

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT  
SUFFOLK SUPERIOR COURT

Suffolk, ss

COMMONWEALTH OF MASSACHUSETTS,  
Plaintiff

V.

NEW VENTURES ASSOCIATES, LLC,  
Defendant

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CA # SUCV2006-00790

**MOTION AND MEMORANDUM OF DEFENDANT,**  
**NEW VENTURES ASSOCIATES, LLC TO**  
**COMPEL CLOSURE OF THE CROW LANE LANDFILL PURSUANT TO**  
**DEFENDANTS CLOSURE AND POST-CLOSURE SCHEDULE AND**  
**FOR THE RELEASE OF FAM FUNDS**

**I. BACKGROUND**

1. This within civil litigation involves defendant, New Ventures Associates, LLC (*hereinafter* “New Ventures”) closure of the Crow Lane Landfill (*hereinafter, the* “Landfill), a previously inactive, unlicensed landfill located at Crow Lane, Newburyport, Massachusetts. New Ventures’ predecessor did not close the landfill in accordance with the rules and regulations of Massachusetts Department of Environmental Protection (*hereinafter the* “Department”). The predecessor disposed of municipal waste, sludge and other materials from the date of commencement until in or about 1972.
2. New Ventures purchased the Landfill on or about 2000, and subsequent thereto entered into an Administrative Consent Order (*hereinafter the* “2003 ACO”) in 2003, and agreed to a Preliminary Injunction (*hereinafter the* “2006 Order”) for the closure of the first half of the Landfill on or about October 2006. New Ventures further entered into a Settlement

Agreement as a final judgment in April 2009 (*hereinafter the* “2009 Judgment”) for the closure of the remaining portion of the Landfill.

3. In addition, at the time of the 2003 ACO, New Ventures was required to enter into a Standby Trust Agreement and to deposit \$2,950,000.00 into a trust account held by a third party as security for the closure and post-closure costs for of the Landfill. The Standby Trust Agreement is generally known as the Financial Assurance Mechanism (*hereinafter the* “FAM”) and includes certain trigger provisions authorizing release of the funds.
4. Under the terms of the closure plan, New Ventures brought construction and demolition materials to the Landfill in order to assist with final grading and shaping. At no time was any municipal waste brought on to the Landfill by New Ventures or included in the closure. Grading and shaping to the final elevation was completed in 2009.
5. New Ventures also agreed in the 2006 Order to install a gas extraction system at the Landfill which serves to collect subsurface gas, then pipe it through a series of treatment tanks where the sulfur levels are reduced prior to the gas being discharged into an enclosed flare where it is combusted at approximately 1,600 degrees Fahrenheit.
6. The 2009 Judgment established the terms of the completion of the Landfill closure, including the design of a portion of the perimeter berm around the Landfill. Portions of the perimeter berm have already been constructed.
7. New Ventures has heretofore covered the grading and shaping materials placed at the Landfill as part of the closure plan with a geotextile fabric layer and has covered the geotextile layer with an impervious membrane (“FML”). It is the intent of New Ventures

consistent with approved closure plan, to cover the membrane with twelve (12') inches of soil and loam later in 2010.

8. A considerable portion of the work required to complete capping of the Landfill was accelerated at the request of the Department and completed by the end of October, 2009. More specifically, New Ventures completed capping of the Landfill, as well as certain required storm water control work.
9. According to the construction schedule (see below) the berm must be completed before the Landfill closure, including loaming and seeding.
10. The Department has not approved the berm design, despite the fact that the design meets the 2009 Agreement.
11. On or about February 25, 2010, a significant wind storm heavily damaged trees, roads, utilities and properties along the northeast and northwest portions of Massachusetts and southern portions of New Hampshire.
12. The winds from the storm reached hurricane-like levels and resulted in power outages for days in the existing areas. The winds also resulted in approximately ten (10%) percent of the membrane layer covering the Landfill being ripped off the surface and blown into other portions of the Landfill and off the side at the southwest corner. The geotextile layer was not damaged.
13. Representatives of New Ventures were on-site at all times and immediately reported the damage to the Department the following morning.
14. An assessment by New Ventures determined that repairs to membrane layer would require professional attention and replacement of certain damaged areas of the membrane.

## II. JUDGE CRATSLEY'S ORDER

New Ventures at all relevant times complied with the terms of the 2009 Judgment with regards to the Landfill closure deadlines and berm design. Notwithstanding such compliance by New Ventures, the Plaintiff recently requested relief from the Court asserting New Ventures was not in compliance with the 2009 Judgment and further asserting the funds held pursuant to the FAM were not sufficient to complete the remaining scope of work. This is despite the fact New Ventures has as of the date hereof completed approximately ninety (90%) percent of the work required to complete closure of the Landfill. (*See Affidavit, Section 44, of William J. Thibeault dated March 29, 2010, attached hereto as Exhibit "A" and incorporated by reference herein*). Further, all that is remaining for Landfill closure is (i) berm completion; (ii) stormwater completion; (iii) completion of FML capping; (iv) loam and seed of the Landfill cap; and (v) post-closure monitoring. (*See Affidavit, Section 44, of William J. Thibeault dated March 29, 2010, attached previously hereto as Exhibit "A" and incorporated by reference herein*). Despite Landfill closure being approximately ninety (90%) percent complete, the Department requested, and the Department recently authorized, the release of certain FAM funds in the respective amounts of \$265,000.00 for stormwater basin work, \$203,772.00 for membrane installation and \$15,892.00 for drilling. This is consistent with New Ventures' position that the monies presently contained in the FAM are sufficient to complete the closure and post-closure scope of work.

New Ventures, in good faith, on two (2) prior occasions, has made attempts to work with the Department in order coordinate estimates and contractor prices to assure the Landfill is closed properly and in the most cost effective manner. (*See correspondence of Richard A. Nysten, Esq. dated 04/09/2010 and 04/16/2010 attached hereto as Exhibit "B" and incorporated by reference herein*). The Department has, to date, steadfastly refused to release or share any data related to

estimates or contractor prices they previously received from third-party contractors for work related to closure of the Landfill. The natural inference to be drawn from the Department's intentional course of action is that it intends to pursue a deliberate and coordinated strategy expressly designed to limit New Ventures ability to secure the return of the FAM monies to which it is rightly entitled. As a result of the Department refusing to share and or release the aforementioned third party contractor invoices, New Ventures has been forced on several occasions prior hereto to pay for contractor work related to the closure of the Landfill out of it's own operating funds rather than through the release of FAM monies as was anticipated.<sup>1</sup> More specifically, the Court recently issued an order on or about March 30, 2010, which allowed the Department to solicit bids for the repair of damage to the Landfill resulting from a significant rain storm on or about February 25, 2010.

New Ventures in good faith, retained contractors to make the necessary repairs to the Landfill resulting from the aforementioned storm. New Ventures was at a disadvantage in retaining these contractors as the Department, as noted above refused to share the prior bids it received for repairs to the Landfill subsequent to the February 25, 2010 storm. The Department has on several occasions prior hereto represented to the Court its desire to see the Landfill closed in a timely and cost effective manner. Notwithstanding this argument, the recent actions of the Department are in direct opposition to this stated goal. To date, New Ventures has undertaken in good faith to nearly complete the closure of the Landfill while the Department has consistently chosen a path designed to result in the greatest amount of delays and financial expenditures while ultimately avoiding the one overriding goal all the parties are working to achieve, final closure of the Landfill. The Department is no longer endeavoring to work in good faith with

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<sup>1</sup> In fact, New Ventures completed the repair of the FML when the Department refused to disclose the costs for the Department to repair the FML or to otherwise respond to Defendant's request for information. (See Exhibit B)

New Ventures to close the Landfill. Rather the Department is committed to a conclusion whereby New Ventures will have completed the majority of the work necessary to close the Landfill, after which the Department will seek to seize control of same, as well as the FAM monies, thereby ultimately taking credit for the successful closure of the Landfill.

### **III. BERM DESIGN AND COMPLIANCE**

Under the terms of the 2009 Judgment, New Ventures was required to submit its design for the completion of the perimeter berm to the Department for review. The 2009 Judgment further required New Ventures to (i) conduct field analysis of the composition of portions of the existing berm; (ii) meet with the Department to discuss its findings; (iii) submit a geotechnical report stating whether any modifications were necessary for the berm design; and (iv) submit a berm modification plan with a safety factor of no less than 1.30. (*See Exhibit "C" attached hereto and incorporated by reference herein*). In accordance with the aforementioned requirements, New Ventures (i) conducted a field analysis of the existing berm; (ii) met with the Department to discuss its findings; (iii) submitted a geotechnical report; and (iv) submitted a berm design with minor modifications that achieved a safety factor of not less than 1.30. On or about June 16, 2009, Geocomp Corporation, on behalf of New Ventures, submitted an analysis of the berm entitled "Report on Additional Geotechnical Field and Laboratory Investigations, Crow Lane Landfill, Newburyport, Massachusetts." (*See Exhibit "D" attached hereto and incorporated by reference herein*).

On or about October 6, 2009, the Department submitted a rebuttal to the aforementioned Geocomp report outlining several alleged deficiencies contained therein. (*See Exhibit "E" attached hereto and incorporated by reference herein*). On or about October 22, 2009, Geocomp addressed each of the issues raised in the October 6, 2009, correspondence from the Department.

(See Exhibit "F" attached hereto and incorporated by reference herein). Geocomp also recommended a monitoring plan to confirm future berm performance. The Geocomp correspondence was drafted and signed by Martin Hawkes in his position as a Senior Environmental Engineer for Geocomp. The Department issued a decision of or about March 3, 2010, alleging the berm design analysis previously submitted by Geocomp did not justify a 1.30 safety factor based upon the requirement for a monitoring plan. (See Exhibit "G" attached hereto and incorporated by reference herein). New Ventures, on or about April 2, 2010, appealed the decision of the Department to the Suffolk Superior Court pursuant to Massachusetts General Laws, Chapter 30A asserting that the Department committed error in issuing a denial of Geocomp berm design analysis. (See Exhibit "H" attached hereto and incorporated by reference herein). New Ventures was forced to appeal the decision of the Department denying the Geocomp berm design analysis due to the continued and repeated refusal of the Department to meet with representatives of New Ventures and Geocomp to discuss the alleged deficiencies in the Geocomp design analysis.

More specifically, counsel for New Ventures continually requested on eight (8) separate occasions that the Department meet with New Ventures and representatives of Geocomp to discuss the issue of berm as well as other ongoing issues. (See correspondence of Richard A. Nylén, Jr., Esq. dated 01/29/2010, 03/05/2010, 03/16/2010, 04/07/2010, 04/09/2010, 04/16/2010, 04/26/10 and 05/20/2010 attached hereto as Exhibit "I" and incorporated by reference herein). Despite these continued and repeated requests for a meeting, the Department refused to meet with New Ventures and instead elected to pursue a course of additional protracted litigation, ultimately benefiting no one. In fact, this course of action by the Department appears solely and

exclusively directed at taking over closure of the Landfill and gaining control of the remaining FAM funds.

New Ventures, at all relevant times, complied with the terms and conditions of 2009 Judgment and submitted a berm design from a licensed professional engineer adhering to the required 1.3 safety factor. The Department did not make a finding that the design did not meet 1.3 safety factor.<sup>2</sup> Instead, the Department simply requested additional information and then, subsequent thereto, refused to meet with New Ventures to discuss same. The actions of the Department have resulted in New Ventures being forced to delay closure of the Landfill until after resolution of the berm appeal. The Landfill requires completion of the berm, and as a result of the denial and other Department actions, New Ventures was, as a consequence, caused to appeal the Department's improper and unsubstantiated decision. Further, the Department's previously approved design required the extension of the FML over the berm. On this basis, previously scheduled loaming and seeding must be put on hold pending resolution of the berm design dispute as the final berm construction cannot at this point be finalized.

#### **IV. CLOSURE AND POST CLOSURE PRO-FORMA**

New Ventures, pursuant to the Court's order dated March 30, 2010, with respect to the Plaintiff's Emergency Motion for Order Granting Site Access to Repair Landfill Damage, was required to submit for Department review and approval a revised closure and post-closure cost estimate. Such estimate was to itemize and clearly identify the assumptions utilized in estimating the closure and post-closure costs and to provide detailed data and information supporting and justifying the assumptions utilized in closure and post-closure estimates.

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<sup>2</sup> New Ventures has acknowledged that it will add rock buttressing to the base of the berm below grade, consistent with the specifications referenced in its report to the Department. (Exhibit I)

On April 7, April 9, and April 26, 2010, New Ventures reminded the Department that its design meets the 1.3 safety factor and requested a meeting to discuss how the berm design, schedule and monitoring affects the Department's request for closure and post-closure costs. The Department refused to respond. This forced New Ventures to provide the closure and post-closure costs without Department consultation.

On or about May 21, 2010,<sup>3</sup> New Ventures, in accordance with Judge Cratsley's Order, forwarded to the Department a detailed cost analysis of the remaining closure and post-closure costs associated with the Landfill. Total closure costs were estimated at \$2,141,507.00, which represents closure costs of \$1,538,307 and post-closure costs of \$603,200.00. (*See correspondence of Richard A. Nylan, Esq. dated 05/20/2010 attached hereto as Exhibit "J" and incorporated by reference herein*). This correspondence again reiterated the frustration and disappointment by New Ventures in the refusal of the Department to discuss the sequence of closure and berm approval, except through written correspondence and press releases. (*See correspondence of Richard A. Nylan, Esq. dated 05/20/2010 previously attached hereto as Exhibit "J" and incorporated by reference herein*). This refusal is clearly calculated to build a case to present to the Court for the seizure of the Landfill along with the remaining FAM monies. The Department's actions are clearly short sighted and result in further extending the final date of Landfill closure along with the continued needless expenditure of judicial resources.

The Department has continually acted under the misapprehension that the FAM monies belong to the Commonwealth, rather than to New Ventures. These funds were originally intended to secure the closure of the Landfill. not to result in a financial windfall for the

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<sup>3</sup> The letter was dated May 20, 2010 but delivered on May 21, 2010.

Department.<sup>4</sup> Finally, there is no clearer evidence of the ultimate intention of the Department to seize control of the Landfill and the FAM monies is necessary than its refusal to respond on eight (8) separate times to the request of New Ventures counsel for a meeting to discuss important outstanding issues related to Landfill closure. *(See correspondence of Richard A. Nylan, Jr., Esq. dated 01/29/2010, 03/05/2010, 03/16/2010, 04/07/2010, 04/09/2010, 04/16/2010, 04/26/10 and 05/20/2010 attached previously hereto as Exhibit "I" and incorporated by reference herein).*

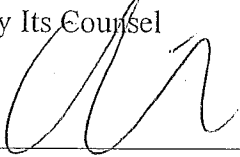
#### V. CONCLUSION

For all the aforementioned reasons, Defendant respectfully requests this honorable Court allow the within motion and compel closure of the Crow Lane Landfill pursuant to the Defendant's Closure and Post-Closure Schedule and further order the release of the remaining FAM funds per the Closure and Post-Closure Schedule pro-forma, or in such manner as the Court may deem appropriate.

Dated: May 24, 2010

Respectfully Submitted,

NEW VENTURES ASSOCIATES, LLC,  
By Its Counsel



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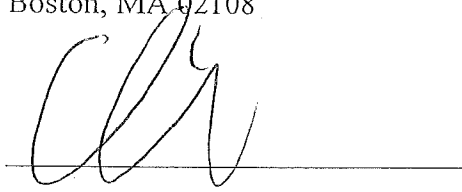
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<sup>4</sup> According to the post-closure and closure estimates, New Ventures has requested the release of \$570,000, the excess held in the FAM. (See Exhibit K)

## CERTIFICATE OF SERVICE

I, Anthony J. Rossi do hereby state that I served a true and correct copy of the within document upon the following parties by in hand delivery, on this the 24<sup>th</sup> day of May, 2010.

Matthew C. Ireland, Esq.  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place  
Boston, MA 02108

A handwritten signature in black ink, appearing to be 'AJR', is written over a horizontal line.

Anthony J. Rossi