



**Department of
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Protection**

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MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Russ Pecunies
FROM: Mark D. Hoffer *MDH*
DATE: 3/11/02
RE: Downtown Building Owners - Results of Testing

Diana Chapin has advised me that several building owners downtown have conducted their own tests of material on or in their buildings in the aftermath of September 11. It is possible that some of these tests reflect the presence of asbestos as a result of the collapse of the World Trade Center (WTC) towers.

Apparently some of these owners have refused to share their test results with DEP. Diana wants to know whether we can compel production of the test results, so that agency personnel can determine whether or not there are actions the owners or others should be taking under law to protect public health and safety.

I would like you to look at this issue as soon as possible and let me know your conclusions. My own preliminary take, based on a quick review of relevant laws, is that we do have authority to compel production of the test results, based on the following:

1. Air Code. The first potential source of authority I looked at is the Air Code. I believe asbestos fibers would constitute "particulate matter" (Ad. Code 24-104(38)) because they are solid matter which is capable of becoming windblown (certainly, if the fibers are on the outside of a structure, exposed to the wind). The definition of an "air contaminant" (Ad. Code 24-104(1)) is "any particulate matter ... in the open air"

The DEP Commissioner is authorized to make any investigation or study which in his or her opinion is desirable for the purpose of enforcing the Air Code or controlling or reducing the amount of any air contaminant (Ad. Code 24-106). In furtherance of this end, he or she is authorized to "compel the production of books, papers and other things reasonably



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necessary to the matter under consideration.” (Id.).

Interfering with or obstructing the Commissioner in carrying out any duty under the Air Code is prohibited (Ad. Code 24-111). However, enforcement of this provision, along with the other provisions of the Air Code, seems to be confined to the NOV process, through the Environmental Control Board.

2. Spill Bill. By way of contrast, it strikes me that the Spill Bill offers a more direct route to compelling production of the test results.

A “hazardous substance” includes all hazardous substances listed under Ad. Code 24-609. The 24-609 list developed by DEP appears in our Spill Bill regulations at 15 RCNY Sect. 11-04(d). That list includes “asbestos”, “asbestos, anthophyllite”, “asbestos, chrysolite”, “asbestos, crocodelite”, “asbestos, tremolite”, “asbestos, actinolite”, and “asbestos, amosite”. (Id.).

The Spill Bill provides that when the DEP Commissioner

has reason to believe that there has been or there exists a substantial threat of a release into the environment of a hazardous substance which may present an immediate and substantial danger to public health or welfare or the environment, the commissioner may, in his or her discretion, order any or all responsible persons to implement any response measures, or to cooperate with and assist the commissioner in implementing any response measures, deemed by the commissioner to be necessary to protect the public health or welfare or the environment (Ad. Code 24-608(a)) (emphasis added).

It further provides that the DEP Commissioner “may ... order the production of documents relevant for determining the nature and extent of the release or threat of release.” (Id.) (emphasis added).

A “release” is defined as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment.” (Ad. Code 24-603(e)). A “responsible person” includes “[an] owner ... of property at the time there is a release, or a substantial threat of a release, of a hazardous substance from such property into the environment.” (Ad. Code 24-603(g)(1)).

Given the foregoing, and in light of the ongoing public concern about air quality downtown and the presence or absence of asbestos in the downtown area, I believe it would be reasonable for the Commissioner to issue an order directing disclosure of the results of tests ordered by downtown building owners to help determine

1) whether there is asbestos present on the outside or inside of the buildings in question;

2) whether there is a substantial risk that the asbestos (if present) would be released into the air; and

3) if released, whether the type or amount of asbestos in question would result in an immediate and substantial danger to public health.

Such a directive, if disobeyed, should create a cause of action that could be taken up in state court, to enforce compliance with the Commissioner's order.

Please review and let me know if you disagree or see a better approach. We need to address this as soon as possible.

MDH:mdh
asb.wpd