STATE OF RHODE ISLAND **PROVIDENCE, SC.**		**SUPERIOR COURT**
HARTFORD PARK TENANTS ASSOCIATION, DEBRA A. MARTIN, on behalf of herself and as Next friend to her minor child MICHAEL J. MARTIN, SHEILA WILHELM, on behalf of herself and as Next friend to her minor children MIKAELAH WILHELM, JOSHUA WILHELM and RICHARD WILHELM, and NICHOLAS J. MARSELLA **Plaintiffs**	:	
vs.	:	**C. A. No. 99-3748**
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, CITY OF PROVIDENCE, RHODE ISLAND, PROVIDENCE SCHOOL BOARD, and ALAN SEPE in his capacity as Acting Director of the Department of Public Property of the City of Providence **Defendants**	:	

PLAINTIFFS' REPLY MEMORANDUM TO RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S OBJECTION TO PLAINTIFFS MOTIONS TO ADJUDGE DEM IN CONTEMPT AND APPOINT A SPECIAL MASTER AND ENFORCE SIDE AGREEMENT WITH DEM

Plaintiffs submit this memorandum of law in response to the objection of defendant Department of Environmental Management ("DEM") to plaintiffs' motions to adjudge DEM in contempt and appoint a special master and to enforce the side agreement with DEM. DEM's objection reveals there are no material facts in dispute as to its compliance with the Court's April 13, 2006 Order ("Order") or the Agreement for Resolution of Claims ("Side Agreement") of even date between plaintiffs and DEM. The undisputed material facts overwhelmingly establish DEM's non-compliance with both the Order and Side Agreement, justifying the relief sought by plaintiffs in this motion. Plaintiffs' response is set forth in detail below.

I. There is no genuine dispute of material fact regarding DEM's failure to comply with the Court Order and Side Agreement.

While plaintiffs and DEM rigorously dispute whether as a matter of law DEM is in contempt of the Order, the parties are in agreement as to the material facts regarding DEM's actions and inactions with respect to the Stakeholder Group established by the Order and its implementation of the Side Agreement.

A. Facts Regarding the Order

1. The Stakeholder Group Only Developed A Single Draft Policy

DEM acknowledges that only one policy came out of the Stakeholder Group Process, a document entitled "Final Draft Guidance Policy for Considering Environmental Justice in the Review of Investigation and Remediation of Contaminated Properties" ("Draft Policy."). The most current version of the Draft Policy dated July 2008 is attached as Exhibit 13 to the Affidavit of Steven Fischbach, Esq. (October 24, 2008) (hereafter, Exhibits to said Affidavit will be referred to as "Fischbach Exh."). DEM also concedes that the Stakeholder Group never considered any proposals for regulations or legislation. Memorandum of Law in Support of R.I. Department of Environmental Management's Objection to Plaintiffs Motions to Adjudge DEM in Contempt and Appoint a Special Master and Enforce Side Agreement With DEM at 6-7 (hereafter, "DEM Mem.").

2. The Draft Policy Remains In Draft Form

DEM acknowledges that the Draft Policy remains in draft form, and will not be finalized until the Court rules on the present motion. DEM Mem., at 9. Although DEM alleges it "has repeatedly explained to Plaintiffs that the policy will be finalized once all Stakeholder Group comments have been received and incorporated and the Stakeholder

Group process closed," DEM Mem., at 27, DEM does not and cannot point to a single document to substantiate this allegation. Moreover, no further comments are likely to be forthcoming given the passage of time and that plaintiffs' counsel was the only member of the Stakeholder Group to submit written comments on the July 2007 version of the Draft Policy and on DEM's draft response to comments it issued on July 30, 2008. DEM Mem., at 8-9.

3. The Draft Policy Does Not Address Cumulative Impacts or Disparate Impacts

DEM concedes that the Draft Policy fails to address cumulative impacts and disparate impacts. DEM explains that "[b]oth of these concerns, are by definition, multi-media concerns; they reach well beyond the scope of IPRARA and outside of the contaminated site remediation program that this Stakeholder Group was established to address." DEM Mem., at 15. Yet, DEM acknowledges that "cumulative impacts concerns are valid concerns in each of its programs . . . ." *Id.* Significantly, DEM's response makes no mention of the cancelled Stakeholder Group meeting that had been scheduled for March of 2008 where the issue of cumulative impacts was to be discussed. See, Deposition of Terrence D. Gray, P.E., July 2, 2008, at 50-51 (hereafter, "Gray Depo.").

4. The Policy Does Not Address DEM's Assuming Jurisdiction When it has Knowledge of Possible Contamination

In its response DEM contends that existing laws and regulations address the jurisdiction issue, yet acknowledge that "the 'prior information' that DEM had on the Springfield Street School Site was not of a sort to trigger" those processes. DEM Mem., at 13. Further, DEM contends the Draft Policy addresses this issue by creating "a more

transparent and open process for public petitioning and complaint filing," *id.*, in spite of DEM's prior acknowledgement that its possession of prior information of the kind it had about the Springfield Street Schools would not trigger those processes. DEM's contentions do not rebut its sworn deposition testimony that the Draft Policy failed to address this issue. Gray Depo., at 85-86.

5. *The Draft Policy's Community Involvement Requirements Only Apply in "Environmental Equity Communities."*

DEM readily concedes the Draft Policy's community involvement requirements only apply to certain "environmental equity areas." DEM Mem., at 16.

6. *The Draft Policy Contains Action Steps Regarding Development of Regulations that DEM Has Not Acted Upon*

DEM acknowledges that the Draft Policy lists two action items for it to take involving the amendment of the Site Remediation Regulations. Nonetheless, DEM maintains that "[t]he mere fact that action items remain open which require DEM down the road does not mean that the work of the Stakeholder Group cannot be considered done." DEM Mem., at 10.

7. *No Votes Were Ever Taken in the Stakeholder Group*

Despite numerous allegations that plaintiffs' counsel and/or plaintiffs were the sole dissenters during the Stakeholder Group process, DEM acknowledge that "no votes were ever taken at Stakeholder Group meetings." DEM Mem., at 8.

8. *DEM Considers the Work of the Stakeholder Group Complete*

DEM not only considers the work of the Stakeholder Group complete, but reiterates its sworn deposition testimony that DEM has the right to decide whether the

work is complete without first asking the Group if the Group had completed its work. DEM Mem., at 9. *See, also,* Gray Depo., at 88-89. [1]

B. Facts Regarding the Side Agreement

1. *Emails Included in DEM's Public File Were Not posted on its On-Line Repository Due to DEM's Practice and Procedure.*

Notwithstanding the two instances cited by plaintiffs where DEM posted email correspondence on an on-line document repository other than the on-line repository for the Springfield Street Schools site, it steadfastly maintains that "as a matter of practice and procedure email correspondence are (sic) generally not included in on-line document repositories established by the Department." DEM Mem., at 19. DEM did, however, print out certain emails and include them in the hard copy repository as evidenced by the twenty two separate pieces of email correspondence between DEM and representatives of the City of Providence that DEM produced its Rule 30(b)(6) deposition. Crawford Depo., at 39; Exh. 22.

2. *DEM's Five-year Review Consists Only of a Field inspection Report*

DEM concedes that it "believes it has complied with the five year review requirement (of the Side Agreement) by conducting the field inspection that was conducted in September, 2006 in addition to reviewing quarterly reports relating to the function of the remedy . . . ." DEM Mem., at 22. DEM does not dispute that it failed to send a copy of the field inspection report to the persons entitled to such a copy under paragraph 1(C) of the Side Agreement.

[1] *See, also,* Discussion, *infra*, at 15, regarding letters from Stakeholder Group members and others protesting DEM's unilateral determination that the work of the Stakeholder Group was completed.

II. Plaintiffs Produced "Clear and Convincing Evidence" that DEM Violated the Order such it Should Be Adjudged in Contempt

The absence of any genuine issue of material fact regarding DEM's compliance with the Order makes the Court's job relatively simple: to determine whether DEM's undisputed actions and actions amount to violation of the Order. Moreover, plaintiffs and DEM do not dispute the legal standard that the Court should utilize to make that determination. As noted by DEM, the Court must determine whether the moving party has proven by clear and convincing evidence that a lawful decree was violated. *Durfee v. Ocean State Steel,* 636 A.2d. 698, 704 (R.I. 1994). That DEM has violated the Order is not even a close call, since the Order clearly required it to allow the Stakeholder Group to develop multiple proposals in the form of legislation, regulations and policies on five discrete topics-and only DEM prevented the Group from accomplishing these court ordered objectives.

The parties agree that the Stakeholder process produced only one Draft Policy, which even today remains in draft form; that the Stakeholder Group never considered any proposals for regulation or legislation; that the Draft Policy does not address cumulative impacts or disparate impacts; that the Draft Policy does not address DEM's assuming jurisdiction over a contaminated site when it possesses information to suspect that a release may have occurred at the site; that the Draft Policy provides for new community involvement initiatives only in so called "environmental equity communities;" that no votes were ever taken in the Stakeholder Group; and that DEM considers the work of the Stakeholder Group complete. Moreover, the parties do not dispute that on numerous occasions plaintiffs asked DEM to reconvene the Stakeholder Group for the purposes of: considering proposals for legislation and regulations; considering proposals to address

cumulative impacts and disparate impacts in DEM's review of clean up proposals contaminated sites as part its consideration of environmental equity issues for low income and minority communities; considering proposals regarding DEM's assuming jurisdiction of contaminated sites when it has information to suspect a release; and for considering proposals for community involvement outside so called environmental equity communities.

DEM has chosen to draw a line in the sand, claiming it has complied with the Order and refusing to reconvene the Stakeholder Group so the Group can complete its court ordered charge. At any time DEM could reconvene the Stakeholder Group and allow the Group to develop proposals for legislation, regulations and policies on the issues contained in the Order; and as such, DEM carries "'the keys of [its] prison [cell] in [its] . . . own pockets.'" *Durfee v. Ocean State Steel*, 636 A.2d 698, 704 (R.I. 1994). As explained below, DEM's arguments that it with the Order and the work of the Stakeholder Group is complete all lack merit and it should be adjudged in contempt.

A. The Order Required the Stakeholder Group to Develop More Than a Single Policy

DEM maintains that the Order only required the Stakeholder Group to develop a single policy. DEM had to, in effect, re-draft the Order to support its argument. DEM asks the court to focus on the word "or" in that part of the Order which reads "legislation, regulations and/or policies." DEM Mem., at 6. DEM ignores the fact that the Order uses the term "and/or" and not simply "or." DEM also ignores that the Order uses the plural not singular form of the words "legislation,[2]" "regulations," "policies" and "proposals." Logically, since the Order charged the Stakeholder Group with addressing five distinct

[2] The plural and singular forms of the word "legislation" are identical; given the use of the plural forms of the words following that term in the Order it is clear that the plural form of "legislation" was intended.

issues, the Order envisioned that the Group would address those issues with multiple "proposals"--some in the form of legislation, and others in the form of regulations or policies. It could not be clearer that the Order contemplated that the Stakeholder Group would develop more than a single policy in draft form during its deliberations.

Next, DEM argues that legislation it proposed even before the Stakeholder Group was assembled somehow discharged DEM from its court ordered obligation to allow the Stakeholder Group to develop new proposals for legislation on the five issues listed in the Order. DEM Mem., at 7-8. DEM proffers not a single iota of legal authority to support an argument which, again, flies in the face of the Order's clear and unambiguous terms.

Finally, DEM argues that since no one in the Stakeholder Group, including plaintiffs' counsel, put forth proposals for legislation or regulations that the work of the Stakeholder Group is complete and DEM has discharged its obligations under the Order. DEM Mem., at 7. Since DEM and its consultant developed the agenda for each meeting of the Stakeholder Group, Gray Depo., at 27-8, this alleged failure on Stakeholder Group members' part should have no bearing on whether DEM complied with the Order. Even if such failure was relevant to the Court's determination, DEM's representation is factually inaccurate. At the second Stakeholder Group meeting on December 19, 2006 plaintiffs' counsel presented a 72 page report containing numerous proposals relevant to the Stakeholder Group's work entitled "Environmental Justice for States: A Guide for Developing Environmental Justice Programs for State Environmental Agencies." See Environmental Equity in the Clean Up and Reuse of Contaminated Properties in Rhode Island, RIDEM Community Network Meetings, Meeting notes and Agendas, Gray Depo, Exh. 8. A copy of this report is attached hereto as Reply Exhibit 1. Said report was a

compilation of "'best practices' for use by a stakeholder group assembled by RIDEM" and contains numerous proposals that the Stakeholder Group could have considered had DEM allowed the Stakeholder Group to continue its work as requested by plaintiffs, particularly regarding the issues of cumulative impact, disparate impact and community involvement. Reply Exhibit 1 at 1, 32-41; 50-67.

B. Cumulative Impact and Disparate Impact

DEM steadfastly maintains that the issues of "cumulative impact" and "disparate impact" are beyond the scope of the Order, since these issues "by definition [are] multimedia concerns." DEM Mem., at 14-15. Plaintiffs agree that these issues involve multiple environmental media; but that fact has no bearing on whether DEM complied with the Order. At its deposition DEM testified that it must evaluate contamination in different environmental media, soils and groundwater, when evaluating clean up plans for a specific site. Crawford Depo., 12-13. Hence, it is completely appropriate for DEM to consider the multimedia concerns of "cumulative impact" and "disparate impact" as part of its review of clean-up plans at contaminated sites.

The Order, itself, prescribes no barrier for the Stakeholder Group to develop proposals on cumulative impact and disparate impact due to the multimedia nature of those issues. Rather, the Order directed the Stakeholder Group to develop proposals on "[i]ssues to consider and methods and standards to employ to ensure the agency takes a 'hard look' at environmental equity issues when reviewing clean up plans for contaminated sites . . . ." Order at 2. DEM concedes that cumulative impacts would be an issue to look at when evaluating clean up plans for contaminated sites ("DEM recognizes that cumulative impacts are valid concerns in each of its programs, and DEM examines

and responds to and addresses such concerns when they are raised in relation to a particular site." DEM Mem., 15). Moreover, the United States Environmental Protection Agency views cumulative impacts and disparate impacts as issues for a recipient such as DEM to consider when evaluating environmental equity issues. *See* Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39655, 39660-61 (June 27, 2000).[3]

C. DEM's Assuming Jurisdiction When it Possesses Information About Contamination at a Site

DEM maintains "[t]he only way that DEM would come upon information to suspect the possibility of a release or contamination is through the already-established public petitioning and complaint process under IPRARA and the Remediation Regulations." DEM Mem., at 12. Apparently, DEM rejects the Court's common sense observation that it should have assumed jurisdiction over the Springfield Street Schools Site when DEM already possessed information that the Site was contaminated. *Hartford Park Tenants Ass'n v. R.I. Dep't of Envtl. Mgmt.,* C.A. No. 99-3748, slip op. at 49-50 (R.I. Super. Oct. 3, 2005) (hereinafter, "*HPTA v. DEM").* DEM offers no explanation why it cannot assert jurisdiction over a site when it already possesses information indicating a site is already contaminated or likely to be contaminated. Moreover, while DEM asserts that the issue was discussed by the Stakeholder Group and is addressed by the Draft Policy, DEM Mem., at 13, DEM provides no citation to the Draft Policy or any other document to support its assertion. That assertion is contradicted by DEM's sworn

[3] As part of recipients' compliance activities with Title VI of the Civil Rights Act of 1964, EPA encourages recipients such as DEM to conduct disparate impact analyses, and as part of those analyses "[d]etermine whether the activities of the permitted entity at issue, either alone or in combination with other relevant sources, cause one or more impacts and develop measure[s] of the magnitude and likelihood of occurrence." Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed. Reg. 39655, 39660 (June 27, 2000).

testimony where DEM expressly admitted that the Draft Policy failed to address this issue. Gray Depo., at 85-86.

D. Community Involvement in the Investigation and Clean Up of Contaminated Sites Located Outside Environmental Equity Areas

DEM maintains that the Order limits the Stakeholder Group's development of proposals for legislation, regulations and/or policies regarding community involvement only to contaminated sites located in "environmental equity areas." Specifically, DEM contends that because the Stakeholder Group was to be composed of "a fair cross section of parties having an interest in the investigation, remediation and redevelopment of contaminated sites in environmental equity areas" it would be "inequitable" to "impose" a Stakeholder Group formulated policy on the whole state. DEM Mem., at 16.

The Court should reject DEM's argument as the plain and clear language of the Order does not confine the issues to be considered by the Stakeholder Group to environmental equity areas. In charging the Stakeholder Group, the Order directs the Stakeholder Group to address five specific issues "in a manner that balances the public's interest in participation with the public benefits from the redevelopment of contaminated sites," with no reference to "environmental equity areas." Order, at 1. The only place the term "environmental equity areas" appears in the Order is in a sentence that describes the range of constituencies that would participate in the Stakeholder group, not the range of issues the Group was charged to address. Thus, the Order directs DEM to include in the Group "a fair cross-section of parties having an interest in the investigation, remediation and redevelopment of contaminated sites in environmental equity areas." *Id.*

DEM's argument, also, ignores the purpose of the Order as recited in the Order's first sentence: "[t]o redress the violations of the Industrial Property Remediation and

Reuse Act, R.I.G.L. §23-19.14-1 *et seq.* regarding community involvement **and** environmental equity, as found by the Court in Conclusions of Law 2, 4, 6, 7, and 8 of its October 3, 2005 Decision." Order, at 1 (emphasis added). DEM's obligations under section 5 of IPRARA, R.I.G.L. §23-19.14-5, regarding community involvement and environmental equity are separate and independent. The Court recognized this separation when it issued two separate conclusions of law regarding DEM's violation of R.I.G.L. §23-19.14-5: number 7 as to its failure to consider environmental equity issues and number 8 as to its failure to develop and implement a community involvement process. *HPTA v. DEM, supra,* at 110. Consequently, the Stakeholder Group was charged to develop proposals for legislation, regulation and policies regarding "a community involvement process during the investigation and remediation of contaminated sites" without regard to a site's location within an environmental equity area. Order at 2.

Finally, DEM's argument that it would be "inequitable" to "impose" proposals developed by the Stakeholder group statewide lacks merit, given that almost every constituency comprising the Stakeholder Group has an interest in the redevelopment of contaminated sites regardless of location. This includes not only DEM and plaintiffs, but several of the parties listed in the Order such as environmental organizations, government representatives, elected officials, developers, representatives from environmental consulting industries and "others."

E. Sovereign Immunity Does Not Prevent an Award of Costs to Plaintiffs for Losses They Sustained

Relying on arguments it made in response to Plaintiffs' Application for Costs still pending before the Court, DEM contends that sovereign immunity bars the Court from compensating plaintiffs for losses it sustained due to DEM's violation of the Order, and

for the lack of any statutory award allowing such an award. DEM Mem., at 28. DEM fails to cite a single case regarding the application of the doctrine of sovereign immunity in the context of a contempt proceeding; and all the cases cited by DEM in response to Plaintiffs' Application for Costs do not address this issue.

Sovereign immunity has never affected the judiciary's power to remedy a violation of a court order in a contempt proceeding. Our Supreme Court has noted that the judiciary's contempt powers are "plenary." *School Comm. v. Westerly Teachers Ass'n*, 111 R.I. 96, 104 (R.I. 1973). The court's plenary contempt powers may be exercised "to coerce the defendant into compliance with the court order and to compensate the complaining party for losses sustained as a result of the violation of the court order." *Durfee v. Ocean State Steel*, 636 A.2d 698, 704 (R.I. 1994) (citing *Ventures Management Co. v. Geruso*, 434 A.2d 252, 254 (R.I. 1981)). Here, plaintiffs incurred costs for depositions to create a record regarding DEM's compliance with the Order and Side Agreement. Had DEM voluntarily addressed the compliance issues raised by plaintiffs, plaintiffs would not have had to incur these costs and seek judicial relief.[4] This loss to plaintiffs is precisely within the Court's plenary contempt powers to compensate a complaining party for losses sustained due to DEM's violation of the Order.

[4] After taking DEM's deposition it took steps to address some of the compliance issues plaintiffs raised regarding the Order and Side Agreement. As to the Order, subsequent to the deposition DEM provided a draft written explanation of its reasons for not acting on certain proposals generated in the Stakeholder Group process; and as to the Side Agreement DEM sent the required written notice about its on-line document repository. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion to Adjudge Defendant DEM in Contempt and Appoint Special Master to Oversee Implementation of Order and Plaintiffs' Motion to Enforce Side Agreement With Defendant DEM, at 17-18.

III. A Special Master is Needed to Oversee the Stakeholder Group Since DEM Prevented the Group from Completing Its Work

Throughout its response to plaintiffs' motion and in its sworn testimony DEM proclaimed that the work of the Stakeholder Group has been completed. DEM's steadfast adherence to this position exemplifies why the Court should appoint a special master. Similarly, DEM's unsubstantiated and inaccurate claim that plaintiffs and their counsel are the only objectors to its closing out the Stakeholder Group process reflects DEM's hostility to the very modest level of judicial intervention in the its affairs stemming from the violations of law found by the Court.

Plaintiffs have already established that the work of the Stakeholder Group set out in the Order has not been completed. The fault for this outcome lies completely with DEM, which refuses to reconvene the Group to complete its Court ordered charge to develop legislation, regulations and or policies. DEM even goes as far as stating its opposition to the Group's developing proposals for legislation and regulation in its response to plaintiffs' motion:

> DEM, in its best professional judgment has decided that now is not the appropriate time to **develop** legislation and/or regulations, and that **development** of legislation and/or regulations at this time would not be the most efficient or effective means of affecting environmental justice progress at DEM.
>
> Mem., at 11. (Emphasis added).

DEM's outright opposition to the Stakeholder Group's developing proposals for regulations and legislation renders it unfit to continue its role as convener of the Group. Under these exceptional circumstances the Court should exercise its authority acknowledged by DEM to appoint a special master to ensure the Stakeholder Group can complete its court ordered charge.

DEM would have the Court believe that plaintiffs and their counsel are the only parties interested in the continued work of the Stakeholder Group. Plaintiffs cannot understand how DEM can make this representation to the Court when it acknowledges that no votes were ever taken in the Stakeholder Group and that the Stakeholder Group was never asked its opinion as to whether the Group had completed its work. DEM Mem., at 8, 9; Gray Depo., at 34-36, 88. Nor is DEM's representation accurate, as two members of the Stakeholder Group members and a newly formed environmental justice group wrote to DEM after it announced the "final" meeting of the Stakeholder Group had been scheduled for July 30, 2008 and urged it to allow the work of the Stakeholder Group to continue. Copies of these written communications were appended to a request for admission served upon DEM following receipt of DEM's objection to this motion, and a copy of the request for admission is appended hereto as Reply Exhibit 2.

The Court should recognize that DEM's attempt to portray plaintiffs as the sole dissenters is motivated solely by a desire to be free of the Court's involvement its affairs. DEM all but admits that motivation in the following passage:

> DEM is continuing to explore options to continue the broader dialogue on environmental justice, but is seeking to do so in a way that moves beyond the boundaries of this Order to allow consideration of programs outside the site remediation program and removes the continued threat of contempt motions such as this one . . . .
>
> DEM Mem., at 25.

Finally, DEM argues that "[e]ven if a special master were to be appointed to oversee DEM's 'completion' of th[e Stakeholder Group's] work, there is still no guarantee that any regulations or legislation will ever be adopted in the form proposed." DEM Mem., at 26. Plaintiffs acknowledge the lack of guarantee regarding the final form

of any legislation or regulations the Stakeholder Group may develop; but remind the Court that DEM is the actor that has prevented the Stakeholder Group from considering and developing those proposals. DEM's continued reticence to letting the Group consider and develop proposals on the issues the Order charged it to address can only be effectively overcome through the appointment of a Special Master.

IV. Plaintiffs Produced Sufficient Evidence that DEM Violated the Side Agreement

A. DEM's Failure to Post Electronic Correspondence Placed in its Hard Copy Repository Violates the Side Agreement

DEM does not dispute that the twenty two pieces of electronic correspondence placed in its hard copy document repository for the Springfield Street Schools Site were not posted on the on-line repository. DEM points to language in the Side Agreement stating that DEM "will not attempt to convert the entire site file" so justify its exclusion of electronic correspondence from the document repository. DEM Mem., at 19. However, that sentence applies to documents that had been placed in the DEM's hard copy repository at the time the Side Agreement was signed, not to documents that would be placed into the hard copy repository in the future. The relevant provision of the Side Agreement reads:

> In addition, DEM will investigate the feasibility of converting (scanning) some **existing** paper documents into electronic format over time. DEM's efforts at converting paper documents for on-line posting will focus on the more relevant **existing** document and will not attempt to convert the entire site file.
>
> Side Agreement, at 1 (emphasis added).

DEM's concedes there is no technological reason why electronic correspondence cannot be posted, but then claims plaintiffs' position places to great a burden on its

limited resources. DEM Mem., at 19-20. Plaintiffs did not mean to suggest that every DEM employee search their emails for mention of the Springfield Street Schools, then make a determination about privilege and redact privileged information. Rather, any time a DEM employee prints out electronic correspondence and places that correspondence into DEM's hard copy repository, the employee should give a copy to the webmaster for posting on the electronic repository. That extra step can hardly be considered burdensome, and accomplishes the purpose of granting the public on-line access to documents contained in DEM's hard copy repository.

B. DEM Never Made Any Written Finding As To Whether the Approved Remedy Is Protective of Human Health and the Environment and Never Sent that Finding To Persons Entitled Under the Side Agreement

DEM concedes it never made any findings regarding the overall protectiveness of the remedial actions in place at the Springfield Street Schools Site and argues that the field inspection conducted in September 2006 satisfies the Side Agreement's five-year review requirement. DEM Mem., at 22. Had the Side Agreement only required DEM to inspect the site every five years and post a report of the inspection on the on-line repository its argument would have merit. However, the Side Agreement requires more of DEM: to review every five-years "the approved remedial action [at the Springfield Street Schools Site] to assure that human health and the environment are being protected by the remedial action being implemented . . . " and "provide public notice of "the findings of its review" to certain named individuals and entities listed in paragraph 1(C) of the Side Agreement. Side Agreement, at ¶4.

DEM also argues that its review of quarterly monitoring reports satisfies its requirements, and that DEM is "confident that the remedy as a whole was properly

functioning to assure that human health and the environment were adequately protected." The Court should reject DEM's proffered post hoc rationalization for its failure to make findings regarding the overall protectiveness of the remedy as the Side Agreement expressly requires.

Nor should the Court should give any credence to DEM's contention that "DEM never proposed that the reviews conducted would be in any way similar to the five-year reviews conducted by Superfund sites . . . ." DEM Mem., at 21. DEM's contention is contradicted by the its sworn testimony regarding the reason DEM suggested a five-year review in the first place: because "EPA does a five-year review of the Superfund remedies and that such a regular review of this particular remedy [at the Springfield Street Schools] is probably warranted because of the reliance on maintenance of these [remedial] systems. *Id.*, at 100-01. This statement, also, explains why the five-year review language in the Side Agreement is nearly identical to the language in the federal Superfund Law granting EPA the authority conduct five-year reviews of Superfund sites.

V. CONCLUSION

For the reasons set forth in plaintiffs initial memorandum of law and those advanced in this reply to DEM's opposition memorandum of law the Court, should grant the relief request in plaintiffs' motion to adjudge defendant DEM in contempt and appoint special master to oversee implementation of order and plaintiffs' motion to enforce side agreement with defendant DEM.

PLAINTIFFS,

BY THEIR ATTORNEYS

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CERTIFICATION

I hereby certify that on this 15th day of December, 2008 I caused to be sent by first class mail, postage prepaid, a true copy of the foregoing memorandum of law together with attached exhibits to the following:

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