

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

EXHIBIT "H"

CIVIL ACTION COVER SHEET

DOCKET NO.(S)

10 1366

Trial Court of Massachusetts Superior Court Department County: SUFFOLK



PLAINTIFF(S) NEW VENTURES ASSOCIATES, LLC

DEFENDANT(S) Department of Environmental Protection and Northeast Regional Bureau of Waste Prevention

ATTORNEY, FIRM NAME, ADDRESS AND TELEPHONE RICHARD A. NYLEN, JR., ESQ. (617) 348-4500 12 Post Office Sq. Boston, MA 02109 Board of Bar Overseers number: 375280

ATTORNEY (if known)

Origin code and track designation

Place an x in one box only:

- 1. F01 Original Complaint
2. F02 Removal to Sup.Ct. C.231,s.104 (Before trial) (F)
3. F03 Retransfer to Sup.Ct. C.231,s.102C (X)

- 4. F04 District Court Appeal c.231, s. 97 &104 (After trial) (X)
5. F05 Reactivated after rescript; relief from judgment/Order (Mass.R.Civ.P. 60) (X)
6. E10 Summary Process Appeal (X)

TYPE OF ACTION AND TRACK DESIGNATION (See reverse side)

CODE NO. TYPE OF ACTION (specify) TRACK IS THIS A JURY CASE?
E02 Appeal from Administrative Agency G.L. c. 30A (X) () Yes (X) No

The following is a full, itemized and detailed statement of the facts on which plaintiff relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS

(Attach additional sheets as necessary)

- A. Documented medical expenses to date:
1. Total hospital expenses
2. Total Doctor expenses
3. Total chiropractic expenses
4. Total physical therapy expenses
5. Total other expenses (describe)
Subtotal
B. Documented lost wages and compensation to date
C. Documented property damages to date
D. Reasonably anticipated future medical and hospital expenses
E. Reasonably anticipated lost wages
F. Other documented items of damages (describe)
G. Brief description of plaintiff's injury, including nature and extent of injury (describe)
TOTAL

CONTRACT CLAIMS

(Attach additional sheets as necessary)

Provide a detailed description of claim(s):

TOTAL \$

PLEASE IDENTIFY, BY CASE NUMBER, NAME AND COUNTY, ANY RELATED ACTION PENDING IN THE SUPERIOR COURT DEPARTMENT

2006-0790

I hereby certify that I have complied with the requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods.

Signature of Attorney of Record

Richard A. Nylén

DATE: 04-02-10

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
C.A. NO.

New Ventures Associates, LLC,
Plaintiff,

v.

Department of Environmental Protection
and Northeast Regional Bureau of Waste
Prevention,

Defendants.

COMPLAINT
AND PETITION FOR REVIEW
PURSUANT TO M.G.L. C. 30A

I. INTRODUCTION

This matter involves an appeal pursuant to M.G.L. c. 30A§14 filed on behalf of New Ventures Associates, LLC (“Plaintiff” or “New Ventures”) against the Department of Environmental Protection (the “Department” or “Defendant”) and its Northeast Regional Bureau of Waste Prevention (the “Bureau”) for the improper issuance of a Decision by the Department denying Plaintiff’s berm construction design plan at the Crow Lane Landfill (the “Landfill”) in Newburyport, Massachusetts. Plaintiff requests that this Court find that the Department’s Decision was arbitrary and capricious, contained errors of law and must be set aside. Plaintiff is the owner of the Landfill and the Decision affects its property rights. Plaintiff is aggrieved by the Decision and has no other recourse.

As grounds for this appeal, Plaintiff states that the Department applied the incorrect standard in denying Plaintiff’s design in contravention of an agreed to Settlement Agreement executed in 2009. The Decision was issued by the Department and is not supported by the facts or the law.

II. PARTIES

1. Plaintiff, New Ventures Associates, LLC (“New Ventures”), is a Limited Liability Corporation with an address of 87 Boston Street, Everett, Suffolk County, Massachusetts, duly organized under the laws of Massachusetts.
2. Defendant, Department of Environmental Protection, is a state agency established by M.G.L., c. 21A which has the regulatory authority over activities pursuant to M.G.L., c.111, §150A.
3. Defendant, Northeast Regional Bureau of Waste Prevention is an office within the Department of Environmental Protection that issued the Modified Conditional Approval and Final Decision.

III. BACKGROUND

4. This matter involves the Plaintiff’s closure of the Crow Lane Landfill, a previously inactive, unlicensed landfill located at Crow Lane, Newburyport, Massachusetts. Plaintiff’s predecessor did not close the Landfill in accordance with the Department’s rules and regulations during its ownership. The predecessor disposed of municipal waste, sludge and other materials through 1972.
5. Plaintiff purchased the Landfill in 2000, entered into an Administrative Consent Order (“ACO”) in 2003, agreed to a Preliminary Injunction (the “2006 Order”) with the Department for the closure of the first half of the Landfill in October 2006, and entered into a Settlement Agreement as a Final Judgment (the “2009 Judgment”) for the closure of the remaining portion of the Landfill.

6. The 2009 Judgment established the terms of the closure, including the design of a portion of the perimeter berm. Portions of the perimeter berm have been constructed already.
7. Under the terms of the closure, New Ventures brought construction and demolition debris (“C&D”) materials to the Landfill to bring it to its final grade and shape. No municipal waste was included in the closure. New Ventures agreed to install a landfill gas extraction system that collects the Landfill gas, pipes it to a series of treatment tanks to reduce sulfur and then discharges the gas to an enclosed flare where it is combusted at 1600° Fahrenheit.
8. New Ventures has covered the C&D material with a geotextile fabric layer and has covered the geotextile layer with an impervious membrane. The membrane will be topped with twelve (12”) inches of soil and seeded later in 2010.
9. 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 its review. The 2009 Judgment 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.

10. In accordance with its 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 with a safety factor of not less than 1.30.
11. Defendant Department approved Plaintiff's geotechnical report. New Ventures' geotechnical consultants submitted revisions to stabilize the perimeter and to add rock fill buttresses for additional support in one area.
12. The berm revision was limited to only one area of the earthen berm where wood chips were found.
13. New Ventures' consultants concluded that the design meets the agreed upon 1.30 safety factor.
14. On or about October 6, 2009, Defendant issued a "Notice of Deficiency" alleging that additional information was necessary from New Ventures to support its conclusions.
15. The Notice of Deficiency did not dispute that the geotechnical plan met the safety factor of 1.30.
16. The Notice of Deficiency did not allege that the purported deficiencies resulted in a design safety factor less than 1.30.

17. The Notice of Deficiency demanded a response within fifteen (15) days.
18. On October 22, 2009 New Ventures' consultants sent a follow up letter to Defendant addressing the Defendant's concerns and recommending a monitoring plan to confirm the berm performance.
19. The Department of Environmental Protection issued a Decision on March 3, 2010 alleging that the berm design analysis did not justify a 1.30 safety factor based upon the requirement of a monitoring plan.
20. The Decision was sent by certified mail dated March 3, 2010 and received on March 4, 2010.
21. It is this Decision that is appealed.
22. Plaintiff had presented substantial evidence that its berm design meets the 1.30 safety factor and should have been approved.
23. The Defendant Department committed error in issuing a Denial of the berm modification.
24. Plaintiff's response to the Department demonstrates compliance with the 2009 Judgment.

25. The Department failed to present evidence that the New Ventures' berm design does not meet the 1.30 safety factor.

COUNT 1
Error of Law; 30A Appeal

26. Plaintiff hereby incorporates and realleges the facts and statements contained in paragraphs 1-25, above.

27. The Department and the Plaintiff have an agreed upon safety factor of 1.30 in the 2009 Judgment.

28. New Ventures submitted expert opinion that its design meets the agreed upon safety factor of 1.30.

29. There was no legal basis for the Department to deny the berm design that meets the 1.30 safety factor.

30. The Department's Decision incorrectly alleges that the berm analysis was deficient.

31. The Department's decision is contrary to the requirements of the 2009 Judgment.

32. The Decision is excessive and without substantial evidence that Plaintiff's design does not meet the 1.30 safety standard.

COUNT II
Denial of Due Process

33. Plaintiff hereby incorporates and realleges the facts and statements contained in paragraphs 1-32, above.

34. Plaintiff is entitled to due process to challenge the Decision. Absent an appeal, Plaintiff has no remedy to address the Department's actions.

35. Plaintiff has a property right and is entitled to a hearing.

COUNT III

Declaratory Relief per M.G.L., c. 231, §A

36. Plaintiff hereby incorporates and realleges the facts and statements contained in paragraphs 1-35, above.

37. Plaintiff hereby states that there is an actual controversy between the parties as to the interpretation of the 2009 Judgment language and the right of the Department to deny the berm design when Plaintiffs' consultants state that it meets the Safety Standard of 1.30.

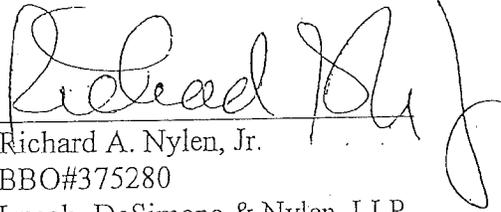
38. Plaintiff requests that this Court declare the right of Plaintiff to challenge this arbitrary Decision and declare that under the terms of the 2009 Judgment, that Plaintiff has met its obligations and presented a berm modification that meets the 1.30 standard.

RELIEF SOUGHT

1. Plaintiff hereby requests that the Court order the Department to rescind the Decision and find that the design meets the safety standard.
2. Plaintiff requests that the Court find that the Department's Decision was arbitrary and capricious, an error of law and is not supported by substantial evidence.
3. Plaintiff requests such other relief at law or in equity as the Court may allow.

Respectfully Submitted,

New Ventures Associates, LLC
By Its Attorney,

A handwritten signature in cursive script, appearing to read "Richard A. Nylan, Jr.", written over a horizontal line.

Richard A. Nylan, Jr.
BBO#375280

Lynch, DeSimone & Nylan, LLP
12 Post Office Square, Suite 600
Boston, MA 02109
(617) 348-4500

Dated: April 2, 2010

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