

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. SUCV2006-00790-C

COMMONWEALTH OF MASSACHUSETTS

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC,

Defendant.

**DEFENDANT NEW VENTURES
ASSOCIATES, LLC'S ("NEW
VENTURES") OPPOSITION TO
PLAINTIFF'S MOTION FOR
EMERGENCY SITE ACCESS AND
A FINDING THAT THE
DEFENDANT IS IN DEFAULT**

Now comes New Ventures Associates, LLC ("New Ventures") and hereby opposes the Commonwealth's Motion for Emergency Site Access to Its Landfill and its request that the Court make a finding that Defendant is in Default of its responsibilities for closure. As reasons therefore, New Ventures states that the Commonwealth has not demonstrated that an emergency exists, has not demonstrated that New Ventures had abandoned the Landfill closure and is seeking the circumvent regulatory provisions to take over the closure of the Landfill now that it is capped.

I. INTRODUCTION

This matter involves the motion filed by the Commonwealth alleging that New Ventures has harmed public health in connection with a landfill closure in Newburyport, Massachusetts. The Commonwealth filed a motion claiming that it needs immediate access to the site to repair a portion of the Landfill cover on Thursday, March 25, 2010. The Department informed the City of Newburyport for political reasons that it filed the motion that day but did not contact the Defendant or its counsel until Friday morning, March 26, 2010. Counsel was not provided copies of the affidavits in support of the Commonwealth's motion until late Friday afternoon, March 26, 2010, after the Commonwealth had issued a press release and after the Court had

scheduled a hearing for Monday, March 29, 2010. (Exhibit 1)

Defendant New Ventures opposes the motion because the Commonwealth has not followed the April 2009 Settlement Agreement and because they seek to violate the Standby Trust Agreement which establish the process for access to New Ventures' \$2.7 Million Dollars in security. As a matter of law, the Commonwealth has not demonstrated that New Ventures is in default of the Standby Trust Agreement.

II. BACKGROUND

As noted by the Commonwealth, this matter involves the closure of the Crow Lane Landfill under Administrative Order by the Department. New Ventures purchased the unlicensed Landfill in 2000 with the intention to close the Landfill legally and has been closing the Landfill since 2003. Closure involves bringing grading and shaping material to the Landfill approved by the Department, constructing a berm around the perimeter of the Landfill and bringing the Landfill to its final grade. Once the Landfill has been brought to its final elevation, the Landfill is capped with a geo-textile material layer and then a flexible membrane liner ("FML") and twelve (12") inches of loam and seed for its final cover. The footprint is approximately 14 acres in size. New Ventures commenced the Landfill closure in 2003 using DEP approved construction and demolition debris ("C&D") for grading and shaping to bring the Landfill to its final elevation.

In addition, at the time of the 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 closure and post-closure of the Landfill. The document is referenced throughout as the Financial Assurance Mechanism ("FAM") and includes provisions to trigger release of monies.

Nine (9) months following the commencement of the closure, odor complaints were filed by several residents at the end of 2004. It was determined that when the DEP approved C&D material was exposed to the elements, it could result in the generation of hydrogen sulfide (“H₂S”). The H₂S needed to be treated prior to discharge to reduce the sulfur content. New Ventures devised a dual treatment process¹ that collects the subsurface gas in wells, pipes it to above ground containers that treat the gas with a filtering agent to reduce the sulfur and then incinerates the gas in an enclosed flare heated at 1600° Fahrenheit.

Once the treatment system was agreed to, the parties executed a Preliminary Injunction in October 2006 with the Commonwealth that set the conditions for closure of the Landfill.² New Ventures installed the landfill gas treatment system consisting of a gas collection system, primary treatment and burning the gas at 1600° Fahrenheit prior to discharge, through a thirty (30’) foot high stack. New Ventures was successful in capping approximately sixty (60%) percent of the Landfill with FML on or before March 2007. However, disputes as to the condition of a portion of the berm resulted in a shutdown in July 2007 that was not lifted by either the Commonwealth or the City of Newburyport until April 30, 2009.

As presented by the Affidavit of William Thibeault, Manager of New Ventures Associates, LLC, following the execution of a second Settlement Agreement in April 2009 for the completion of the closure, New Ventures has met its closure obligations. (Thibeault Affidavit ¶43)³

¹ As noted in the Affidavit of William Thibeault no pretreatment is required in the Brocton landfill that was closed with the same C&D materials. (Affidavit, ¶18)

² Prior to the Preliminary Injunction, New Ventures sent a draft pro forma of the costs for closure and post-closure. It has not been finalized.

³ Mr. Carrigan notes in his affidavit (¶9) that the Department has issued several enforcement orders through the years with respect to the closure. No enforcement orders have been issued since the final closure agreement was reached in April 2009.

The April 2009 Settlement Agreement called for the completion of the capping of the Landfill by the end of 2009, loam and seeding of the Landfill in 2010, completion of the stormwater basin in 2010 and an as-built plan filed in 2010. The Department and New Ventures agreed to accelerate the Landfill capping and the installation of Stormwater Basin #1 and its associated piping to handle and treat stormwater. In return for accelerating the capping, the Department agreed to amend the FAM and reimbursed contractors directly for the work performed. No monies were paid to New Ventures. (Exhibit J to Carrigan Affidavit; Thibeault Affidavit, ¶58)

Mr. Chalpin suggests that the Department had no choice but to authorize the expenditure of \$265,000.00 for stormwater basin work, \$203,772.00 for FML installation and \$15,892.00 for drilling. This is not the case.

As noted in the affidavit of William Thibeault, the documents do not support the Commonwealth's assertion that it paid monies out of the FAM to reimburse contractors for work performed because of New Ventures' threat that it would not complete the closure. A meeting was held between the Department, the Commonwealth and New Ventures in the fall of 2009. At the meeting the Commonwealth and the Department agreed to pay for the work out of the FAM if the stormwater controls would be completed in 2009, rather than 2010 and the capping would take place in September and October 2009 rather than by November 27, 2009. (Thibeault Affidavit, ¶58) The agreement was reflected in the first amendment to the FAM agreement that references specifically "accelerating closure activities so that capping takes place in less time . . ." and a finding that "New Ventures is not in default of the corrective closure and post-closure obligations." (Exhibit I to Carrigan Affidavit, p. 2) There is no reference in any of the executed documents to a failure or refusal by New Ventures to pay for

this work. In addition, no Default Order was issued under the FAM by the Department.

The capping and stormwater control work was completed in October well in advance of the 2010 deadlines and the Commonwealth paid for the work out of the FAM. (Carrigan, Exhibit J.) Throughout this process, New Ventures met its legal obligation under the Settlement Agreement to staff the Landfill twenty-four (24) hours per day, seven (7) days per week. (Thibeault Affidavit, ¶43)

In February 25, 2010, a heavy rain and wind storm heavily damaged, trees, roads, utilities and properties along the northeast and northwest portions of Massachusetts and Southern New Hampshire. Winds were hurricane-like and caused power outages for days in the surrounding areas. The winds caused damage by ripping a limited portion of the FML on top of the Landfill representing approximately ten (10%) percent of its cover. The FML in this area was blown into other portions of the Landfill and off the side of the Southwest corner. (Thibeault Affidavit, ¶49)

New Ventures personnel were on-site at all times and reported the damage to the Department the next morning. (Carrigan Affidavit, ¶42) As assessment followed at which time New Ventures determined that the repairs to the FML required professional attention and replacement. New Ventures contacted the Department and was informed that if it wanted to pay for repairs out of the FAM, then certain financial records were required. (Exhibit 5 to Chalpin Affidavit)

New Ventures contacted the Department to confirm that the information would be confidential on March 5, 2010. (Exhibit 8 to Chalpin Affidavit) Despite repeated requests, the letter has not been responded to by the Department.⁴ (Thibeault Affidavit, ¶54)

⁴ The Commonwealth mischaracterizes New Ventures' request that the Department confirm that tax records are

III. ARGUMENT

A. **THERE IS NO DEMONSTRATED EMERGENCY THREAT TO PUBLIC HEALTH AND WELFARE ASSOCIATED WITH THE DAMAGED FML.**

The Commonwealth offers its general view on the unintended consequences of the use of DEP approved C&D materials when they are exposed to the elements. The Commonwealth acknowledges that when the landfills are fully capped that the gas control measures can control the emissions.

The Defendant does not dispute the language cited by the Department in the Settlement Agreement that provides access to the site by the Department “to patch repair or extrusion weld any FML rips, tears seam openings or other damage.” (§27, April 2009 Judgment) The Defendant pointed out that the Department will access the very monies that New Ventures seeks to access to effect the repairs. No response has been received. (Exhibit 2)

As noted in the attached Affidavit of William Thibeault, New Ventures requested access to the FAM monies to repair the FML. New Ventures contacted the FML installer, received a quote, and has been waiting for a response from the Department to its request to fund the repairs. (See Exhibit L to Carrigan Affidavit) In its letter to the Department, New Ventures pointed out that there was no evidence of off gassing in the neighborhood⁵ or a threat to public health or safety from the limited damage to the FML. The Department has provided no evidence to the contrary. The Commonwealth has not brought to the Court’s attention the fact that the H₂S readings in the neighborhood are at a nondetected level for the majority of the

confidential as a demand. It merely asks the Department to confirm its interpretation of the law. It is not seeking special treatment.

⁵ New Ventures retained the services of a public health scientist in 2005 to evaluate the potential health threat in response to odor complaints prior to the installation of the pretreatment process and enclosed flare. The conclusion is that the exposure to H₂S in limited parts per billion as alleged will not harm public health.

times recorded.⁶

Further, the Commonwealth has not brought to the Court's attention that there is no evidence that there are odors present as the result of damage to the FML or that the post-February 26th reading exceeds H₂S readings from before the FML damage.⁷ New Ventures has access to the readings which have not increased. (Thibeault Affidavit, ¶¶50, 55)

New Ventures asks that the Court deny the Commonwealth's request to enter the Landfill to make the FML repairs for several reasons. First, there is no emergency established or public health threat. Second, the Department will be expending monies from the same security fund ("FML") that New Ventures seeks to access. Third, the FML repair requires oversight by New Ventures as machinery access must not disturb the integrity of the undamaged FML and geo-textile layer. (Thibeault Affidavit, ¶59) Fourth, there is already in place a process for the certification of work by New Ventures' project engineer prior to disbursement. (Exhibit I to Carrigan Affidavit) Finally, Department costs will exceed the costs of New Ventures' implementation and oversight. (Thibeault Affidavit, ¶¶59, 60)

B. NEW VENTURES HAS NOT ABANDONED THE LANDFILL AND IS NOT IN DEFAULT.

The Department asks the Court to ignore the contractual rights established in the performance bond (FAM) and to make a finding based upon hearsay statements that New Ventures has abandoned its obligations to close the Landfill. In making the extraordinary request, the Department fails to cite any present violations of the April 2009 Settlement Agreement.

⁶ A Jerome Meter that reads H₂S is located in the neighborhood and makes continuous readings.

⁷ The Department has access to New Ventures' daily readings and has engaged a consultant to conduct its own

The Standby Trust Agreement sets a specific process for a Default and Department access Section 6 of the Standby Trust states that if New Ventures, a grantor, is in Default, the Department must issue a Default Notice identifying what the obligations that are out of compliance. (Exhibit D to Carrigan Affidavit)

The Commonwealth's request should be denied for the following reasons:

First, the Department asks the Court to find that New Ventures is "financially unable to complete any further Landfill correction actions or closures work." There is nothing in the notice, other than hearsay statements that New Ventures is unable to complete closure.

Second, the Department has not issued a Default Notice as required pursuant to Section 6 of the Trust Agreement. The Department's notice under Paragraph 27 of the Settlement Agreement is not sufficient. Third, New Ventures has not defaulted on any of its closure obligations. It continues to staff the Landfill closure, operate the pretreatment process and conduct monitoring as required by the Settlement Agreement. The Department has not notified New Ventures of the failure to take corrective actions with the issuance of a Notice of Default.

(Thibeault Affidavit, ¶70)

C. THE COMMONWEALTH HAS ALLOWED NEW VENTURES TO PAY FOR OTHER EXPENSES OUT OF THE FAM.

The Commonwealth argues that New Ventures' request to access FAM monies for expenses associated with the Landfill closure is evidence of a Default under the Standby Trust Agreement associated with the FAM. This not supported by the facts as the Department previously allowed other expenses to be paid from the FAM. (Carrigan Affidavit, ¶¶I, J)

D. THE REQUEST FOR A PRO FORMA IS BEING ADDRESSED

The Department has requested the submission of a revised pro forma with updated

readings.

estimates of the cost of closure and post-closure. (Commonwealth's Memorandum at p. 16) New Ventures is presently working on this document but was waiting for the resolution of the berm modification to submit its figures.

The Commonwealth alleges that New Ventures has "substantially" underestimated the true cost of operating and monitoring the Landfill once it is closed and that the Financial Assurance Mechanism is underfunded (Commonwealth's Memorandum, p. 3) without any supporting data or figures.

The 2006 Post-Closure Estimate of \$4.4 Million Dollars to conduct post-closure maintenance and monitoring was sent to the Department as a draft due to the lack of experience at the time with the media that treats the Landfill, lack of experience with the specific well performance and the variations associated with fuel. The estimate was provided prior to the installation and operation of the three (3) containment trailers and the enclosed flare.

Post-installation results demonstrate that the use of three (3) media containers with primary and secondary treatment prior to incineration has reduced the amount of media necessary to meet the Department's performance standard of ninety-five (95%) H₂S destruction prior to incineration. Second, the capping of the Landfill reduced the H₂S content in the Landfill gas. (Thibeault Affidavit, ¶¶47, 48)

Third, it is probable that once the H₂S content reaches a certain level, pretreatment will no longer be required and the Landfill gas can be incinerated directly to meet the performance standards, similar to the Brockton facility. The 2006 estimate of \$2.9 Million Dollars for five (5) years of pre-treatment exceeds in many multiples the costs to date. The Department agrees that updating the pro forma is not an exact science for post-closure costs and requires

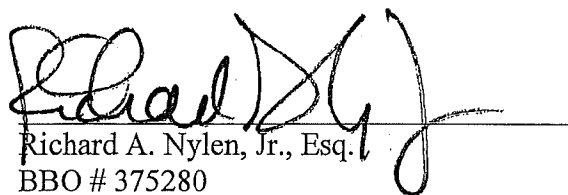
monitoring milestones to reflect the field conditions that will change over time. (Carrigan Affidavit, ¶32)

New Ventures is in receipt of the Department' request to revise all of its closure and post-closure estimates and intends to comply with same. (Thibeault Affidavit)

IV. CONCLUSION

For the reasons above, Defendant requests that the Commonwealth's Motion be denied and that the parties follow the procedures established by the FAM and the 2009 Settlement Agreement.

Respectfully submitted,



Richard A. Nylén, Jr., Esq.
BBO # 375280
Lynch, DeSimone & Nylén, LLP
12 Post Office Square, Suite 600
Boston, MA 02109
(617) 348-4500

Dated: March 29, 2010

H:\Thibeault, William\SUCV2006-0790\Opposition to FAM Access 03-27-10.doc

EXHIBIT 1

Richard Nylen

From: Information, Crowlane (DEP) [Crowlane.Information@state.ma.us]
Sent: Friday, March 26, 2010 2:02 PM
To: Powers, Rosemary (DEP); 'ebaker@horsleywitten.com'; 'turtleredwolf@aol.com'; 'leo.rocco@comcast.net'; 'william.woodbury@verizon.net'; 'ronklod@verizon.net'; 'afreyhome@comcast.net'; 'ariherzog@gmail.com'; 'bandicorson@comcast.net'; 'bderrivan@kitchenviews.com'; 'bkapprsr@comcast.net'; 'bren2002@comcast.net'; 'councilorhutch@yahoo.com'; 'd.holaday@comcast.net'; 'david-chatfield@comcast.net'; 'dkasbm15@comcast.net'; 'dvomtoc@comcast.net'; 'edcameronNBPT@gmail.com'; 'finnegan@greenet.net'; 'gary1955@comcast.net'; 'gearls25@comcast.net'; 'gillian.swart@comcast.net'; 'heathdee@comcast.net'; 'jamescaponigro@msn.com'; 'japnubble@aol.com'; 'jcteixeira@comcast.net'; 'jebortz@comcast.net'; 'jim@strongstreet.com'; 'JMorris@CityofNewburyport.com'; 'jmyette@earthlink.net'; 'jvroy@comcast.net'; 'jwarnat@aol.com'; 'kbjackson@comcast.net'; 'loulucci@comcast.net'; 'm.michaelfrey@comcast.net'; 'marlenclark@comcast.net'; 'newburyport@cnc.com'; 'oconnor.ives@gmail.com'; 'ph@computer.org'; 'zpm61@aol.com'; 'gainzy@yahoo.com'; 'tjbtj@comcast.net'; 'tiwack@comcast.net'; 'susantsao@comcast.net'; 'peteremurphy@comcast.net'; 'shanleyjames@comcast.net'; 'Scallyandwags@aol.com'; 'mspgodfrey@yahoo.com'; 'pgames46@comcast.net'; 'stellamccormick@comcast.net'; 'mdcarroll90@comcast.net'; 'MReilly@CityofNewburyport.com'; 'kfarrell@newburyportnews.com'; 'cala90@aol.com'; 'derrivan@comcast.net'; 'rnylen@ldnllp.com'; 'mquatromoni@sitec-engineering.com'; 'tuppenney@comcast.net'; 'Jackvanloan@earthlink.net'
Subject: Crow Lane Landfill Update - March 26, 2010
Attachments: Crow Lane-Motion for Site Access & Default Declaration.pdf; Crow Lane-Brief in Support of Motion for Site Access & Default Declaration.pdf

Crow Lane Landfill Update –March 26, 2010

This update is being provided as part of MassDEP's commitment to more frequent communications with the residents and officials of Newburyport concerning the capping and closure of Crow Lane Landfill. Please send your questions, comments and suggestions to: crowlane.information@massmail.state.ma.us. In addition to these email updates, correspondence and reports are posted in the MassDEP Northeast Region website at: <http://www.mass.gov/dep/about/region/crowlane.htm>.

Please call the New Ventures complaint line at (978) 462-5240 and, if you are able to do so, send an e-mail to CrowLaneLandfill@gmail.com and crowlane.information@massmail.state.ma.us as soon as possible when you detect odors. This information will assist us in having Shaw personnel when at the landfill investigate the complaints and in collecting additional off-site ambient air samples when odors are occurring.

Court Action Filed

On Thursday, March 25, 2010, the Attorney General's Office filed a motion on behalf of MassDEP in Suffolk Superior Court regarding the Crow Lane Landfill. The Attorney General's Office is requesting that the court issue an order granting the Department and its contractors access to the landfill for the purpose of repairing the damaged Flexible Membrane Liner (the "FML" cap) and gas extraction wells with the cost of these repairs paid to MassDEP's contractors by reimbursement through New Ventures' Financial Assurance Mechanism (the "FAM"). [A FAM is essentially a performance bond required of landfill owners by the Solid Waste Regulations. It serves to provide the Commonwealth with the funds necessary to perform closure and post-closure activities at a landfill in the event that the operator fails in whole or in part to do so in accordance with permits or orders].

In addition, the Commonwealth requested that the court declare that New Ventures has

defaulted on its Landfill closure obligations and breached the provisions in their FAM because it cannot fund and perform the required repairs or any further closure work. The Attorney General argues that, because New Ventures has defaulted on its FAM obligations, the court should also declare that MassDEP is authorized to control and direct the use and disbursement of all remaining FAM funds to reimburse contractors performing all further Landfill closure work. Finally, the Attorney General asks that the court order New Ventures to submit to MassDEP revised cost estimates that fully and accurately address all tasks necessary to close the landfill and pay for post-closure maintenance of the landfill.

The court has scheduled a hearing on the Attorney General Office's motion for Monday, March 29, 2010 at 2 PM in Suffolk Superior Court, Session C, Room 313 in Boston. The papers filed by the Attorney General's Office with the court will be available on the MassDEP web page late Monday at <http://www.mass.gov/dep/about/region/crowlane.htm>." Electronic copies of the Motion and Brief are attached to this email.

EXHIBIT 2

Richard Nylan

From: Richard Nylan [rnylen@ldnllp.com]
Sent: Friday, March 19, 2010 3:07 PM
To: 'Dingle, Mike (DEP)'
Subject: FW: NVLLC; TAX RETURNS
Attachments: Letter to Dingle 03-05-10.pdf

Michael:

As a follow up to this letter and to the telephone message that I left on Monday, March 15, 2010, could you please confirm that you agree that tax returns that are submitted in connection with the Department's request for financial information are confidential under the public records statute and the Department's regulations.

I would appreciate hearing from you as the Department has requested this information and New Ventures cannot proceed without an answer.

Thank you.

Chip
Richard A. Nylan, Jr., Esq.
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12 Post Office Square
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Tel: (617) 348-4500, ext. 231
Fax: (617) 348-4545
rnylen@ldnllp.com

From: Richard Nylan [mailto:rnylen@ldnllp.com]
Sent: Friday, March 05, 2010 4:04 PM
To: 'Dingle, Mike (DEP)'
Cc: 'Chalpin, Richard (DEP)'; 'Carrigan, John (DEP)'; 'tuppenney@comcast.net'; 'omldllc@aol.com'; 'rossi34esq@aol.com'
Subject: NVLLC; TAX RETURNS

LYNCH, DESIMONE & NYLEN, LLP

ATTORNEYS AT LAW
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FREDERICK S. GILMAN
STEPHEN W. DECOURCEY
JOHN P. CARR
SHANNON MICHAUD

OF COUNSEL

JAMES W. MURPHY
WAYNE H. SCOTT

March 5, 2010

Via Email & First Class Mail

Michael W. Dingle, Senior Counsel
Office of General Counsel
Department of Environmental Protection
One Winter Street – 3rd. Floor
Boston, MA 02108

Re: New Ventures Associates, LLC; Tax Returns

Dear Attorney Dingle:

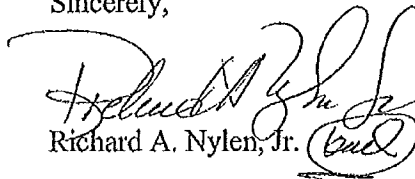
I have had an opportunity to review the definition of “public records” referenced in 310 CMR 3.00 as well as M.G.L., Chapter 66, §30 and M.G.L., Chapter 4, §7. The definitions exclude those records that are statutorily exempted. Under M.G.L., Chapter 62(c), §21, the disclosure of tax returns is prohibited.

On this basis, I would like to confirm that any tax returns that are sent to the Department as part of its review of New Ventures’ request for FAM access are not considered public records for purposes of release to the general public.

I look forward to hearing from you.

Thank you.

Sincerely,


Richard A. Nylén, Jr.

RAN/kad

March 5, 2010
Page 2

cc: Mr. Richard Chalpin
Mr. John Carrigan
Mr. William Thibeault
Anthony J. Rossi, Esq.

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SHANNON MICHAUD

OF COUNSEL

JAMES W. MURPHY
WAYNE H. SCOTT

March 22, 2010

Via Email & 1st Class Mail

John A. Carrigan, Section Chief
Solid Waste Management
DEP-Northeast Regional Office
205B Lowell Street
Wilmington, MA 01887

**Re: Commonwealth of Massachusetts vs. New Ventures Associates LLC ;
Civil Action No. SUCV2006-00790; FMF# 39545;
Repair of FML and Wells**

Dear Mr. Carrigan:

This letter is in response to the Department's letter dated March 11, 2010 that was received while I was away last week. We are writing again in hopes of ending the paper trail and getting back to the business of repairing and closing the Crow Lane Landfill.

At present time the Department has suggested that it may elect to transfer monies from the New Ventures Financial Assurance Mechanism ("FAM") to repair portions of the flexible membrane liner ("FML") and landfill gas system that were damaged during hurricane-like force winds of February 25 and February 26, 2010 rather than allow New Ventures to access the FAM. New Ventures' response to that position was articulated in my letter dated March 5, 2010.

1. The Department stated by letter from Richard Chalpin that New Ventures' future access to the FAM must be supported by presenting New Ventures' financial records to the Department.
2. New Ventures sent a letter dated March 4, 2010 seeking a confirmation that the tax returns are considered confidential under the public records statute and its regulations pursuant to M.G.L., c. 62C. No confirmation has been received as of this date. A follow up telephone call and email have been sent to Department counsel. New Ventures cannot comply with the Department's request without a response to its letter.

March 22, 2010
Page 2

3. New Ventures has taken steps and contacted the FML installer to conduct the repairs. The cost for the Department to conduct repairs will exceed costs if New Ventures' supervises the repair which is in the bests interest of all parties.
4. My references to the absence of a public health threat or off-gassing is that Paragraph 27 is designed specifically to assure compliance with the Settlement Agreement and performance standards. I acknowledge the Department's position that FML repairs are not tied to public health threats or off-gassing.
5. New Ventures has requested previously a meeting with the Department to discuss the repairs, operation and maintenance and closure issues in lieu of continuous letters that polarize positions rather than focus on completion of the closure.

We await the Department's response on these matters.

Please contact us if you have any questions.

Thank you.

Sincerely,


Richard A. Nylen, Jr.

RAN/kad

cc: The Honorable Donna Holaday, Mayor
Mr. William Thibeault, New Ventures Associates, LLC
Mr. Michael Quatromoni
Mark R. Reich, Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
C.A. NO. SUCV2006-0790C

COMMONWEALTH OF
MASSACHUSETTS

Plaintiff,

v.

NEW VENTURES ASSOCIATES, LLC

Defendant.

**AFFIDAVIT
OF
WILLIAM THIBEAULT IN
OPPOSITION TO THE
COMMONWEALTH'S EMERGENCY
MOTION FOR SITE ACCESS AND
REQUEST FOR DEFAULT**

1. I am the Manager of New Ventures Associates, LLC ("New Ventures"). New Ventures purchased the Crow Lane Landfill (the "Landfill") in 2000 for the purpose of closing the illegal, unlined Landfill. The landfill had been operated by a prior owner through 1987, but had never been closed in accordance with the Department of Environmental Protection's (the "Department") regulations. New Ventures did not dispose of solid waste at the Landfill and did not have an affiliation with the prior owner. I am aware that the source of a majority of the municipal waste at the Landfill is the City and that the City entered into an agreement with the prior owner to dispose of sewer sludge including metals in the Landfill in 1986.
2. In addition to New Ventures, I have been affiliated with other separate companies for cleaning up Brownfield sites including contractor yards and automobile junk yards and converting them to clean sites including Stop and Shop in Everett and BJ's Wholesale Club in Revere.
3. Subsequent to New Ventures' purchase of the Landfill, the Department required the execution of an Administrative Consent Order ("2003 ACO") in order to close the

Landfill. The ACO was required because the Landfill was not closed by the prior owner in accordance with the Department's regulations. The Landfill closure footprint is approximately fourteen (14) acres in size. Closure involves placing grading and shaping materials to the final elevation, placing geo-textile material on top of the grading and shaping material, placing an impermeable flexible membrane liner (the "FML") and then 12 inches of loam with seed. It is further defined in Paragraph 10, below.

4. Prior to the execution of the 2003 ACO, the Department's representative informed New Ventures that it must address City issues and receive approval for the operation of the closure from the City. New Ventures contacted then Newburyport Mayor Alan Lavender whose representatives drafted a Host Community Agreement (the "HCA") that established the operational terms of the closure. The City insisted that New Ventures tie the proposed post-closure height of the Landfill to a draft final grading plan in existence at the time that had been drafted by Goldberg Zoino Associates ("GZA").
5. After the HCA was executed in 2002, the Department prepared and executed its 2003 ACO.
6. In connection with the 2003 ACO, New Ventures prepared and submitted a pro forma analysis in accordance with Department policy that identified the anticipated costs for closure of the Landfill and established the approximate air space available for placing cover material on the Landfill to meet the final elevations with the existing footprint. The pro forma did not include extensive leachate collection system costs, the sulfur pretreatment system costs, berm modification costs, the reduction in air space due to increased soil requirements, extensive monitoring, the Jerome Meter, or staffing the facility seven (7) days a week, 24 hours a day that were added in 2005 and 2006,

subsequent to the 2003 ACO. Under the terms of the HCA, the Landfill size could not be expanded without Newburyport City Council and Mayoral approval despite additional costs of closure added to the Landfill closure.

7. As part of the Commonwealth's Solid Waste Master Plan and its policies for the closure of illegal, unlicensed landfills in the Commonwealth and for finding a disposal option for construction and demolition debris, the Department approved the use of construction and demolition debris (the "C&D debris") for grading, shaping and closing landfills. New Ventures was authorized by the Department to bring the Department approved C&D materials to the Landfill beginning in 2003. C&D waste is processed from building materials and rubble from the construction, repair or demolition of buildings, roads or structures and is six (6") inches or less in size. Revenues from accepting the C&D materials are proposed to finance the closure of landfills under the Department's Policy.
8. A copy of the proforma was provided to the Department in 2003.
9. As part of the 2003 ACO, New Ventures posted a Two Million Nine Hundred and Fifty Thousand (\$2,950,000.00) Dollar cash bond required by the Department's regulations for the Landfill closure which is intended as security for closure and post-closure completion. The cash bond is referenced as a Financial Assurance Mechanism (the "FAM"). The terms of the FAM are established in a Standby Trust Agreement through which an independent third party holds the monies. Access to the FAM is governed by the Trust Agreement which is Exhibit D of Mr. Carrigan's Affidavit.
10. I am familiar with the closure requirements of the Landfill from the Department of Environmental Protection (the "Department") and the HCA. Under the terms of the Department's 2003 ACO, closure of the Landfill was scheduled for completion within

three (3) years. Closure is defined by the Department's regulations at 310 CMR 19.00 and includes placing the DEP approved C&D materials to the elevation approved by the Department, mixing the C&D with soils, constructing stormwater collection basins to collect, manage and treat post-closure stormwater that will no longer infiltrate into the Landfill, installing a landfill gas extraction system to collect, discharge and burn subsurface gases, installing an impermeable and flexible liner (the "FML") as a seal over the landfill materials when the landfill reaches final grade, loaming and seeding the top of the Landfill for final cover and installing post-closure wells to monitor the downgradient areas after the Landfill has been closed.

11. Prior to the commencement of closure, New Ventures, through its environmental consultant, GZA, submitted a Notice of Intent to the Newburyport Conservation Commission (the "NCC") seeking approval of certain work within wetland resource areas and within 100 feet of these resource areas. New Ventures sought approval for the removal of historic solid waste from the wetlands, the construction of the perimeter berm and the construction of three (3) stormwater basins to collect, treat and manage post closure stormwater. Once the Landfill is closed the stormwater will not longer infiltrate into the Landfill and stormwater basins are necessary to handle the rainwater.
12. The NCC, after several public hearings, issued an Order of Conditions approving the activities. It was appealed by several residents to DEP.
13. New Ventures eliminated stormwater basin #3 from the wetlands and redesigned the stormwater basins 1 and 2 to take all post closure landfill stormwater. As a result the Department issued a Superseding Order of Conditions (the "SOC") allowing the work in January 2003.

14. This redesign required New Ventures to enlarge and widen the perimeter berm in order to collect and carry the stormwater to Stormwater Basin 2. The modification did not add to the height of the Landfill.
15. New Ventures commenced the closure in 2003 in compliance with the 2003 ACO and the SOC, New Ventures brought C&D materials to the Landfill and mixed it with soils to bring the contours to the approved grade.
16. The Department later determined that the degradation of C&D materials through exposure to the elements could result in the generation of hydrogen sulfide (the "H₂S") and rotten egg odors. The Department did not prohibit and has not prohibited the use of C&D materials for closure. New Ventures was informed by the Department that further pretreatment of the H₂S was required. The Department required soils to be mixed with C&D materials on a 1 to 1 basis. In October 2004, the Department issued an Order halting the closure an odor control program was developed. New Ventures adopted an odor program that combusted the landfill gas with an approved open flare from 2004 through 2006.
17. In 2005, following receipt of odor complaints filed with the Board of Health, New Ventures retained a Harvard public health consultant to advise New Ventures as to whether exposure to H₂S was a public health threat. The consultant issued a report that concluded that H₂S could result in nuisance odors at very low levels but that the reported levels did not represent a public health threat. A copy of the Report has been filed with the Court in this matter.
18. In 2005 and 2006, New Ventures consulted with the Department, engineers and other Landfill operators to determine how to address the effect of landfill gas emissions

associated with the use of C&D materials for closure. I am aware of at least three (3) other landfill closures that used C&D materials authorized by the Department in southeastern, central and western Massachusetts.

19. Other landfill closure operators were either publicly held corporations or had the ability to expand the air space at their landfill to recover the additional costs associated with the sulfur treatment process.
20. In May 2005, New Ventures entered into an agreement with the Newburyport Board of Health (the "BOH") regarding the operations of the closure. The agreement established that New Ventures would take certain actions to effect the Landfill closure. At or around that time, New Ventures sealed leachate breakouts at the Landfill. New Ventures agreed with the BOH that it would not accept materials if the H₂S levels reached 80 parts per billion. New Ventures also agreed to purchase and install a Jerome Meter in the neighborhood. The Jerome Meter is a small hand-held monitoring device that measures the level of H₂S in its vicinity with a detectable floor of 1-2 ppb. The Jerome Meter also runs off electricity and registers the levels every five minutes. The machine can be downloaded and is to provide H₂S readings. When complaints are called in to the New Ventures' complaint hot line, New Ventures must respond within one (1) hour and take the H₂S reading at the complaint location. These readings are provided to the Department the next day.
21. At no time have the H₂S levels registered in the neighborhood reached or exceeded 80 parts per billion to my knowledge.
22. In October 2006, New Ventures executed an agreement as a Preliminary Injunction (the "2006 Order") with the Department that modified the terms for the final closure of the

Landfill. Under the 2006 Order, New Ventures accelerated the closure of a portion of the Landfill in 2007 and recommenced the closure.

23. In accordance with the 2006 Order, New Ventures expended considerable monies that were not anticipated in the closure of the Landfill and were not included in the pro forma as part of the 2003 approval. The pro forma did not include a gas blanket extraction system or pretreatment costs associated with treating of landfill gases prior to combustion through the enclosed flare. These costs have exceeded several million dollars.
24. New Ventures, in connection with Wood Waste, Inc., its supplier of C&D material agreed to reduce the amount of gypsum in the C&D material collected by Wood Waste beginning in October 2006. The separation occurs prior to the processing of the C&D materials for disposal at the Landfill. Sheetrock containing gypsum was not allowed for processing at the Wood Waste facility. The Department has not banned the use of C&D materials for landfill grading, shaping or closure purposes.
25. New Ventures performed the following actions in compliance with the 2006 Preliminary Injunction:
 - a. In January 2007 New Ventures purchased and installed a permanent pretreatment system to treat the sulfides from the landfill gases. The pretreatment system consists of multiple gas extraction wells installed below surface, a piping system that collects the gases and brings them to the surface, three (3) pretreatment vessels that use sulfide pretreatment media, a condensation tank, a permanent piping system that connects the pretreatment system and the enclosed flare to the landfill gas collection system, a fully automated enclosed flare to combust the gas at 1600°F and

a thirty (30') foot high stack emission tower for the discharge of the combusted gases. This pretreatment system remains in place.

- b. Entered into a contract with an FML liner company for the accelerated closure of one-half of the Landfill including, Geocomposite and Flexible Membrane Liner ("FML") installation in 2006 and 2007.
- c. Installed additional vertical wells and piping for landfill gas extraction as part of the treatment and combustion system.
- d. Contracted for, designed and installed a horizontal gas collection system for the enclosed portion of the Landfill (more than fifty (50%) percent) in addition to the vertical wells. The horizontal system is no longer a benefit and only a portion is utilized.
- e. Operated the pretreatment system 24 hours a day, seven days a week that includes two or three containment structures with media to filter the sulfides as well as the enclosed flare and stack.
- f. Trained employees to run the pretreatment system and conduct daily and weekly tests for the Department.
- g. Arranged for the purchase of media to treat the sulfides and replaced the pretreatment media in response to the H₂S levels that entered the enclosed flare.
- h. Prepared a quality assurance and quality control plan with a construction sequence for the Department.

- i. Conducted, completed and submitted a Comprehensive Site Assessment (the "CSA") for the Department involving an analysis of the physical features of the site and groundwater conditions.
- j. Constructed gas vent trenches and installed piping for landfill gas extraction.
- k. Arranged for staffing the Landfill seven (7) days a week, twenty-four (24) hours a day when operating, including a complaint hotline. When a complaint is called in, New Ventures responds to the complaint location and takes a reading.
- l. Generally met the Department's performance standard of destroying in excess of 95% of all H₂S being treated through the pretreatment process, and 100% with the combustion.
- m. Constructed a stormwater basin (Basin #2) to collect and treat stormwater from the capped portion of the Landfill. Commenced work on the second stormwater management basin. (Basin #1)
- n. Pumped out leachate collection tanks installed at the perimeter of the Landfill.
- o. Submitted a geotechnical evaluation of the perimeter berm and provided supplemental information.
- p. Placed \$200,000.00 into escrow to guarantee purchase of the H₂S pretreatment system and media.
- q. Capped more than fifty (50%) percent of the Landfill with the FML liner.

26. New Ventures expended more than Three Million (\$3,000,000.00) Dollars in excess of the projected costs at that time without requesting access to the FAM.
27. In July 2007, New Ventures was issued a Notice of Responsibility (the "NOR") letter by the Department that alleged that the Landfill should be regulated as a hazardous waste site under M.G.L., c.21E, and that I am personally liable for hazardous waste found or disposed, at the site. The Department refused to meet with New Ventures to discuss its NOR allegations.
28. The NOR letter was part of the Department's strategy in 2007 to take over the Landfill closure. No hazardous waste has been deposited at the Landfill by New Ventures. All materials used in connection with the closure have been approved by the Department. Any hazardous wastes placed at the site took place when the private operator was receiving municipal waste.
29. In August 2007, New Ventures agreed to a Stipulation (the "2007 Order") with the City of Newburyport Board of Health issued by the Essex Superior Court that required New Ventures to perform four (4) actions. (Essex Superior Court, Civil Action No. ESCV2007-01255) New Ventures is in compliance with this Order.
30. On or about September 20, Superior Court Justice McLaughlin issued an Order denying the Department's request to enter the Landfill and take action under M.G.L., c. 21E. Justice McLaughlin required New Ventures to take certain actions toward closure. New Ventures has taken these steps to the extent practicable and feasible.
31. In compliance with the Judge's Order, New Ventures submitted an Immediate Response Action (the "IRA") Plan under M.G.L., c. 21E to the Department that incorporated the following actions to take place. The IRA was complied with.

- a. Take steps to place temporary cap of clay-like soils to a depth of one (1') foot over Phase 1A of the Landfill.
 - b. Continue to patch and maintain the FML layer and to take steps to weld the seams.
 - c. The submission of a proposed plan proposing three new extraction wells to complete the gas system loop to the Department for its approval.
32. New Ventures prepared the design of the new subsurface wells and installed the wells in 2008. The pretreatment gas collection system is now looped without any gaps.
33. In April and May 2008, New Ventures meet with the Commonwealth to address the Commonwealth's concern with the composition of the perimeter berm and the closure of the Landfill.
34. In connection with the construction of the perimeter berm that holds the Landfill, the berm was expanded beyond the berm area as shown on the draft closure plan that was incorporated in the 2002 HCA. The berm was expanded to add to the stability of the Landfill.
35. The modification did not increase the height of the Landfill.
36. In April 2009, the City of Newburyport Board of Health issued an Order to complete the closure which had been on hold since 2007. The Board considered the open Landfill to be a public health threat.
37. Under this Order, Landfill closure was intended during 2010.
38. Under this Order closure involves the following:
 - a. Bring the Landfill to final grade.
 - b. Place the FML over the remaining forty (40%) percent of the Landfill.

- c. Place twelve (12”) inches of loam and seed on the entire Landfill cover.
39. The C&D materials that were used for grading and shaping were authorized by the Department.
40. The Department has banned many materials from solid waste disposal and closure, but not C&D materials.
41. I am aware and have personal knowledge that the facilities that transfer solid waste are authorized to take in C&D materials as DEP authorized cover for Landfills.
42. In April 2009, New Ventures entered into an agreement with the Department that was filed with this Court that set the schedule for the closure of the remaining 40% of the Landfill.
43. In accordance with the Settlement Agreement dated April 30, 2009, New Ventures has performed the following tasks in a timely manner:
- a. Completed the field work for the geotechnical investigation of the perimeter berm along Phase I of the Landfill.
 - b. Met with the Department’s technical consultants to review the geotechnical results of the perimeter berm.
 - c. Submitted a geotechnical report by its geotechnical consultant that established the requirements for the berm meeting the agreed upon safety standard of 1.3 in the April 2009 Settlement Agreement.
 - d. Fabricated three (3) new replacement containers to hold the Landfill gas pretreatment media which were installed and operate continuously to treat the gases prior to combustion.
 - e. Completed construction of the geo-textile layer covering the C&D materials.

- f. Completed construction of the Final FML cap upon the remaining portion of the Landfill with the exception of the haul road necessary to bring loam and seed to the top of the Landfill.
 - g. Emptied leachate tanks.
 - h. Constructed the stormwater controls for the remaining part of the Landfill, including Detention Basin #1 to collect the stormwater from the south side of the Landfill and a piping system to convey the stormwater to the wetlands in accordance with the plans.
 - i. Operated the Landfill with personnel on a 24 hour per day/7 day per week basis including daily monitoring of the pre-treatment system and H₂S levels.
 - j. Presented a berm modification design that meets the Department's 1.3 safety standard.
 - k. Maintained the pretreatment system.
 - l. Maintained the complaint hot line including follow up readings.
44. In my opinion the Landfill closure is at approximately ninety percent.
45. All that is remaining to be performed is for 1) FMR repair; 2) berm completion; 3) complete the FML capping; 4) loam and seed of the Landfill cap; 5) post-closure monitoring.
46. The 2.7 million dollars in the FAM exceeds the cost of the repair, closure and post-closure requirements.
47. In New Ventures' experience the level of H₂S has dropped dramatically following the capping of the Landfill. Since the exposure to moisture and interaction is ended with the capping of the Landfill, the amount of H₂S generated is reduced by almost one-half

immediately and will continue to reduce. This experience is consistent with the landfills that have reduced levels of H₂S after capping.

48. New Ventures has access to sufficient amounts of pretreatment media for post-closure purposes. The media containers are emptied on a less frequent basis.
49. On or about Thursday night and Friday morning, February 25 and 26, the northeast region of Massachusetts was hit hard by a storm. The storm produced hurricane-like winds exceeding 50 miles per hour. The storm left the northern portion of the state without power for several days. Southern New Hampshire lost power in more than 1/3 of its homes for days. The winds ripped a portion of the FML (10%) on the top of the Landfill. The FML that was ripped twisted in a ball. It remains on the Landfill.
50. I have inspected the damage to the FML from the hurricane-like winds of Thursday night/Friday morning, February 26, 2010. The damage was limited to less than 10 percent of the FML. In addition, several wells were damaged. New Ventures' personnel were on site during and after the storm and took immediate steps to secure the material and to seal any openings created. No C&D materials were exposed as they are covered by a geo-textile fabric. No new complaints of H₂S odors have been received as a result of the FML damage. No higher readings of H₂S in the neighborhood have been detected or recorded.
51. New Ventures determined that based upon the weight of the FML material and its need to replace the torn FML with new FML that must be welded as part of the repair that it needs a professional installer to complete the work.
52. New Ventures received an estimate for repairs from the installer and was reminded that repairs are not to take place when temperatures are below freezing. In addition, the repair

will require the creation of an access way to get to the damaged area with its equipment. This work must be supervised so as to not damage the surrounding FML. The estimate is based upon the number laborers that New Ventures will make available for the repair.

53. I contacted Richard Chalpin, the Director of the Northeast Region, directly and discussed funding the FML repair. Mr. Chalpin stated that the Commonwealth would consider taking monies from the FAM to pay for the repairs if New Ventures shared financial information. I stated to Mr. Chalpin that, due to a pending lawsuit, I wanted to confirm that financial information is not a public record.
54. On or about March 5, 2010, counsel to New Ventures sent a letter to the Department stating his opinion that the financial records of New Ventures are not public records. Despite telephone calls and e-mails, the Department had not responded to our request.
55. To my knowledge there are no odor complaints or higher readings substantiated in the neighborhood associated with the FML damages. None were attached to the Commonwealth's Affidavits.
56. I have requested the Department consider funding certain future costs out of the FAM.
57. There is presently \$2,731,659.36 in the FAM for the limited tasks of FML repair, berm completion, FML installation for the access road and loaming and seeding.
58. I am aware of the statements/affidavit of Richard Chalpin regarding New Ventures' request for the use of FAM monies to fund certain costs and respond as follows:
 - a. The use of FAM monies to accelerate the closure of the Landfill with FML, to accelerate the work necessary to construct the stormwater basin and to conduct drilling was based upon an agreement with the Department. There was no threat by New Ventures that it would not conduct the work and no requirement that

financial records be submitted as part of the agreement to fund the work out of the FAM.

- b. The MOA with the Department and the amendment to the FAM in October 2009 is consistent with the above-referenced agreement. There is no reference to any lack of funds available or refusal of New Ventures to pay for this work in the amendment. Rather, the amendment specifically references the purpose of accelerating the closure and that there is no default. (Chalpin, Exhibit 1, p.1.; Carrigan Exhibit I, p. 2)
- c. On February 4, 2010, Mr. Chalpin informed me by email that in order to access the FAM for the repair of the blower for the enclosed flare, that New Ventures needed to state that it did not have revenue to pay for this task. (Chalpin, Exhibit 3) New Ventures complied. There was no request for financial information in connection with access to these monies for the blower.
- d. On February 4, 2010, DEP counsel informed New Ventures' counsel that if it wanted to access monies for future closure and O&M purposes, that financial information was required as well as an updated pro forma. (Chalpin, Exhibit 7)
- e. On March 2, 2010, Mr. Chalpin sent an email, in response to my request to access monies to fix the FML damaged by hurricane-like winds, that New Ventures must submit financial records. (Chalpin, Exhibit 5)
- f. As part of that response, New Ventures' counsel submitted a letter dated March 5, 2010 seeking confirmation that New Ventures' tax records were confidential. (Chalpin, Exhibit 8) No response has been received for the past three (3) weeks.

- g. The pro forma referenced by Mr. Chalpin in his affidavit is not reliable for several reasons. First, as noted in the document, it was a draft document, because it was an estimate prior to installation of the pre-treatment system in 2006. Second, the document was drafted with the bulk of the post-closure estimate set aside for Landfill gas and operation. Third, following the installation of the pre-treatment system, costs are considerably less than anticipated because the media is less expensive and because the volume of media required for the Landfill gas pre-treatment process is less than anticipated once the Landfill is capped. The concentration of H₂S in the Landfill gas has dropped by almost eighty (80%) percent in the area capped. This is consistent with the experience of other landfills that used C&D materials for grading and shaping.
- h. Monitoring and maintenance costs will be in the range of Thirty Thousand (\$30,000.00) Dollars per year for thirty (30) years or One Million (\$1,000,000.00) Dollars.
- i. New Ventures has not stated that it will abandon the Landfill closure.
- j. New Ventures is prepared to oversee the repair of the FML which is critical as the work will require the installer to avoid damage to the remainder of the intact FML.

59. If the Department takes over the FML repair tasks, the costs will exceed the costs that New Ventures will expend and New Ventures will be harmed financially and will be exposed to potential liability.

60. If the Department takes over the task of closure, including berm completion, the costs will be greater than New Ventures will expend and New Ventures will be harmed financially and will be exposed to liability.
61. As part of day-to-day operations, New Ventures has repaired breakout areas with asphalt grinding as sealants, has adjusted the FML and its seal has regulated the gas extraction wells to pull gas from the Landfill for treatment purposes and operates the pretreatment and combustion process on a 24/7 basis. In addition, New Ventures has continued to man the Landfill continuously and has pumped the leachate collection system, except Tank 4.
62. I have not been made aware of, reviewed, or seen, any medical evidence that any odors have been reported or verified after the FML damage or that there have been any injuries to public health. Counsel to New Ventures requested this information through a Freedom of Information Act request two (2) months ago that has not been responded to by the Department.
63. There is no evidence of an emergency or public health threat as a result of the FML damage.
64. New Ventures has complied with the Department's Orders and the Board of Health Orders when issued and has taken steps to abate the odor potential air pollution through closure of the Landfill and operation of the pre-treatment process.
65. New Ventures is in the process of updating its pro forma as part of the process for completing the closure of the Landfill. Due to the reduced cost of media, the post-closure costs have been reduced. The post-closure FAM is not under-funded.
66. At no time has New Ventures abandoned the closure of the Landfill or stated it would abandon the closure.

67. I have personally telephoned Mr. Chalpin and Mr. Carrigan during the past three (3) weeks to follow up correspondence and discuss closure and have requested a meeting with the Department. The telephone calls have not been returned.
68. Out of frustration, I contacted and met with the Mayor of Newburyport to facilitate the communication with the Department regarding closure of the facility and repairs to the FML.
69. Apparently the Department instructed the Mayor not to speak to me about the matter.
70. I have not been served with a Default Notice under the FAM Trust.

Signed under the pains and penalties of perjury this 29th day of March, 2010.

NEW VENTURES ASSOCIATES, LLC

By:

Name: WILLIAM THIBEAULT

Its: Manager

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