

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 06-0790 C

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,
v.
NEW VENTURES ASSOCIATES, LLC,
Defendant.

**COMMONWEALTH'S OPPOSITION TO NEW VENTURES' REQUEST FOR
RELEASE OF FAM FUNDS AND MOTION TO COMPEL CLOSURE OF THE
LANDFILL PURSUANT TO ITS CLOSURE AND POST-CLOSURE SCHEDULE**

The Commonwealth respectfully submits this opposition to defendant New Ventures Associates, LLC's ("New Ventures") motion filed on May 24, 2010 (served on the Commonwealth on May 25, 2010) requesting an order "to compel closure of the Crow Lane Landfill pursuant to defendant's closure and post-closure schedule and for release of FAM funds ("New Ventures' May 24 Motion").

This opposition, supported by three short affidavits (cited herein), address issues raised and arguments made in New Ventures' May 24 Motion that are not discussed or fully addressed in the Commonwealth's May 19, 2010 *Memorandum In Support Of Commonwealth's Motion For A Supplemental Order Declaring That Defendant Has Further Defaulted On Its Closure Obligations* ("Commonwealth's May 19 Brief").

I. The Landfill Berm Design

A. New Ventures Has Ignored, Not Addressed and Remedied, the Berm Deficiencies Identified by MassDEP

In accordance with paragraph 12(a)(vi) of the Final Judgment, MassDEP issued to New Ventures a deficiency notice dated October 6, 2009 that identified multiple and serious

deficiencies in New Ventures' MSE berm design modification proposal. *See* May 27, 2010 Affidavit of David Adams, MassDEP Environmental Engineer IV, filed in support of this opposition ("Adams May 27 Aff.") paragraph 25 ("¶ 25"). The Final Judgment requires that:

New Ventures shall within fifteen (15) days of the Department's deficiency notice *submit for Department approval* a revised MSE berm modification plan with a safety factor no less than 1.30 *that remedies all deficiencies noted by the Department.*

Final Judgment, ¶ 12(a)(vi) (emphasis added).

New Ventures' May 24 Motion simply ignores the Final Judgment requirement that it must remedy all deficiencies identified by MassDEP. New Ventures' failure to address and remedy the many deficiencies noted by MassDEP is discussed in the Commonwealth's May 19 Brief at pp. 8-9, 10-13, which is fully supported by affidavits. Among the most important of the many deficiencies identified by MassDEP is the fact that New Ventures' design proposal and calculation of the safety factor failed to use appropriately conservative assumptions – and failed to sufficiently justify the non-conservative assumptions it did use – about the strength of the soft clay underlying the berm or the settlement of the rotting organic layer within the berm. *Id.*, p. 8-9, 10-11. The fact that New Ventures failed to run strength tests or otherwise document and support the assumptions its consultant used about the strength of the decaying organic material means that "no one knows what the decomposed, long term strength of the organics will be . . . [and] the long term strength of the berm is highly questionable." *Id.*, p. 11 (quoting supporting affidavit).

On October 22, 2009, New Ventures' berm design and consultant, Geocomp, responded to MassDEP's notice of deficiency. Adams May 27 Aff., ¶ 25. New Ventures' October 22, 2009 response failed to address and remedy the berm design problems and instead simply ignored most of the critical deficiencies identified by MassDEP. *Id.*, ¶¶ 25-30. *See also* May

27, 2010 Affidavit of Benjamin Siebecker, Environmental Engineer at Shaw Environmental, Inc., filed in support of this opposition (“Siebecker May 27 Aff.”), ¶ 12 (identifying six separate design deficiencies that were ignored or incompletely addressed, along with four other items noted as “general” design issues). Geocomp’s response acknowledges that it will be necessary to monitor berm stability. Adams May 27 Aff., ¶ 26. Although it admits stability monitoring is necessary, New Ventures has not submitted an actual stability monitoring plan, has not presented any criteria for determining when stability test results indicate that further design changes are necessary, and has not prepared an emergency or contingency plan to further buttress the berm if stability tests show that failure or a partial collapse may be imminent.¹ Adams May 27 Aff., ¶ 26; Commonwealth’s May 19 Brief, pp. 12-13.

B. There is no Reason For MassDEP to Meet Regarding the Berm Because New Ventures Refuses to Acknowledge, Address and Remedy the Design Deficiencies

In an effort to attempt to resolve the berm design dispute, the Commonwealth gave New Ventures a written proposal on November 20, 2009. Carrigan May 27 Aff., ¶ 12 and Exhibit A attached thereto. This proposal suggested specific measures that could be taken to address and remedy the deficiencies identified by MassDEP so that New Ventures and its consultant could submit a berm design modification plan that MassDEP could approve. *Id.* In a response dated November 30, 2009, attached as Exhibit B to the Carrigan May 27, Aff. 12, New Ventures emphatically and completely rejected this proposal. *Id.* Not only did New Ventures reject the specific measures MassDEP proposed to confirm or justify Geocomp’s assumptions about the strength of the materials in or under the berm, New Ventures also rejected out-of-hand any

¹ As noted in the Adams May 17 Aff, New Ventures’ “wait and see” stability monitoring approach to berm safety acknowledges that monitoring could demonstrate that design changes must be made “to reduce risk to an acceptable level,” but does not define what it proposes may be an “acceptable” risk. Adams May 17 Aff., ¶ 26.

proposal that might involve *any* “design and construction revisions.” *Id.* With New Ventures’ November 30, 2009 rejection of MassDEP’s proposal, there was no common ground to continue productive discussions about what could be done to resolve the dispute. However, the Commonwealth continued to encourage berm discussions, so long as New Ventures and its consultant would acknowledge the design deficiencies identified by MassDEP and agree to address and attempt to remedy the problems. *Id.*

On several occasions since the November 30, 2009 impasse, New Ventures has promised to submit to MassDEP a further response from its geotechnical consultant, Geocomp, addressing the design problems identified in MassDEP’s deficiency notice. By letter dated March 5, 2010, New Ventures stated that “it intends to respond to the items raised by the Department’s consultants so that it can go forward and complete berm construction.” *See* March 5, 2010 letter from New Ventures to MassDEP, attached in Exhibit I to New Ventures’ May 24, 2010 Motion. More specifically, in a companion March 5, 2010 email to the Commonwealth, New Ventures’ counsel stated that New Ventures “still intend[s] to respond to the issues raised in [MassDEP’s consultant] Shaw’s Exhibit 2 from your earlier correspondence . . . We are planning on doing that after [] March 15th.”² *See* March 5, 2010 email from New Ventures to the Commonwealth attached in Exhibit I to New Ventures’ May 24 Motion. The Commonwealth never received that response. Carrigan May 27 Aff., ¶ 13. As recently as April

² “Shaw’s Exhibit 2” is a September 23, 2009 report from MassDEP’s consultant, Shaw, identifying all of the berm deficiencies New Ventures consultant failed to address. This September 23, 2009 report is “Attachment 2” to the Siebecker May 17, 2010 Affidavit submitted in support of the Commonwealth’s May 19 Brief. In addition, Shaw prepared a memo dated November 5, 2009 that further discussed the ways in which Geocomp’s October 22, 2009 response to MassDEP’s deficiency notice ignored or failed to address many critical deficiencies identified by MassDEP. *See* Siebecker May 27 Aff., ¶ 12 and Shaw’s November 5 2009 berm deficiency memo, “Attachment 3” to the May 17 Siebecker Aff. *See also* Adams May 17 Aff., ¶¶ 26-30.

30, 2010, New Ventures continued to promise that it would submit to MassDEP a “substantive” and “detailed” response from Geocomp directed at the berm design deficiencies identified by MassDEP:

Please be advised that New Ventures will be responding to the Department’s letter dated Saturday night April 17th with respect to the alleged berm deficiencies with a detailed response from GeoComp. . . . The response will be substantive and directed at the items raised by the Department and [its consultant] Shaw.

See April 30, 2010 email from New Ventures counsel to the Commonwealth, attached as Exhibit C to the Carrigan Aff. Once again, New Ventures failed to follow through and submit that promised response. In fact, since October late 2009, New Ventures has failed to submit *any* response from Geocomp addressing the berm design deficiencies. Carrigan May 27 Aff., ¶ 13.

Rather than seriously address the deficiencies and remedy the design with a submittal from its consultant, New Ventures now simply insists that the Commonwealth meet to discuss the berm. *Id.* However, New Ventures has made clear that it wants a meeting only so that New Ventures may “explain the proposed short and long term monitoring that would be used to confirm the [minimum required] 1.3 stability certified by GeoComp”, which it characterizes as a “minor question.” See page 2 of New Ventures’ April 26, 2010 letter the Commonwealth attached in Exhibit I of New Ventures’ May 24 Motion.

Because New Ventures has failed and refused comply with the requirements of paragraph 12(a)(vi) of the Final Judgment by failing to acknowledge and agree to address and remedy the berm design deficiencies, there was no reason for MassDEP to meet to discuss the berm. See Commonwealth’s May 19 Brief, p. 16, note 1. New Ventures has had the past seven months to address and remedy the berm design but has refused. New Ventures is in default and deserves no further chance to continue to drag out its fight over the berm design.

C. New Ventures Has Offered No Opinion From Its Consultant Rebutting the Expert Opinion of MassDEP and its Consultant that Geocomp Failed to Demonstrate that the Berm Design Meets the Required Safety Factor

New Ventures' May 24 Motion is not supported by affidavit from its berm design expert, Geocomp.³ Nowhere in New Ventures' May 24 Motion does New Ventures offer an opinion by Geocomp to challenge or rebut the expert opinions of MassDEP and its consultant discussed on page 15-16 of the Commonwealth's May 19 Brief that Geocomp failed to demonstrate that its proposed berm design meets the minimum required 1.30 safety factor. In particular, New Ventures has not provided any rebuttal to MassDEP's expert opinion that Geocomp has failed to give an *unqualified* opinion that the proposed design meets the minimum safety factor. *Id.* Geocomp qualifies its safety factor conclusion by admitting that it has not fully addressed the potential impact of consolidation of soft clay layer under the berm, or the impact of the rotting organic material and, therefore, the berm must be monitored during and after construction, and further design changes or additional buttressing may be necessary should monitoring detect instability or threat of collapse. *Id.*

New Ventures' counsel asserts that "Geocomp's finding that the [berm] design meets the 1.3 safety standard is not contingent upon the monitoring protocol." *See* page 2 of the April 26, 2010 letter from New Ventures' counsel to the Commonwealth, included in Exhibit I to New Ventures' May 24 Motion. New Ventures' counsel does not support this assertion with any testimony from Geocomp. In fact New Ventures' November 30, 2009 letter states that "New Ventures has submitted a berm design that meets the 1.3 safety factor *subject to* short term and long term monitoring" (emphasis added). *See* Carrigan Aff., ¶ 13.

³ As this opposition was being finalized the afternoon of May 27, 2010, New Ventures' served the Commonwealth with an opposition to the Commonwealth's May 19 default motion that included a very short affidavit from Geocomp stating that its original berm design will meet the required 1.3 safety factor if constructed according to the proposed sequence. *See* May 27 Affidavit of Allen Marr attached as Exhibit 2 to New Ventures' May 27 opposition to the Commonwealth May 19 default motion. However, this Geocomp affidavit does not even acknowledge that MassDEP issued a notice of deficiency, let alone opine that any deficiencies have been remedied. *Id.* Instead, that affidavit simply states, without any explanation, that Geocomp "addressed" "issues raised" by MassDEP's consultant, Shaw. This claim is soundly refuted by the Siebecker May 27 Aff., ¶ 12 and Adams May 27 Aff., ¶¶ 26-30.

D. New Ventures' May 24 Motion Ignored The Expert Opinion of MassDEP and its Consultant that the Berm is Already Showing Disturbing Signs of Stress and Potential Failure

New Ventures' May 24 Motion fails to acknowledge or address the discussion in the Commonwealth's May 19 Brief (supported by affidavit testimony and photographs) that slumping and straining of the Landfill cap is already occurring along the northwest corner, causing the cap to begin to fail by ripping and tearing along stress points. *See* Commonwealth's May 19 Brief at 14-15. If a safe and stable berm is not constructed soon, this tearing could progress to the point of collapse in the Landfill's northwest corner. *Id.*

II. Nothing Prevented New Ventures From Completing Substantial Portions of the Landfill Closure Before the Berm Design Dispute is Resolved and New Ventures Has Defaulted By Refusing to Work to Meet the Final Judgment Deadlines

New Ventures' May 24 motion argues that it has not defaulted on its closure obligations because no further Landfill closure work can be completed until the berm design is resolved.

But New Ventures is wrong. Nothing prevented New Ventures from placing the FML "skirt" over the completed earthen berm along the north and east sides on the Landfill and then constructing the sand drainage layer and placing loam and grass seed over nearly half of the Landfill in time to meet the May 30, 2010 deadline required by paragraph 12(d) and 12(h) of the Final Judgment. *See* Sibecker May 27, Aff., ¶ 10 Adams May 27, Aff., ¶¶ 20 - 24. The same work can be completed once the earthen berm along the Landfill's south side is finished. *Id.* Since November, MassDEP has urged New Ventures to continue working to complete construction of the earthen berm along the landfill's south side. *See* Commonwealth's May 19 Brief, p. 16-17. *See also* Carrigan Aff., ¶ 14, ¶¶ Adams May 27, Aff., ¶ 23: Nothing prevented New Ventures from completing the south side berm, and then also placing the FML "skirt," constructing the sand drainage layer, and placing the loam and

seed cover up to the southern berm so that approximately two thirds of the Landfill would be finished by the May 30, 2010 deadline. *Id.* New Ventures has further defaulted by failing to continue working to meet the Final Judgment deadlines.

Rather than work to meet closure deadlines and address the berm deficiencies, New Ventures has pursued an obstructionist path while asserting that, unless the Commonwealth agrees to let New Ventures build the berm according to its deficient design and “pursuant to” its “closure cost schedule” (that seeks return of FAM funds), the Landfill will not be closed this summer and fall.

III. New Ventures is Still In Contempt Because Its Landfill Closure and Post-Closure Cost Estimates Do Not Meet the Requirements of the FAM Trust Agreement and Regulations and Are Otherwise Incomplete and Deficient

The closure and post-closure cost estimates New Ventures’ submitted to the Commonwealth on May 21, 2010 (after being served with the Commonwealth’s May 19 Contempt Complaint) do not meet the requirements of 310 C.M.R. 19.051(2) and the FAM Trust Agreement. *Sibecker May 27 Aff.*, ¶¶ 7 - 9, 11; *Adams May 27 Aff.*, ¶¶ 8 - 19. The purpose of the FAM is to assure that there are sufficient funds available for a third party – MassDEP or its contractors – to complete the Landfill closure and to perform all required post-closure operations and maintenance in the event that New Ventures defaults or is otherwise unable to meet its closure and post closure obligations. *Id. See* 310 C.M.R. 19.051(2). For this reason, the landfill closure regulations require that the FAM be fully funded to pay for third-party services associated with completing closure and operating, maintaining, and monitoring the Landfill for thirty (30) years after closure, the minimum required post-closure period for which the FAM must be funded. *See* 310 CMR 19.142(2);

310 C.M.R. 19.051(2). Carrigan May 27 Aff., ¶¶ 15 - 17.⁴ In addition, 310 C.M.R. 19.051(5)(g) requires that closure and post-closure cost estimates be certified by a registered professional engineer. Carrigan May 27 Aff. 15 -17, ¶ ; Siebecker May 27 Aff., ¶ 8.

The closure and post-closure cost estimates submitted by New Ventures on May 21, 2010 do not meet this required standard. *Id.* New Ventures' cost estimates are not certified by an engineer. *Id.* Moreover, New Ventures' cost estimates merely summarize what *it* intends to spend to complete the closure and conduct post-closure operations and maintenance. *Id.* Because of this, New Ventures' estimates assume labor and material costs that do not reflect the true costs of MassDEP and its contractors performing the necessary work if New Ventures defaults. *Id.* And, as further addressed below, many of New Ventures' cost estimates are incomplete and unsupported. *Id.* For but one example, the post-closure estimate asserts, without any support or documentation, that New Ventures "currently has on hand at the Wood Waste yard in Everett [a facility owned by a separate corporate entity]" more than enough pretreatment media to last for the entire post-closure period. *See* paragraph (b) of Crow Lane's Closure and Post Closure Cost Estimates, attached as Exhibit J to New Ventures' May 24 Motion. Thus, New Ventures has no cost estimate for the pretreatment media – the single largest post-closure operational cost – for the entire thirty year post-closure period for which cost estimates are required. Adequate FAM funding for post-closure operations cannot depend on a completely unsupported claim of how much post-closure pretreatment media will be required, coupled with a "zero cost" estimate based on media supposedly sitting around in a different corporate facility. *Id.* Rather, the regulations and FAM Trust Agreement require that estimates be based on what a third party would spend on required pretreatment media.

⁴ The post-closure period for FAM funding may be terminated before thirty years, but only if MassDEP determines, based on site-specific data and supporting material, that financial assurance is no longer needed for maintenance and operation of the closed landfill. Carrigan May 27 Aff.,

Seibecker May 27 Aff., ¶ 7; Adams May 27 Aff., ¶ 6.

Beyond the fact that New Ventures' cost estimates fail to meet the requirements of the landfill closure regulations and FAM Trust Agreement, the post-closure cost estimates are deficient, incomplete, and grossly underestimate post-closure operation and maintenance costs. The multiple ways in which New Ventures' post-closure cost estimates are incomplete and unsupported are discussed in the Siebecker May 27 Aff. at ¶¶ 7 – 9, 11, and in the Adams May 27 Aff. at ¶¶ 8 – 19. This opposition will not attempt to review and summarize all the deficiencies which are clearly articulated in the Siebecker and Adams May 27 Affidavits. However, the deficiencies with New Ventures' "zero cost" estimate for post-closure operation and maintenance of the Landfill gas pretreatment system and flare deserve special note.

New Ventures' claim that the landfill gas pretreatment system and flare will only need to be operated for five (5) years or less following closure is not supported in any way except by data for one day of landfill gas production and the bald claim that "experience at other landfills indicates" that the generation of gas inside the landfill will stop one month to one year after closure and, thus, running the landfill gas pretreatment system and flare for only five years is more than adequate and "greatly exceeds empirical experience." *Id.* But New Ventures does not provide any empirical evidence -- its post-closure cost estimates are not supported with any documentation and have not been certified by an engineer, as required. *Id.*

All other landfills in Massachusetts that, like New Ventures' Crow Lane Landfill, have used construction and demolition waste fines and residual material ("C&D Material") for landfill shaping and grading are still operating their landfill gas systems more than five years after closure and are generating hydrogen sulfide gas in the thousands of parts per million ("ppm") concentrations requiring ongoing treatment. *See Carrigan May 27 Aff., ¶ 16.* For Landfill gas production to cease within one year of closure, as suggested by New

Ventures, substantial reduction in gas production would already be evident. Adams May 27 Aff., ¶ 9; Siebecker May 27 Aff., ¶ 8. New Ventures' asserts that this is happening, but the data for a single day of landfill gas readings do not support this claim. Adams May 27 Aff., ¶ 9; Siebecker May 27 Aff., ¶ 8. As noted in the Adams May 27 Aff.:

The reduction in Hydrogen Sulfide generation on which New Ventures bases their assumptions for the time period over which the landfill gas control system needs to operate clearly is not evident in the data. The data included with the cost estimate by New Ventures shows but a single day in time. The data, further, is incomplete, in that New Ventures has not reporting the concentration of Hydrogen Sulfide being delivered to the pretreatment system. Thus, the data included with the cost estimate provides no evidence of historical trends necessary to predict the future needs for LFG [Landfill gas] controls. . . . Therefore, it is expected that operation of the landfill gas control system, including the enclosed flare and LFG pretreatment system, will be required beyond the five (5) years cited by New Ventures for the cost estimate. At this point there is not sufficient data to infer any reduction in the operation of the LFG controls will occur which would allow a reduction in the time period for the FAM.

Adams May 27 Aff., ¶ 9

At this point there is not sufficient data to estimate the reduction [of pretreatment media use]. The cost estimate needs to provide a sufficient supply of pretreatment media for the entire post-closure period. Given the uncertainty of media consumption, New Ventures has not made sufficiently conservative estimates of the rate of reduction in media consumption to insure the availability of media meets the operational needs of the LFG control system.

Id., ¶ 10.⁵ See also Siebecker May 27 Aff., ¶ 8.

Finally, New Ventures' cost estimates do not include any estimate of the costs of construction and post-construction stability monitoring for the Landfill berm, which New Ventures' consultant admits is necessary. Siebecker Aff., ¶ 8. In addition to failing to include stability monitoring estimates, New Ventures failed to include potential cost of additional berm design enhancements or emergency buttressing that may be necessary. *Id.*

⁵ Furthermore, New Ventures' pretreatment cost estimates omit the costs for labor, transportation, and other materials (including sealants) necessary to repack the pretreatment vessels with media, as well and costs to dispose of the used media, screening, sealants and other waste generated during repacking of the pretreatment vessels. See Adams May 27 Aff., ¶ 10.

New Ventures' cost estimates are inadequate and unresponsive to the requirement in this Court's March 30, 2010 Default Order that New Ventures submit the cost estimates that "provide[] detailed data and information that supports and justifies the assumptions utilized in closure and post-closure cost estimate" and that comply with the requirements of the FAM Trust Agreement 310 C.M.R. 19,051(2). See March 30, 2010 Default Order (Cratsley, J.), attached as Exhibit 1 to the Commonwealth May 19 2010 Memorandum in support of its motion for a contempt order. New Ventures is still in contempt.

CONCLUSION

For all the foregoing reasons, this Court should deny New Ventures' motion for an order allowing it to finish closing the Landfill using New Ventures' proposed berm design in accordance with New Ventures' proposed closure cost schedule. This Court should further deny New Ventures' request that \$570,000 of the FAM be returned based on New Ventures' inadequate and incomplete closure and post-closure cost estimates that do not meet requirements of 310 C.M.R. 19.051 or the FAM Trust Agreement.

Respectfully submitted,

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