reported that this exceeded levels associated with respiratory symptoms in one study. CDC, “Health Concerns Associated with Mold in Water-damaged Homes After Hurricane Katrina and Rita – New Orleans Area, Louisiana, October 2005,” *MMWR Morbid. Mortal. Wkly. Rpt.* 55(2):41-44 (2006).

contaminated with asbestos or lead, EPA recommends that, at a minimum, you wear gloves, goggles, and most importantly, OSHA-approved respiratory protection, if available.”<sup>50</sup> Also, EPA vaguely recommended that the individual “try to obtain help from specially trained contractors, if available,”<sup>51</sup> While this was a slight improvement over EPA’s conduct in the WTC disaster, which was to refer people to the City health department’s advice that they could clean up asbestos and lead-laden dust with nothing more than a wet mop and wet rag,<sup>52</sup> the advice was, as Congressman Nadler pointed out in his September 21, 2005 letter to President Bush, “dangerous and illegal.”<sup>53</sup> Oddly, EPA’s press release, in warning about the toxicity of lead, stated only very vaguely that, “Lead is a highly toxic metal which produces a range of adverse health effects, particularly in young children.”<sup>54</sup> For some reason, it did not bother to state clearly that lead causes permanent, irreversible brain damage in children.<sup>55</sup> One could hardly call that an adequate warning. The EPA Inspector General Tinsley had cautioned with regard to EPA’s failure to warn against exposure to WTC indoor contamination:

The absence of instructions recommending that residents obtain professional cleaning in the initial weeks following the disaster may have increased the long-term health risks for those who cleaned WTC dust without using respirators and other professional cleaning equipment.”<sup>56</sup>

In both the WTC and the Hurricane Katrina disaster response, EPA failed to disclose that asbestos or lead-based paint should not be managed by untrained, uncertified family members or workers.

#### **E. OSHA Abandoned Its Mandate to Protect Workers During Response Activities for the WTC Disaster – and the Hurricane Katrina Disaster**

Many thousands of Ground Zero area workers were placed at greater risk in the aftermath of the 9/11 attack because OSHA chose not to enforce its own “Hazardous Waste Operations and Emergency Response” (HAZWOPER)<sup>57</sup> protection standards. Sierra Club’s *Pollution and Deception at Ground Zero Revisited* report refutes OSHA’s arguments to rationalize its lack of enforcement. A disaster is when we need those standards most. The more hazardous the emergency, the greater is the need for first responders to have protective gear. New York City lost at least twice as many firefighters from active duty after 9/11 because of respiratory health impairments from 9/11 dust exposure as it lost on the day of the attack.<sup>58</sup> Yet, despite the illnesses that arose among Ground Zero workers, both OSHA and the Department of Homeland Security (DHS) have incorporated lack of enforcement into new federal plans for emergency response. And in national emergencies, OSHA does not have the final word on safety.<sup>59</sup> Apparently our first responders are brave but expendable.

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<sup>50</sup> U.S.E.P.A., Press Release: “EPA and Federal Partners Warn of Potential Environmental Health Hazards When Returning to Homes and Businesses After Hurricane Katrina” (Sept. 14, 2005).

<sup>51</sup> *Id.*

<sup>52</sup> See *Pollution and Deception at Ground Zero*, pp. 62-66.

<sup>53</sup> Letter from U.S. Representative Jerrold Nadler to President George W. Bush (Sept. 21, 2005).

<sup>54</sup> U.S.E.P.A., Press Release: “EPA and Federal Partners Warn of Potential Environmental Health Hazards When Returning to Homes and Businesses After Hurricane Katrina” (Sept. 14, 2005).

<sup>55</sup> B. Lanphear, K. Dietrich, P. Auinger, C. Cox, “Cognitive Deficits Associated with Blood Lead Concentrations < 10  $\Sigma$ g/dL in US Children and Adolescents,” *Publ. Health Rep.* 115:521-29 (2000); see also, R. Canfield, *et al.*, “Intellectual Impairment in Children with Blood Lead Concentrations Below 10 Micrograms per Deciliter,” *N. Engl. J. Med.* 348:1517-26 (2003).

<sup>56</sup> *IG Report*, p. 25.

<sup>57</sup> 29 CFR 1910.120.

<sup>58</sup> The Fire Department of New York lost 341 firefighters and two paramedics on September 11, 2001. As of May 2004, 325 firefighters affected by Ground Zero reportedly still were on restricted light duty, 69 were on medical leave, and 320 with lung impairments had retired. Anthony DePalma, “Many Who Served on 9/11 Are Still Pressing Fight for Workers’ Compensation,” *New York Times* (May 13, 2004).

<sup>59</sup> See, *Pollution and Deception at Ground Zero Revisited*, pp. 26-29. The federal *National Response Plan* states that OSHA’s role is to provide “advice and Support,” and in any dispute, OSHA defers to the Joint Field Office Coordination Group. The word “enforcement never appears in the section of the *National Response Plan* that describes OSHA’s role. See, Dept. of Homeland Security, *National Response*

So it was disturbing -- but unfortunately not surprising -- that news stories identified workers in the Katrina disaster who were unprotected. On August 31, 2005, OSHA announced that it would “offer as much assistance as possible” for cleanup and recovery worker safety, and a spokesperson said, I encourage you to take proper safety and health precautions.”<sup>60</sup> As in the WTC disaster, the U.S. Department of Labor characterized OSHA’s role as being “to provide technical assistance.”<sup>61</sup> Also, as in the case of the WTC disaster response,<sup>62</sup> OSHA’s lack of enforcement persisted long after the immediate, life-threatening phase of disaster response had subsided. OSHA did not resume regular enforcement of safety and health standards until nearly five months after the hurricane event. Even then, it did not resume regular enforcement everywhere. Its news release stated:

As of Jan. 25, normal enforcement will be conducted throughout Florida and Alabama, in Mississippi north of Interstate 10, and in Louisiana except in seven parishes in and around New Orleans. Following Hurricanes Katrina, Rita and Wilma, OSHA exempted a number of counties and parishes in Florida, Alabama, Mississippi and Louisiana from regular enforcement status. This action enabled OSHA staff to provide faster and more flexible response to hazards facing workers involved in the cleanup and recovery. . . . OSHA limited inspections to cases involving fatalities, catastrophic accidents or complaints.<sup>63</sup>

OSHA did not resume regular enforcement in the area south of Interstate 10 in Mississippi until June 28, 2006 – ten months after the Katrina Hurricane event. As of the writing of this report, OSHA still has not announced a resumption of enforcement in New Orleans, Slidell, and eight parishes of Louisiana.<sup>64</sup> As occurred at Ground Zero, this failure to ensure safety left workers at risk.

Congressman Nadler urged in his letter to President Bush that history was repeating itself regarding failure to protect disaster response workers. On September 17, 2005, for example, a photograph on the front page of the *Washington Post* showed a FEMA contractor cleaning up debris in the French Quarter wearing only a paper mask, yet a September 18, 2005 photograph, also on the front page of the *Washington Post*, showed other contractors in the French Quarter wearing complete protective suits and respirators.<sup>65</sup> A Louisiana State Trooper now suffering from respiratory ailments stated to a reporter, “They dumped us off in New Orleans without the right equipment and they didn’t give us shots or respirators.”<sup>66</sup> Dr. Robert Boe, consultant for the United Methodist Fellowship of Health Care Volunteers, reported that several volunteers returning from the Gulf Coast contracted cellulites, a bacterial infection of the skin and underlying tissue.<sup>67</sup> The National Council for Occupational Safety and Health, the AFL-CIO, the United Church of Christ, the New York Committee for Occupational Safety and Health, the Sierra Club and others sent an urgent letter on

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*Plan* (Dec. 4, 2004), p. 53 and Worker Safety and Health Support Annex, pp. 1 and 3-4. see also, “In National Emergencies, OSHA to Provide Assistance, Not Enforcement,” *Occupational Hazards* (Apr. 8, 2004)(<http://occupationalhazards.com/articles/11624> >).

<sup>60</sup> U.S. Dept. of Labor, OSHA Trade News Release: “OSHA Offers Assistance for Hurricane Katrina Cleanup and Recovery Workers: Public Service Announcement Highlights Worker Safety Issues” (Aug. 31, 2005).

<sup>61</sup> U.S. Dept. of Labor, OSHA National News Release: “OSHA Teams Deployed to Aid Hurricane Katrina Recovery Workers: Agency Focused on Safety in Cleanup and Recovery Operations” (USD L 05-1724-NAT)(Sept. 13, 2005).

<sup>62</sup> See, *Pollution and Deception at Ground Zero*, Part III.A.2, pp. 85-88.

<sup>63</sup> U.S. Dept. of Labor, OSHA National News Release: “OSHA Resuming Regular Enforcement Along Most of U.S. Gulf Coast” (USD L 06-119-NAT)(Jan. 20, 2006).

<sup>64</sup> U.S. Dept. of Labor, OSHA National News Release: “OSHA Resuming Regular Enforcement Throughout Mississippi: Portions of the State Were Exempted Following Last Year’s Hurricanes” (June 28, 2006). Neither Mississippi nor Louisiana extends OSHA protection to public employees in their state. Jordan Barab, “Katrina Workers in Peril: Will We Repeat Mistakes of 9/11 Cleanup?” *Center for American Progress on-line publication* (Sept. 14, 2005)([www.americanprogress.org/site/pp.aspx?c=bjJRJ8\VF&b=1043341&printmode=1](http://www.americanprogress.org/site/pp.aspx?c=bjJRJ8\VF&b=1043341&printmode=1)).

<sup>65</sup> Letter from U.S. Representative Jerrold Nadler to President George W. Bush (Sept. 21, 2005).

<sup>66</sup> George Graham, “Mysterious Illness Could Have Katrina Ties,” *Ruston Daily Leader* (Jan. 2, 2006).

<sup>67</sup> Susan Kim, “Disaster Health Risks Weighed,” *Current News – Disaster News Network* (newsletter)(Mar. 4, 2006).

October 6, 2005 to Congress warning that hurricane disaster responders were inadequately protected against hazardous exposures and describing positive steps that the federal government should take to address the problem.<sup>68</sup> As in the case of the warnings about 9/11 pollution hazards, however, the federal government failed to change its course of action.

## II. BREAKING A BROKEN SYSTEM – MAKING THINGS WORSE RATHER THAN BETTER

Sierra Club's *Pollution and Deception at Ground Zero Revisited* report urged that the Bush administration should have responded to the known health crisis that resulted from 9/11 pollution exposure by establishing precautionary warning protocols and reinstating worker safety enforcement in national emergencies. Instead, it tightened political control over communication and weakened OSHA's role in health and safety. Now things appear to be getting even worse.

### A. The Department of Homeland Security Takes Over Clean-up Guidance-setting for Radiological Contamination from Terrorist Attacks – Using Non-health Factors

A concern that the Sierra Club raised in its two prior reports has become a reality – DHS has established its own cleanup guideline for radiological contamination from Radiological Dispersal Devices (“dirty bombs” or devices that cause dissemination of radioactive material without a nuclear detonation) or Improvised Nuclear Devices (illicit nuclear weapons). The guideline was issued on January 3, 2006, effective immediately.<sup>69</sup> This guidance policy on radiological contamination is worrisome for two major reasons:

- First, instead of establishing peer-reviewed, health-based safety standards for the public to reoccupy an area after cleanup, it refers decision-makers to an array of guidelines, some of which are weaker than standards already established as best practice in the United States.
- Second, it recommends that decisions to allow reoccupation of an area should be based partly on a range of economic considerations, which may put people at significant risk.

As explained below, following the Department of Homeland Security's recommendations could allow people to re-occupy contaminated areas even if they would be exposed to radiation at doses higher than EPA's guidance allows at Superfund sites.

The guideline could allow a significant amount of radioactive contamination from a terrorist attack to remain in place without cleanup, depending on how decision-makers implement the policy. Decisions about how much risk to tolerate will be conducted on a case-by-case basis, rather than being based on consistent public health standards. The guidance vaguely advises governments to choose among a variety of “dose or risk benchmarks” in determining allowable long-term public exposure to radiation, including standards or guidelines set by “other sources” such as “international advisory organizations.”<sup>70</sup> In some cases, such international guidelines may be far more lenient than current United States standards for radiological cleanup. The Committee to Bridge the Gap and the Nuclear Information Resource Service, together with a variety of organizations, expressed special

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<sup>68</sup> Letter to Congress from the National Council for Occupational Safety and Health, AFL-CIO, United Church of Christ, New York Committee for Occupational Safety and Health, Sierra Club, *et al.* urging health and safety enforcement in disaster areas (Oct. 6, 2005).

<sup>69</sup> Although public comment was allowed until March 6, 2006, the guideline in fact took effect immediately “for interim use” upon the date that it was issued. 71 *Fed.Reg.*174-196 (Jan. 3, 2006)(Dept. of Homeland Security: Preparedness Directorate; Protective Action Guides for Radiological Dispersal Device and Improvised Nuclear Device Incidents; Notice).

<sup>70</sup> See 71 *Fed.Reg.* 183.

concern that one international organization mentioned in the guidance,<sup>71</sup> the International Commission on Radiation Protection, sets guidelines that are substantially less protective than current federal regulations protecting nuclear power plant employees.<sup>72</sup>

Under the DHS guideline, decisions about how much risk to tolerate also will be based in part on a wide range of economic and social factors. The Department states:

The evaluation of cleanup alternatives, for example, should factor all relevant variables, including: areas impacted (*e.g.*, size, location relative to population), types of contamination (chemical, biological, and radioactive), human health, public welfare, technical feasibility, costs and available resources to implement and maintain remedial options, long-term effectiveness, timeliness, public acceptability, and *economic effects* (*e.g.*, on residents, tourism, business and industry).<sup>73</sup> (*Emphasis added.*)

**This federal policy, in effect, recommends weighing concerns about diminished tourism against human health risks from radiation.** While the Department attempts to rationalize its approach by arguing that, “Failure to restore important services rapidly could result in additional adverse public health and welfare impacts that could be more significant than the direct radiological impacts,”<sup>74</sup> it is hard to imagine how diminished tourism would affect public health. DHS’s guidance document fails to explain what specific types of economic effects would be so important that public health should be compromised to avoid them, or even what alternatives should be considered to reduce such economic impacts before considering being less protective of human health.

As Sierra Club’s *Pollution and Deception at Ground Zero* report noted, there was pressure from the White House to re-open the New York Stock Exchange quickly after the 9/11 attack, and this appears to have been a motivating factor in the efforts made to reassure the public that the area was safe despite lack of test data to prove the assertion.<sup>75</sup> Also, an internal document from the New York City’s health department, recently uncovered by attorney Joel Kupferman of the New York Environmental Law and Justice Project, reveals that an Associate Health Commissioner expressed concern about an order from City Hall to reopen several blocks near Ground Zero, warning that the City’s Department of Environmental Protection “believes the air quality at those locations is not yet suitable for reoccupancy.” The health official noted that “The Mayor’s Office is under pressure from building owners and business owners in the red zone to open more of the city to reoccupancy.”<sup>76</sup> **It is therefore worrisome that DHS includes the broad term of “businesses” within its definition of infrastructure** when it states that there may be “an urgent need to restore the services of critical infrastructure (*e.g.*, roads, rail lines, airports, electric power, water, sewage, medical facilities, and businesses)” shortly after an incident.<sup>77</sup> This overly broad language is of great concern, since certain

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<sup>71</sup> See 71 *Fed.Reg.* 176.

<sup>72</sup> Matthew Wald, “Even After ‘Dirty Bomb’ Exposure, Residents Might Be Allowed Back In,” *New York Times* (Jan. 3, 2006); see Letter of Comment from Daniel Hirsch, Committee to Bridge the Gap, Diane D’Arrigo, Nuclear Information & Resource Service, *et al.*, to the Office of the General Counsel, Federal Emergency Management Agency, re Docket No. DHS-2004-0029 and Z-RIN 1660-ZA02 (Apr. 14, 2006). The Committee to Bridge the Gap, the Nuclear Information and Resource Service, the Union of Concerned Scientists, Sierra Club and over 50 other organizations sent a strong letter of objection when the proposal first surfaced in 2004. See Letter from Daniel Hirsch, Committee to Bridge the Gap, *et al.*, to Secretary Tom Ridge, Department of Homeland Security (Dec. 2, 2004).

<sup>73</sup> 71 *Fed.Reg.* 177. See also, factors listed at 71 *Fed.Reg.* 183.

<sup>74</sup> *Id.*

<sup>75</sup> *Pollution and Deception at Ground Zero*, pp. 72-74. The EPA Inspector General reported with regard to the White House Council on Environmental Quality’s insistence on removal of cautionary language and insertion of safety assurances in EPA press releases that EPA’s chief of staff “told us that other considerations, such as the desire to reopen Wall Street and national security concerns, were considered when preparing EPA’s early press releases,” and that “final approval came from the White House.” *IG Report*, p. 17.

<sup>76</sup> Memorandum from Kelly McKinney, P.E., Associate Commissioner, NYC Dept. of Health (Oct. 6, 2001); Juan Gonzalez, “9/11 Air Fears Stifled,” *New York Daily News* (Aug. 23, 2006).

<sup>77</sup> 71 *Fed.Reg.* 179.

types of businesses and financial interests are in a much stronger position to lobby governmental decision-makers than advocates for human health.

Several commentators objected that the DHS guidance document essentially leaves public health protection entirely up to the discretion of incident decision-makers, with no upper limit. The National Institute for Occupational Safety and Health (NIOSH) urged that our country's already existing health-based standards should not be undermined, stating:

Any long-term exposure standards for occupational exposures to ionizing radiation following an RDD or IND incident should be within mandated occupational exposure limits (*e.g.*, Occupational Safety and Health Administration, Department of Energy, Nuclear Regulatory Commission) for ionizing radiation. The flexibility to balance competing interests in the long-term remediation of such an incident should be thus constrained, rather than unlimited. Guidance must protect human health rather than treat it as one of many factors to be balanced.<sup>78</sup>

The New Jersey Department of Environmental Protection's Radiation Protection and Release Prevention Element similarly urged that, "a flexible process with goals, ranges and limits would be more appropriate for site recovery."<sup>79</sup> **Without such limitations, the DHS guidance can reasonably be expected to lead to widely varying cleanup standards, leaving the public subject to risk based largely on politics and economics rather than health-based science.**

As one commentator on DHS's guidance document emphasized, compromising human health can itself have harmful economic impacts. The Huntsville-Madison County Emergency Management Agency urged that too little emphasis is placed on "the primary priority of saving life." It stated:

[T]he high levels of radiation resulting from an IND should be mentioned and emphasis heavily weighted on protection of life and health. If this is done, the consequences will automatically carry over into social and economic benefits; if not done, damage to social and economic factors will be magnified.<sup>80</sup>

This is a lesson that the federal government should have learned from the high economic costs of the illnesses now being suffered by thousands of Ground Zero workers who need medical monitoring, treatment, and compensation for their loss of ability to work. **Those costs, unfortunately, are mostly being borne by the Ground Zero heroes themselves.**

Congress should question whether DHS should be engaged in setting cleanup guidelines. DHS itself acknowledges in its own guidance document that the "late phase," for which it would use the "optimization" approach, "is no longer a response to an 'emergency situation,' and is better viewed in terms of the objectives of site restoration and cleanup."<sup>81</sup> The United States *already has toxic cleanup standards and guidelines* established by EPA, which has decades of expertise in pollution and health, and worker protection standards established by OSHA. To the extent that more standards or guidelines are needed, especially to deal with acute exposures such as occurred in the 9/11 attack, these agencies are best qualified to develop them. The Illinois Emergency Management

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<sup>78</sup> National Institute for Occupational Safety and Health, Comments on the Dept. of Homeland Security Notice Preparedness Directorate, Protective Action Guides for RDD and IND Incidents, Docket No. DHS-2004-0029 and Z-RIN 1660-ZA02 (Mar. 6, 2006), p. 4.

<sup>79</sup> Jill Lapoti, Director, New Jersey Dept. of Environmental Protection Division of Environmental Safety and Health, Letter of Comment to the Office of the General Counsel, Federal Emergency Management Agency re Docket No. DHS-2004-0029 and Z-RIN 1660-ZA02 (Mar. 3, 2006), p. 5.

<sup>80</sup> Kirk Paradise, nuclear incident response planning expert and Plans Coordinator for the Huntsville-Madison County Emergency Management Agency, Comments on Docket No. DHS-2004-0029 and Z-RIN-1660-ZA02 (January 2006), p. 3.

<sup>81</sup> 71 *Fed.Reg.* 183.

Agency, in its comments on the rules, raised the important question of whether a RDD cleanup could be conducted under EPA's Superfund statutory authority, "or does Homeland Security intend that the implementation of this guidance will preclude the use of the Superfund process for cleanups?" It observed that large cleanups can be conducted using already established standards, stating:

Very large, real world cleanups are being done right now, and they don't follow your approach to cleanup standards. In Illinois, the West Chicago Residential Areas site is a Superfund site that includes over 2,170 properties in and around the town of West Chicago. This cleanup began in 1994 and is still in progress. More than 110,000 cubic yards of material have been removed and shipped to a licensed low-level waste site. Your RDD scenario developers would be hard pressed to come up with a scenario that is this large in scope, yet the cleanup standard for this site was taken straight from 40 CFR 192. . . . [T]his is a privately funded cleanup. Is DHS sending the message that publicly funded cleanups shouldn't have to use stringent cleanup standards?<sup>82</sup>

The fundamental question is: **Why should our federal government treat the contamination caused by terrorists more leniently than contamination caused by negligence or an accident?**

It is not yet clear whether or not this DHS guidance document would apply in the event of a terrorist attack on a nuclear power plant, but it appears likely. DHS's guidance document asserts that its guideline would not be relevant to a nuclear power plant *accident*. It argues that nuclear power plants tend to be located in rural settings and have detailed emergency plans, and that radioactive releases from nuclear power plant accidents usually are slow, allowing time for preparation.<sup>83</sup> But the reality is that some nuclear plants are close to heavily populated areas where evacuation would be difficult. The Indian Point nuclear facility is relatively close to New York City and has an emergency evacuation plan that has been heavily criticized as impractical and unachievable. If such an attack did occur and a radioactive release resulted, it seems likely that at least some people in the federal government might seek to have the DHS's extremely lenient standard apply – especially given the economic pressures, which would likely be similar to those after the 9/11 attack.

It is also not yet clear if this is the end of cleanup guideline-setting by DHS. As noted in Sierra Club's *Pollution and Deception at Ground Zero Revisited* report, the "optimization" policy initiative first surfaced publicly in a 2003 *Inside EPA* article about plans to develop radiological *and chemical* cleanup goals for terrorist attacks or national emergencies that would be weaker than Superfund cleanup standards.<sup>84</sup> Americans must not make the mistake of acquiescing to weak "emergency measures" that we don't really want to live with on a long-term basis. The improper response to the WTC disaster has had harmful consequences that people are still bearing today.

The United States Congress should bring swift and aggressive scrutiny to this new and controversial approach to post-disaster cleanup. New York City is a highly vulnerable target for a radiological attack, but so are many other large cities in our country. To date, this radical shift in guideline setting has attracted far too little attention and avoided significant public scrutiny, but its consequences could be substantial, far-reaching and long lasting for an affected population.

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<sup>82</sup> Gary Wright, Asst. Director, Illinois Emergency management Agency, Letter of Comment re Docket No. DHS-2004-0029 and Z-RIN 1660-ZA02, to the Office of the General Counsel, Federal Emergency management Agency (Mar. 6, 2006), p. 3.

<sup>83</sup> 71 *Fed.Reg.* 179.

<sup>84</sup> As noted in Sierra Club's 2004 report, *Inside EPA* had reported that the White House Office of Science and Technology Policy had established a "high-level 'steering group' of federal agencies" to develop new chemical cleanup standards. "Administration to Draft Emergency Toxic Cleanup Standard Different than Superfund," *Inside EPA* (Oct. 30, 2003).

**B. The Department of Homeland Security Proposes Eliminating Public Environmental Review of Major Activities – Including Demolition and Hazardous Materials Management**

DHA issued a highly controversial directive this year, which took effect on April 19, 2006, that will eliminate public disclosure of environmental impacts of a broad range of its activities. The directive sets out DHS's disturbing new policy for complying with the National Environmental Policy Act (NEPA).<sup>85</sup> It will limit the ability of Congress and the public to hold DHS accountable for the impacts of its actions on public health and the environment.<sup>86</sup> Given the impacts of the WTC and Katrina disasters, Congress should be concerned about its ability to oversee DHS's actions.

NEPA requires all federal agencies to consider the environmental impacts of a proposed action before proceeding, and if an action may significantly affect the environment, the agency usually must prepare an environmental impact statement.<sup>87</sup> Regarding response to emergencies, of course, existing provisions of the Stafford Act and rules already either exempt certain activities from NEPA or allow more flexible "alternative arrangements" to comply with the law. This flexibility applies to providing certain federal aid to meet immediate threats to life and property; the repair, restoration or replacement of public facilities or certain non-profit facilities (generally those providing critical services); and disaster debris removal.<sup>88</sup> Also, NEPA allows an agency to establish "categorical exclusions" – but these are for routine agency administrative actions that are generally known not to cause significant environmental effects.<sup>89</sup>

The new DHS directive tries to mix these two concepts, creating broad new "categorical exclusions" that would exempt from public disclosure the environmental impacts of many disaster-related actions. These include response activities that could take place long after the emergency phase has passed, such as disposal of construction debris, hazardous material management and demolition work.<sup>90</sup> Many such post-disaster activities continue for months or even years after the disaster.<sup>91</sup>

This radical change to NEPA procedures is not necessary for disaster response. The Congressional Research Service examined the role of NEPA in hurricane response and concluded:

Emergency response actions, such as providing essential relief to victims, managing disaster debris, and repairing or restoring public facilities damaged by the disaster, are [already] exempted from NEPA's requirements under provisions of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act).<sup>92</sup>

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<sup>85</sup> 42 U.S.C. § 4321.

<sup>86</sup> DHS's directive specifically instructs both the Federal Emergency Management Agency (FEMA) and the United States Coast Guard, as component parts of DHS, to amend their environmental procedures to conform to DHS's new directive. 71 *Fed.Reg.* 16790.

<sup>87</sup> See 40 CFR §1508.27.

<sup>88</sup> See The Stafford Act, 42 USC § 5159 and 44 CFR §10.8. See also 42 USC §5173 (authorizing the President to clear debris and wreckage from major disasters), and 42 USC §§ 5170a, 5170b, 5172, 5173, and 5192 regarding types of federal assistance for which the exemption applies. FEMA adopted "alternative arrangements" for reconstruction of critical infrastructure such as hospitals and schools in New Orleans. <[www.fema.gov/plan/ehp/noma/faq1.shtm](http://www.fema.gov/plan/ehp/noma/faq1.shtm)>. See 71 *Fed.Reg.* 14712-14716 (Mar. 23, 2006) for original proposal.

<sup>89</sup> See 40 CFR 1508.4.

<sup>90</sup> For example, it exempts "[r]emoval or demolition, along with subsequent disposal of debris to permitted or authorized off-site locations, of non-historic buildings, structures, other improvements and/or equipment in compliance with applicable environmental and safety requirements." 71 *Fed.Reg.* 16790-16820 (Apr. 4, 2006)(DHS Env'tl. Planning Program: Notice of Final Directive)(see 71 *Fed.Reg.* 16814, "categorical exemption E4"); see, "Final DHS NEPA Policy Includes New Exemptions for Disaster Cleanups," *Inside EPA* (Apr. 10, 2006).

<sup>91</sup> Lower Manhattan, for example, still awaits proper cleanup and testing of buildings surrounding Ground Zero, and certain heavily contaminated buildings still await demolition. While in the case of the Ground Zero area buildings, other agencies subject to environmental review rules at the State level are carrying out those projects, this new directive could set a very harmful precedent.

<sup>92</sup> Congressional Research Service (CRS), *NEPA and Hurricane Response, Recovery and Rebuilding Efforts* (Sept. 28, 2005), p. 1. It similarly concluded that in the aftermath of Hurricane Katrina, "environmental regulations do not appear to have posed an obstacle to local, state, federal, or private response efforts, in part because existing waiver or flexibility provisions were used in certain cases." CRS, *Emergency Waiver of EPA Regulations: Authorities and Legislative Proposals in the Aftermath of Hurricane Katrina* (Sept. 29, 2005).

Public interest organizations objected to the DHS directive's broad exemptions. A letter signed by 15 environmental groups, including the Sierra Club, Defenders of Wildlife, the Natural Resources Defense Council, and American Rivers, urged that DHS's approach "fails to strike the important, but achievable, balance between its responsibility to provide for the safety of the nation's citizens and its duty to protect the human and natural environment."<sup>93</sup> DHS failed to address this concern.

The effect of this new directive is to shield DHS actions from the public eye and – very likely – from Congressional oversight. While DHS argues that it would consider extraordinary circumstances that might cause an otherwise exempt action not to be excluded in a particular case, and create a "Record of Environmental Consideration" in making the evaluation, that is a hollow promise. The directive presents no opportunity for public comment on a "Record of Environmental Consideration," and the document itself "will normally not exceed two pages."<sup>94</sup> This new DHS policy, if allowed to stand, will completely eliminate public disclosure of the impacts of a broad range of DHS actions. Without public disclosure, Congressional oversight of the public health and environmental impacts of DHS's post-disaster actions will be extremely difficult, if not impossible.

### **C. Other Serious Problems of Oversight and Accountability**

The Department of Homeland Security's role in the more civil-based activity of disaster response and recovery remains murky. Congressional oversight is difficult for three reasons:

- DHS is stepping into areas previously reserved for agencies such as EPA and OSHA, which have clear statutory mandates to protect environmental health;
- DHS does not appear to be subjecting its public health initiatives to independent scientific peer review (unlike EPA and OSHA);
- DHS staff do not have sufficient whistleblower protection, which impairs the ability of honest staff members to reveal improper conduct in the agency.

Congress will not be able to provide a proper check-and-balance to the executive acts of this agency unless these issues are resolved.

**Jurisdictional Encroachment.** Sierra Club's *Pollution and Deception at Ground Zero Revisited* report explained that, under the new National Response Plan, EPA does not have final authority over its own statements to the public about risk, and OSHA does not have the final word on safety for rescue and recovery workers. These authorities and functions, as our report described, are now subsumed into a joint command system, under the authority of DHS, that fails to incorporate important principles of precaution ("better safe than sorry") when dealing with toxic contamination to ensure that proper warnings are given.<sup>95</sup> During the 9/11 disaster response, as the 2003 EPA Inspector General report had documented, EPA and OSHA communications to the public were controlled by the White House Council on Environmental Quality. In the Hurricane Katrina disaster, the first to be managed under the new *National Response Plan* established in 2004, both agencies reported to a joint command under the Department of Homeland Security.<sup>96</sup> Yet DHS's mission is so broad that it is

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<sup>93</sup> Letter from 15 environmental and public interest organizations to Department of Homeland Security re "Notice of Proposed Directive Implementing the National Environmental Policy Act" (Aug. 16, 2004)

<sup>94</sup> 71 *Fed.Reg.*16790, 16811 (Notice of Final Directive, Paragraph 3.3B).

<sup>95</sup> Sierra Club, *Pollution and Deception at Ground Zero Revisited*, pp. 26-33.

<sup>96</sup> See U.S. Dept. of Labor, OSHA National News Release: "OSHA Tapped as Federal Safety Coordinator for Worker Safety and Health During Hurricane Katrina Recovery Operations Activated Under National Response Plan" (Sept. 15, 2005).

extremely challenging to hold the agency accountable. Rather than ensure the primacy of human health protection, the new system of disaster response developed after 9/11 makes it even more likely that property and economic concerns will interfere with protection of human health and safety. This makes concerted Congressional oversight difficult.

**Priorities that Conflict with Protecting Human Health and Safety.** The insertion of the DHS into the jurisdiction of EPA and OSHA is troubling because of DHS's conflicting motivations and goals. For example, in July 2005, agents of DHS's Immigration and Customs Enforcement agency posed as OSHA staff members. As reported in the *New York Times*, they posted fliers telling construction workers at an Air Force base in North Carolina that they were required to attend a mandatory OSHA training session. Some workers who arrived were then arrested on immigration-related charges. A U.S. Labor Department spokesperson disclosed that OSHA had not been consulted before this "sting" operation and stated, "[W]e do not condone the use of OSHA's name in this activity." A spokesperson for Republican Cherie Killian Berry, North Carolina's Labor Commissioner, stated, "when you start stinging people using the name of safety officials, you undermine the trust relationships we work very hard to build to help promote safety."<sup>97</sup> The sting was also condemned by the American Public Health Association<sup>98</sup> and the American Society of Safety Engineers.<sup>99</sup> The incident revealed a disturbing lack of emphasis on human health and safety in DHS's priorities.<sup>100</sup> Similarly, the fact that FEMA neglected to activate the worker safety provision of the National Response Plan, until September 15, over two weeks after Hurricane Katrina struck,<sup>101</sup> indicates a disturbing lack of commitment to safety for rescue and recovery workers.

**Lack of Peer Review.** EPA has a Science Advisory Board comprised of independent experts on a broad range of environmental and public health matters, who play an important role in agency policy. During the Katrina disaster response, for example, the White House requested that EPA submit its water-sampling plan for bacteria to the Science Advisory Board. The scientists urged that the bacteria sampling be expanded to include E. coli, which helped lead to the collection of data indicating high levels of contamination and issuance of a public warning.<sup>102</sup> In developing its radiological guidelines, in contrast, DHS appears to have consulted only with what it termed a "focus group" of representatives from 13 State agencies with expertise in radiological emergency response and consequence management.<sup>103</sup> The DHS document does not refer to or describe any peer review process by independent scientists or health experts. Disturbingly, the Radiation Advisory Committee of EPA's Science Advisory Board had offered to analyze and provide comments on an earlier version

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<sup>97</sup> Steven Greenhouse, "Immigration Sting Puts 2 U.S. Agencies at Odds," *New York Times* (July 16, 2005).

<sup>98</sup> Letter from Georges C. Benjamin, M.D., Exec. Dir., American Public Health Association, to Michael Chertoff, Secretary, Department of Homeland Security (Aug. 17, 2005).

<sup>99</sup> "Immigration Sting Damages OSHA's Efforts, ASSE Says," *Society Update* (ASSE e-newsletter), Vol. 9, No. 9.

<sup>100</sup> DHS Immigration and Customs Enforcement (ICE) spokespeople initially defended the health and safety masquerade as an effort to prevent illegal aliens from working at sensitive work sites. Steven Greenhouse, "Immigration Sting Puts 2 U.S. Agencies at Odds," *New York Times* (July 16, 2005). As public outcry continued, however, DHS Secretary Michael Chertoff indicated that using ruses involving health and safety were not appropriate." Steven Greenhouse, "U.S. Officials Defend Ploys to Catch Immigrants," *New York Times* (Feb. 11, 2006). The DHS ICE finally sent a letter to the United Food & Commercial Workers International Union, stating that "the use of ruses involving health and safety programs . . . will be discontinued by ICE." Letter from Marcy M. Forman, Director, DHS ICE, to Michael Wilson, Director, Legis. & Political Action Dept., United Food & Commercial Workers Internat'l Union, CLC (Mar. 17, 2006) Unfortunately, as the New York Committee for Occupational Safety and Health (NYCOSH) has observed, the belated apology may not repair the damage already done to OSHA's credibility among workers. "Homeland Security's Grudging and Belated Promise to Stop Masquerading as OSHA Wasn't from the Goodness of Anyone's Heart," *NYCOSH Update on Safety and Health*, Vol. IX, No. 2 (Apr. 20, 2006).

<sup>101</sup> See U.S. Dept. of Labor, OSHA National News Release: "OSHA Tapped as Federal Safety Coordinator for Worker Safety and Health During Hurricane Katrina Recovery Operations Activated Under National Response Plan" (USD L 05-1736-NAT)(Sept. 15, 2006). See also, Michelle Chen, "Relief Workers May Be Next Wave of Katrina Victims," *NewStandard* (Sept. 23, 2005)(available at: <http://newstandardnews.net/content/index.cfm/2395/printmode/true> )

<sup>102</sup> See, "SAB Prompts EPA to Expand New Orleans's Water Monitoring for Bacteria," *Inside EPA* (Sept. 7, 2005). EPA announced that New Orleans floodwaters contained 10 times more E. coli than EPA considers safe for human contact. The results were announced on Wednesday, September 7, 2005, but the data reportedly was not posted on the website until the weekend. See, Tasha Eichenseher, "Senior EPA Official Calls Hurricane Testing Inadequate," *Greenwire* (Sept. 12, 2005).

<sup>103</sup> 71 *Fed. Reg.* 174.

of DHS's radiological guidance, cautioning that DHS's proposed approach "represents a significant change in radiation protection guidance," but the offer apparently was never accepted.<sup>104</sup>

A focus group is not a peer review panel, and consulting with other government agencies is not the same as conducting an independent scientific peer review of health risks of a cleanup guideline for radiological disasters. Since a terrorist using a radiological device would more likely target a populated area, the approach government uses to respond to an attack will have far-reaching consequences for human health. Political shortcuts to proper peer review should not be allowed.

**Whistleblower Protection.** Some experts have expressed concern that conscientious DHS staff would be very vulnerable to disciplinary action if they spoke the truth about agency misconduct, incompetence or irresponsibility. This situation has been made even more worrisome by a recent DHS directive that constricts what information its employees may disclose to the public.

Government whistleblowers – employees who speak out about government misconduct – can play an important role in public disclosure of risks from national disasters.<sup>105</sup> In the wake of the World Trade Disaster, two whistleblowers at the federal Environmental Protection Agency sought to raise concerns about the agency's response. The first, Hugh Kaufman, as investigator for the EPA Ombudsman's office under then EPA Ombudsman Robert Martin, organized a public hearing and elicited testimony from independent scientists about the inadequacy of EPA testing and deceptiveness of EPA assurances of safety. Shortly afterward, in the wake of this and another investigation raising questions about whether or not conflicts of interest related to EPA Administrator Christine Todd Whitman's financial ties existed, EPA Administrator Whitman dismantled the independent EPA Ombudsman office, leading to the resignation of Ombudsman Robert Martin.<sup>106</sup> Mr. Kaufman was shunted off to a less influential position. But Mr. Kaufman's job was protected because of the specific whistleblower provisions established under federal environmental laws.<sup>107</sup> Similarly, solid waste specialist Dr. Cate Jenkins, another whistleblower, was able to raise concerns about the weakness of the benchmarks that EPA was using to evaluate air safety after 9/11, and the ineffectiveness of analytical equipment that EPA was using that reduced the detection of asbestos, with job protection under the law.<sup>108</sup> Hugh Kaufman also became active regarding the Hurricane Katrina disaster, raising publicly the concern that EPA was failing to conduct systematic testing to identify contaminated areas. Information that whistleblowers disclose can help the public and elected officials raise questions, learn the truth about agency actions and hold agencies accountable.

DHS employees, in contrast, have general protection under the Whistleblower Protection Act<sup>109</sup> – a broad law that has been weakened over the years by a series of court decisions.<sup>110</sup> In early

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<sup>104</sup> EPA Radiation Advisory Committee, Science Advisory Board, "Agency Request – Project #05-25: Optimization of Radiological Emergency Cleanup Decisions." The Committee had stated that, "the use of 'an optimization framework', rather than a numeric threshold cleanup standard is a new and critical feature." *Id.*

<sup>105</sup> The GAO reports that whistleblower cases rose "dramatically" in fiscal year 2002, by approximately 46% compared to the prior year, and remained at a high level the next year. U.S. GAO, *U.S. Office of Special Counsel: Strategy for Reducing Persistent Backlog of Cases Should Be Provided to Congress* (GAO-04-36)(Mar. 2004), p. 9. It reported that the rise apparently "was prompted, in part, by the terrorist events of September 11, 2001," after which the agency received more cases involving allegations of dangers to public health and safety and national security." *Id.*, pp. 10-11. The Project on Government Oversight reports that some whistleblowers explained they could no longer stand by knowing that people's lives were at risk. Project on Government Oversight, *Homeland Security and National Security Whistleblower Protections: The Unfinished Agenda* (Apr. 28, 2005)(hereafter, *Project on Government Oversight Report*), p. 1.

<sup>106</sup> Robert McClure and Paul Shukovsky, "Watchdog Quits EPA: Silenced, He Says," *Seattle Post-Intelligencer* (Apr. 23, 2002); see Statement of Robert J. Martin before the United States Senate Committee on Environment and Public Works (June 25, 2002) ([http://epw.senate.gov/107th/Martin\\_062502.htm](http://epw.senate.gov/107th/Martin_062502.htm)).

<sup>107</sup> Seven federal environmental laws contain employee whistleblower protections (although six have a very short 30 day deadline for filing a charge of unlawful discrimination): The Clean Air Act, 41 USC §7622; Clean Water Act, 33 USC § 1367; Safe Drinking Water Act, 42 USC § 300j-9(i); Toxic Substance Control Act, 15 USC § 2622; Resources Conservation and Recovery Act, 42 USC § 6971; Energy Reorganization Act of 1974, 42 USC §5851, and CERCLA, 42 USC § 9610. The procedure to address violations is at 29 CFR § 24.

<sup>108</sup> See Cate Jenkins, Ph.D., "Memorandum re Status of Air and Dust Asbestos testing After WTC Collapse" (Mar. 11, 2002).

<sup>109</sup> Whistleblower Protection Act of 1989, P.L. 101-12, 103 Stat. 16 (5 USC § 1201 *et seq.*).

2006, U.S. Representative Christopher Shays, a Republican, held a Congressional hearing on post-9/11 whistleblowing. The briefing memorandum for this hearing explained:

Employees in the national security arena now work in an environment of heightened sensitivity and insecurity. When a department or agency's practices are called into question, the first impulse is one of self-preservation and damage control. The reorganization of the national security community appears to have significantly retarded progress made with respect to whistleblower rights over the last twenty-five years.<sup>111</sup>

William Weaver, senior advisor to the National Security Whistleblowers Coalition, testified at this hearing that employees at the Department of Homeland Security are at particular risk. He stated:

Many of our members and many people we converse with are employees of the Department of Homeland Security (DHS). These people describe an agency riddled with problems that defeat the very mission of the organization. Embarrassing issues concerning management . . . and numerous other problems indicate an agency with deep problems. Some might argue that the importance of the DHS mission requires freedom from oversight, but in fact the opposite is true: the agency charged with protecting the physical security of the nation must be guarded against national bureaucratic tendencies to cover up mistakes and hide incompetence.<sup>112</sup>

It is reasonable to be concerned that activities conducted by DHS, rather than EPA or OSHA, can more easily be insulated from whistleblower protection because of deference to the agency's security mission. The blurring of the distinction between military/security and civilian activities at DHS presents a special risk for whistleblowers, and DHS's encroachment on functions that should be in the domain of other civil agencies heightens the risk that information necessary for Congressional and public oversight will not be disclosed. Congress must scrutinize this issue.

**Document Disclosure.** DHS has created a disincentive to whistleblowing and even conventional public disclosure under the Freedom of Information Act by issuing a vague directive requiring its employees to safeguard information that it deems "For Official Use Only." The DHS Directive broadly defines "For Official Use Only (FOUO)" as, "The term used within DHS to identify unclassified information of a sensitive nature, not otherwise categorized by statute or regulation, the unauthorized disclosure of which could adversely impact a person's privacy or welfare, the conduct of Federal programs, or other programs or operations essential to the national interest."<sup>113</sup> At issue is the somewhat murky area of "Sensitive but Unclassified" information (a term not defined by any statute<sup>114</sup>), which the Department of Justice asserts may sometimes be exempt

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<sup>110</sup> The Whistleblower Protection Act has been eroded by court rulings. In 1999, the Federal Circuit Court held that the law only shields those charging government misconduct if the charge is supported by "irrefragable" (incontestable) proof. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). The Project on Government Oversight notes that this "makes it virtually impossible for a whistleblower to prevail unless the wrongdoer confesses, in which there is no need for a whistleblower." *Project on Government Oversight Report*, p. 7.

<sup>111</sup> Briefing Memorandum for February 14, 2006 Subcommittee Hearing from Vincent Chase, Chief Investigator and Major Marc LaRoche, to Members of the Subcommittee on National Security, Emerging Threats, and International Relations (Feb. 9, 2006), pp. 13-14.

<sup>112</sup> Testimony of William G. Weaver, National Security Whistleblowers Coalition to House Government Reform Committee, Subcommittee on National Security, Emerging Threats and International Relations (Feb. 14, 2006), p. 4. Republican U.S. Reps. Todd Platts and Tom Davis, with Democrat U.S. Rep. Henry Waxman, have urged that federal whistleblowers involved in national defense need strong protection, stating, "The Committee's experience has demonstrated repeatedly that whistleblowers can be America's first line of defense against threats from outside, as well as from bureaucratic breakdowns within the government that can be equally dangerous. Committee investigations and hearings repeatedly have confirmed this conclusion, whether the context was protection of nuclear weapons facilities, disregarded advance warnings about vulnerability to 9/11, [or] failure to upgrade homeland security since that tragedy. . . ." Letter from Reps. Tom Davis, Henry Waxman and Todd Platts to Hon. Duncan Hunter, Chair, House Committee on Armed Services (Aug. 2, 2006).

<sup>113</sup> DHS, *Safeguarding Sensitive But Unclassified (For Official Use Only) Information*, MD 11042.1 (June 6, 2005), Subdivision 4.

<sup>114</sup> Congressional Research Service, "Sensitive But Unclassified" Information and Other Controls: Policy and Options for Scientific and

from disclosure under the Freedom of Information Act.<sup>115</sup> The new DHS directive attempts to limit the information that it must release to the public, while failing to emphasize the values that should weigh in favor of disclosure.<sup>116</sup>

In the WTC disaster, people had to turn to the Freedom of Information Act to spur disclosure of environmental testing data. Joel Kupferman of the New York Environmental Law and Justice Project used it to obtain the test data that revealed significant contamination from Ground Zero.<sup>117</sup> EPA began posting data on its website after the Freedom of Information requests were filed.<sup>118</sup>

The directive provides some guidance on placing information in this protected category. It lists a variety of types of information that may be designated “For Official Use Only,” such as systems security data, which may help limit such classifications to some extent.<sup>119</sup> It also warns that information “shall not be designated as FOUO in order to conceal government negligence, ineptitude, illegalities, or other disreputable circumstances embarrassing to a government agency.”<sup>120</sup> Nevertheless, the directive raises serious concerns.

- It does not require DHS to weigh the use of this label against the importance of disclosure to promote public safety or agency accountability.
- Also, its disturbing instruction that “FOUO material will be destroyed when no longer needed”<sup>121</sup> could undermine both Congressional and judicial oversight, as it may encourage workers to destroy documents before it is actually appropriate to do so. Also, many federal employees preserve documents they deem helpful but would not necessarily categorize as needed. This directive requires them to destroy such documents if they are deemed to be FOUO.

Some experts urge that material should simply be either classified or unclassified, while vague terms such as “Sensitive but Unclassified” should not be used.<sup>122</sup> Certainly, the fact that DHS is engaged in broad-ranging activities that are civilian in nature, including toxic hazards response, increases the risk to public health and safety from the “chilling effect” of this restrictive disclosure policy.

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*Technical Information* (Feb. 15, 2006), p.8.

<sup>115</sup> Department of Justice, *FOIA Guide, 2004 Edition*, Exemption One and Exemption Two ([www.usdoj.gov/oip/foi-act.html](http://www.usdoj.gov/oip/foi-act.html)).

<sup>116</sup> At first, it had proposed a directive threatening employees with criminal prosecution if they publicly disclosed any document to marked “For Official Use Only,” or any document that could be so labeled. DHS, *Safeguarding Sensitive But Unclassified (For Official Use Only) Information*, MD 11042 (May 11, 2004) ([www.dhs.gov/interweb/assetlibrary/Mgmt\\_NEPA\\_MD11042SensUnclass.pdf](http://www.dhs.gov/interweb/assetlibrary/Mgmt_NEPA_MD11042SensUnclass.pdf)). After outcry from labor and advocacy groups, the penalty provisions were eliminated, but the fundamental policy remained essentially the same. DHS, *Safeguarding Sensitive But Unclassified (For Official Use Only) Information*, MD 11042.1 (June 6, 2005).

<sup>117</sup> Attorney Kupferman filed the Freedom of Information Act request to obtain EPA’s test results from the WTC disaster on September 21, 2001. See Freedom of Information Act Request letter by Joel Kupferman, Esq., New York Environmental Law & Justice Project to the U.S.E.P.A. (Sept. 21, 2001). EPA sent him about 800 pages of test data on October 19, 2001.

<sup>118</sup> EPA announced that it had posted WTC monitoring data on its website on October 3, 2001. OSHA Press Release, “EPA and OSHA Web Sites Provide Environmental Monitoring Data from World Trade Center and Surrounding Areas” (Oct. 3, 2001).

<sup>119</sup> *Id.* Subdivision 6.C.

<sup>120</sup> *Id.*, Subdivision 6.A.3.

<sup>121</sup> *Id.*, Subdivision 6.K.1.

<sup>122</sup> See discussion in Congressional Research Service, *Sensitive But Unclassified” Information and Other Controls*, *supra*, pp. 47-49.

### III. HOW THE PUBLIC PAYS WHEN GOVERNMENT DOES IT WRONG: HARMFUL IMPACTS ON HUMAN HEALTH OF FAILED ENVIRONMENTAL DISASTER RESPONSE

The Mount Sinai WTC Medical Monitoring Program recently released the newest statistics on the health of 9,442 of the workers who have come to its program for screening. The Program found:

- Fully 69 percent of all responders reported having had at least one WTC-worsened or newly incident respiratory symptom while performing WTC response work, and symptoms persisted to the time of examination in 59 percent. Examinations were performed between July 2002 and April 2004.<sup>123</sup>
- Of the workers with a self-reported history of pneumonia, 10 percent were diagnosed with pneumonia during the six months after 9/11, compared to only 1 percent in the six months prior to 9/11. Of those who sought medical help for acute bronchitis, 45 percent were diagnosed with bronchitis during the six months after 9/11, compared with 12 percent during the six months prior to 9/11.<sup>124</sup>

The results are consistent with a new study of over 12,000 firefighters from Ground Zero. It found that the Ground Zero firefighters, on average, experienced a loss of lung function during the first year after the disaster that was equal in magnitude to 12 years of aging-related lung function decline.<sup>125</sup>

These statistics, unfortunately, tell only part of the story. They do not describe the health impacts on many of the immediate survivors of the WTC attack. While a CDC study found that two-thirds of survivors who reported being in the dust and debris cloud experienced new or worsening respiratory symptoms,<sup>126</sup> many of these people are not eligible for the WTC Medical Monitoring Program. The statistics do not describe the health impacts on workers who have not yet come to the program for screening. They do not describe the health impacts on residents, small business people, area employees and schoolchildren who returned to affected areas after the attack and were exposed to dust in their homes or workplaces as well as emissions from the still smoldering Ground Zero.<sup>127</sup> They do not provide statistics on other health symptoms or end points, such as stroke, heart attack,<sup>128</sup> immune system impacts, or cancer,<sup>129</sup> although the Program recently obtained approval to begin to collect data on cancer and some other conditions.<sup>130</sup> The statistics do not include reproductive impacts.<sup>131</sup> Most important, they do not and cannot describe future health consequences.

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<sup>123</sup> Robin Herbert, *et al.*, "The WTC Disaster and the Health of Workers: Five-Year Assessment of a Unique Medical Screening Program," *Envtl. Health Persp.* (Sept. 2006), p. 14.

<sup>124</sup> *Id.*, p. 15.

<sup>125</sup> Gisela Banauch, *et al.*, "Pulmonary Function After Exposure to the World Trade Center Collapse in the New York City Fire Department," *Am. J. Respir. Crit. Care. Med.* 174:312-319, 317 (2006).

<sup>126</sup> Robert Brackbill, *et al.*, "Surveillance for World Trade Center Disaster Health Effects Among Survivors of Collapsed and Damaged Buildings," *MMMR* 55(SS-2)(Apr. 7, 2006). The survey did not ask residents how long these symptoms persisted. The study recommended "[l]ong-term follow-up," with particular attention to those persons exposed to the dust cloud.

<sup>127</sup> The fires at Ground Zero were not declared out until Dec. 19, 2001. Rand Science & Technology Policy Inst., *Protecting Emergency Responders: Lessons Learned from Terrorist Attacks* (Proceedings, Dec. 9-11, 2001 conf.), p. 15. A federal report found that the existing medical monitoring programs are not coordinated with each other. U.S. GAO, *September 11: Health Effects in the Aftermath of the World Trade Center Attack* (GAO-04-1068T)(Sept. 8, 2004), p. 15. A survey of over 2,000 residents in the affected area found that 44 percent reported a higher incidence of at least one persistent new-onset symptom. Shao Lin, Joan Reibman, *et al.*, "Upper Respiratory Symptoms and Other Health Effects Among Residents Living Near the WTC Site After September 11, 2001," *Am. J. of Epid.* 162(6) (Sept. 15, 2005).

<sup>128</sup> Experts report that many studies have demonstrated an increased risk for cardiovascular events in relation to both short- and long-term exposure to present-day concentrations of ambient particulate matter. See C. Arden Pope III and Douglas Dockery, "Health Effects of Fine Particulate Air Pollution: Lines that Connect," *J. Air & Waste Manage. Assoc.* 56:709-742, 722 (June 2006).

<sup>129</sup> The Patrolmen's Benevolent Association started its own online medical registry in an attempt to track cancers and other diseases of 9/11 responders. Susan Edelman and Carl Campanile, "PBA Blasts Hosp's 9/11 Health Monitoring," *New York Post* (June 25, 2006).

<sup>130</sup> Susan Edelman, "WTC Sick Monitor to Focus on Cancer," *New York Post* (Aug. 13, 2006).

<sup>131</sup> One study found that 57.5 percent of mothers exposed to the WTC dust cloud had detectible levels of a biomarker for procarcinogenic

**A. Disturbing Evidence Indicates that some Ground Zero Workers Are Dying from Conditions Caused by 9/11 Pollution Exposure**

In January 2006, a New Jersey county coroner made the first official declaration of a 9/11 pollution-related death. The evidence was compelling. Police detective James Zadroga of Little Egg Harbor in New Jersey died on January 5, 2006 at the young age of 34, from brain and respiratory complications. James Zadroga worked more than 450 hours at Ground Zero.<sup>132</sup> He worked on 12-hour shifts, using only a paper mask. He returned to his detective squad in October, already experiencing impairment of breathing. During 2002, Zadroga also experienced a constant cough.<sup>133</sup> The 6'2" police detective suffered from recurring, painful headaches, and ultimately needed oxygen, antibiotics and steroid injections to get through the day. He retired on an NYPD disability in November 2004, just weeks after his 29-year-old wife had died of a heart condition. He died at home, in the presence of his four-year-old daughter.<sup>134</sup>

Dr. Gerard Breton, a pathologist at the Ocean County, New Jersey medical examiner's office conducted an autopsy on Feb. 28, 2006. In a report released by James Zadroga's family and the Detectives Endowment Association on April 11, 2006, pathologist Breton stated that Detective Zadroga's death was "directly related" to 9/11 pollution exposure. He had died of respiratory failure and had inflammation in his lung tissue due to "a history of exposure to toxic fumes and dust," Dr. Breton wrote. The Coroner found material "consistent with dust" in Mr. Zadroga's lungs.<sup>135</sup> Dr. James Cay, the Ocean County, New Jersey coroner, ruled, "It is felt with a reasonable degree of medical certainty that the cause of death in this case was directly related to the 9/11 incident."<sup>136</sup> This was the first known ruling definitively linking a death to 9/11 pollution.

It was not the first such death, however. Emergency Medical Technician Timothy Keller died on June 23, 2005. He was only 41 years old. Mr. Keller may have been the first Ground Zero worker to die from 9/11 pollution exposure. The Nassau County medical examiner stated that his death was the result of "congestive heart failure due to hypertensive and arteriosclerotic heart disease and associated conditions, [including] ...chronic asthmatic bronchitis and pulmonary emphysema." During his first couple days at Ground Zero, Tim Keller reported to *Newsday* in 2003, he coughed up handfuls of dirt and sand, but he continued working his normal shift, returning to Ground Zero at night to help search for body parts. He tried to hide his worsening condition for fear of losing his job. By spring of 2004, he was assigned to light duty. At that point, his captain reported, he couldn't walk more than about 10 feet without having coughing fits that lasted three or four minutes. A pulmonary function test at the Fire Department's Bureau of Health Services showed that his lungs were operating at only 33 percent of capacity. His doctor had diagnosed severe chronic asthmatic bronchitis and sinusitis, and severe obstructive sleep apnea. He tried to stay on the job, but finally had

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genetic damages – damage that makes one more susceptible to cancer – and 60.6 percent of the newborns also were affected. Frederica Perera, *et al.*, "DNA Damage from Polycyclic Aromatic Hydrocarbons Measured by Benzo[a]pyrene-DNA Adducts in Mothers and Newborns from Northern Manhattan, the WTC Area, Poland and China," *Cancer Epid. Biomarkers & Prev.* 14:709-14 (Mar. 2005). A new study has found that three-year-old children exposed *in utero* to polycyclic aromatic hydrocarbons (PAHs), mostly from vehicle exhaust fumes, were nearly three times more likely to have cognitive deficiencies than other children. Frederica Perera, *et al.*, "Effect of Prenatal Exposure to Airborne Polycyclic Aromatic Hydrocarbons on Neurodevelopment in the First Three Years of Life Among Inner-city Children," *Envtl. Health Persp.* 114(8):1287-1292 (Aug. 2006) PAHs were a significant component of WTC pollution.

<sup>132</sup> Robert Moore, "A Cop Dies & Kin Blame 9/11 Debris," *New York Daily News* (Jan. 7, 2006).

<sup>133</sup> Larry McShane, "WTC Attacks Claim Latest Victim – Four Years Later," *Associated Press* (Jan. 28, 2006).

<sup>134</sup> Murray Weiss and Cathy Burke, "Ground Zero Job Did Kill Officer," *New York Post* (Apr. 12, 2006).

<sup>135</sup> Amy Werstfeldt, Associated Press, "Autopsy Links Cop's Death to Post-9/11 Work," *New York Newsday* (Apr. 11, 2006); Murray Weiss and Cathy Burke, "Ground Zero Job Did Kill Officer," *New York Post* (Apr. 12, 2006).

<sup>136</sup> Murray Weiss and Cathy Burke, "Ground Zero Job Did Kill Officer," *New York Post* (Apr. 12, 2006); Rich Schapiro, "WTC Air Doomed Ex-cop," *New York Daily News* (Apr. 12, 2006).

to quit in December 2004.<sup>137</sup> Keller was a nonsmoker. He had about a decade of experience on the job, with no previously known health problems before 9/11. He died at his home in Levittown.<sup>138</sup>

Estimates of deaths of Ground Zero workers have ranged up to 57, based on assertions of attorney David Worby, who is representing thousands of workers in civil actions, but he has not yet revealed the details of his information,<sup>139</sup> and there is no firm number. City officials told the *Associated Press* that they currently don't know how many Ground Zero workers have died, and it will take many more months to cross-check their registry against the National Death Index. Also, that index lags by as much as two years, so even when the registry does complete its first post-9/11 death count, it will only reflect deaths from 2004 or earlier.<sup>140</sup>

## **B. Many Ailing Ground Zero Workers with Years of Work Experience Are Now Bearing the Burden of Serious Financial Distress**

Most of the Ground Zero workers were engaged in professions that required physical fitness – as construction workers, firefighters, police officers, emergency medical technicians, and similar vocations. In many cases, when they lose their jobs, they lose their health insurance. This means that they have to fight for workers compensation or pensions. As the General Accounting Office (GAO) had noted, none of the medical screening or survey programs were originally funded to actual medical treatment. With strong advocacy from New York's Congressional Delegation and labor leaders, a portion – about \$52 million – of the \$125 million in federal funding that had been allocated for administration of workers compensation claims was re-allocated to provide some funding for medical treatment programs, but it will only meet a fraction of the need<sup>141</sup> In January 2006, U.S. Representatives Carolyn Maloney and Vito Fossella, joined by Ground Zero workers from the nonprofit *Unsung Heroes Helping Heroes* and several labor leaders, called for appointment of a “9/11 Health Czar” to coordinate the federal response to Ground Zero Health Impacts.<sup>142</sup> Rather than the President appointing a “Health Czar” with the ability to move resources, the Secretary of Health and Human Services appointed a “Health Coordinator,” Dr. John Howard, Director of the National Institute for Occupational Safety and Health (NIOSH), to make recommendations<sup>143</sup> – without even providing him with a full-time staffperson assigned to 9/11 health issues.<sup>144</sup>

Some Ground Zero workers who have become too ill to work have been able to receive disability pensions that allow them to support their families at a reasonable level. Many, however, only have recourse to the New York State workers compensation system, which is shamefully inadequate. The highest amount of income that a worker can receive through that system is \$400 per week, or approximately \$21,000 per year.<sup>145</sup> Some workers have been unable to obtain workers compensation at all, either because the Workers Compensation Board determined that they failed to meet their burden of proving that their illness was caused by 9/11 pollution, or because they missed

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<sup>137</sup> Ridgely Ochs, “One 9/11 Hero's Tale of Tragedy,” *Newsday* (Sept. 4, 2005).

<sup>138</sup> Amy Westfeldt, “Ground Zero Workers' Deaths Linked to Illnesses from Debris,” *Associated Press* (Jan. 14, 2006).

<sup>139</sup> Shawn Cohen and Jake Sherman, “Thousands Claim Exposure in 9/11 Aftermath,” *The Journal News* (June 22, 2006).

<sup>140</sup> Devlin Barrett, “Plenty of Frustration, Few Answers for Sick 9/11 Workers,” *Associated Press* (Apr. 9, 2006).

<sup>141</sup> Congress approved the legislation authorizing this funding in late December 2005, but the funds have yet to be released. Devlin Barrett, “Congress Gives New Life to 9/11 Programs,” *Newsday* (Dec. 22, 2005).

<sup>142</sup> Offices of Rep. Maloney and Rep. Fossella, Media Advisory: “Fossella, Maloney & Sick/Injured Ground Zero Workers to Call for Appointment of 9/11 Health Czar to Coordinate Feds' Response to Ground Zero Health Impacts” (Jan. 23, 2006).

<sup>143</sup> See, U.S. Reps. Vito Fossella & Carolyn Maloney, Press Release: “Reps. Fossella & Maloney Announce Appointment of 9/11 Health Coordinator to Oversee Feds' Response to Ground Zero Health Impacts” (Feb. 27, 2006)

<sup>144</sup> Anthony DePalma, “Officials Slow to Hear Claims of 9/11 Illnesses,” *New York Times* (Sept. 5, 2006).

<sup>145</sup> See, NYC Bar Association, “A Guide to Workers Compensation in New York” ([www.nycba.org/publications/workscompensation.html](http://www.nycba.org/publications/workscompensation.html)).

the deadline for filing their claim.<sup>146</sup> While a new law now allows late filing of such claims, it contains burdensome requirements that may limit how many workers apply.<sup>147</sup>

Tim Keller's final months on earth were spent under conditions of abject poverty, frustration and a profound feeling of betrayal. After leaving work, he lived on unemployment checks, with no health insurance or pharmaceutical coverage. He applied for workers compensation in early September 2004, and for line-of-duty injury benefits. The City reportedly denied both applications in October 2004, even though he had been healthy before his service at Ground Zero and a letter from his pulmonologist stated that his condition "appeared to have been related to the WTC disaster." The Law Department reportedly asserted that there was "no medical evidence of a causal relationship." In November 2004, Keller applied for disability retirement (three-quarters pension) through the NYC Employees Retirement System. He retired in December and was approved for disability retirement in January 2005. It generally takes six to nine months before full retirement payments occur, so he received nothing until April 2005, when he got a small check, a partial advance payment retroactive to January. In June, he received a check for \$10,017, retroactive disability retirement payments for January through March. It all went to his landlord. He had been relying on food donations from his union and the kindness of his landlord, who did not evict Keller even though he was behind in rent. He died almost penniless in his apartment.<sup>148</sup>

Detective James Zadroga fared better than some. He was given a disability pension of three-quarters pay in 2004, which is now available for his orphaned four-year-old daughter Tylerann. The Detectives Endowment Association and Mr. Zadroga's family successfully lobbied to have Mr. Zadroga's eight-year pension changed to death in the line of duty, which would allow his orphaned daughter to receive funds for at least an additional seven years.<sup>149</sup> Still, upon leaving the NYPD he lost his health insurance and had to bear his own large medical expenses. This means that his retired parents, in addition to the new responsibility of raising his young daughter, must also shoulder a heavy debt of about \$50,000 in medical bills. His father, Joseph Zadroga, a retired police chief from North Arlington, New Jersey, and his wife Linda now worry about maintaining their own health so that they can be there to meet the needs of their granddaughter while coping with their own grief.<sup>150</sup>

The federal government has utterly failed to respond to this situation. It has failed to establish a fair and equitable program to ensure that all Ground Zero workers have access to medical care and necessary prescriptions. It has also failed to address the inadequacies of compensation for the Ground Zero workers who have lost their jobs because they responded when our country needed them.

### **C. 9/11 Health Impacts on Residents and Area Employees Have Not Been Measured and Risks of Further Exposure to WTC Dust Remain Unaddressed**

Despite advocacy by 9/11 Environmental Action, the Independence Plaza North Tenants Association, and many other community-based organizations as well as Manhattan Community Board 1, five years have passed without the federal, State or local government establishing a

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<sup>146</sup> A spokesman for the state Workers' Compensation Board said the average rate of rejection for WTC-related applications was 27% compared with 16 % of all claims from 1998-2004. Ridgely Ochs, "One 9/11 Hero's Tale of Tragedy," *Newsday* (Sept. 4, 2005).

<sup>147</sup> The new law requires workers to file a sworn affidavit within just a year of the law's passage regarding their service in 9/11 response even if they do not yet have symptoms of health impacts. Also, it requires notification of the worker's employer upon the filing of that affidavit, even if the worker is not ready to submit a claim. See Workers Compensation Law, § 162. It is not clear how many workers will know about the registration requirement, or whether the early notification of employers requirement may be a disincentive for workers seeking promotions or raises, especially if they do not yet have symptoms.

<sup>148</sup> Ridgely Ochs, "One 9/11 Hero's Tale of Tragedy," *Newsday* (Sept. 4, 2005); telephone interview of David Keller (Sept. 6, 2006).

<sup>149</sup> Wendy Gillett, "Zadroga 9/11 Ruling Likely to Help Other Rescuers: Detective Found to Have Died as a Result of Terror Attacks," *CBS News* (Apr. 12, 2006); Rich Shapiro, "WTC Air Doomed Ex-cop," *New York Daily News* (Apr. 12, 2006).

<sup>150</sup> Robert Moore, "A Cop Dies & Kin Blame 9/11 Debris," *New York Daily News* (Jan. 7, 2006).

comprehensive, systematic medical monitoring program to address the exposures of residents and area employees affected by the 9/11 pollution. On September 5, 2006, New York City Mayor Michael Bloomberg announced the creation of a new clinic that would provide both medical monitoring and treatment for up to several thousand 9/11 pollution-exposed individuals, including residents, area workers and others. It will be modeled on a small program at the Bellevue Hospital Center created in August 2005 through American Red Cross funding.<sup>151</sup> This may prove to be a very helpful new program, and may also provide important new data on health effects among residents, small business owners and area employees. Without federal funding, unfortunately, its scope will be limited, and given the federal government's delay in action on this issue, it is unlikely to "capture" the many people who have left the affected area within the past five years.

Furthermore, unlike most Ground Zero workers, residents and area employees remain at risk of further exposure to 9/11 contaminants because the federal EPA has refused to undertake a proper testing and cleanup program for the parts of Manhattan and Brooklyn affected by the 9/11 pollution.<sup>152</sup> Sierra Club's *Pollution and Deception at Ground Zero* report explained in detail why the agency's first attempt, in 2002, to carry out some kind of testing and cleanup program was completely inadequate.<sup>153</sup> Subsequently, in 2004, Senator Hillary Clinton and Joseph Lieberman held up the nomination of the new EPA Administrator until a WTC Expert Technical Review Panel was formed to address the issues of testing, cleanup and unmet health needs. The Panel never got to the issue of unmet health needs because the federal administration summarily disbanded it after members began to express what apparently was too much criticism of EPA's plan for a second testing and cleanup program. Indeed, the Panel meeting following an impromptu presentation by two Panel members on how to carry out sampling on a geographically scientific basis was the Panel's last.<sup>154</sup> At that final meeting, the Panel members urged EPA to work out a compromise with the community, unanimously offering their own services for a "marathon" negotiation session, but EPA declined. EPA's resulting inadequate testing and cleanup plan has been roundly criticized by environmental and community groups, the New York City Council, and elected officials.<sup>155</sup> The Panel, it should be noted, had been serving without pay.

#### **D. The Full Health Impacts of Hurricane Katrina on Response Workers and Residents Has Not Been Measured but Some Impacts Have Been Revealed**

The full health impacts of Hurricane Katrina remain unknown. On September 7, 2005, a spokesperson for the CDC stated that five people had died from bacterial infections caused by the dirty floodwater.<sup>156</sup> The number had risen to six deaths by September 23, 2005.<sup>157</sup> Since then, anecdotal evidence suggests that the impact of Hurricane Katrina and debris management activities

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<sup>151</sup> Office of the Mayor, City of New York, Press Release: "Mayor Bloomberg Announces Comprehensive Citywide Effort to Address 9/11 World Trade Center Health-related Issues" (Sept. 5, 2006).

<sup>152</sup> Public concern about what contaminants may remain in buildings was heightened in 2006 when hundreds of bone fragments were found on a damaged, soon-to-be-demolished building next to Ground Zero, the vacant 41-story former Deutsche Bank building. See Amy Westfeldt, "Tower with World Trade Center Dust, Human Remains Looms at Ground Zero," *Associated Press* (May 19, 2006).

<sup>153</sup> *Pollution and Deception at Ground Zero*, pp. 92-107.

<sup>154</sup> U.S.E.P.A., Press Release: "U.S. EPA to Test Dust in Lower Manhattan" (Nov. 29, 2005)(announces final meeting of Panel).

<sup>155</sup> See, e.g., "Statement of Senator Hillary Rodham Clinton on the Release of the EPA's WTC Testing Plan" (Nov. 29, 2005); Michael Powell, "EPA to Scale Back Testing at Ground Zero," *Washington Post* (Nov. 30, 2005)(Quoting Rep. Jerrold Nadler); Anthony DePalma, "EPA to Get a Scolding on 9/11 Dust," *New York Times* (Mar. 1, 2006)(citing City Council resolution opposed to the EPA plan).

<sup>156</sup> "CDC Says 5 Dead from Dirty Water After Katrina," *Reuters* (Sept. 7, 2005). Widespread infectious disease such as cholera or typhoid fever, fortunately, did not occur. A study conducted from early September to early October of hospital emergency departments in three counties in Mississippi found, fortunately, "no major outbreaks of infectious disease," but noted that at the one facility with available pre-hurricane data, visits increased approximately twofold. CDC, "Surveillance for Illness and Injury After Hurricane Katrina – Three Counties, Mississippi, September 5-October 11, 2005," *MMMR* 54(40):1018-1021(Oct. 14, 2005)(the study was conducted between September 5 and October 11, 2005).

<sup>157</sup> CDC, "Update on CDC's Response to Hurricane Katrina: Sept. 23, 2005)" ([www.cdc.gov/od/katrina/09-19-05.htm](http://www.cdc.gov/od/katrina/09-19-05.htm)).

may have caused significant health problems. By November 2005, complaints began to surface about respiratory conditions that some people dubbed “Katrina cough.” Dr. Kevin Jordan, director of medical affairs at Touro Infirmary and Memorial Medical Center in New Orleans reported that the hospital had seen at least a 25 percent increase of complaints regarding sinus headaches, congestion, runny noses and sore throats since Katrina.<sup>158</sup> Reporters describe widespread complaints of coughs, infections and rashes. Dr. Howard Frumkin, director of the National Center for Environmental Health, a division of the CDC in Atlanta, noted that debris burning, mold and diesel emissions from construction and debris-clearing vehicles can be sources of respiratory irritants.<sup>159</sup> As in the case of the “WTC Cough,” some rescue and recovery personnel are reporting persistent respiratory conditions or rashes that began during their response to the Hurricane Katrina disaster.<sup>160</sup> While the Louisiana Department of Health and Hospitals found no increase in respiratory symptoms serious enough to send people to an emergency room, the American Lung Association of Louisiana screened about 1,600 people since the hurricane so far, and reported that about 25 percent of them had mild to moderate reduced lung function.<sup>161</sup> It is attempting to determine the extent to which this may be an elevated level, and whether pre- and post-Katrina information will differ. Its study is continuing.<sup>162</sup>

The lack of medical monitoring is a serious problem. Sierra Club field organizer Darryl Malek-Wiley, a New Orleans resident, noted early on the need to track the long-term health effects on exposed recovery workers. He observed, however, that considering how the government has haphazardly fanned refugees across the country, “If that’s the level of record keeping they have for workers, it’s going to be a disaster in the future.”<sup>163</sup> Some experts in volunteer disaster response agree with this concern, urging that the federal government needs to track post-disaster illnesses. They note that currently, disaster area illness of residents may or may not get reported to a local or state health department, and trends may or may not be identified and reported to the Centers for Disaster Control. OSHA, in turn, collects worker illness and injury data generally, but that activity is not the same as a national reporting system dedicated to a specific disaster. Both Dr. Robert Boe of the United Methodist Fellowship of Health Care Volunteers and Florence Coppola, executive for National Disaster Ministries for the United Church of Christ, have called for a national monitoring program for disaster relief workers.<sup>164</sup>

While a full description of the issue of continuing exposures of residents and workers in the Hurricane Katrina disaster area is beyond the scope of this report, it certainly must be said that residents and workers in the Katrina disaster area face a daunting array of challenges in obtaining cleanup of contaminated sediment as well as mold problems. Like the residents in the World Trade Center disaster area, they need the federal government to step forward with resources, testing and action. Five years later, the Ground Zero community is still advocating and still waiting. Neither of these communities should be left in such a frustrating limbo.

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<sup>158</sup> Scott Gold and Ann Simmons, “‘Katrina Cough’ Floats Around,” *Los Angeles Times* (Nov. 4, 2005).

<sup>159</sup> Seth Borenstein and Chris Adams, “Health Problems Abound Months After Katrina Roared shore,” *Miami Herald* (Nov. 29, 2005).

<sup>160</sup> Liz Szabo, “‘Katrina Cough’ Sending Many to the Doctor,” *USA Today* (8/28/2006); George Graham, “Mysterious Illness Could Have Katrina Ties,” *Ruston Daily Leader* (Jan. 2, 2006). Susan Kim, “Disaster Health Risks Weighed,” *Current News – Disaster News Network* (newsletter) (Mar. 4, 2006).

<sup>161</sup> Liz Szabo, “‘Katrina Cough’ Sending Many to the Doctor,” *supra*.

<sup>162</sup> Telephone interview of Dr. Thomas Lotz, Executive Director, American Lung Association of Louisiana (Sept. 6, 2006).

<sup>163</sup> Statement of Darryl Malek-Wiley, Sierra Club field organizer in Louisiana, in Michelle Chen, “Relief Workers May Be Next Wave of Katrina Victims,” *NewStandard* (online news)(available at: <http://newstandardnews.net/content/index.cfm/items/2395/printmode/true>).

<sup>164</sup> Susan Kim, “Disaster Health Risks Weighed,” *supra*.

## **RECOMMENDATIONS:**

**Congress should establish an inquiry into the breadth of the Department of Homeland Security's activities to evaluate its scope of activities and identify ways to strengthen accountability and disclosure** – especially for civil-based functions such as disaster recovery. In addition, the federal government, in cooperation with Congressional oversight, should:

1. Restore the primacy of EPA and OSHA in carrying out their statutory mandates in disaster Response, carefully circumscribing the role of the Department of Homeland Security.
2. Revise disaster response plans to emphasize EPA's duty to address indoor contamination, and defer to that agency for setting environmental cleanup guidelines.
3. Revise disaster response plans to emphasize OSHA's duty to enforce its HAZWOPER rules in disasters involving potentially significant toxic releases.
4. Establish guidelines affirming EPA's duty to establish cleanup standards and conduct proper systematic environmental testing after a national disaster that involves releases of hazardous substances. Those guidelines, as U.S. Rep. Jerrold Nadler has emphasized, should include scientific sampling methods, state-of-the-art testing equipment and analysis, and comparison to appropriate standards or guidelines. The guidelines should be produced in consultation with the EPA Science Advisory Board.
5. Establish proper funding to address the unmet health-related needs of Ground Zero rescue and recovery workers and to assess and address the health-related needs of residents and area employees affected by 9/11 pollution. That assessment of unmet needs, as U.S. Rep. Carolyn Maloney has emphasized, should be subject to an independent peer review.
6. Establish strong programs to address the environmental impacts of the Hurricane Katrina disaster and assess the health impacts of the disaster, including impacts on rescue and recovery workers.