PLAINTIFF'S EXHIBIT

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UNITED STATES DISTRICT COURTS
EASTERN DISTRICT OF NEW YORK
and
SOUTHERN DISTRICT OF NEW YORK

IN RE JOINT EASTERN AND SOUTHERN DISTRICT ASBESTOS LITIGATION	NYAL-PH-8888 (CPS) 91-PH-8889 (JBW)
THIS DOCUMENT RELATES TO: All Powerhouse Cases	

MEMORANDUM IN SUPPORT OF OCF'S
REQUEST FOR THE COURT TO TAKE JUDICIAL
NOTICE OF CERTAIN NEW YORK REGULATIONS

Preliminary Statement

Defendant and third-party plaintiff Owens-Corning Fiberglas Corporation ("OCF") respectfully submits this memorandum in support of its request that the Court take judicial notice, pursuant to Federal Rule of Evidence 201(b), of the existence and content of certain New York state regulations regarding the control of harmful dusts -- including asbestos dust -- in the workplace. The regulations at issue are:

1. Industrial Code Rule No. 23 (1945);
2. Industrial Code Rule No. 23 (1951);
3. Industrial Code Rule No. 12 (1956);
4. Industrial Code Rule No. 12 (1958);
5. Industrial Code Rule No. 23 (1959); and

6. Industrial Code Rule No. 12 (1971) (collectively, the "New York Regulations").[1]

OCF proffers these New York Regulations, first, as proof of the notice to defendants and third-party defendants of the potential hazards of asbestos dust and, second, because they give specific content to the "safe workplace" mandate of New York Labor Law §§ 200 and 241(6). During its case-in-chief, OCF shall present evidence of its own awareness of the existence and content of such state regulations, and of the fact that many defendants and third-party defendants in these cases were listed on the State's mailing lists for dissemination of these regulations. (See Mailing Lists annexed as Taber Aff. Exhs. 7, 8, and 9.)

OCF will also present evidence that many parties to these cases -- including Consolidated Edison Company of New York ("Con Ed") and its contractors -- directly incorporated references to these regulatory standards into their own construction contracts. Those contracts required, for example, the affirmative control of "harmful dust or fumes" with the term "harmful dust or fumes" to be "as defined by the Industrial Board of the State Labor Department." (See Taber Aff. Exh. 10 at 54, Exh. 11 at 3, Exh. 12 at 5, Exh. 13 at GC-32, Exh. 14 at 5; emphasis added.)

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1 Copies of these regulations are annexed as Exhibits 1 to 6 of the accompanying affidavit of Kenneth W. Taber ("Taber Aff."), sworn to December 12, 1991.

In establishing the propriety of taking judicial notice of the New York Regulations, this memorandum first fixes those regulations in their proper historical context (see "Factual Background", infra), and thereafter spells out the legal basis for taking judicial notice of such regulations. (See Argument, infra.)

FACTUAL BACKGROUND

The State of New York, through its Department of Labor, was historically a leader in the field of industrial hygiene and worker safety. An early focus of state regulators, dating back to the 1930's, was the prevention of occupational diseases caused by exposure to industrial dusts. The 1936 Annual Report of the New York Industrial Commissioner observed that "[i]n the last two years a new emphasis has developed in the field of occupational diseases," with the Department of Labor "embark[ing] on a vigorous campaign for the prevention of poisonings and dust diseases in industry." (Taber Aff. Exh. 14 at 22.)[2]

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2 That same year, New York enacted a series of statutory provisions, initially directed towards the well-recognized hazards of silica dust, but also expressly intended to reach other still-to-be-identified hazardous dusts. L.1936, ch. 887. (See Taber Aff. Exh. 15.) Section 65-2 of then new Labor Law Article 4-A, entitled "Silicosis and Other Dust Diseases," provided in pertinent part that:

> The industrial commissioner and the industrial board are hereby required to add to the indus-

(continued...)

In 1944, New York's Department of Labor addressed these safety issues as they affected members of the construction trades, enacting Industrial Code Rule No. 23, entitled "Erection, Repair and Demolition of Buildings or Structures." Rule 23 provided, as a general matter, that:

> Every person employing, or directing another to perform labor of any kind in the erection, alteration, repair, renovation or demolition of any building or structure, and any excavation in connection therewith, shall cause such operations to be so arranged, operated and conducted and shall furnish or erect or cause to be furnished or erected for the performance of such operations, such scaffolding, hoists, ladders, derricks and other equipment as to give proper protection to the lives, health and safety of all persons employed therein and frequenting the construction site, as herein provided.

(See Taber Aff. Exh. 1 at § 23-1.2.1; emphasis added.) On the subject of workplace dust control, Rule 23 left no doubt that dust levels impairing worker health would not be tolerated at construction sites:

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[2](...continued)

> trial code ... effective rules and regulations governing the installation, maintenance and effective operating in all industries and operations wherein silica dust or other harmful dust hazard is present, of approved devices designed to eliminate such harmful dusts and to promulgate such other regulations as will effectively control the incidence of silicosis and similar diseases.

This same 1936 legislation also enacted Labor Law § 222-a, requiring all state agencies, public benefit corporations and municipal corporations contracting for public works in which a harmful dust hazard was created, to include in such contracts a provision requiring the use of dust control methods approved by the New York Industrial Board.

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> All operations on every construction site shall be so conducted as to prevent, by safe and effective means, the raising of dust in such quantities as to obstruct the vision or impair the health of workmen.

(See Taber Aff. Exh. 1 at § 23-3.6; emphasis added.)

By the 1940's, the American Conference of Governmental Industrial Hygienists (the "ACGIH") -- a nationwide independent organization of the leading government scientists and physicians working in the industrial hygiene field[3] -- was fully engaged in a systematic review of the scientific literature to set "threshold limit values," or TLV's, for a variety of potentially hazardous substances. In 1946, the ACGIH formally adopted 5 MPPCF as the asbestos TLV. That, in turn, prompted states across the country to enact the ACGIH's recommendation as law.[4]

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3 The ACGIH was originally known as the National Conference of Governmental Industrial Hygienists. (See Taber Aff. Exh. 17.) As one commentator has noted:

> The ACGIH's role in the setting of occupational health standards, through the formulation and adoption of the TLV's, has been astonishingly influential. In fact, from about 1940 to the passage of the Occupational Safety and Health Act in 1970, this organization was the leading force in promoting U.S. industrial health standards.

(Taber Aff. Exh. 17, Paull, "The Origin and Basis of Threshold Limit Values.")

4 In Ohio, for example, where OCF was -- and is still -- headquartered, regulations were adopted that same year requiring employers to comply with the TLV for asbestos dust. (See Taber Aff. Exh. 18.) Those regulations not only mandated adherence to the TLV, but also expressly (continued...)

In New York, the adoption of regulations governing asbestos dust in the workplace came somewhat more slowly -- and was preceded by a general strengthening in 1951 of Rule 23's provision regarding dust control at construction sites. That 1951 amendment required the use of ventilation or other affirmative means to control workplace dust levels:

> **23-3.14. Control of dusts and gases.** Dusts and gases shall be controlled by ventilation or otherwise so as to prevent concentrations tending to injure health...

(See Taber Aff. Exh. 2.)

On June 21, 1956, the New York Industrial Board addressed the subject of asbestos dust directly. The Board adopted Industrial Rule 12, setting forth the specific concentrations above which certain dusts, including asbestos dust, would constitute "dangerous air contaminants." (See Taber Aff. Exh. 3.) For asbestos dust, Rule 12 adopted the threshold limit value previously recommended by the ACGIH: 5 MPPCF. Section 12-29 of new Rule 12 expressly stated:

> The existence of air contaminants consisting of or deriving from the substances named in the following

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[4](...continued)
required employers (1) to warn employees of workplace hazards, such as exposures to asbestos dust; and (2) to furnish employees any necessary protective gear, such as respirators. (See Taber Aff. Exh. 18 at §§ 251, 254).

OCF was fully aware of the adoption of the Ohio regulations, having been sent a preliminary draft of those regulations by the Ohio State Department of Health, with a request that OCF comment upon that draft. (See Taber Aff. Exh. 19.)

table in relative quantities greater than those set forth as to each substance shall constitute <u>prima-facie evidence</u> that such contaminants are <u>dangerous air contaminants</u>.

* * *

C. Mineral Dusts

Substance	Million Particles per Cubic Foot
Alundum	50
Asbestos	**5**
Carborundum (silicon carbide)	50
Dust (nuisance, no free silica)	50
Mica (below 5% free S_1O_2)	20
Portland cement	50
Talc	20
Silica: Class I (below 5%, free S_1O_2)	50
Class II (5% to 50% free S_1O_2)	20
Class III (above 50% free S_1O_2)	5
Slate (below 5% free S_1O_2)	50
Soapstone (below 5% free S_1O_2)	20
Total dust (below 5% free S_1O_2)	50

(Taber Aff. Exh. 3, at 738; emphasis added.)

Rule 12 mandated that such hazardous dusts be affirmatively "controlled by ventilation or otherwise." Section 12-9 provided:

> **12-9. General control methods.** One or more of the following methods shall be used to prevent, remove, or control dangerous air contaminants:
>
> 1. Substitution of a material which does not produce air contaminants;
>
> 2. Local exhaust ventilation at the source of generation of the air contaminant;
>
> 3. Dilution ventilation in any work space in which air contaminants are generated or released;

4. Application of water or other wetting agent to prevent air contaminants;

5. Other methods approved by the board.

(See Taber Aff. Exh. 3 at 715.)

Section 12-2 of the Rule also made it clear that "control of dangerous air contaminants," such as asbestos dust, included "providing, installing, operating and maintaining control or protective equipment." Each employer was therefore required to "instruct his employees as to the hazards of their work, the use of such control or protective equipment and their responsibility for complying with this rule." (See Taber Aff. Exh. 3 at 713.)

In 1959, a series of amendments to Rule 23 by the Industrial Board again underscored the fact that one of Rule 23's primary goals was to protect "persons employed in construction and demolition work" from "the hazards of exposure to . . . air contaminants." (Taber Aff. Exh. 5 at "Finding of Fact,"; emphasis added.) Rule 12, as noted above, defined asbestos dust as one such "air contaminant" from which workers were to be protected.[5]

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[5] In 1958, the Industrial Board amended Rule 12, effective November 1, 1958, to apply only to factories. The 1958 version of Rule 12 continued to state, however, that, for the construction sites at issue here, Rule 23's mandate for workplace dust control remained fully in force. The 1958 version of Rule 12 -- like all subsequent versions of Rule 12, through 1971 -- continued to identify asbestos dust concentrations greater than 5 MPPCF as "dangerous air contaminants." (Taber Aff. Exh. 4 at § 12-1.)

The foregoing New York Regulations were not only published in the Official Compilation of the New York Code of Rules and Regulations ("NYCCR"), they were also directly disseminated to a number of defendants and/or third-party defendants in these cases:

(a) The "Mailing List -- Industrial Code Rule No. 23," dated 1958-1959, for example, includes Bethlehem Steel Company, Stone & Webster Engineering Corporation, DuPont and General Electric Company (See Taber Aff. Exh. 8);

(b) the "Mailing List For Industrial Code Rules 12, 18 and 32," dated April 1, 1958, includes General Motors Corporation, General Electric Company and DuPont (See Taber Aff. Exh. 7); and

(c) the "Mailing List -- Industrial Code Rule No. 23," dated 1963, includes Bethlehem Steel Company, Stone & Webster Engineering Corporation, Westinghouse Electric Corporation, DuPont and General Electric Company, (See Taber Aff. Exh. 9.)

Additionally, these New York Regulations were referenced in construction contracts governing much of the underlying construction work at issue in these cases. Con Edison's "Articles of the General Conditions," dated May 23, 1958, for example, expressly required "Dust or Fume Control," with "harmful dusts" to be as defined by the New York State

Industrial Board -- the authors of Rules 12 and 23. That contract language provided:

> Whenever demolition or other work of any kind creates harmful dust or fumes, equipment for the protection of property against dust and fumes and also the workman against the inhalation of "harmful dust or fumes" shall be installed, maintained and effectively operated by the contractor as required by law.
>
> All such equipment is to be of a type approved by the State, County and/or Municipal regulatory body or in accord with the specifications adopted by such regulatory body and "harmful dust or fumes" is to be as defined by the Industrial Board of the State Labor Department or other governmental body having jurisdiction.

(See Taber Aff. Exh. 11; emphasis added.)

This standard contractual provision was either incorporated by reference or directly repeated in countless Con Edison contracts for construction at the sites in issue in these cases. These contracts demonstrate knowledge on the part of Con Edison and those with whom it contracted that:

1. the New York Industrial Board had identified particular construction dusts as "harmful" to workers if inhaled; and

2. as a matter of contractual mandate, if nothing else, workmen were to be protected from any such hazards identified by the Industrial Board.

Given this standard contractual provision, the jury is certainly entitled to learn -- through judicial notice of the New York Regulations -- that asbestos dust was a "harmful dust" identified by the Industrial Board.

ARGUMENT

THE EXISTENCE AND CONTENTS OF THE NEW YORK REGULATIONS ARE FACTS OF WHICH THE COURT SHOULD TAKE JUDICIAL NOTICE

Federal Rule of Evidence 201(b) provides that:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Both of these alternative tests are met by the New York Regulations. First, that the existence and contents of the New York Regulations was "generally known" within this State is confirmed by:

1. the fact that private parties, in their own contracts, expressly provided that the term "harmful dust" would be governed by the Industrial Board's pronouncements (i.e., through regulations like Industrial Code Rules 12 and 23);

2. the fact that these regulations were officially published in NYCRR; and

3. the fact that these Regulations were widely disseminated throughout the state, as demonstrated by the State's own mailing lists. The mailing list for the 1958 version of Industrial Code Rule 12, for example, includes more than 150 corporations, a dozen trade associations, eight insurance companies or industry representatives, eight national and local labor organizations, six professional

societies, 18 cities' chambers of commerce, and a long list of additional state and federal governmental entities. The 1958-1959 mailing list for Rule 23 lists more than 400 entities, including corporations, professional societies, insurance industry representatives, governmental entities, contractors' associations, and labor unions. The 1963 mailing list for Rule 23 lists more than 250 entities, again from a wide variety of construction-related backgrounds. (see Taber Aff. Exhs. 7, 8 and 9.)[6]

The second alternative test under Rule 201(b) -- whether the existence and contents of the New York Regulations are fully "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" -- is also readily met here. Indeed, one need look no further than NYCRR, which "presumptively establish[es] the codes, rules and regulations of the State of New York." Exec. L. § 102(5); see People v. Foster, 27 N.Y.2d 47, 313 N.Y.S.2d 384, 386, 261 N.E.2d 389 (1970).[7]

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6 See Snell v. Suffolk County, 782 F.2d 1094, 1105 (2d Cir. 1986) (court can take judicial notice of adjudicative facts, a category which includes "the ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the jury unless clearly indisputable").

7 See also N.Y. CPLR 4511 (detailing when state courts are required, upon request, to take judicial notice of state law and regulations).

We also note that the Fifth Circuit, in reviewing several asbestos personal injury cases, expressly took judicial notice of 1983 OSHA regulations analogous to the New York Regulations at issue here. Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1144 (5th Cir. 1985). Those regulations, like the state regulations at issue here, addressed the question of what was the safe exposure limit for asbestos fibers.

Additionally, the New York Regulations are properly the subject of judicial notice because they lend specific content to New York's statutory mandate that site-owners, contractors, employers and supervising engineers provide construction workers a "safe workplace". (See New York Labor Law §§ 200 and 241(6).) Taking judicial notice of government documents, as a means for providing content to such general phrases, is hardly a novel endeavor. In Austracan v. Neptune Orient Lines, Ltd., 612 F. Supp. 578, 584 (S.D.N.Y. 1985), for example, Judge Haight interpreted the phrase "pier-to-house", in an admiralty action over lost cargo, by referring to its definition in a Government publication:

> This is the definition appearing in a Government publication, A Shopper's Guide to Storage of Cargo in Marine Containers, U.S. Department of Transportation, Maritime Administration (1982). The booklet acknowledges the assistance of a formidable number of leading industry representatives. I do not hesi-

tate to take judicial notice of its contents under Rule 201(b)(2) F.R. Evid.

Id.

Finally, we note that, a decision now to take judicial notice of the New York Regulations stands separate and apart from the question of whether, as OCF contends, the New York Regulations are also the governing law in this case. At this juncture, the New York Regulations are being offered only to establish, as a matter of historical fact, that such regulations were promulgated by the New York Industrial Board, were published in the State's official publication, were widely disseminated within the State, and were relied upon by parties in their private contractual dealings.[8] Taking judicial notice of the New York Regulations for those limited purposes is plainly permitted by Federal Rule of Evidence 201(b).

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8 The issue of whether the New York Regulations are controlling law in this case can, and no doubt will, be addressed in connection with the preparation of the Court's charge to the jury.

CONCLUSION

For the foregoing reasons, defendant and third-party plaintiff Owens Corning Fiberglas Corporation respectfully requests that the Court take judicial notice of the existence and contents of these New York Regulations.

Dated: New York, New York
December 12, 1991

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December 12, 1991

BY HAND

Hon. Charles P. Sifton
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: NYAL Powerhouse Consolidation
NYAL-PH-8888 (CPS)
91-PH-8889 (JBW)

Dear Judge Sifton:

Enclosed please find courtesy copies of defendant and third-party plaintiff Owens-Corning Fiberglas Corporation's Memorandum of Law in support of its request for the Court to take judicial notice of certain New York regulations and the Affidavit of Kenneth W. Taber submitted in support thereof. Copies of the memorandum have been made available to all parties in court. Copies of the affidavit are available at Superior Reproduction.

Very truly yours,

Frank E. Derby

Frank E. Derby

cc: All Parties
(for distribution in court)

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