

Court, Bristol VA lodges this Motion now in order to give the Court adequate time to consider Bristol VA's grounds.

I. Background

Bristol VA has engaged in a years-long process with DEQ to attempt to ameliorate the landfill at 2655 Valley Drive, Bristol, Virginia 24201 ("Landfill"). After decades of accepting waste from both Bristol TN and Bristol VA, the Landfill developed a periodic odor. After two of Bristol VA's efforts to abate the smell from the landfill failed, Bristol VA wrote to the DEQ and United States Environmental Protection Agency on January 3, 2022, seeking their assistance in identifying the cause of the odor and a solution. (See **Exhibit 2**.) Responding to Bristol VA's request for expertise, the DEQ convened an expert panel that issued a report on April 25, 2022, setting out recommendations to ameliorate the Landfill. (See ECF No. 1-4.) One month and one day after the DEQ issued its report, Bristol TN filed this lawsuit against Bristol VA asserting a public nuisance claim and seeking money damages and, essentially, compliance with the DEQ plan.

Because Bristol VA planned to continue its work with DEQ to implement the recommendations in the report, and because Bristol VA believes it is of utmost importance to the 17,000 citizens of Bristol VA and their 27,000 neighbors in Bristol TN to remediate the Landfill, Bristol VA readily agreed to negotiate a preliminary injunction. That resulted in the negotiated order entered by this Court on June 14, 2022. The Preliminary Injunction requires a number of actions from Bristol VA, some in the immediate term, and others over the long term. Bristol VA is making progress on a number of fronts. The Preliminary Injunction requires that Bristol VA cease accepting waste by September 12, 2022, provide a plan to accomplish the goals in the DEQ Report, install intermediate cover, and install thermocouples.

Since the entry of the Preliminary Injunction by this Court, Bristol VA has worked diligently to meet its obligations required by the Order. (Lamie Decl. ¶¶ 3-6.) Bristol VA will meet the deadline for cessation of acceptance of waste; it has continued work on accomplishing the goals from the DEQ report, but it has encountered factors beyond its control in installation of cover and thermocouples.

A. Rain and a COVID-19 Outbreak Delayed the Installation of Intermediate Cover.

Though Bristol VA began installation of intermediate cover before the Preliminary Injunction was entered, 16 days of rain, and a COVID-19 outbreak among qualified staff have led the City to request more time. (*See id.* ¶¶ 7-15.) Bristol VA has pulled every city dump truck not required for emergency services to haul almost 2,000 loads and 20,000 tons of cover to the Landfill. (*Id.* ¶¶ 9-12.) While much of the Landfill is now covered, rain has made conditions dangerous for staff, forcing the City to slow its efforts. (*Id.* ¶ 13.) The trucks cannot operate in the mud, and the rain leads the cover to condense and move. (*Id.*) Additionally, a number of the duly qualified operators caught COVID-19 further delaying application of cover. (*Id.* ¶ 14.) The City pulled other employees from their assignments to fill their ranks, but this has slowed the City's efforts. (*Id.*) The Preliminary Injunction requires that the City complete the installation of intermediate cover by September 12, 2022. While it is theoretically possible that the City will meet the existing deadline, there is no room for any further rain, employee illness, or equipment breakdown. The City takes this Court's Order seriously, and so as to avoid any violation due to conditions out of its control, seeks this additional time.

Specifically, Bristol VA believes that it can complete the installation of cover by **Monday, October 10, 2022**. (*See id.* ¶ 15.) Despite this request for an extension, Bristol VA pledges that it will work diligently to complete cover on the Landfill as soon as practicable.

When it agreed to the Preliminary Injunction, Bristol VA could not have reasonably anticipated the combination of rain and illness that caused this delay.

B. The City Has Not Received any Responsive Bids for Installation of Thermocouples, in Part Because of Supply Chain Disruption.

The Preliminary Injunction requires installation of thermocouples by September 12, 2022. Thermocouples are long cables with sensors designed to measure the temperature of its surroundings. (*Id.* ¶ 17.) In the Landfill, the thermocouples measure the temperature of the decaying waste. (*Id.*) They do not mitigate the odor problem. They are simply tools for collecting data that may assist in addressing the problem.

To install thermocouples in this landfill, one must drill down into the Landfill as far as possible, without damaging the liner, to create wells. (*Id.*) Then, steel casing is placed in the drilled hole with a thermocouple installed inside of the steel casing to measure temperature at certain determined increments throughout the depth of the drilled hole. (*Id.*) The cable is then capped off at the top of the well and Internet of Things (IoT) type equipment is attached to the thermocouple to measure and record the temperature. (*Id.*)

Bristol VA's expert consultants spent 2-3 weeks designing the thermocouple system to be installed in the Landfill. (*Id.* ¶ 18.) The city then requested bids on July 8, 2022, on an accelerated timeline to meet the deadline in the Preliminary Injunction. (*Id.* ¶¶ 19-20.) However, because of the penalties involved in the bid request for not meeting the accelerated timeline, including liquidated damages, and because of the 6-8 week delay for obtaining the steel casings required for thermocouple installation due to the global supply chain disruption, Bristol VA received one bid but it was deemed nonresponsive since it did not include a bid bond as required by applicable law. (*Id.* ¶¶ 23-26.) When it agreed to the Preliminary Injunction, Bristol VA could not have anticipated this time delay nor could it anticipate the lack of responsive bid.

Bristol VA is currently planning to request bids again on a longer timeframe to attract responsive bids and to comply with the Virginia Procurement Act. (*Id.* ¶¶ 25-26.) Taking into account the extended bidding process required of Bristol VA, time for anticipated shipping delays due to the delays in the global supply chain, and time for performance, Bristol VA will likely need until late March, 2023, to install the thermocouples. (*Id.* ¶¶ 26-28.) Much of this delay comes from the supply chain disruptions. Bristol VA pledges that it will work diligently to complete the thermocouple installation as soon as practicable. Bristol VA requests an extension until **March 15, 2023**, to be able to comply with the applicable deadline.

C. Bristol Has Undertaken, and Continues, Other Significant Work at the Landfill.

The actions required by the Preliminary Injunction are not occurring in isolation. Rather, they are part of multiple remediation efforts currently underway. As explained by Bristol's Project Manager, William Lamie, in the attached declaration, the City is working on multiple recommendations made the by the DEQ. These efforts include, designing a benzene treatment plant, which will initially include a temporary plant and then a more permanent one; improving the performance of existing gas extraction wells by adding additional wells; performing weekly monitoring activities of gas emissions at the Landfill surface; and installing at least five deep, dedicated monitoring wells to enable sampling and characterization of leachate and measurement of temperature profiles in the waste. (*Id.* ¶ 3.) This work is on top of prior efforts in the past year, including improvements to the Landfill Gas and Dewatering system in 2021, the addition of gas wells in 2021, and replacement and repair of wet well pumps in 2022. (*Id.* ¶¶ 4-6.)

II. Legal Standard

“District courts have broad discretion to craft remedies based on the circumstances of a case, but likewise must ensure that ‘a preliminary injunction is no more burdensome to the

defendant than necessary to provide complete relief to the plaintiffs.” *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (quoting *Roe v. Dep’t of Def.*, 947 F.3d 207, 231 (4th Cir. 2020)). “Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents . . .” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087, 198 L. Ed. 2d 643 (2017). In crafting a remedy, a Court may consider the equities and the “overall public interest.” *Id.*

III. Argument

Because factors outside of the control of Bristol VA cause it to need more time to meet two of the deadlines in the Preliminary Injunction, and because it is in the public interest that Bristol VA continues this important work in a manner that is safe given weather conditions, complies with the Virginia Procurement Act’s requirements, and conforms to the realities of the global supply chain disruptions, this Court should extend those deadlines.

A. It is in the Court’s equity to grant Bristol VA more days to spread intermediate cover.

The Court should grant Bristol VA more time to complete installation of immediate cover because it is impracticable for Bristol VA to meet the current deadlines. At the time that Bristol VA agreed to put cover down over the course of 90 days, it did not anticipate that rain would consume more than 15% of those work days, and that it would likewise grapple with an operator shortage due to a COVID-19 outbreak among qualified operators. In contrast to its present state, the Landfill was capable of being covered.

This Court recently refused to overburden another defendant in a preliminary injunction matter. Although, the defendant agreed to close its facility which was in violation of the Animal Welfare Act, it requested the Court merely allow it to fulfill its existing contracts. *United States v. Envigo RMS, LLC*, 2022 WL 2195030, at *1 (W.D. Va. June 17, 2022). The Court

emphasized that its authority was “limited to balancing the concrete burdens on *both* parties while preventing irreparable harms.” *Id.* at *3. Because the Court found that the “public interest would be better served by allowing Defendant to fulfill its contracts” and plaintiff could not articulate a concrete burden imposed on it from allowing it to do so, it granted the defendant relief. *Id.*

The situation here is no different. Like the defendant in *Envigo RMS*, Bristol VA agrees to eventually close its Landfill and has taken steps towards this goal. (*See* Lamie Decl. ¶¶ 3-6.) It has tried to compensate for the unexpected delays in applying immediate cover, including pulling qualified operators from other assignments and having dedicated personnel work overtime. (*Id.* ¶¶ 9, 15.) However, even with these steps, Bristol VA risks not meeting the 90-day deadline, particularly if there is additional rain, illness among employees, equipment failures, or other unanticipated obstacles. It is in the interest of the public that this deadline be extended as any penalties from the failure to spread cover would come from funds that could otherwise be devoted to remediating the Landfill. *Int'l Refugee Assistance Project*, 137 S. Ct. at 2087 (equity and public interest to be weighed in preliminary injunction remedy); *Envigo RMS*, 2022 WL 2195030, at *3. And, just like the plaintiff in *Envigo RMS*, allowing Bristol VA extra time to meet its deadline presents no substantial burden on Bristol TN. Though Bristol VA has not been able to cover the Landfill in its entirety, it has made substantial progress and the vast majority of the Landfill is covered, so little benefit is lost for the 4 week delay.

Bristol VA specifically requests that the Court amend the Preliminary Injunction to extend the deadline to install cover by **four weeks**. (*See* Lamie Decl. ¶ 15.) Bristol VA will endeavor to meet the original deadline but asks for the extra time to avoid appearing before this Court again should the same problems that hindered its installation of cover persist.

B. It is in the interest of justice that Bristol VA receive more time to install thermocouples.

Bristol VA took reasonable steps to comply with the Preliminary Injunction, including immediately assigning its experts to design the project, issuing its bid under the Virginia Public Procurement Act, Va. Code § 2.2-4300 *et seq.*, on an accelerated timeline, and even adding requirements that would penalize operators who could not meet the timeline. (*See* Lamie Decl. ¶¶ 18-20.) However, like many members of the public and companies, Bristol VA did not anticipate that supply chain issues would create a supply shortage of a material that is crucial to the process of installing thermocouples. (*See id.* ¶¶ 23, 26.) The supply chain disruptions are out of Bristol VA's control. Likewise, the lack of any responsive bid is out of the city's control. To that end, the city is adapting as best as it can, by revising the bid request to attempt to obtain a responsive request. (*Id.* ¶ 25.) First, just as this Court found in *Envigo RMS*, extending the deadline to install the thermocouple system presents no burden on Bristol TN. *See* 2022 WL 2195030, at *3. The installation of the thermocouples will have no effect on the smell as they are an information gathering tool – not an odor mitigation tool. Further, it is in the public interest that the city be given more time to complete that work so it is done lawfully and properly and that the city not be penalized for factors beyond its control. *See id.* (noting that “interim equitable relief is not a vehicle for punishment”).

Bristol VA is working diligently to amend the request for bids to allow more time for contractors to obtain the necessary steel casings. (Lamie Decl. ¶ 25.) For reasons stated in Paragraph 28 of William Lamie's declaration, Bristol VA requests the Court amend the Preliminary Injunction to extend the deadline to install thermocouples until March 15, 2023, but it pledges to install this system sooner if practicable.

IV. Conclusion

For the reasons stated above, Bristol VA cannot meet two of the deadline requirements in the Preliminary Injunction Order. Nonetheless, the relief that Bristol VA seeks would still ensure that Plaintiff Bristol TN obtains the same relief. Therefore, this Court should amend Part II of the Preliminary Injunction Order extending:

- a. The time for installation of intermediate cover to October 10, 2022; and
- b. The time for installation of thermocouples is extended to March 15, 2023.

Bristol VA respectfully requests that this Court grant this Motion, enter the Proposed Order attached to this motion, and grant Bristol VA all other appropriate relief as the Court deems just and proper.

Dated: August 19, 2022

Respectfully submitted,

THE CITY OF BRISTOL, VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that on, August 19, 2022, I caused the foregoing to be filed with the Clerk of the U.S. District Court for the Western District of Virginia using the Court's CM/ECF system, which will electronically serve copies of the same on counsel for all parties.

/s/ Erin Ashwell

Erin Ashwell

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