

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 06-0790 C

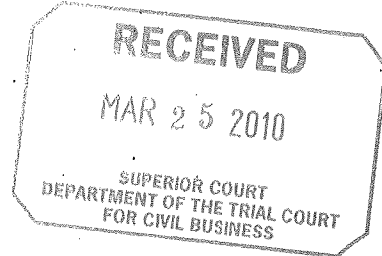
COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC,

Defendant.



MEMORANDUM IN SUPPORT OF COMMONWEALTH'S MOTION FOR 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

Pursuant to paragraph 27 of the Settlement Agreement and Final Judgment in the above captioned action entered on April 30, 2009 and amended by Orders of the court on May 27, 2009 and October 7, 2009 (the "Final Judgment"), the Commonwealth of Massachusetts (the "Commonwealth") hereby moves for issuance of a post-judgment order allowing the Massachusetts Department of Environmental Protection ("MassDEP") and its contractors to access the Crow Lane landfill ("Landfill") to perform critical repair work.

During a storm on February 26, 2010, high winds tore off at least one and one half (1.5) acres of the flexible membrane liner capping the Landfill, exposing the underlying gas vent layer. This damage leaves the Landfill open to rainwater infiltration and stormwater runoff, increasing the risk of landfill gas and leachate generation and releases, including the release of noxious Hydrogen Sulfide gas in violation of the Commonwealth's air pollution and solid waste laws. The February storm also damaged and caused the failure of three Landfill gas extraction wells. As of the date of this motion – more than three weeks after the storm – defendant New Ventures Associates, LLC ("New Ventures") has failed to repair the damaged

Landfill cap and gas wells. Moreover, New Ventures has repeatedly advised MassDEP that it lacks the resources to effectuate repairs at the Landfill. In these circumstances, the recent storm damage threatens the health and welfare of residents living in the vicinity of the Landfill by increasing the risk of noxious Hydrogen Sulfide and other gas releases. Despite the authority granted by paragraph 27 of the Final Judgment for MassDEP to enter the site and repair damage to the Landfill's cap and gas system in the event that New Ventures fails to do the work itself, New Ventures has denied MassDEP access to the Landfill to make the repairs.

As demonstrated by the attached affidavits, New Ventures now claims that it does not have the funds necessary to fix the wind damaged Landfill cap and gas wells. In addition, New Ventures claims that it does not have the funds necessary to complete the remaining Landfill closure work required by the Final Judgment or perform post-closure operation and maintenance of the Landfill. New Ventures claims that the only way it can pay to perform all further landfill work is to use the funds set aside in the financial assurance mechanism established for the Landfill. This mechanism (essentially a performance bond) is required by the solid waste regulations to assure that adequate funding is available and accessible to MassDEP in the event that New Ventures defaults on its obligations by failing, in whole or in part, to complete any required corrective actions, perform Landfill closure work, or perform post-closure operations and maintenance.

If the Court finds that New Ventures does not have the financial resources to make repairs or complete any further Landfill closure work, the Court should declare that, pursuant to the terms of the trust agreement for the Landfill's financial assurance mechanism, New Ventures has defaulted on its Landfill closure obligations and that MassDEP is therefore authorized by the trust agreement to exercise control over the trust fund by directing the disbursement of the funds to contractors performing all remaining Landfill closure work.

For years, residents living near the Landfill have been subjected to periodic releases of Hydrogen Sulfide and other Landfill gases that have threatened their health and welfare and created nuisance conditions. New Ventures has a long history of failing to operate the Landfill in a manner that prevents the release of noxious Hydrogen Sulfide and other Landfill gases -- even when the Landfill was generating revenue. New Ventures' persistent delays in fully and promptly responding to problems at the Landfill, and its claims that it has no funds to repair the storm damage or carry out its Landfill closure and post-closure obligations, warrant the conclusion that it has breached its agreement and defaulted on its statutory obligations. It deserves no further chances; this Court should declare that New Ventures is in default and order that MassDEP is authorized to take control of the Landfill's closure by directing the use and disbursement of the remaining trust agreement funds to assure that the required repairs and remaining Landfill closure work are performed fully and properly in a manner that minimizes the risk of noxious Hydrogen Sulfide and other landfill gas releases.

Finally, the Commonwealth seeks an order requiring that New Ventures submit to MassDEP revised cost estimates that fully and adequately address all remaining Landfill closure work costs and post-closure operation and maintenance costs. These cost estimates are required by the Commonwealth's solid waste regulations and the trust agreement for the Landfill's financial assurance mechanism. As demonstrated by the attached affidavits, New Ventures has failed to provide MassDEP with revised estimates that satisfy the regulatory requirements and New Ventures' past submissions substantially underestimate the true costs of operating and maintaining the Landfill once it is closed. Thus, the Landfill's financial assurance mechanism is currently underfunded. This Court should order that New Ventures submit revised closure and post closure cost estimates to MassDEP, as required by 310 C.M.R. 19.051(6).

BACKGROUND

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

Landfill Gas, Hydrogen Sulfide, and Threats to the Public Health and Welfare

New Ventures used processed construction and demolition waste fines and residual material ("C&D Material") from a solid waste processing facility located in Everett for grading and shaping of the landfill during the closure process. Carrigan Aff., ¶¶ 7, 8. New Ventures derived revenue from the receipt of C&D Material from the Everett facility to finance the closure of the Landfill. *Id.*, ¶ 8.

Landfills, including Crow Lane, closed using C&D Material, generate Hydrogen Sulfide and other landfill gases. Carrigan Aff., ¶¶ 9-12, 14. Wallboard in C&D Material contains gypsum that, when exposed to moist, anaerobic conditions in a landfill containing organic material, breaks down and releases Hydrogen Sulfide gas. *Id.* ¶¶ 11, 12. Hydrogen Sulfide and other gases generated by landfills can be successfully controlled to prevent any releases to the ambient air. *Id.* For landfills that have used C&D Material, MassDEP requires that various gas control measures be taken. *Id.*, ¶ 15. When fully implemented and properly maintained, these measures have successfully controlled the release of Hydrogen Sulfide and other gasses at Massachusetts landfills other than Crow Lane. *Id.*, ¶ 15.

Hydrogen Sulfide is a gas with a noxious, pungent, rotten egg odor that most people detect at extremely low levels. Carrigan Aff., ¶ 11. Based on review of Hydrogen Sulfide concentration monitoring data from neighborhoods around the Landfill and resident odor complaints, MassDEP's Office of Research and Standards concluded that "the past and

continuing exposures experienced by residents in the community surrounding the Crow Lane Landfill have been persistent and noxious [and] these conditions represent a significant nuisance condition detrimentally affecting the public welfare in the community.”¹ *Id.* ¶ 9.

The Landfill Closure Schedule

The Final Judgment set a schedule for the Landfill’s capping and closure. The Final Judgment required that New Ventures complete installation of the impermeable, “flexible membrane liner” (“FML”) cap for the entire Landfill by November 27, 2009, before winter weather conditions would halt all installation work until spring. *See* Final Judgment, paragraph 12 (g). Because the final sand drainage and vegetative cover cannot be installed on top of the FML cap during the winter, the Final Judgment requires that New Ventures complete this work by May 30, 2010. *See Id.*, paragraph 12 (h). Among other requirements and deadlines, the Final Judgment also orders that New Ventures complete construction of all stormwater controls for the Landfill by June 14, 2010, and submit to MassDEP a Landfill Closure Completion application by June 29, 2010. *See Id.*, paragraph 12 (i) and (j).

The FAM and Standby Trust

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

¹ *See* Affidavit of Michael Hutcheson filed with the Commonwealth’s July 27, 2007 motion for an injunctive order requiring immediate remedial actions at the landfill (“Hutcheson Aff.”), attached to the Carrigan Aff. as Exhibit B. As Head of the Air and Water Toxics Section of the Department’s Office of Research and Standards, Hutcheson is responsible for producing reviews of toxicity data, developing new human health and ecological risk assessment methodologies, and evaluating environmental sampling data and assessing both human and ecological risks as a result of exposures to chemicals in the environment and home.

landfill closure work and post-closure operations and maintenance. *See* 310 CMR

19.051(2)(a). *See also* Carrigan Aff., ¶¶ 21, 22. 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).

On October 20, 2003, MassDEP and New Ventures executed a Corrective Action Standby Trust Agreement ("Trust Agreement") that established an approved financial assurance mechanism ("FAM") pursuant to 310 CMR 19.051(12)(a). *See* Affidavit of Richard J. Chalpin, Regional Director, MassDEP Northeast Regional Office ("Chalpin Aff."), ¶ 7. *See also* Carrigan Aff., ¶ 25 and the Trust Agreement attached as Exhibit D to the Carrigan Aff. New Ventures is the Grantor of the trust, MassDEP is the beneficiary, and the River Bank in North Andover is the current Trustee. *See* Carrigan Aff., ¶ 25. Pursuant to the Trust Agreement, New Ventures initially funded the FAM at \$2,050,000, and made three subsequent payments into the FAM totaling \$925,000, bringing the total amount in the FAM to \$2,975,000, excluding any accrued interest. *Id.*, ¶¶ 26.

In September 2009, New Ventures informed MassDEP that it did not have revenue or funds sufficient to complete installation of the Landfill's FML cap and was thus not able to contract with its FML installer to schedule and perform the work. *See* Chalpin Aff., ¶ 10. New Ventures informed MassDEP that, for the same reasons, it was unable to contract for blasting work necessary to create a stormwater detention basin, or pay for the installation of

pipng and landfill gas extraction wells. *Id.*, ¶ 11.

New Ventures' failure to contract for and schedule installation of the Landfill's FML cap – whether or not it was able – not only delayed the start of this work, but threatened to prevent completion of the FML cap before winter, when weather conditions would halt installation work until spring. Chalpin Aff., ¶¶ 10-13.

Leaving the Landfill uncapped over the winter would have allowed rain, snowmelt and stormwater runoff to infiltrate the Landfill, thereby dramatically increasing the risk and likelihood of periodic and ongoing releases of Hydrogen Sulfide and other gasses from the Landfill, resulting in nuisance conditions threatening the health and welfare of residents living in the vicinity of the Landfill. Chalpin Aff., ¶ 13; Carrigan Aff., ¶¶ 36.

For this compelling public health and welfare reason, MassDEP agreed in October 2009 to secure the use of FAM funds through an amendment to the Trust Agreement that allowed vendors to be paid for the performance of this specific work.² Chalpin Aff., ¶ 14. *See also* Carrigan Aff., ¶ 38 and Stand-by Trust Agreement, as amended, attached as Exhibit D to the Carrigan Aff. At the same time, MassDEP and New Ventures executed a Memorandum of Agreement (“MOA”) that established procedures for contractors performing the work at the Landfill to be paid directly from the FAM after MassDEP inspected and approved their work. Chalpin Aff., ¶ 14. *See also* Carrigan Aff., ¶ 38 and the Memorandum of Agreement attached as Exhibit I to the Carrigan Aff. The specific closure activities authorized by the MOA were strictly limited to the (1) installation of the FML cap; (2) installation of Landfill gas extraction wells; and (3) blasting of a Stormwater Control Basin. Carrigan Aff., ¶ 38.

New Ventures completed installation of the FML cap and gas extraction wells before

² For unrelated reasons, the Trust Agreement was also amended to change the Trustee from US Bank NA to River Bank. Chalpin Aff., ¶ 14.

the end of November, 2009, with MassDEP oversight and approval of the work performed. Chalpin Aff., ¶ 15; Carrigan Aff., ¶ 39. In December 2009, New Ventures completed installation of the drainage pipes and much of the blasting work for the stormwater basin. Chalpin Aff., ¶ 15. Following the MassDEP authorized disbursement of funds from the FAM to the third party contractors to pay for this capping, blasting, and gas well installation work, the balance in the FAM is \$2,734,886 as of the date of this motion. Carrigan Aff., ¶ 30.

FACTS IN SUPPORT OF REQUESTED RELIEF

On February 26, 2010, New Ventures informed MassDEP that, sometime during the early morning hours of February 26, 2010, strong winds damaged gas extraction wells and a portion of the Landfill's FML cap. Carrigan Aff., ¶ 41. On February 27 and March 1, 2010, MassDEP and its consultant, Shaw Environmental, Inc. of Salem, New Hampshire, inspected the damage and discovered that at least one and one half (1.5) acres and as much as two (2) acres of the FML cap had been blown off the southwestern portion of the Landfill, with damage to the edges of the remaining FML. *Id.*, ¶ 42. As a result of this damage, at least 1.5 acres of the geotextile gas vent layer underlying the FML cap is now uncovered and exposed to the elements. *Id.* The loss of this FML cap and exposure of the underlying gas vent layer allows precipitation and stormwater runoff to infiltrate into the C&D Material and other solid waste inside the Landfill, increasing the risk of leachate and landfill gas generation and release, including noxious Hydrogen Sulfide gas releases and the creation of nuisance odors. *Id.*, ¶ 43. The MassDEP inspectors also observed that components of the Landfill gas extraction system were damaged, including landfill gas extraction wells EW-10, EW-11, and EW-12, which had been rendered inoperable, requiring repair or replacement. *Id.*, ¶ 42.

On February 26, 2010, New Ventures attempted to temporarily isolate these damaged gas extraction wells from the rest of the Landfill gas extraction system. Carrigan Aff., ¶ 42,

43. In addition, a few hours after discovering the storm damage, New Ventures placed sandbags in an attempt to secure the edges of the remaining, damaged FML. *Id.* Since implementing these stop-gap, temporary measures, New Ventures has, as of the date of this motion, taken no action to replace and repair the lost and damaged FML or repair the damaged gas extraction wells. *Id.*, ¶¶ 50. *See also Id.*, ¶¶ 42, 43.

By letter dated March 3, 2010, MassDEP notified New Ventures that, because it had failed to replace and repair the damaged FML and gas wells, MassDEP may exercise its authority under paragraph 27 of the Final Judgment to access the Landfill Site with contractors and perform the necessary repair work. *See Carrigan Aff.*, ¶ 44 and MassDEP March 3, 2010 “Paragraph 27 Notice” letter to New Ventures, attached as Exhibit K to the Carrigan Aff. *See also Chalpin Aff.*, ¶ 30.

In addition, on March 5, 2010, MassDEP sent New Ventures a “14 day notice” letter pursuant to the terms of paragraph 6(a) of the FAM Trust Agreement. *See Carrigan Aff.*, ¶ 47 and MassDEP March 5, 2010 “Notice to Issue Notice and Instructions to Trustee” letter to New Ventures, attached as Exhibit N to the Carrigan Aff. This “14 day notice” informed New Ventures that, because it had failed to repair the FML and gas wells damaged by the February storm, MassDEP would, after expiration of the 14 day period, send a “default notice” informing the Trustee that MassDEP is securing control over the transfer, use, and disbursement of funds in the FAM for the purpose of repairing the damaged FML and gas wells and directing the Trustee to reimburse MassDEP’s or its contractors for cost of these repairs. *Id.*

By letter dated March 5, 2010, New Ventures responded by denying access to the Landfill site, stating that MassDEP had no authority under paragraph 27 of the Final Judgment to enter the Landfill Site and perform repair work on the damaged FML or gas

wells or to seek reimbursement for the FAM. *See* Chalpin Aff., ¶ [[23]]. *See also* Carrigan Aff., ¶ 45 and New Ventures' March 5, 2010 letter attached as Exhibit L to the Carrigan Aff. New Ventures' March 5, 2010 letter further informed MassDEP that New Ventures had “contacted [[GSE]], its FML installer for a ‘timetable’ to repair the FML,” and that it would “contact [MassDEP] when the [FML] repairs are scheduled” (quotation in original). New Ventures' March 5, 2010 letter failed to acknowledge the damaged and inoperable gas extraction wells or address whether or not New Ventures intended to repair the damaged wells. *Id.*

By letter dated March 10, 2010, MassDEP notified New Ventures that it must replace and repair the damaged FML and gas extraction wells without delay. *See* Chalpin Aff., ¶ 32. *See also* Carrigan Aff., ¶ 46 and MassDEP March 10, 2010 “Repair of FML & Wells – response to Nylen Letter of 3/5/10” letter to New Ventures, attached as Exhibit M to the Carrigan Aff. This March 10, 2010 letter expressly reserved MassDEP's right under paragraph 27 of the Final Judgment and paragraph 6(a) of the FAM Trust Agreement to access the site and perform the necessary FML and gas well repair work and seek reimbursement from the FAM in accordance with MassDEP's March 3, “paragraph 27 notice” and March 5, 2010 “14 day notice” letters to New Ventures. *See* Chalpin Aff., ¶ 32. *See also* Exhibits M and N to the Carrigan Aff.

As of the date of this motion, New Ventures has not replaced or repaired the missing and damaged FML and has taken no action to replace or repair the damaged gas wells. Carrigan Aff., ¶ 51. Moreover, New Ventures has not informed MassDEP that it has contracted for or scheduled the repair of the damaged FML and gas extraction wells. *Id.*

Finally, by letter dated March 5, 2010, MassDEP sent New Ventures notice that the FAM was not adequately funded based on New Ventures' most recent 2006 Landfill closure

and post-closure cost estimates submitted to MassDEP, which estimated that post-closure costs would be \$4,478,400. *See* Chalpin Aff., ¶ 29. *See also* Carrigan Aff., ¶ 48 and MassDEP March 5, 2010 “Stand-by Trust Account – Funding” letter to New Ventures, attached as Exhibit O to the Carrigan Aff. Because the FAM is currently funded at \$2,734,886, MassDEP’s March 5, 2010 notice letter informed New Ventures that the FAM is not adequately funded to assure that funds are available to cover all Landfill closure and post-closure costs. *Id.*

ARGUMENT

I. Because New Ventures Has Failed to Repair the Damaged Landfill Cap and Gas Wells, This Court Should Issue an Order Authorizing MassDEP and Its Contractor Access To the Landfill To Perform the Repair Work Pursuant to Paragraph 27 of the Final Judgment

The Final Judgment anticipates a situation where, as here, New Ventures fails to perform necessary repair or maintenance work at the Landfill involving damage to the FML cap or Landfill gas system, and the judgment expressly gives MassDEP authority to do the work itself in these circumstances. Paragraph 27 of the Final Judgment provides clear and unequivocal authority for MassDEP to access the landfill Site to repair damaged FML and to take any actions necessary to assure that the Landfill gas system is operating properly:

The Department and its contractors shall have the right to access the Site at any time and without notice to: respond to odor complaints; conduct inspections; take air quality readings, leachate samples, or other samples; secure the continued installation and full operation of the LFG Pretreatment System in the event that the LFG Pretreatment System has been removed, disabled, or otherwise fails, or if New Ventures has abandoned or stopped operating the LFG Pretreatment System; secure the continued installation and full operation of the enclosed flare, including, without limitation, all piping, gas collection systems, propane tanks, and other components required to operate the enclosed flare; and otherwise inspect the Site or monitor activity to ensure compliance with all terms, conditions, and requirements of this Final Judgment and the Settlement Agreement, as well as with any other applicable administrative enforcement orders issued by the Department.

...
The Department and its contractors shall also, within seventy-two (72) hours of notice by the Department, have the right to access the Site at any time to take actions necessary to: (i) assure that the landfill gas system, including, without limitation, the LFG Pre-treatment System, the enclosed flare, and gas collection system, is operating in full compliance with the performance standards in Appendix B to the Settlement Agreement; (ii) patch, repair, or extrusion weld any FML rips, tears, seam openings or other damage; (iii) cover, patch, or otherwise mitigate any breakouts of hydrogen sulfide or other Landfill gases from the Landfill surface. . . .

Final Judgment, paragraph 27 (emphasis added).

As of the date of this motion, more than three weeks have passed since the storm blew off 1.5 acres of the Landfill cap. Carrigan Aff., ¶¶ 41, 42. For nearly a month, at least 1.5 acres of the Landfill's gas vent layer has been uncovered and exposed to the elements and three broken gas wells have not been operating. *Id.* The lost and damaged FML cap allows precipitation and stormwater runoff to infiltrate into the C&D Material and other solid waste inside the Landfill, increasing the risk of leachate and Landfill gas generation and release, including the release of noxious Hydrogen Sulfide gas releases and the creation of nuisance odors. *Id.*, ¶ 43. *See also* Chalpin Aff., ¶¶ 13, 14. Because New Ventures has failed to make the critically required repairs, this Court should grant the Commonwealth's motion allowing MassDEP and its contractors access to the Landfill Site to perform the necessary repair work pursuant to the authority granted in paragraph 27 of the Final Judgment.

II. The Trust Agreement Authorizes That MassDEP Be Reimbursed For Repairing the Damaged FML and Gas Wells and, Further, Provides That If New Ventures Fails In Whole or In Part to Take Corrective Action or Fulfill Its 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

On repeated occasions, New Ventures has informed MassDEP that it lacks the revenues to fund any further closure activities, including those required by this Court's Final

Judgment, and has requested that MassDEP authorize disbursements for those activities from the FAM. *See Chalpin Aff.*, ¶¶ 10-11, 17-19, 21-24. Most recently, New Ventures has informed MassDEP that it cannot pay to repair the FML cap and gas wells damaged in the February storm. *See Chalpin Aff.*, ¶¶ 21, 22. New Ventures suggests that it is ready to carry out the necessary work, provided it is allowed to draw funds from the FAM to pay for the work. But the FAM is a performance bond, not the primary funding mechanism for closure and post-closure work.³ Rather, the FAM is intended to be held in reserve and act as a fall-back in case the owner or operator defaults on its obligations, to ensure that funds will be available should MassDEP find that it must itself contract for the necessary work. Such is now the case.

Under the terms of the Trust Agreement and 310 C.M.R. 19.051, MassDEP and its contractors may be reimbursed for any repair work or corrective action MassDEP performs to bring the Landfill back into compliance with any orders issued by MassDEP including, the Final Judgment's requirements. In addition, 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

³ New Ventures now claims that it is willing to submit financial records to MassDEP that demonstrate that it has insufficient funds to pay for any further landfill repairs or do the remaining work necessary to complete the Landfill's closure. *See Chalpin Aff.*, ¶¶ 22-24. However, New Ventures is willing to submit these financial documents only if the Commonwealth enters into a confidentiality agreement and provides an opinion that any tax records submitted are exempt from the Public Records Law. *Id.*, ¶ 26. At this point, the Landfill's financial documents are not relevant to the question of whether or not New Ventures is in default because it has failed in whole or in part to take corrective actions or perform the remaining closure obligations, although it may explain *why* the company is in default. New Ventures appears to be under the impression that, if it submits financial documents (that it insists be kept confidential) to demonstrate a lack of revenue and funds, the company should be able to access and use the FAM funds to pay for any all remaining work required to close the Landfill and perform all post-closure operations and maintenance. *Id.*, ¶¶ 27, 28. For the reasons discussed above, New Ventures' assumption ignores or misreads the terms of Trust Agreement and the regulatory provisions at 310 CMR 19.051. New Ventures is in default and the Trust Agreement authorizes MassDEP to take control over the remaining Landfill closure work by directing the disbursement the FAM funds to contractors finishing the closure.

use and disbursement of the FAM to pay contractors to perform all remaining closure and post-closure work. Paragraph 6(a) of the 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).

A. The Trust Agreement Authorizes That MassDEP and Its Contractors Be Reimbursed for Repairing the Storm Damaged FML Cap and Gas Wells

If this Court grants the relief sought by the Commonwealth in Section I, above, and authorizes MassDEP and its contractors to access the Landfill to repair the storm damaged FML and gas wells, this Court should also declare that the Trust Agreement authorizes MassDEP to direct the Trustee to reimburse MassDEP and its contractors for the cost of such repair work through the FAM in accordance with the terms of Trust Agreement paragraph 6(a), quoted above. In addition to the terms of the Trust Agreement, 310 C.M.R.

19.051(9)(a) provides that MassDEP may take "control over and direct the transfer, use and disbursement of the [remaining FAM funds] for the purpose of effecting closure and post-closure maintenance including but not limited to . . . directing the holder of the financial assurance mechanism to reimburse [MassDEP] for actions it or its agents has performed to

bring the facility into compliance.” 310 C.M.R. 19.051(9)(a).

B. This Court Should Declare that New Ventures Has Defaulted on its Landfill Closure Obligations and that, Pursuant to the Terms of the Trust Agreement, MassDEP is Authorized to Take Exclusive Control and Direction Over the Disbursement of the FAM Funds to Contractors Paid to Perform All Remaining Closure and Post-Closure Work

Should this Court find that New Ventures is financially unable to complete any further Landfill corrective actions or closure work, this Court should declare, in accordance with Paragraph 6(a) of the Trust Agreement, that New Ventures is in default of its closure obligations.

Pursuant to Paragraph 6(a) of the Trust Agreement, New Ventures’ failure to contract for and repair the wind damaged FML cap and gas wells, as well as its inability to contract for and perform the remaining Landfill closure work, 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). Upon such a default, paragraph 6(a) of the Trust Agreement authorizes MassDEP to issue a “default notice” and then instruct the Trustee to make payments from the FAM “. . . as [MassDEP] may at that time or thereafter direct in writing,” at which point New Ventures shall “*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*” work. Trust Agreement, paragraph 6(a) (emphasis added).

Over the long course of the Landfill’s closure, New Ventures has time-and-again violated the Commonwealth’s solid waste and air pollution control laws, MassDEP administrative orders, and orders of this Court, resulting in nuisance conditions that

threatened the health and welfare of residents living near the Landfill. *See Carrigan Aff.*, ¶ 9, and paragraphs 15-17, 38-46 and 79-84 of the Carrigan Affidavit dated July 27, 2007 submitted in support of an injunctive motion seeking an order that New Ventures implement several measures to stop gas releases and odors at the Landfill. *See also* paragraphs 16-21 of the Carrigan Affidavit dated November 3, 2008, submitted in support of a November 2008 Contempt Complaint filed in this case. Both the 2007 and 2008 Carrigan Affidavits are on file with the Court. New Ventures has a long history of failing to operate the Landfill in a manner that prevents the release of noxious Hydrogen Sulfide and other Landfill gases. *Id.* Because New Ventures now claims that it has no funds to repair the storm damage or carry out any further Landfill closure work, this Court should declare that New Ventures has breached the Trust Agreement and defaulted on its Landfill closure obligations. Pursuant to the terms of the Trust Agreement, this Court should also declare that MassDEP is authorized to direct the use and disbursement of the remaining trust funds to assure the required repairs and remaining Landfill closure work are performed fully and properly in a manner that minimizes the risk of noxious Hydrogen Sulfide and other landfill gas releases.

III. The Court Should Order That New Ventures Submit to MassDEP Full and Complete Estimates of all Remaining Landfill Closure Work Costs and Post-Closure Operation and Maintenance Costs

Paragraph 4 of the Trust Agreement provides that the FAM is “subject to periodic adjustment in accordance with the financial assurance cost estimate and funding requirements at 310 C.M.R. 19.051 (6)-(8).” Pursuant to 310 C.M.R. 19.015(6), New Ventures must revise its Landfill closure and post-closure operation and maintenance costs on an annual basis and submit a revised cost estimate to MassDEP every two years. Upon determining in a revised estimate that the cost of closure or post-closure maintenance exceeds by ten percent (10%) the amount in the FAM, 310 C.M.R. 19.051(6) requires that New Ventures either (i)

increase the amount in the FAM to an amount equal to the revised estimate; or (ii) secure and maintain an additional financial assurance mechanism in an amount equal to the difference between the amount in the FAM and the full amount of the revised estimate of the cost of closure or post-closure maintenance. 310 CMR 19.051(7)(a).

In February and October, 2006, New Ventures submitted revised Landfill closure and post-closure cost estimates, also known as “proformas,” to MassDEP. Carrigan Aff., ¶¶ 27, 28. Both of New Ventures’ revised proformas, dated January 2006 and September 2006, estimated Landfill post-closure costs to be \$4,478,400 -- which exceeds the current FAM balance of \$2,734,886. *Id.*, ¶¶ 30, 51.

By letter dated March 5, 2010, MassDEP notified New Ventures of its obligations under 310 CMR 19.051(2), (6), and (7)(a) to fully fund the FAM in accordance with the estimates provided in the 2006 proformas. *See* Exhibit O attached to the Carrigan Aff. In this March 5, 2010 letter, MassDEP demanded that New Ventures return to compliance by adequately funding the FAM and further noted that New Ventures was in violation of the regulatory requirements at 310 C.M.R. 19.051(6) because it had not submitted to MassDEP the required Landfill closure and post-closure cost estimate revision.

As of the date of this motion, New Ventures has not added any funds to the FAM or established an additional financial assurance mechanism to match the amount set forth in New Ventures’ 2006 proformas. Carrigan Aff., ¶ 51. New Ventures now claims that its new post-closure cost estimates are drastically lower than those in the 2006 proformas, although it has yet to submit new cost estimates pursuant to the requirements of 310 C.M.R. 19.051(6).⁴

For the reasons set forth in paragraphs 27-33, 35, 54, 57 of the Carrigan Aff., it is MassDEP Northeast Regional Office Solid Waste Chief John Carrigan’s professional opinion

⁴ New Ventures did submit to MassDEP an incomplete proforma in December 2007 and a “draft” proforma in September 2009, but these incomplete and draft proformas do not satisfy the requirements of 310 C.M.R. 19.051(6) and were submitted “for settlement purposes only.” *See* Carrigan Aff., ¶ 28, note 4.

that the 2006 proformas underestimate and fail to account for all closure and post-closure costs. Many of New Ventures' closure and post-closure cost estimates are based upon unsupported assumptions and undocumented "lump sum" cost estimates. *See Carrigan Aff.*, ¶¶ 29, 33. For instance, New Ventures fails to document or explain its estimates for the five year cost of operating the Landfill gas control system. *Id.*, ¶ 33. Based upon analysis performed by its consultant, Shaw Environmental, and the experiences of other Massachusetts landfills, it is Carrigan's professional opinion that New Ventures' estimate of the five year cost of operating the Landfill gas control system seriously underestimates the actual cost of operating the system over that five year timeframe. *Id.*, ¶ 35. Moreover, New Ventures fails to provide any support or documentation for its assumption that it will only need to operate and maintain the Landfill gas control system for five years following closure. *Id.*, ¶ 33, 35. Many other landfills in Massachusetts have continued to generate landfill gases, including thousands of parts per million concentrations of Hydrogen Sulfide gas, requiring ongoing operation and maintenance of their gas control and air pollution control equipment for substantially longer than five years. *Id.*, 34. In addition, New Ventures' 2006 post-closure cost estimates fail to account for several necessary costs, including the costs associated with the management, collection and disposal of leachate. *Id.*, ¶ 35.

The Court should order that New Ventures return to compliance with 310 C.M.R. 19.051(6) by submitting to MassDEP a revised proforma that fully and adequately estimates all remaining Landfill closure costs and post-closure operation and maintenance costs by addressing and all tasks and cost factors set forth in Exhibit 1 to the Commonwealth's proposed order attached to the motion filed with this memorandum.

CONCLUSION

For all the foregoing reasons, the Commonwealth respectfully requests that this Court issue an order granting the Department and its contractors access to the Landfill site for the

purpose of repairing the damaged FML and gas extraction wells with the cost of these repairs paid to DEP's contractors by reimbursement through the FAM. In addition, the Commonwealth requests that this Court declare that New Ventures has defaulted on its Landfill closure obligations and breached the Trust Agreement because it cannot fund and perform the required repairs or any further closure work. Because New Ventures has defaulted, this Court should also declare that, pursuant to the terms of the Trust Agreement, MassDEP is authorized to control and direct the use and disbursement of all remaining trust funds to reimburse contractors performing all further Landfill closure work. Finally, the Commonwealth requests that this Court order New Ventures to submit to MassDEP revised estimates that fully and accurately address all tasks and cost factors set forth in Exhibit 1 to the Commonwealth's Proposed Order. All of the requested relief is in the public interest because it addresses and remedies a threat to the public health and welfare.

Respectfully submitted,

COMMONWEALTH OF
MASSACHUSETTS

MARTHA COAKLEY
ATTORNEY GENERAL,

By: 

Matthew C. Ireland, BBO # 554868
Assistant Attorney General
Environmental Protection Division
One Ashburton Place
Boston, Massachusetts 02108
617-727-2200, ext. 2434

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