

Heritage Dictionary of the English Language 123 (Houghton Mifflin 4th ed. 2000); see also Doran v. Petroleum Mgmt. Corp., 545 F.2d 893, 904 (1977) (“The ‘availability’ of information means either disclosure of or effective access to the relevant information.”). “Adequate” is defined as “sufficient to satisfy a requirement or meet a need.” The American Heritage Dictionary at 21. The requirement that must be met pursuant to Section 5(a)(2) is to “ensure community involvement.” Therefore, the statute requires that the public records be made accessible enough to “ensure community involvement.” Clearly, establishment of informational repositories in the impacted communities provides prima facie effective access. Section 5 (a)(2). The issue here is whether or not the presence of the records at DEM’s offices in Providence was sufficient to ensure the involvement of the community impacted by the Springfield Street site clean-up.

The documents were kept at DEM offices in Providence. There were no informational repositories set up in the impacted community. Information on the availability of the records was not offered until the April 26, 1999 meeting. A flyer sent out on April 9, 1999 announced the meeting and mentioned the existence of public records but did not state how such documents could be obtained and did not provide a contact name or number. Low income minority residents comprised most of the impacted community. Such citizens are generally not highly educated in the arcane workings of state agencies and, therefore, could be expected to require some clear direction as to how to access the relevant records. DEM’s own argument suggests that the community did not gain access to the records in time to effectively comment on the proceedings: DEM was open to public comment at the April meeting, but while it heard general lamenting over the construction of schools on the Site, no substantive technical

comments were elicited. Inadequate access to the relevant public records could explain the lack of substantive comments—the uninformed cannot effectively speak to specific technical issues. That the information was not sought after and denied does not tend to show that the information was adequately available, to the contrary, it demonstrates that the information was too unavailable to be sought after by members of the impacted community. The IPRARA requires informational repositories when necessary. Given the nature of the project (construction of schools) and the make up of the impacted community (low income and minority) the necessity for DEM to make some effort to provide effective access is apparent. Simply housing the documents at DEM headquarters was not enough to satisfy the statute.

Section 5(a)(3)

Finally, Section 5(a)(3) requires that “[n]otification to abutting residents, and other interested parties, when the investigation of the Site is deemed complete by the department of environmental management” be included as part of the community involvement process that must be developed and implemented. DEM developed a process that included such notification by promulgating Remediation Regulations §§ 7.07 and 7.09. Section 7.07B requires the performing party—in this case, the City—to both notify abutters and to provide them with findings:

“When the Site Investigation is deemed complete, the Department will issue a program letter confirming that the performing party has adequately assessed the nature and extent of contamination at the contaminated site. Prior to the formal Department approval of the Site Investigation Report (in the form of a Remedial Decision Letter), the performing party must notify all abutting property owners, tenants and community well suppliers associated with any well head protection areas which encircle the contaminated-site that the investigation is complete and

provide them with the findings of the investigation and any proposed remedial alternative which includes on-site treatment and/or containment of hazardous materials as part of the final remedy.” CRIR 12-180-001 § 7.07B.

Moreover, section 7.09 requires more than mere notice when the remedial alternatives chosen will include onsite treatment or containment of hazardous materials:

“All preferred remedial alternatives which include on-site treatment and/or containment of hazardous materials as part of the final contaminated-site remedy shall be subject to public notice as specified in Rule 7.07 (Public Notice), *and* shall be subject to public review and comment regarding the technical feasibility of such preferred remedial alternative prior to issuance of the Remedial Decision Letter.” CRIR 12-180-001 § 7.09.

Despite the existence of these regulations, however, the process was not implemented during the Springfield Street Site investigation and remediation. When the site investigation was deemed complete, DEM issued a Remedial Decision Letter on April 9, 1999, which set conditions to be met before final approval. Among these conditions were the completion of the technical design plans and public notice and comment. DEM contends that the April 26, 1999 meeting provided both adequate notice and ample opportunity for comment. DEM also argues that since a final order was not issued until June 4, 1999, abutters and interested parties had more than a month to provide substantive technical comment after the April 26th meeting. Even if this Court allows for DEM to consider the term “Remedial Decision Letter” a misnomer because of the conditions attached (thereby transforming it into a “program letter”) the manner of notification, solely via the April 26, 1999 public meeting, was insufficient to satisfy the statute’s mandate. The abutters, even if they received the flier announcing the meeting, were not necessarily informed that a site investigation was deemed complete if they were

not in attendance. Additionally, interested parties, “those who ha[d] a recognizable stake (and therefore standing) in the matter,” Black’s Law Dictionary 1144 (7th 1999), may not have even received the flyer to become aware of the meeting.

In summary, this Court declares DEM actions, but mostly inactions, with respect to approving the City’s plans to construct the schools on the Site violated G.L. § 23-19.14-5. Specifically, DEM did not meet the environmental equity and community involvement requirements established by IPRARA Section 5(a).

COUNT TWO: REMEDIATION REGULATIONS

Plaintiffs claim that Defendants violated various sections of the Remediation Regulations. For the purpose of addressing these claims, the allegedly violated sections can be divided into two categories: those regulations requiring notice to third parties, and those regulations requiring approval by DEM based on the context of the performing party’s SIR and RAWP.

A. Notice Regulations

The facts relative to the notice regulations have been discussed in the preceding Count I, supra. Based on these facts, and the plain language of the regulation, this Court decided on summary judgment that the City had violated section 7.07 by failing to notify abutting property owners “prior to the implementation of the Site Investigation Field activities” and by failing to notify and provide necessary information to abutters when the site investigation was deemed complete. CRIR 12-180-001 § 7.07. Here, the Court further holds that the City violated section 7.09 by the same inaction attendant to the violation of section 7.07. Section 7.09 requires public notice and comment when the

remedial alternative includes “onsite treatment and/or containment of hazardous materials.” CRIR 12-180-001 § 7.09. Since the remedy at the Site included on-site treatment and/or containment of hazardous materials—the installation of a sub-slab ventilation system, capping of the soil in some areas and a soil gas ventilation system—section 7.09 applied. Despite this requirement, the City failed to timely notify even the abutting property owners, made no effort to supply pertinent information to the public on which substantive comment could be based, and did not even ensure that the public records were adequately available. The failure to properly notify and provide the necessary information as required in section 7.07 resulted in a failure to elicit the requisite substantive public review and comment.

Additionally, the Court holds that DEM likewise violated section 7.09 by issuing the Remedial Decision Letter in spite of the obvious lack of public comment. Section 7.09 requires that public comment be afforded prior to the issuance of the Remedial Decision Letter and specifically requires that “the decision regarding the appropriateness of a site remedy shall be based upon the information contained within the decision record for the contaminated site, and that the decision record shall include . . . B. [a] final response, approved by the Department, to substantive public comments.” *Id.* In the instant case, the Department issued the Remedial Decision Letter without consideration of any final response to public comment (no such comment existed nor had any been solicited by the City or the DEM). Clearly, the Remedial Decision Letter was advanced without adherence to the Section 7.09 mandate.

B. Context Regulations

1. Plaintiffs' Argument

The main thrust of Plaintiffs' argument relative to the remaining regulations is that Defendants' failure to adhere to them resulted in implementation of an inadequate site investigation and remedy. The first specific violation complained of is DEM's failure to issue a program letter as required by Regulation 7.07 B, thereby allowing an incomplete characterization of both the horizontal or vertical extent, on and through the Site, of any potential chemicals or compounds of concern.

Plaintiffs also assert that sections 7.0 and 8.0 were violated by the Municipal Defendants in pursuit of the site remediation process, and that sections 7.0, 8.0, and 9.0 were violated by DEM for approving the actions of the Municipal Defendants in pursuit of the site remediation process. The allegedly violative actions of the Municipal Defendants include use of improper engineering and scientific judgment in characterizing the geology and lithology of the Site, failure to test for the presence of certain hazardous and toxic substances known to be or highly likely to be at the Site, failure to conduct scientifically adequate testing to determine the location, nature, extent, and migration of hazardous and toxic substances on the Site, and failure to propose and implement the remedy that is most protective to human health and the environment.

Specifically, the Plaintiffs claim Remediation Regulation section 8.02 requires that contaminated soil be remediated in a manner which meets the direct exposure and leachability criterion for "each hazardous substance established in Rule 8.02B (Method I Soil Objectives: Tables 1 and 2)." CRIR 12-18-001 § 8.02B. Tables 1 and 2 (the Direct Exposure Criteria for Soil and the Leachability Criteria) list several known substances

and set the maximum amount of each that may safely be present for either residential exposure or industrial/commercial exposure, with the former generally amounting to a much smaller amount than the latter. There is no dispute that several substances listed, including many under the category of “metals” and whole categories of substances, such as pesticides and semi-VOCs, were not tested for as part of the City’s site investigation. The Plaintiffs assert that unless a substance is tested for, it cannot be determined whether concentrations existed in excess of the Table 1 and 2 standards. Therefore, Plaintiffs argue that the SIR was incomplete under Remediation Regulations sections 7.04A (Site Investigation Report must contain documentation of compliance with Section 8) and 7.08 (“A completed Site Investigation Report must contain all the information set forth in Rule[s] 7.04 . . . as necessary and appropriate”). Accordingly, Plaintiffs assert that the remedy, which was based on this incomplete site investigation, is inadequate.

Plaintiffs further contend that given the past use of the Site, even if the Remediation Regulations did not explicitly require testing for the presence of all of the substances listed, “sound professional judgment,” pursuant to section 7.03, dictated the necessity of testing for those substances. The Plaintiffs point out that there were no historical restrictions on what could have been disposed of at the Site, so any kind of waste could have been deposited. Therefore, sound judgment - and common sense - would require testing for a greater number of substances.

Specifically, Plaintiffs’ expert, Christine Pollock (Pollock), testified that the following substances should have been tested for: thirteen priority pollutant metals, metals base neutral extract table compounds, pH, PCBs, pesticides, and herbicides. Pollock further suggested that tests should have been taken for such hazardous

characteristics as toxicity, corrosivity, reactivity, and ignitability. Claiming that Defendants' remedy failed to address many possible contaminants that were not discovered, Plaintiffs' argument can be summed up as follows: "the absence of evidence of harm is not the same thing as evidence of the absence of the harm." Morrillo-Frosch, Pastor & Sadd, Integrating Environmental Justice and the Precautionary Principle in Research and Policy Making: The Case of Ambient Air Toxics Exposures and Health Risks Among Schoolchildren in Los Angeles, 584 *Annals* 47, 50 (2002) (internal citations omitted).

Given the greater susceptibility of minority school age children in Providence to the harmful effects resulting from exposures to contamination, as established by the testimony of Plaintiffs' expert Dr. Mitchell, and the lack of data about the nature and extent of such contamination at the Site, the Plaintiffs argue that the most conservative and protective remedy available should have been implemented. Plaintiffs suggest that a RCRA cap, the "presumptive remedy" for closing an unengineered landfill under Rhode Island's Solid Waste Regulations, was the most conservative and protective remedy available and that such should have been used in lieu of the cover consisting of two feet of clean fill that was implemented. Accordingly, the Plaintiffs ask this Court to declare that DEM and the Municipal Defendants failed to comply with DEM's Remediation Regulations when the Municipal Defendants applied to DEM for permission to construct the schools on the Site.

2. Defendants' Argument

As for the lack of a program letter, DEM concedes that it did not issue one, as was required by the plain language of Remediation Regulation § 7.07B; however, DEM urges

this Court to consider the April 9, 1999 Remedial Decision Letter, as fulfilling this requirement; and the June 4, 1999 Order of Approval as fulfilling the requirement of the Remedial Decision Letter.

As for the adequacy of the site investigation and the approved remedy, DEM adamantly defends both. The Department argues that no evidence was presented to show that the approved remedy was inadequate to protect the users of the Site from direct exposure to the kinds of hazardous materials known to be present at the Site. DEM also points out that Section 7.01 provides that the site investigation process is discretionary on behalf of the Director of the Department. CRIR 12-18-001 § 7.01 (“The Director may require . . . an investigation” (emphasis added)). Likewise, DEM contends that the identification of the list of contaminants to be tested at a site is also discretionary and left to the “best professional judgment” of an applicant’s experts and DEM’s staff. DEM does not require that each of the substances listed in the exposure tables be tested in every case. Rather, experts determine which substances to test for based on the history of the site and other pertinent data consistent with their sound professional judgment. Furthermore, DEM maintains that the Springfield Street Site investigation was abundantly protective even though every substance mentioned in §8.02B was not tested for, because all subsurface media - including soil, groundwater, and soil gas - were appropriately tested for contaminants. DEM argues that the testing that was done was adequate to ensure the development of a remedy at the Site that would be protective of all known and reasonably foreseeable contaminants.

Specifically, DEM contends it was not required to do additional testing of contaminant metals or landfill gases. Jeffrey P. Crawford, then a principal environmental

scientist at DEM, testified at length that additional metals were rarely encountered in Rhode Island, and when they were, they were associated with specific activities that were not known to have occurred at the Site. Moreover, Crawford testified that when hazardous levels of metals, such as lead and arsenic, were discovered, the remedy implemented, capping the Site, eliminated direct exposure of other such metals; thus, additional testing for other metals was unnecessary.⁶ In addition, testing for landfill gases, volatiles or semi-volatile organic compounds (“VOCs” or “SVOCs”) in soil and groundwater also became unnecessary because the remedy included soil vapor extraction and monitoring systems to check and prevent harmful vapors from entering the school buildings. This remedy, according to Crawford, removes all vapors, not just those tested for during the investigation.

DEM also maintains that the groundwater at the Site was found to be within the appropriate classification for the Site and the entire surrounding area, and, since the groundwater quality on-site was compliant with the groundwater classification for the surrounding areas, no groundwater remedy was required. DEM believed there was no reason to perform a detailed study of groundwater flow, to map groundwater contours, or perform fate and transport models.⁷ There was no evidence that contamination at the Site

⁶With regard to soil testing, DEM also maintains the soil on the Site was widely tested for contaminants, including twenty test pits. DEM points to its Exhibit D to show that the soil testing locations were reasonably well distributed throughout the Site. DEM claims analysis included tests for VOCs, polychlorinated biphenyls (“PCBs”), total petroleum hydrocarbons (“TPH”) and RCRA-8 metals (arsenic, barium, cadmium, chromium, lead, mercury, selenium and silver). With the exception of one exceedance for TPH, DEM argues the predominant soil contaminants observed across the Site were lead and arsenic, which are common urban contaminants. DEM maintains that these analytical findings resulted in the capping of the Site to prevent direct exposure to soils contaminated with these metals.

⁷The City’s analysis of the groundwater found no exceedance of DEM’s established “GB Ground Water Objectives” at 23 groundwater sampling points. See Remediation Regulation Table 4, and Pl. Ex. 38, Tables 2 and 5. Furthermore, Crawford testified that both the Site and all surrounding areas were classified as “GB” groundwaters, which are defined by statute as “groundwater sources which may not be suitable for public or private drinking water without treatment due to known or presumed degradation.” Section 46-13.1-4(a)(3).

was a threat to surrounding properties. Moreover, DEM points out that the groundwater at the Site was observed to be between 6.5 and 17.8 feet below grade during the site investigation (before the 2-foot soil cap was applied to the Site), which is not a direct contact threat.

Furthermore, DEM declares that the requirements of the Remediation Regulations were actually exceeded by requiring independent exposure criteria for gasses or vapors. The Remediation Regulations, as then constituted, only required a site to be characterized for contaminants in soil and groundwater. The regulations contained no independent exposure criteria for gasses or vapors which might be found within the soil. However, since soil gasses are known to be a by-product of the decay and decomposition of garbage, DEM requested a soil gas study at the Site. The City collected soil gas samples at twelve sampling points that were primarily located in the footprint of the middle school building, where the waste was deepest and was proposed to be contained on-site. The soil gas study evaluated both "landfill gasses" (methane, carbon dioxide, & oxygen) and a number of VOCs and SVOCs. Lacking Rhode Island promulgated regulatory standards with which to evaluate such contaminant levels in soil gas, DEM and the City agreed to use residential "volatilization" criteria from Connecticut to evaluate the VOCs and SVOCs in soil gas at the Site.

The results of these analyses showed no violation of the Connecticut standards. In fact, analyses of landfill gasses showed no or low concentrations of methane and high concentrations of oxygen. Given these results, the City's consultants concluded that high concentrations of oxygen were evidence of aerobic decomposition that would minimize the potential for methane to become a health or safety threat for the schools. Combined

with the fact that Rhode Island lacks any enforceable standards for soil gases, DEM asserts that these low risk analytical results could easily have been interpreted to mean that there was no need for any remedial action with respect to soil gas. Nonetheless, due to the history of the Site, the sensitive nature of the Site's proposed use (schools), and the obvious difficulties inherent to retrofitting the school buildings with sub-foundation vapor removal systems if soil gases were found to be a problem in the future, DEM required that soil gas monitoring and abatement be included as part of the remedy.

Accordingly, not only were each of the buildings constructed with sub-foundation soil vapor extraction systems to prevent soil gases from entering into the buildings, the entire Site was ringed with soil sentinel wells to monitor trends in soil gases. These perimeter wells not only have a monitoring function, but they are also capable of being interconnected and vented to provide extra soil vapor extraction capabilities if they are required at the Site. Thus, DEM argues its remedy utilized the most protective criteria available and appropriate - beyond the Department's strictest regulatory standards.

Finally, DEM argues that the Plaintiffs have failed to show any damage. DEM admits there were some intermittent, short-term problems associated with dust and odors; however, DEM maintains these temporary nuisances were vastly outweighed by the positive environmental consequences flowing from the investigation and remediation of a previously uncontrolled, abandoned dumpsite. More importantly, DEM points out that the Plaintiffs have provided no evidence of negative environmental consequences, actual health impacts from exposure to contaminants emanating from the Site, which can be traced to an inadequate remedy approved by DEM.

The City concurred with DEM, maintaining that the schools are environmentally safe and that the site investigation was adequate. At trial, the City provided two witnesses whose opinions were based on uncontested data and reports.

Timothy O'Connor (O'Connor), a registered professional engineer and Director of Environmental Services for a civil engineering firm, was qualified as an expert in the investigation and remediation of hazardous materials and sites in Rhode Island, as well as the occurrence and geochemistry of metals in Rhode Island soil. He rendered an expert opinion as to a reasonable degree of scientific certainty that the scope of the site investigation was tailored to the specific conditions and circumstances at the Site using the best professional judgment required in Remediation Regulation § 7.01 ("The scope of the Site Investigation shall be tailored to specific conditions and circumstances at the site under investigation.") and that the site investigation was conducted in a manner that facilitated selection of a remedy for the Site pursuant to the same regulation. He testified that the Site is in an urban area where groundwater is not used as drinking water and noted that the site investigation found no exceedance of standards for any media other than soil. He added that he was aware that autofluff had once been present at the Site and that industrial waste had also been deposited there. He also admitted that some materials, such as some metals not among the "RCRA 8," the groundwater, or the PH in the soil, had not been tested for; however, he testified that it is not the industrial standard to test for such materials when investigating municipal landfills. O'Connor also noted that DEM had never rejected a site investigation or RAWP that he had helped to prepare. Most importantly, O'Connor testified that the remedy would not have changed even if the additional materials had been found at the Site. He explained that such contaminants are

not mobile in the environment and there would not be a concern about them “dissolving into groundwater and moving very far,” especially in an area such as this Site “where no one is drinking the water” and said groundwater is “10 to 12 feet below the surface” and “cannot flow to the surface.”

The City’s other expert was Dr. John Collins (hereinafter “Collins), a PhD and chief scientist at Vanasses, Hangen, Brustlin, Inc. (who conducts “risk assessments”-discipline dealing with making decisions about hazardous waste sites). Having worked on between 50-200 uncontrolled landfills in 40 different states, and having previously performed risk assessments on populations consisting of elementary and middle school age children, he was qualified as an expert in “risk assessments on hazardous waste sites” and stated that the industry standards in Rhode Island for his area of expertise are enumerated in Section 8 of the Remediation Regulations. He was very familiar with the SIR, RAWP, monitoring reports, nurse’s logs, and deposition and trial testimony of Plaintiffs’ experts. Collins testified that the remedial objectives and soil objectives in the SIR and RAWP “are protective of human health and the environment.” He also determined that the groundwater objectives in the SIR and RAWP were likewise protective. Furthermore, Collins testified that not all of the substances in §8.02B presented a risk of harm to humans. He did not agree that testing for pesticides at the Site should have been performed. He agreed that the levels of lead found at the Site exceeded the Direct Exposure Criteria, but stated, “I know that lead is not moving across the site” and the risk of it to humans is “extremely low.” He also had a high degree of certainty that “the groundwater is not coming to the surface.” In his expert opinion, there was no significant health risks presented by the remedy regarding action levels for carbon

monoxide and carbon dioxide that were detected in the soil gas removal system at the schools. He testified that the remedy was designed to protect against all of the potential contaminants; therefore, separate tests for cyanide, beryllium, copper, manganese, nickel, or zinc were unnecessary. He also opined that lead was not important regarding groundwater because there would not be a great deal of mobility with the levels present. He further testified that the exceedance of action levels for carbon dioxide did not change his opinion. Finally, he explained that the remedy chosen prevents exposure of any contaminants, so it is not necessary to establish the presence, or absence, of each.

3. Analysis

The question is whether or not the actions taken by the City in determining the scope of the investigation (what substances to test for and what remedy to apply) fulfilled the requirements of the Remediation Regulations. Since DEM sanctioned the City's actions, the ultimate issue to be decided is whether, in so doing, the Department properly interpreted its own regulations. "An agency's interpretation of its own regulation is due great deference." Massachusetts v. Hayes, 691 F.2d 57, 62 (1st Cir. 1982) (citing Udall v. Tallman, 380 U.S. 1, 16, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1964)); see also State v. Cluley, 808 A.2d 1098, 1103-04 (2002) (court held that it was error to substitute for a definition used by a governmental agency in the application of its own regulation because agency was due deference and agency's interpretation was not plainly wrong). Moreover, DEM's interpretation "is 'of controlling weight unless it is *plainly erroneous* or *inconsistent* with the regulation.'" Hayes, 691 F.2d at 62 (1st Cir. 1982) (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414, 89 L. Ed. 1700, 65 S. Ct. 1215 (1945)).

Even allowing for deference to the Department, the conceded lack of a Program

Letter cannot be remedied by renaming and substituting documents because such action would clearly be inconsistent with the Remediation Regulations. Particularly problematic would be the Department's designation of the June 4, 1999 Order of Approval as the Remedial Decision Letter. As explained in Section 2.02 of the Remediation Regulations, the Order of Approval is itself a required document which approves the technical details of implementing the remedy as laid out in the RAWP. See also CRIR 12-180-001 §10.01. Accordingly, this Court holds that DEM violated § 7.07B by failing to issue the Program Letter.

On the other hand, the plain language of the Remediation Regulations supports DEM's contention that site investigations are generally discretionary. Therefore Plaintiffs' claim that Defendants had an explicit obligation to test for each of the § 8.02B substances fails. Section 7.01 provides that the Director of DEM "may require a performing party for any contaminated-site to conduct, in a specified amount of time, an investigation of the contaminated-site to adequately assess the nature and extent of the contamination, and to evaluate and design a proposed remedy." CRIR 12-180-001 § 7.01. This regulation also provides that such an investigation "must determine the nature and extent of the contaminated-site and the actual and potential impacts of the release;" however, "the *scope* of the [s]ite [i]nvestigation shall be tailored to specific conditions and circumstances at the site under investigation *using professional judgment.*" Id.

While the Remediation Regulations provide specific perimeters for a site investigation, and § 7.03 lists twenty-three elements that shall be considered in the site investigation report "as appropriate," the last factor provides that "[a]ny other site-specific factor that the Director has reason to believe is necessary to make an accurate

decision as to the appropriate remedial action necessary to be taken at the contaminated-site.” Id. § 7.03(W). In general, these factors include a description of the contamination, a characterization of the property surrounding the affected area, classifications and testing of area impacted, and procedures to remediate the site. The plain language of the regulations makes clear that testing for the presence of all substances listed in Table 1 is not mandatory. Rather, “sound professional judgment” dictates the scope of the examination. Id. § 7.03.

The issue, then, is whether or not “sound professional judgment” was employed in the investigation of the Site. Put another way, did DEM properly interpret the requirement of “sound professional judgment” to conclude that it was exercised by the City in investigating and implementing a remedy at the Site? This Court answers in the affirmative.

In the first place, Crawford’s testimony was convincing as to why certain testing was not conducted. Crawford testified at length that those metals not tested were rarely encountered in Rhode Island. He also explained that they were associated with specific activities that were not known to occur at the Site. Moreover, Crawford’s testimony that capping the Site eliminated direct exposure to, not only the lead and arsenic known to be at hazardous levels, but also other such metals, was a sound explanation as to why it was unnecessary to commit to additional testing. Similarly, the evidence showed that additional testing for landfill gases, volatiles or semi-volatile organic compounds (“VOCs” or “SVOCs”) in soil and groundwater was likewise unnecessary because the remedy included soil vapor extraction and monitoring systems to check and prevent all harmful vapors from entering the school buildings.

DEM presented scientific data establishing that the groundwater at the Site was within the appropriate classification, according to established criteria applicable to the Site and the surrounding area. Therefore, no groundwater remedy was required. See note 7, supra. The evidence did not show that contamination at the Site threatened to degrade environmental conditions on surrounding properties.

Furthermore, the remedy applied exceeded the requirements of the applicable Remediation Regulations. While the Remediation Regulations, only required the Site to be characterized for contaminants in soil and groundwater, a soil gas study was also performed at the Site. The soil gas study evaluated both “landfill gasses” (methane, carbon dioxide, and oxygen) and a number of VOCs and SVOCs. The results of these analyses showed no violation of the standards that were applied. (Connecticut standards were applied because there were no established standards in Rhode Island.) Also, analysis of landfill gasses showed no or low concentrations of methane and high concentrations of oxygen.

Exercise of “sound professional judgment” could reasonably have resulted in a determination that there was no need for any remedial action with respect to soil gas, but DEM still required that soil gas monitoring and abatement be included as part of the remedy due to the history of the Site, the sensitive nature of the Site’s proposed use (schools), and the obvious difficulties inherent to retrofitting the school buildings with sub-foundation vapor removal systems if soil gases were found to be a problem in the future. Each of the buildings was constructed with sub-foundation soil vapor extraction systems to prevent soil gases from entering into the buildings, and the entire Site was ringed with soil sentinel wells to monitor trends in soil gases. These perimeter wells not

only have a monitoring function, but they are also capable of being interconnected and vented to provide extra soil vapor extraction capabilities if they are required at the Site. This evidence supports a finding that the remedy applied utilized the most protective criteria available and appropriate; and, in fact, that the remedy went beyond the strictest regulatory standards.

This Court also found the City's two experts, O'Connor and Collins, most creditable. O'Connor explained that the applicable groundwater standards were premised on the fact that the Site was located in an urban area where the groundwater was not used as drinking water. He recognized that some materials had not been tested for—such as some metals not among the “RCRA 8,” the groundwater, or the PH in the soil—and explained that it is not the industry standard to test for such materials when investigating municipal landfills. Significantly, he provided credible testimony that the ultimate remedy would not have changed even if these materials had been discovered because they are not mobile in the environment.

Collins, who was very familiar with the SIR, the RAWP, the monitoring reports, the nurse's logs, and the deposition and trial testimony of Plaintiffs' experts testified that the remedial soil and groundwater objectives in the SIR and the RAWP were protective of human health and the environment, even considering the sensitivity of the school age children. He further added that not all of the substances in Table 1 presented a risk of harm to humans if they were exposed to them. He testified that the remedy was designed to protect human health and the environment from all of the potential contaminants and did not require identifying the levels of cyanide, beryllium, copper, manganese, nickel, or zinc because other contaminants of potential concern had been found. He particularly

noted that lead was not important regarding groundwater because there would not be a great deal of mobility with the levels present.

Conversely, no evidence was presented to show that the remedy approved was inadequate. Despite Plaintiffs' premise that lack of evidence of contamination does not amount to lack of contamination, Defendants' experts adequately explained that the chosen remedy protected against all of the potential contaminants contemplated by the regulations. See Cluley, 808 A.2d at 1105 (“[P]roper judicial deference to [agency’s] interpretation of its regulations required the [Court] to presume the validity and reasonableness of that construction until and unless the party challenging its interpretation proved otherwise.”). Even allowing for the extra sensitivity of minority school age children, additional discoveries of contamination would not have led to a different remedy under the Remediation Regulations. Therefore, Plaintiffs failed to establish that Defendants failed to use “sound professional judgment” in designing and implementing a remedial plan for the Springfield Street Site. There is no evidence that the community surrounding the Site has been required to bear a disproportionately negative environmental burden as a result of the remediation of the Site, aside from the intermittent, short-term problems associated with dust and odors which DEM fully acknowledges and which do not rise to violations of the Remediation Regulations on the adequacy of the site investigation or the adequacy of the remedy applied. Additionally, the remedy includes continuous monitoring, and as of the date of trial, no serious problems have yet to be reported. Accordingly, this Court finds that the Remediation Regulations relative to the adequacy of the site investigation and remedy selected were not violated by the Defendants.

COUNTS III and V

Count III of Plaintiffs' amended complaint alleged violations of §§ 601 and 602 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and the regulations promulgated under § 602, which Plaintiffs claimed were all actionable pursuant to 42 U.S.C. § 1983. This Court granted summary judgment to DEM as to § 1983 and to all of the defendants as to § 602 of Title VI and the regulations promulgated thereunder. The Court allowed the Plaintiffs to proceed against the Municipal Defendants pursuant to § 1983 and against all of the Defendants pursuant to a direct cause of action under § 601 of Title VI.⁸

Since § 601 of Title VI prohibits "only those racial classifications that would violate the Equal Protection Clause," Regents of the Univ. of California v. Bakke, 438 U.S. 265, 287 (1978), the two Counts, III and V, stand or fall together. Id.

SECTION 1983 AND THE MUNICIPAL DEFENDANTS

Section 1983 provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

⁸ While Plaintiffs' Count Three, as worded in their First Amended Complaint, only seeks relief under Title VI pursuant to § 1983 without mention of a direct cause of action, such a private right of action exists under Section 601 of Title VI. Alexander v. Sandoval, 532 U.S. 275, 279-290 (2001) (providing that "private individuals may sue [through a private cause of action] to enforce § 601 of Title VI and obtain both injunctive relief and damages."). Still, this Court allowed both of the Plaintiffs' Title VI claims to proceed to trial for various reasons: the Defendants had actual notice of the dual causes of action pursued by the Plaintiff pursuant to § 601 of Title VI, the Defendants did not object, and the First Amended Complaint "[gave] the opposing party fair and adequate notice of the type of claim being asserted." Haley v. Town of Lincoln, 611 A.2d 845, 848 (R.I. 1992).

In 1978, the United States Supreme Court held that municipalities were amenable to suit under § 1983, concluding that municipalities are suable “persons.” Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 690 (1978). Accordingly, municipalities “can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” Id. Specifically, municipal liability may be imposed “when execution of a government’s policy or custom, whether made by its lawmakers or by those whose acts or edicts may fairly be said to represent official policy, inflicts the injury.” Id. at 694.

Post-Monell, United States Supreme Court case law detailed the requisite steps to proving municipal liability under § 1983. See Single Hiring Decisions and Municipal Entities: The United States Supreme Court’s Latest Safeguard Against Municipal Liability Under 42 U.S.C. § 1983, note, 20 U. Ark. Little Rock L.J. 327, 338-339 (Winter 1998) (discussing the development of law under § 1983). The Supreme Court determined that single acts by officials could constitute official policy for purposes of municipal liability. Pembaur v. City of Cincinnati, 475 U.S. 469, 485 (1986). A plurality of the Court in Pembaur held that a single decision to follow a course of action, when made by the official with final authority to establish policy in that aspect of the municipality’s business, could subject a municipality to liability under §1983. Id. The Court noted that the final authority to establish policy could be derived from a legislative enactment or through a delegation from another official policy maker. Id. at 483. The Pembaur

plurality directed lower courts to look to state law to determine whether an official possessed such final authority. Id. at 483.

Later, in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), a plurality of the Court followed Pembaur – holding that state law determines who are the policymakers for § 1983 municipal liability – and went further, finding state law to be the sole source for such an authority determination. Id. at 124-25. The Praprotnik court also stated that if “authorized policy makers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.” Id. at 127. “The ‘official policy’ requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipality liability is limited to action for which the municipality is actually responsible.” Pembaur, 475 U.S. at 480.

Plaintiffs argue first that Sepe, acting in his official capacity as Acting Director of the DPP, had final decision-making power pursuant to Providence Home Rule Charter § 1006 which conferred authority in the Director’s office to plan and construct City owned buildings such as public schools. The Plaintiffs argue that Sepe’s actions constitute “policy,” in that they clearly constituted “a specific decision or set of decisions designed to carry out [such] a chosen course of action,” see id. at 481 n.9, which was the construction of the schools on the Site. The Plaintiffs point to the language of § 1006 of the Charter which provides in pertinent part:

“There shall be a department of public property, the head of which shall be the director of public property The department of public property shall have jurisdiction over all land owned by the city . . . and over all . . . structures owned by or under the control of the city, and shall be responsible for the maintenance, planning, design,

construction, alterations and repairs to all such city property under its jurisdiction . . . The department of public property shall also be responsible . . . for all purchasing and procurement of materials, supplies, contractual services, equipment and all other necessary categories of procurement for the City.” Providence Home Rule Charter §1006 (1980).

The Plaintiffs also point to language in the Charter that empowers the Director of the DPP to “make such rules and regulations as may be necessary to carry out the responsibilities imposed upon the department.” *Id.* Furthermore, Plaintiffs note that the Charter was “adopted by [its] city voters and ratified, confirmed and validated by the General Assembly” and as such constitutes state law. City of Providence v. Employee Ret. Bd. of City of Providence, 749 A.2d 1088, 1098 (R.I. 2000).

Plaintiffs cite to five actions taken by Sepe in his official capacity as the highest official of the DPP which are alleged to have violated Plaintiffs’ constitutional rights to equal protection and due process under the Fourteenth Amendment to the U.S. Constitution: (1) rejecting three sites and presenting only one site to various City officials for the construction of the schools; (2) sending bulldozers to the Site without notifying abutters and before obtaining regulatory approval; (3) successfully asking DEM to expedite its review of the City’s site investigation and RAWP; (4) starting construction of the schools without first obtaining approval from DEM or obtaining necessary foundation and construction permits, and without taking ownership of the Site; and (5) providing inadequate notice to abutters of the Site as required by the IPRARA and the Remediation Regulations.

The City counters that Sepe, in his capacity as acting director of the DPP, was not a policymaker subjecting the City to municipal liability under § 1983. The Municipal

Defendants cite to Sean Patrick v. City of Providence, C.A. No. 96-689L, United States District Court for the District of Rhode Island (April 24, 1998), to support their argument. Sean Patrick involved the Police Chief stationing a group of police officers outside of a nightclub, ostensibly framing a “policy” in response to a particular circumstance. The court held that the City was not liable under § 1983 because the policy was not promulgated by its highest authority in the City of Providence – the Mayor and the City Council. The Municipal Defendants analogize the Police Chief’s decision to station police officers outside a club to Sepe’s decision to site the schools and suggest that neither action constitutes a policy of the City. The Municipal Defendants assert that all city departments, such as the police department and the DPP, are subject to the legislative power of the City Council. See Ret. Bd. of Employees Ret. System of Providence v. City Council of Providence, 660 A.2d 721, 728 (R.I. 1995).

The Municipal Defendants further discredit the Plaintiffs’ reliance upon Home Rule Charter § 1006 by suggesting that, on its face, it severely limited Sepe’s authority. By way of example they point out that subsection (c) only empowered Sepe to award bids of less than two thousand dollars. They note that Sepe had no authority to award bids over two thousand dollars, which would leave him quite shy of the power, or final policy making authority, to award the bids necessary to carry out a construction project of this magnitude. Therefore, the Municipal Defendants argue that the limitations on Sepe’s power foreclose the possibility of his being deemed a final policy maker.

Examination of the Home Rule Charter reveals that the DPP “is responsible for the maintenance, planning, design, construction, alterations and repairs to all such city property under its jurisdiction,” but that the Department’s purchasing and sales functions

are limited by deference to the City Council and the Board of Contract and Supply. Providence Home Rule Charter §1006 (a) 1 and 2. However, the Home Rule Charter does not speak to the function underlying this claim, the function of choosing a site upon which to build schools, either to grant that authority or to curtail its scope. See Pembaur, 475 U.S. at 486 (J. White concurring). Therefore, a determination of whether or not Sepe had final authority in the site selection process cannot be resolved solely by reference to the Charter. Indeed, the Charter leaves open the scope of the Director's responsibility. Providence Home Rule Charter § 1006 (a) 9 (the Director is "responsible for all other functions and duties which are or shall be hereafter assigned to the department").

Additionally, defendants' reliance on Sean Patrick is misguided. First, as an unpublished order, it has no precedential value. See note 8, supra. Second, the Home Rule Charter explicitly vests policy making authority for police functions with the Commissioner of Public Safety and not with the Police Chief whose tortuous conduct gave rise to the complaint in that action. See Home Rule Charter § 1001. Also, factually, a decision to conduct a single evening long stake out is clearly distinguishable from the decision to permanently construct schools for a particular segment of the City's population in that its occurrence would be less likely brought to the attention of other City officials for timely approval or disapproval. Therefore, this Court must look further to determine whether or not state law granted Sepe final policy making authority with respect to the siting of the Springfield Street schools. See Praprotnik, 485 U.S. at 125-27 (authority may be granted legislatively or by delegation or ratification).

In the fall of 1998 the Providence School Department notified Sepe, as Acting Director of the DPP, that there was a need for schools in the Silver Lake area of

Providence. Thereafter, Sepe called the Planning Department to see if there were any available buildings or land in the Silver Lake area of Providence. Sepe testified that he then identified four possible sites from a list of properties from the Planning Department: (1) Neutaconcanut Park, (2) Almacs on Plainfield Street, (3) Merino Park, and (4) the Springfield Street Site.

The evidence also revealed that the initial determination to locate the schools on the Site was made by Sepe. After some investigation, he decided not to build on the Neutaconcacut property because of a deed restriction; not to build on the Almac site based on the recommendations of people in the construction industry, including architects and others; and not to proceed on the Marino Park site because of wetland issues, environmental issues relating to the Woonasquatucket River, and a lengthy permitting process. Clearly, these actions by Sepe were conducted pursuant to his authority under the City's Home Rule Charter as functions assigned to the department.

The evidence also revealed that, at Sepe's instruction, the City sent bulldozers to the Site on March 6, 1999 to clear trees and vegetation, despite the fact that the City did not yet own the property, nor possess a building permit and without warning abutting residents. On March 15, 1999, the City's Board of Contract and Supply awarded a contract to O. Ahlberg & Sons, Inc. for construction management and building design services for the proposed schools. On March 16, 1999, a meeting about the school construction proposal, with ATC and City Council member Igliazzi presiding, was held at the Silver Lake Community Center. Once the City submitted its site investigation and RAWP to DEM for approval Sepe asked DEM more than once to expedite its review of the Municipal Defendants' site investigation report and RAWP. By April 26, 1999, the

City had incurred expenses on the schools project in an amount of \$300,000 and \$400,000. By May 6, 1999, the same day the City applied for a building permit, and prior to DEM approval of the City's RAWP, part of the foundation of the elementary school-building had already been poured and piles were driven to support a school building. It was not until June 15, 1999 that the City took title to the land, by which time construction on both school buildings was well underway.

To finance the construction of the schools, the PPBA had to issue bonds. The process for issuing bonds involved the then-Mayor of Providence, Vincent Cianci, who requested by letter, dated March 1, 1999, that a certain amount of money be borrowed through the PPBA. Before the PPBA could issue these bonds, the plan needed both the Providence School Board and City Council's approval. On April 8, 1999, the Providence City Council passed a resolution authorizing the issue and/or requesting the PPBA to issue bonds for the Springfield Street schools.

On April 8, 1999, the Providence City Council approved then-Mayor Cianci's proposal to permit the PPBA to issue bonds to finance the construction of the school complex at the Site. On or about May 10, 1999, the Providence School Board voted 7-1 to approve the issuance of bonds to finance construction of the schools. On May 18, 1999, the PPBA took several votes relating to the Site. First, it voted to purchase environmental liability insurance for the school buildings. Second, it voted to include the costs of environmental monitoring and remediation as part of the basic rent to be paid by the City when the City leased back the school buildings from the PPBA. Third, it voted to issue bonds to finance construction of the schools.

On July 13, 1999, the PPBA voted to purchase a 10 year \$50,000,000 pollution and remediation liability policy for the schools, and to establish an environmental reserve account for the schools to be funded by the City with annual payments of \$40,000, until the account reached \$200,000. The bonds approved by the PPBA for the schools included \$11,400,000 for the costs of the Springfield Street Elementary School Project and \$19,007,600 for the Springfield Street Middle School Complex.

The question to be decided is whether Sepe's allegedly unconstitutional acts can be attributed to the City itself rather than to Sepe in his capacity as an employee, to ensure that liability is not based on respondeat superior. See Monell, 436 U.S. at 691. Clearly, the overarching "course of action" taken by Sepe, choosing the Site, is attributable to the City itself, and the fact that the decision to do so was made by Sepe, coupled with the authority vested in his office by the Home Rule Charter, suggests that he had the requisite "final policy making" authority. In fact, the evidence establishes that his decision to eliminate the other potential sites was never questioned by any other official, even though the construction of the new schools constituted a substantial investment by the City, which indicates that his "final policy making" authority was universally accepted by other city officials. In the alternative, despite the asserted limitations on Sepe's spending power, those other official policy makers – the PPBA, the City Council, the Mayor, and the Board of Contract and Supply – who may have actually retained that power, can fairly be said to have ratified the decision by their own actions. It would be disingenuous of the City to now claim that it had not adopted the "policy" of choosing the Site, when they have for years been utilizing the schools located there. Particularly illuminating is the PPBA's decision to purchase pollution and remediation

liability insurance, which shows that the PPBA was aware of the potential problems but chose to proceed with the course of action chosen by Sepe. Likewise, the expeditious nature in which the schools were constructed, despite legal impediments that would likely delay a project in the normal course of events—lack of DEM approval, lack of ownership, lack of a building permit—support a finding that Sepe was delegated the authority to create the final city policy in matters concerning the construction of these schools. Unlike, the Sean Patrick police chief, Sepe’s final policy making power was repeatedly reinforced by other officials who enabled Sepe to proceed in such rapid fashion. Accordingly, this Court holds that the City is amenable to suit under § 1983 for the alleged constitutional violations of its official, Sepe.

THE APPLICABILITY OF THE SOLID WASTE REGULATIONS

In overseeing the remediation of the Site, it is uncontroverted that DEM applied the Remediation Regulations promulgated under IPRARA. Plaintiffs contend that this choice resulted in application of a less protective remedy than that which should have been required pursuant to the Solid Waste Regulations. The Solid Waste Regulations were promulgated by DEM pursuant to G.L.1956 §§ 23-18.9-8 and 23-18.9-9, as amended, and proscribe the method for closing Solid Waste Facilities. Therefore, whether or not the Site should have been classified as a solid waste facility subject to closure under the Solid Waste Regulations is a question of law which bears on Plaintiffs’ claim of intentional discrimination under Section 601 of Title VI, the Equal protection Clauses of the Fourteenth Amendment of the United States Constitution, and Article 1, Section 2 of the Rhode Island Constitution.

Plaintiffs contend that the Site qualifies as a solid waste management facility as that term is defined in the Solid Waste Regulations because at least three cubic yards of solid waste were, and are, present at the Site. CRIR 12-030-021 § 1.3.123 (“[A]ny property owner is considered to be operating a solid waste management facility if an amount of solid waste greater than three cubic yards exists on their property.”) Therefore, Plaintiffs contend that the City violated the Solid Waste Regulations, and that such violation was subject to an administrative penalty up to \$25,000 per day. CRIR 12-030-021 §1.6.10. Additionally, Plaintiffs contend that the Site was subject to the preferred and most protective remedy for closing a landfill in Rhode Island, known as an RCRA cap. CRIR 12-030-021 § 2.1.09. As defined under the Solid Waste Regulations, a RCRA cap consists of four layers: a base layer, an impermeable layer of clay or geomembrane, a drainage layer and a vegetative support layer. *Id.* The remedy approved by DEM pursuant to the Remediation Regulations does not include an impermeable barrier across the entire site. Rather, the remedial action work plan only provided for the installation of a geotextilemembrane in those portions of the Site not covered by pavement.

DEM insists that the Solid Waste Regulations were not applicable and that the Department’s decision to manage the investigation and remediation of the Site under the Remediation Regulations was appropriate, well within DEM’s discretion, and entitled to deference. DEM points out that each of the Department’s five witnesses to testify at trial, agreed that the Remediation Regulations were the appropriate regulatory vehicle for managing the investigation and remediation of a site that had not actively accepted waste for disposal for nearly twenty-five years; was abandoned well before solid waste

management facilities were required to be licensed in 1992, and before the current Solid Waste Regulations came into existence in 1997; and was never licensed, nor ever eligible to be licensed, as a dump. DEM asserts that clean-ups of abandoned facilities and illegal dump sites are generally handled under the Remediation Regulations and that no evidence was presented to show that the Solid Waste Regulations are ever applied to such sites. DEM further contends that the two regulatory schemes – Remediation Regulations and Solid Waste Regulations – are mutually exclusive. The IPRARA applies to the remediation of sites contaminated with hazardous materials, and not to landfills closed under the Solid Waste Regulations. Finally, DEM asserts that its policy regarding the application of regulations is entitled to judicial deference.

Analysis

At issue is DEM's interpretation and application of its own regulations pursuant to its statutory authority and "[a]n agency's interpretation of its own regulation is due great deference." Massachusetts v. Hayes, 691 F.2d at 62 (citing Udall v. Tallman, 380 U.S. 1, 16, (1964)); see also Cluley, 808 A.2d at 1103-04 (court held that it was error to substitute for a definition used by a governmental agency in the application of its own regulation because agency was due deference and agency's interpretation was not plainly wrong). DEM's interpretation that the Site was not a new or existing landfill subject to the Solid Waste Regulations, but a contaminated site subject to the Remediation Regulations, is therefore due such deference unless it is "clearly erroneous or unauthorized." Labor Ready Northeast, Inc., 849 A.2d at 344. Plaintiffs' argument, however, suggests that § 1.3.123 of the Solid Waste Regulations is clear and

unambiguous and, if read literally, it mandates application of the Solid Waste Regulations to the Site because it contained the requisite three yards of waste disposal.

It is a court's "responsibility in interpreting a legislative enactment to determine and effectuate what the Legislature intended and to give a meaning most consistent with its policies or obvious purposes." Gryguc v. Bendick, 510 A.2d 937, 939 (1986)(internal citations omitted). In addition, although not controlling, the interpretation given a statute by an administrative agency will be given great weight." Id. The primary purpose of the Solid Waste Regulations is to "minimize the environmental hazards associated with the operation of solid waste landfills." CRIR 12-030-021 § 1.1.01. This purpose comports with the General Assembly's intent in establishing the refuse disposal laws requiring each city and town "to make provision for the safe and sanitary disposal of all refuse." G.L. 1956 § 23-18.9-1. According to DEM, these regulations, promulgated in 1999, apply to new and existing facilities, not to abandoned landfills. See § 1.8.00. In general, the Solid Waste Regulations are prospective, and not retrospective, in scope. They prohibit the establishment of new solid waste management or composting facilities without DEM's approval, establish an application process for the creation of such facilities, and require a license or registration from DEM to operate such facilities. CRIR 12-030-021 (2005). Additionally, the regulations provide for pre-planned closure of such facilities in accordance with environmental standards established by the agency. Id. Therefore, a review of the whole solid waste regulatory scheme and the authorizing statutes supports DEM's decision to omit an abandoned landfill, such as existed at the Site, from the forward looking regulatory process. In fact, the evidence shows that DEM had record that the Site contained waste disposal for some time but never applied the Solid Waste

Regulations. Accordingly, this Court finds DEM's interpretation is not clearly erroneous or unauthorized and the Solid Waste Regulations were not applicable to the Site.

COUNTS THREE AND FIVE: INTENTIONAL DISCRIMINATION AND EQUAL PROTECTION

Intentional discrimination in the administration of federally funded programs is prohibited by § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.⁹ Individuals like the Plaintiffs have a private right to sue to enforce their Title VI rights. Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001). Section 601 specifically prohibits those acts of intentional discrimination that violate the Equal Protection Clause of the Fourteenth Amendment. Id. at 279. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

A. Plaintiffs' Argument

The gravamen of Plaintiffs' Equal Protection claim is that locating the schools on the Site was an intentional act of racial discrimination. Plaintiffs assert that there was ample evidence to infer intent on behalf of all of the Defendants based on an analysis of the following factors that the United States Supreme Court has deemed relevant to such an inquiry: the impact of the decision, the historical background of the decision, the sequence of events leading up to the decision, the legislative or administrative background of the decision, and the departures from the normal process of reaching such a decision. Id. at 268 (identifying subjects of proper inquiry in determining whether

⁹ While the Municipal Defendants do not deny that the PSB relies on federal financial assistance in providing programs to school children, they assert that Title VI doesn't apply because the act of siting a building for use as a school is neither a program or an activity and is not dependent on the use of federal funds. However, since the City and the PSB admittedly receive federal financial assistance, § 601 applies to all of the Defendants' activities because the law "encompasses all activities of a recipient of federal financial assistance on an institution-wide basis." Cureton v. Nat'l Collegiate Athletic Ass'n, 198 F. 3d 107, 115 (3d Cir. 1999).

racially discriminatory intent existed).

The starting point is Plaintiffs' insistence that the evidence revealed that the decision to locate the schools bears most heavily on minorities and, as such, has a disparate impact on that discrete class. Facts allegedly supporting this claim of disparate impact include: the racial make-up of the schools is 77% to 84% non-white; non-white students in Providence suffer from higher rates of malnutrition and environmental illnesses such as asthma and lead poisoning, and Providence school age children are more susceptible to injury from contamination than children in other parts of the state. Plaintiffs argue that the disparate impact is the more egregious because it was foreseeable. DEM admittedly knew that the Site was located in an "environmental equity" community with a large population of racial minorities, but expedited review of the project while ostensibly ignoring safety concerns raised by largely non-white objectors to the City's plans, despite having had no prior experience evaluating a remediation plan for a school on a dump. Similarly, the City was aware that the schools would serve a predominantly non-white population and forged ahead while overlooking public outcry and skirting precise permitting and regulatory requirements.

Plaintiffs claim that the following evidence, all part of the sequence of events leading up to the ultimate decision and all allegedly amounting to departures from the normal process by which such a site would be reviewed, reveals invidious intent on the part of DEM: DEM (a) approved the City's SIR before allowing the public to review and comment on the same which effectively eliminated any possibility for the largely non-white objectors to influence the outcome, (b) ignored its mandatory duty under the IPRARA to consider environmental equity issues for racial minorities, (c) approved an

incomplete SIR and a less protective remedy than the presumptive remedy used to close a landfill, (d) approved the construction of two schools on top of an unlicensed solid waste management facility that, according to Plaintiffs, continues to operate in violation of the Solid Waste Regulations, (e) ignored its own Immediate Compliance Order halting the City's excavation and stockpiling of soil and allowed the City to implement the remedy prior to granting approval and with knowledge that the City's implementation of the remedy was causing adverse health effects in the community, and (f) failed to impose an environmental land use restriction on the Site even four years after it approved the City's plans.

Plaintiffs also claim that there is abundant evidence to establish intent on the part of the Municipal Defendants. As to the history of the decision, Plaintiffs argue that City officials were aware of a steady increase in student population caused by an influx of Latinos over a five year period, that they were also aware that the number of white students was decreasing as a percentage of that population, and that they waited until the fall of 1998 to begin planning schools that needed to be operational by the fall of 1999. Therefore, the Plaintiffs allege that the process of elimination orchestrated by Defendant Sepe was truncated by the City's self-imposed time constraint requiring construction to begin by April 1, 1999: the Almacs and Neutaconcacut Park sites were eliminated before a preliminary drawing stage of the site selection process; only a "chicken scratch site plan" was made for the Merino Park site, but no environmental tests were performed by the municipal defendants at Merino Park because Sepe learned it would take a year to get a wetlands permit and that there were environmental issues relating to the Woonasquatucket River which abutted that site.

Additionally, the Plaintiffs claim the specific sequence of events leading up to the decision to place the schools on the Site further evidences the Municipal Defendants' discriminatory intent. Primarily, Plaintiffs point out the failure on the part of the City to invite the requisite public comment and the allegedly blatant disregard of the public outcry against the proposed schools. Plaintiffs particularly point to the following sequence of events that occurred between February and June of 1999 as indicative of the Municipal Defendants' ill motives. Despite almost immediate opposition from neighbors, the final site of the schools was determined in February of 1999 at which time the City first announced its plan to build the schools. DEM (receiving approximately two or three calls a day from concerned neighbors) quickly contacted the Mayor's office to apprise the City of records indicating that there was a landfill at the Site, but the City's initial response was to deny that fact. Meanwhile, various city officials (Plaintiffs point out that they were white city officials) took action to put construction of the schools on the fast track in order to commence work at the Site by April. On March 1, 1999, then Mayor Cianci requested that the City Council issue bonds to build the schools; on or about March 6, 1999, the City sent bulldozers to the Site to clear trees and vegetation without notifying and warning abutting residents, on March 15, 1999, the construction management contract for the schools was awarded. By April 8, 1999, without holding a public hearing, the City Council approved the issuance of bonds for the schools. In response to newspaper articles and calls from concerned neighbors on the issue, DEM met with representatives of the City on March 1, 1999 to discuss the City's plans for building the schools on the Site. Not until that March 1st meeting did the City acknowledge that the Site was a former landfill.

The City remitted a SIR on March 26, 1999 and a RAWP on April 2, 1999 without any detailed drawings of the proposed construction or remedial systems. Thereafter, white city officials, Sepe and Mr. Troiano, asked DEM to expedite review of the SIR and the RAWP, stressing the necessity of a September 1st opening, and DEM agreed to the requests. Within two weeks time, DEM issued a Remedial Decision Letter on April 9, 1999.

Concurrently, during the months of March and April of 1999, community opposition to placing the schools on the Site grew. Opposition was expressed at a community forum on March 16, 1999 at the Silver Lake Community Center and at meetings of the PSB. On April 19, 1999, DEM and the City met privately to plan a second public forum and the attendants, virtually all of whom were white according to the Plaintiffs, focused on how to assuage rather than address the public's fears. The Plaintiffs contend the outcome of the second public meeting, held April 26, 1999, was preordained, and the opposition expressed by the 12 out of 15 attendees was largely ignored.¹⁰ In fact, by April 26th, the City had already incurred expenses in an amount between \$300,000 and \$400,000. The Plaintiffs claim that while the opposition of non-whites resulted in School Board votes that were cast along racial lines (on April 26, 1999 the PSB voted 4-3 to reject the issuance of bonds and on May 4, 1999 they voted 5-3 to

¹⁰ The Plaintiffs quoted concerns directly out of the City's notes. Ms. Sheila Conway, a Providence School Department employee and teacher, stated "How can you think about doing this? It is unbelievable to me. I will not teach in that school. I won't work in a school that is on a dump. I can't believe that this is happening and I can't believe that you think this is good for your people. Would you have your children go there? My family members won't go there." (Exhibit 10 at 14) Also, Mrs. Pena stated "In 20 years from now, you won't be in Providence. Our children will be in Providence. Our people will be in Providence and they will be sick. I know what I know today, and you can build your school and you can be superintendent of that school, but my children, meaning Latino children, won't go to that school." *Id.* at 14-15. Furthermore, Mrs. Martineau stated "We know the school is going in. We know it is a done deal. We went to bed one night and everything was status quo, and we woke up the next morning and they were putting up a school and nobody told us what was going on." *Id.* at 24.

reject issuance of the bonds), the ultimate school board approval was coerced by the continued construction. By the time of the May 10, 1999 approval by a vote of 7-1, part of the foundation for the elementary school building had already been poured and piles were driven to support the middle school building. Plaintiffs quote a member of the School Board: "It is outrageous that this school board is being forced to approve a site and this construction under the pressure of the bulldozers and pile drivers. Never again should this school board have to approve a site for a school after construction has already been started."

As further evidence of invidious discriminatory intent on the part of the Municipal Defendants, Plaintiffs point out the obvious irregularities attendant to the process of siting these schools. The Municipal Defendants disregarded both DEM requirements – commencing construction prior to DEM approvals and ignoring DEM stop work orders – and the City's own building ordinance. The Building Ordinance of the City of Providence, Section 112.1, Chapter 1079 of the Ordinances of 1956, enacted December 21, 1956, as amended, makes it unlawful to construct a building without obtaining the required building permit, yet, as of May 7, 1999, the City had not received the required foundation permit for either the elementary or middle school, and by then the foundation for the elementary school building had already been partially built. Defendant Sepe authorized both the pouring of foundations and the driving of piles, despite acknowledging at trial that DPP had no written policy of starting construction without building permits. Ultimately, the building permit for the elementary school was not obtained until August 31, 1999, but the school was completed and opened to students in early September. Likewise, the middle school permit was not issued until October 14,