

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION NO. 06-0790 C

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC,

Defendant.

**MEMORANDUM IN SUPPORT OF COMMONWEALTH'S MOTION FOR AN  
ORDER DECLARING THAT DEFENDANT NEW VENTURES IS IN CONTEMPT OF  
THIS COURT'S MARCH 30, 2010 DEFAULT ORDER**

As pled in the Commonwealth's complaint for civil contempt, filed herewith, defendant New Ventures Associates, LLC ("New Ventures") is in contempt of this Court's (Cratsley, J.) March 30, 2010 Order ("Default Order") declaring that New Ventures defaulted on its obligations to close the Crow Lane Landfill and, further, ordering that New Ventures submit for Massachusetts Department of Environmental Protection ("MassDEP") approval a full and complete revision of the closure and post-closure costs estimates for the Landfill. *See* Default Order, p. 2, ¶ 4, attached as Exhibit 1.

As demonstrated by the Commonwealth's affidavits, as of the date of this memorandum, New Ventures has not submitted to MassDEP any revised closure or post-closure cost estimates. The Commonwealth respectfully requests that this Court declare that New Ventures is in contempt of its March 30, 2010 Default Order, and also declare that New Ventures has further defaulted on its Landfill closure obligations by its contempt of this Court's order. This Court should order that New Ventures comply with the Default Order, and the Commonwealth requests that New Ventures be ordered to pay a daily penalty for each and every day during which it remains in contempt in order to compel compliance.

## BACKGROUND FACTS AND STATEMENT OF THE CONTEMPT

New Ventures owns and operates the Landfill, which is located on Crow Lane in Newburyport. *See* Affidavit of John Carrigan, Chief of the Solid Waste Division of MassDEP's Northeast Regional Office. ("Carrigan Aff."), paragraph 5 ("¶ 5").

This Court's March 30, 2010 Default Order declared that New Ventures had defaulted on its Landfill closure and post-closure obligations and authorized MassDEP to "control and direct the use of all remaining Trust Funds" to repair storm damage to the Landfill's FML cap and gas wells. *See* Default Order, p. 1-2, ¶¶ 2, 3.

This Court's March 30, 2010 Default Order also ordered New Ventures to submit for MassDEP approval a full and complete estimate of Landfill closure and post-closure costs. *See* Default Order, p. 2, ¶ 4. As of the date of this memorandum and the Commonwealth's contempt complaint, New Ventures has not submitted to MassDEP any Landfill closure or post-closure cost estimates. Carrigan Aff., ¶ 13, 64.

## ARGUMENT

### **I. The Standard for the Commonwealth's Request for an Order Declaring that New Ventures is in Contempt of this Court's Default Order**

In a civil contempt action, the plaintiff bears the burden of showing a clear and undoubted disobedience of a clear and unequivocal command. *Manchester v. Dept. of Environ. Quality Engineering*, 381 Mass. 208, 212 (1980), citing *United Factory Outlet, Inc. v. Jay's Stores, Inc.*, 361 Mass. 35, 36 (1972). The Commonwealth must prove its case for civil contempt by a preponderance of the evidence. *Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't of Mental Retardation (no. 1)*, 424 Mass. 430, 443 (1997), citing *United States Time Corp. v. G.E.M. of Boston, Inc.*, 345 Mass. 279, 282 (1963).

**II. New Ventures is in Contempt of This Court's March 30, 2010 Order that it Submit to MassDEP Full and Complete Estimates of all Remaining Landfill Closure Work Costs and Post-Closure Operation and Maintenance Costs**

This Court's March 30, 2010 Default Order required, pursuant to the Trust Agreement for the Landfill's performance bond and 310 C.M.R. 19.051(2), that:

New Ventures submit for MassDEP review and approval a revised closure and post-closure cost estimate that itemizes and clearly identifies the assumptions utilized in estimating the closure and post-closure costs and provides detailed data and information that supports and justifies the assumptions utilized in closure and post-closure cost estimates including, without limitation:

- a. The length of time the LFG control system is proposed to operate;
- b. The amount of pretreatment media that will be utilized including the purchase and disposal costs;
- c. The amount and cost for the collection and disposal of condensate;
- d. The cost of the maintenance and replacement of the pretreatment tanks;
- e. The cost of the maintenance and replacement of the enclosed flare;
- f. The labor cost to operate, maintain, and monitor the operation of the LFG control system;
- g. The quantity and cost of propane as an auxiliary fuel for the enclosed flare;
- h. The inspection and maintenance of the landfill cover including mowing, storm water controls, erosion repair, inspection and monitoring of the Berm stability including the MSE Wall (or Berm);
- i. The collection and disposal of leachate including the volume and disposal cost; and
- j. The itemized cost of conducting environmental monitoring of the Landfill including labor for sample collection and report preparation and the sample analytical costs.

Default Order, p. 2, ¶ 4. This Court's requirement that New Ventures submit for MassDEP approval revised Landfill closure and post-closure cost estimates is a "clear and unequivocal command." *Manchester v. DEQE*, 381 Mass. at 212.

By letter to MassDEP dated April 7, 2010, New Ventures informed the Commonwealth that "it [ ] will comply with Judge Cratsley's Order to submit closure and post-closure costs to the Department." See New Ventures' April 7, 2010 letter, attached Exhibit P to the Carrigan Aff., at p. 2.

However, just two days later, New Ventures informed the Commonwealth that it would *not* submit *any* closure or post-closure cost estimates ordered by this Court unless and until MassDEP approved New Ventures' berm design proposal and agreed to let it construct a landfill stormwater basin according to a new design that does not comply with the MassDEP approved design required by the Final Judgment:

New Ventures will provide the Department with closure or post-closure costs when the Department approves the final berm design and the elevation of the [stormwater] Detention Basin #1 has been resolved.

New Ventures' April 9, 2010 letter, attached as Exhibit R to the Carrigan Aff., at p. 2, ¶ 6.

In yet another letter to MassDEP dated April 16, 2010, New Ventures not only restated its refusal to submit the closure and post-closure cost estimates ordered by this Court, but blamed the Commonwealth for its contempt of the Court's Default Order:

the Commonwealth and MassDEP continue to prevent New Ventures from responding to and complying with the Court's Order to present closure and post-closure costs. . . . Costs cannot be completed as demanded by the Department without resolution [of New Ventures' berm design and stormwater basin disputes].

New Ventures April 16 letter to MassDEP attached as Exhibit Y to the Carrigan Aff., p. 3.

New Ventures' failure to make necessary safety and stability changes to the berm design and construction plan, submit a berm design that MassDEP can approve, and build the berm in accordance with a MassDEP approved design plan is the subject of a separate motion, also filed today, requesting that this Court supplement its March 30, 2010 Default Order by declaring that New Ventures has further defaulted on its Landfill closure obligations. As set forth in that motion, the dispute over the berm's design only affects berm construction on the Landfill's west side and northwest corner. Carrigan Aff., ¶32-37. The dispute over one portion of one Landfill closure task does not prevent or excuse New Ventures from submitting closure and post-closure cost *estimates* for all closure and post-closure tasks. *Id.* New Ventures submitted Landfill closure and post-closure cost estimates to

MassDEP in 2006 when final Landfill closure costs were less certain than they are now and multiple issues remained concerning the final design plans for various Landfill components and costs, including the berm. *Id.*, ¶¶ 58, 59. Moreover, at a minimum, New Ventures could for submit cost estimates based on its current and deficient berm design proposal.<sup>1</sup> *Id.*

New Ventures' position in its April 9 and April 16, 2010 letters that it would not submit any Landfill closure or post-closure cost estimates unless and until MassDEP approves a final berm design was but another tactic by New Ventures to stall, delay, and disregard its Landfill closure obligations, in blatant contempt of this Court's Default Order.

In response, the Commonwealth informed New Ventures, by letter dated April 16, 2010, that "there is nothing in Judge Cratsley's Order that conditions or makes New Ventures' obligation to submit a revised closure and post-closure cost estimate contingent on any action by MassDEP." *See* Commonwealth's April 16, 2010 letter to New Ventures, attached as Exhibit U to the Carrigan Aff., at p. 2.

By letter dated April 26, 2010, New Ventures appeared to reconsider its refusal to provide the cost estimates ordered by this Court. *See* New Ventures' April 26, 2010 letter to MassDEP, attached as Exhibit W to the Carrigan Aff., at p. 3. However, New Ventures' April 26, 2010 letter makes no mention of this Court's Default Order, provides no indication of when it might submit cost estimates, and simply states that it is willing to work toward completing "open items at the Landfill," including the closure and post-closure cost estimates. *Id.* In any event, seven weeks have gone by since this Court's March 30, 2010 Default Order and New Ventures has not complied with that order or even indicated when it

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<sup>1</sup> There is no merit to New Ventures claim that an issue involving the final elevation of a stormwater basin somehow excuses or prevents it from submitting closure and post-closure cost estimates. Nothing prohibits New Ventures from submitting a cost estimate based on its proposed elevation, along with or instead of an estimate based on the elevation approved by MassDEP in the Final CAD. Carrigan Aff., ¶ 37. Moreover, the different elevations would not likely alter the basin construction costs to such a degree as to substantially affect the overall closure and post-closure cost estimate. *Id.*

might comply. New Ventures is in contempt.

**III. New Ventures Contempt of this Court's Order is a Further Default of its Landfill Closure Obligations**

The Commonwealth's solid waste regulations at 310 C.M.R. 19.051 require that every landfill in Massachusetts establish and continuously maintain financial assurance that is adequate (in MassDEP's judgment based upon the regulatory criteria) to assure that the landfill's owner or operator is at all times financially capable of performing all required landfill closure work and post-closure operations and maintenance. *See* 310 CMR 19.051(2)(a). *See also* Carrigan Aff., ¶¶ 55, 56. An approved financial assurance mechanism must include MassDEP as a party, and must be structured so that MassDEP has the right to obtain, without the consent of the landfill's owner or operator:

exclusive direction and control over the transfer, use and disbursement of the secured funds . . . to perform approved closure and post-closure maintenance or secure reimbursement for costs incurred for so performing upon its determination that an owner or operator has failed in whole or in part to carry out closure or post-closure requirements in accordance with 310 CMR 19.000 or any plan or permit conditions or orders issued hereunder.

310 CMR 19.051(2)(d).

Thus, the FAM essentially acts as a performance bond, and is intended to be held in reserve, to act as a fall-back in case the owner or operator defaults on its obligations, and to ensure that funds will be available should MassDEP find that it must itself contract for the necessary work. The Trust Agreement provides that if New Ventures fails in whole or in part to carry out any corrective action work or perform its Landfill closure obligations, it is in default and MassDEP may take exclusive control over the use and disbursement of the FAM to pay contractors to perform all remaining closure and post-closure work. *See* FAM Trust Agreement attached as Exhibit L to the Carrigan Aff. Paragraph 6(a) of the FAM Trust Agreement provides that:

If [New Ventures] has failed in whole or in part to carry out its corrective action, closure and/or post-closure maintenance obligations in accordance with approved plans or has otherwise failed to cure any corrective action, closure or post-closure related condition contained in any notice to [New Ventures] from the Department, including any notice concerning the existence, modification, addition, replacement or failure to replace any financial assurance mechanism, the Department may send written notification (a "Default Notice") to the Trustee of [New Ventures'] failure, after first giving [New Ventures] fourteen days written notice of the Department's intention of doing so, along with written instructions to draw against the Trust Fund Property. Upon Receipt of a Default Notice and instructions from the Department to draw upon the [FAM], the Trustee shall, in accordance with such instructions, draw upon the [FAM] . . . and make such payments from the Trust Property, or any portion thereof, all as the Department may at that time *or thereafter* direct in writing. *[New Ventures] shall thereupon lose all right, title and interest in the Trust Fund property in an amount equal to the cost incurred to perform or have performed all tasks the Department deems necessary to complete proper corrective action, closure and/or post-closure, maintenance and monitoring of the [Landfill]*

Trust Agreement, paragraph 6(a) (emphasis added).

Pursuant to Paragraph 6(a) of the Trust Agreement, New Ventures' failure to submit to MassDEP revised landfill closure and post closure cost estimates required by this Court's Default Order, as well as by the solid waste regulations at 310 C.M.R. 19.051, constitutes default because New Ventures "has failed in whole or in part to carry out its corrective action, closure and/or post-closure maintenance obligations . . . or has otherwise failed to cure any corrective action, closure or post-closure related condition contained in any notice to [New Ventures] from [MassDEP]." Trust Agreement, paragraph 6(a).

This Court should order that New Ventures submit to MassDEP the Landfill closure and post-closure cost estimates required by paragraph 4 of this Court's Default Order. The Commonwealth also respectfully requests that this Court order that New Ventures pay a substantial daily penalty for each and every day during which New Ventures remains in contempt in order to compel compliance.

In the alternative, the Court may order, pursuant to paragraph 6(a) of the FAM Trust Agreement, that MassDEP is authorized to direct FAM funds to pay for the preparation of the required Landfill closure and post-closure cost estimates by MassDEP or its contractor.

**IV. As Authorized by the Default Order, DEP's Contractors Will Mobilize to Correct Inadequate and Incomplete Repair Work New Ventures Attempted to Complete to Fix Storm Damage to the Landfill's FML Cap and Gas Wells**

Finally, the Commonwealth informs the Court that MassDEP has completed the bidding process and is mobilizing contractors to repair storm damage to the Landfill's gas wells and flexible membrane liner ("FML") cap. *See* Default Order, p. 1, ¶ 1. However, MassDEP's repair work will be limited to correcting incomplete or improper repair work already attempted by New Ventures. Carrigan Aff., ¶¶ 14-15. *See also* Affidavit of David Adams, Environmental Engineer in the Solid Waste Division of MassDEP's Northeast Regional Office ("Adams Aff."), ¶¶ 45-47, 50.

As this Court found, New Ventures was "unable or unwilling" to make emergency repairs to the storm damaged FML and gas well for many weeks, claiming it did not have sufficient funds to pay to have the work done. Default Order, p. 1, ¶ 1. Despite these claims, New Ventures quickly mobilized contractors to the Landfill and began storm damage repair work shortly after this Court issued the Default Order and before MassDEP could complete the bidding processes for its contractor to make the authorized repairs. Adams Aff., p. [ ]. New Ventures explained that because this Court's Default Order placed "no limits . . . upon the Department's expenditures of FAM monies, New Ventures [now] intends to proceed and repair the wells and FML." *See* New Ventures April 7, 2010 letter, attached as Exhibit P to the Carrigan Aff., at p.2.

As set forth in the attached affidavits, MassDEP and its contractor closely monitored and inspected the repair work attempted by New Ventures. Adams Aff., ¶¶ 45-47; Carrigan Aff., ¶ 15. New Ventures did not fully or properly complete the repair work in compliance with the specifications and requirements in the Final Judgment. Adams Aff., ¶¶ 47, 50; Carrigan Aff., ¶ 15. In particular, New Ventures repaired most of the Landfill's cap with damaged FML material that had been ripped from and blown off the landfill by the storm.

Adams Aff., ¶ 45. New Ventures salvaged this damaged FML for use in making the repairs in violation of the specifications and requirements of the Final Judgment prohibiting use of such salvaged and “reclaimed” FML “that has seen previous service.” Adams Aff., ¶¶ 45, 47; Carrigan Aff., ¶ 15. Moreover, some of the storm damaged FML reclaimed and used by New Ventures had not been replaced on the Landfill in a manner that complied with the requirements and specifications in the Final Corrective Action Design Plan (“Final CAD”) attached and incorporated by reference into the Settlement and Final Judgment in this case entered by the Court on April 30, 2009. *Id.* For these reasons, MassDEP’s contractors will correct those portions of the FML repair that do not meet the Final Judgment’s specifications and requirements. Carrigan Aff., ¶ 15. New Ventures also failed to complete the gas well repairs in compliance with the Final Judgment’s specifications. Adams Aff., ¶ 48; Carrigan Aff., ¶ 15. MassDEP’s contractors will correct and complete the gas well repairs so that the gas wellheads comply with the specifications and requirements in the Final CAD. Carrigan Aff., ¶ 15.

### CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully requests that this Court declare that New Ventures is in contempt of its March 30, 2010 Default Order, and also declare that New Ventures has further defaulted on its Landfill closure obligations by its contempt of this Court’s order that it submit to MassDEP revised Landfill closure and post-closure cost estimates required by the both the solid waste regulations and the FAM Trust Agreement. This Court should order That New Ventures submit to MassDEP the Landfill closure and post-closure cost estimates required by paragraph 4 of this Court’s Default Order. The Commonwealth also requests that the Court order that New Ventures pay a substantial daily penalty for each and every day during which New Ventures remains in contempt in order to compel compliance with the Default Order. In the alternative, the Court could order

that, pursuant to paragraph 6(a) of the FAM Trust Agreement, MassDEP is authorized to control and direct the FAM funds to pay its contractor to prepare the revised Landfill closure and post-closure cost estimates required by this Court's Default Order and the Commonwealth's solid waste regulations for landfill closure.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS  
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Dated May 19, 2010

# **EXHIBIT 1**

**NOTIFY**

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT  
CIVIL ACTION  
NO. 06-0790C

Notice sent  
04.01.10

M.I

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RAN:gm

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(md)

COMMONWEALTH OF MASSACHUSETTS,  
Plaintiff

v.

NEW VENTURES ASSOCIATES, LLC,  
Defendant

ORDER OF THE COURT ON COMMONWEALTH'S EMERGENCY MOTION FOR  
ORDER GRANTING SITE ACCESS TO REPAIR LANDFILL DAMAGE,  
DECLARING THAT DEFENDANT IS IN DEFAULT, AND ORDERING DEFENDANT  
TO SUBMIT LANDFILL CLOSURE AND POST-CLOSURE COST ESTIMATES

Following a hearing and oral argument on March 29, 2010 regarding this emergency motion of the Commonwealth, this Court issues the following post-judgment order:

(1) The MassDEP and its contractors are granted immediate access to the Crow Lane Landfill for the purpose of repairing the damaged FML and gas extraction wells. Any effort by the Defendant to deny the MassDEP access to the landfill site as ordered herein shall be considered contempt of court.

(2) For the reasons set out below, and as established in the affidavits of John A. Carrigan and Richard J. Chalpin, and pursuant to the terms of Paragraph 6(a) of the Trust Agreement, I declare and so find that the Defendant has violated its "post-closure maintenance obligations" and "otherwise failed to cure any corrective action, closure or post-closure related condition

contained in any notice to the Grantor [the defendant] from the Department [MassDEP],...” and thus has breached the Trust Agreement and defaulted.


(3) Based on the breach of the Trust Agreement and the default described in Paragraph (2), MassDEP is hereby authorized to control and direct the use and disbursement of all remaining Trust funds as needed to reimburse contractors performing the repairs to the damaged FML and damaged gas extraction wells, as described in Paragraph (1).

(4) Based on the breach of the Trust Agreement and the default described in Paragraph (2), the defendant shall, pursuant to the Trust Agreement and 310 C.M.R. 19.051(2), submit for MassDEP review and approval a revised closure and post-closure cost estimate that itemizes and clearly identifies the assumptions utilized in estimating the closure and post-closure costs and provides detailed data and information that supports and justifies the assumptions utilized in closure and post-closure cost estimates including, without limitation:

- a. The length of time the LFG control system is proposed to operate;
- b. The amount of pretreatment media that will be utilized including the purchase and disposal costs;
- c. The amount and cost for the collection and disposal of condensate;
- d. The cost of the maintenance and replacement of the pretreatment tanks;
- e. The cost of the maintenance and replacement of the enclosed flare;
- f. The labor cost to operate, maintain, and monitor the operation of the LFG control system;
- g. The quantity and cost of propane as an auxiliary fuel for the enclosed flare;
- h. The inspection and maintenance of the landfill cover including mowing, storm water controls, erosion repair, inspection and monitoring of the Berm stability including the MSE Wall (or Berm);
- i. The collection and disposal of leachate including the volume and disposal cost; and
- j. The itemized cost of conducting environmental monitoring of the Landfill including labor for sample collection and report preparation and the sample analytical costs.

I make this decision and order because of the undisputed evidence in affidavit form that a public health hazard has been created by the recent storm which blew off the cap or cover (the FML) over 1.5 acres of the landfill in question as well as the defendant's unwillingness and/or inability over many weeks to make these emergency repairs. Furthermore, I find from the same affidavits that three of the gas extraction wells are broken and the defendants have likewise been unwilling and/or unable to repair them. Furthermore the same affidavits establish that there have been similar delays on the part of the defendants regarding "post-closure maintenance obligations" under the Trust Agreement in the past. Finally, the current issue raised by the defendant about the confidentiality of tax returns holding up any repairs is insufficient in my mind to justify the three to four week delay in the defendant acting to make these urgently needed repairs.

Therefore, for all the reasons cited herein, this Order shall issue forthwith.



John C. Cratsley  
Justice of the Superior Court

March 30, 2010

notice sent  
03.31.10  
(mdj)