COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

August 13, 2009

In the Matter of

JAMES LAMOUNTAIN

Docket No. DEP-07-165
File No. PAN-WE-06-7004
Holland

In the Matter of

NORTHEAST CONCEPTS, INC

Docket No. DEP-07-166
File No. PAN-WE-06-7005
Holland

RECOMMENDED FINAL DECISION

PENALTY- appeal from penalties assessed to an individual and a corporate entity for open-burning without a permit in violation of 310 CMR 7.07(3)(g). The penalty against the individual is vacated because any responsibility he had for the unpermitted open burning was as a corporate official, not as an individual. The penalty against the corporation is reduced to $100 because the failure to possess a valid permit one day after an existing burn permit expired was based on a reasonable misunderstanding regarding permit renewal.

James La Mountain, Holland, for himself and for Northeast Concepts, Inc.

Michael W. Dingle, Esq., Boston, for the Department of Environmental Protection.

JAMES P. ROONEY, Administrative Magistrate

Introduction

The Department of Environmental Protection issued penalties to James LaMountain and Northeast Concepts, Inc. for open burning without a permit on land owned by Northeast

Concepts in the Town of Holland. After a hearing, I conclude that LaMountain is not personally liable because he was acting as a representative of a separate corporate entity, Huguenot Farms, Inc., which manages agricultural activities on the land. I conclude also that Northeast Concepts is liable as the landowner, but that only the minimum penalty of $100 should be assessed for a burn that took place one day after an existing burn permit had expired because this activity reflected a reasonable misunderstanding concerning permit renewal.

Background

Northeast Concepts, Inc. owns an undeveloped 80-acre parcel of former farmland in the Town of Holland off Mashapaug Road that the company intends to return to farm production. In 2006, Northeast Concepts had charged a separate corporation, Huguenot Farms, Inc., with the responsibility for preparing the land for farming.[1] James LaMountain owned ten percent of the shares of Huguenot Farms and held all its corporate offices, according to Huguenot Farms' latest corporate filing.

One of the projects undertaken to restore farming at the site has been field clearing to create pasture. Part of that work included burning cleared brush and trees.

While open burning of combustible materials is generally disallowed by 310 CMR 7.07(1) of DEP's Air Quality Regulations, agricultural burning is allowed by both statute and regulation. M.G.L. c. 111, §142L provides that "the burning of tree prunings, diseased plant materials, and brush from land clearing operations, which are the direct result of the normal commercial pursuit of agriculture ... shall be allowed subject to the permission of the local fire chief which need not be in writing" and "shall be based solely upon whether or not appropriate

[1] Huguenot Farms owned a part interest in Northeast Concepts. According to James LaMountain,

meteorological conditions exist to ensure safe burning." DEP's Air Quality Regulations also allow "open burning of brush and trees resulting from agricultural land clearing operations," 310 CMR 7.07(3)[c], but require that such burning be conducted:

> 1. during periods of good atmospheric ventilation,
> 2. without causing a nuisance,
> 3. with smoke starters if starters or starting aids are used, and
> 4. under the provisions of a properly executed permit issued under the provisions of M.G.L. c. 48, §13.

310 CMR 7.07(3)(g). M.G.L. c. 48, §13 addresses the issuance of two day burn permits by fire chiefs or "forest wardens," who are municipal officials charged with fire protection. See M.G.L. c. 48, §§8 and 9. Violations of M.G.L. c. 48, §13 are punishable by a maximum fine of $500.

The Holland Fire Department received reports of open burning on Northeast Concepts' property on May 28 and 30, 2006, prior to any application for a burn permit. DEP employee Roberta Baker, who is responsible for handling open burning issues in DEP's Western Regional Office, visited the site on June 12, 2006, accompanied by Holland Fire Chief Paul H. Foster and James LaMountain. Baker saw two burnt areas along a cart path.

On July 10, 2006, after receiving further complaints from the Holland Fire Department that burning without a permit had occurred on June 24 and 27, 2006, DEP issued separate enforcement orders to Northeast Concepts and to James LaMountain. Each was directed to "conduct [no] open burning at the Site until such time that the Respondent has obtained a written permit from the Holland Fire Department and otherwise complies with the requirements of 310 CMR 7.07(3)(g)1-4."

Huguenot Farms is now defunct.

James LaMountain appealed the enforcement order issued to him. His appeal was dismissed because he sought no relief from the order requiring a burn permit. He requested instead an acknowledgment that the burning was for legitimate agricultural purposes. The purpose for which the burning had been conducted was not, however, a subject of the enforcement order. See Matter of James P. LaMountain, Docket No. 2006-112, Recommended Final Decision (Mass. Dep't. of Envt'l Prot., Sept., 18, 2006), *adopted by* Final Decision (September 25, 2006). Northeast Concepts did not appeal the enforcement order issued to it.

Meanwhile, on July 8, 2006, Fire Chief Foster filed a complaint in Housing Court against James LaMountain seeking an injunction against open burning on the site without a permit. The Fire Chief alleged that the burns were disturbing neighbors and were being conducted at all hours. Six days after the suit was filed and prior to the Housing Court's ruling on the merits, LaMountain and Foster entered into an agreement in which LaMountain consented not to conduct burning on the site without a permit, to obey any applicable DEP orders, and to cease burning if it was causing a nuisance.

On October 4, 2006, LaMountain applied for a permit from the Fire Chief. LaMountain listed the applicant as "James LaMountain/Huguenot Farms." Chief Foster issued a permit on October 6 and set the date of expiration as October 31, 2006. LaMountain had requested that the permit be for one year, a request Chief Foster declined to grant, instead issuing a one month permit while telling LaMountain he could renew the permit without an additional fee. The parties dispute the import of these discussions on renewal.

On November 1, 2006, Holland Selectman James Wetlaufer phoned Steven Ellis, the Deputy Regional Director of DEP's Bureau of Waste Prevention, to report that burning was

taking place on the site that day without a permit.[2] Ellis sent environmental engineer Loretta Oi to respond to the complaint. She traveled to Holland and drove with Police Chief Kevin Gleason to Mashapaug Road shortly after 2:00 p.m., stopping at a residence adjacent to the undeveloped site owned by Northeast Concepts. There she observed smoke blowing off of the undeveloped site. Oi and Gleason then drove onto the site and saw three people attending a fire. They were Michael LaMountain, James LaMountain's son who at the hearing described himself as a principal of Huguenot farms and the person who is in charge of agricultural development on the site, Chad Brigham, the president of Northeast Concepts, and Ed Mozdzierz, a Huguenot Farms employee.

In his subsequent report, Chief Gleason stated that he spoke to Brigham and asked him if he had a burn permit. When Brigham responded that he had one in the office, Gleason informed him that it had expired. Brigham responded that he did not know the permit had expired and agreed that, if that were the case, he would put out the fire.

According to Michael LaMountain, on November 1, 2006, he checked the weather to see if there were likely to be conditions adverse to burning. He then sought permission from Mozdzierz, who serves as Huguenot Farms' forest warden. Only then did he authorize burning that day. At some point, Mozdzierz signed an open air burning permit for November 1 and 2, 2006, although it is not clear from the record whether he did so before or after Chief Gleason told Brigham to cease burning.

After Oi reported to Ellis that she had confirmed burning on the site, Ellis called James

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[2] Fire Chief Foster had faxed a copy of the burn permit to Ellis the previous day.

LaMountain at his home, which is elsewhere in Holland. LaMountain, who had not been to the site that day, knew that open burning had been conducted, but told Ellis he was unaware the permit had expired and said he would take it up with the Fire Chief. LaMountain then called Chief Foster to request renewal of the permit. The following day, Foster denied the request. In a letter to LaMountain, he stated that he was denying renewal because burning had occurred on the site after 4:00 p.m. on numerous occasions in October 2006 and the Town had received complaints from neighbors about smoke.

On November 6, 2006, DEP issued separate $1,000 penalties to Northeast Concepts and James LaMountain for open burning at the site on November 1, 2006 "without a properly executed permit under M.G.L. c. 48, §13, in violation of MassDEP's prior order and 310 CMR 7.07(3)(g)." According to DEP analyst Saadi Motamedi, who calculated the penalties, each penalty reflects a base penalty of $860 adjusted upward by 25% for a past history of noncompliance that is reflected in the previous enforcement orders and an additional upward adjustment of 25% for lack of good faith in that each penalized party should have known that the burn permit expired on October 31, 2006 and yet did nothing to stop the burn the following day. These penalty adjustments exceeded DEP's maximum penalty for this type of violation, so DEP reduced each of the penalties to the $1,000 maximum.

Both Northeast Concepts and LaMountain appealed.

On June 5, 2007, Justice Dina Fein of the Housing Court issued her findings in the case brought by Fire Chief Foster against James LaMountain. She found that, because the only current use of the property was agricultural, "open burning on the property is permitted, within the constraints set forth at 310 CMR 7.07(3)." Fire Department, Town of Holland v. James

LaMountain, Docket No. 06-CV-00392, Findings, Rulings, and Order for Entry of Permanent Injunction (Housing Court, Western Dept., Fein, J., June 5, 2007 at 6.) However, she also ruled that under M.G.L. c. 48, §13 permission of the Fire Department must be obtained prior to conducting agricultural burning, and although M.G.L. c. 111, §142L mentions only the presence of appropriate meteorological conditions as a permissible limit on an agricultural burning permit, Justice Fein found that the Fire Chief had the implicit authority to "withhold permission, or place conditions upon his permission, if deemed necessary in light of meteorological conditions to protect public safety." Id. at 7. She issued "a permanent injunction ... prohibiting the defendant from conducting open burns at the property except pursuant to, and upon such conditions as required, by agricultural burning permits issued for not more than two day intervals by the Chief of the Fire Department for the Town of Holland." Id.

LaMountain appealed Judge Fein's order, but read it as supporting his contention that the burning on the site was related to agriculture, and moved to dismiss the penalties on this ground.[3] I denied the motion because Justice Fein did not rule on whether the November 1, 2006 burning required a new permit or was allowed on other grounds. Ruling on Motion to Dismiss at 3 (August 21, 2007).

I held a hearing in these appeals on January 24, 2008. Fire Chief Paul Foster testified for DEP, as did DEP staff members Roberta Baker, Loretta Oi, Steven Ellis, and Saadi Motamedi. James LaMountain testified for himself and Northeast Concepts. His son, Michael LaMountain, testified as well.

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[3] Justice Fein's ruling seems to have quelled disputes about agricultural burning on the site. According to James LaMountain, the town has issued permits for open burning on the site since her ruling.

Discussion

The penalties DEP assessed against Northeast Concepts and James LaMountain were solely for violating the requirement of the Air Quality Regulations that open burning be conducted "under the provisions of a properly executed permit issued under the provisions of M.G.L. c. 48, §13." 310 CMR 7.07(3)(g)4. Although the Air Quality Regulations place other limits on open burning, limiting burning to "periods of good atmospheric ventilation," for example, see 310 CMR 7.07(3)(g)1, DEP did not charge either Northeast Concepts or LaMountain with violating any of these other limitations.

This distinguishes DEP's action from the court action brought by the Holland Fire Department. The Fire Department claimed not only that burns were being conducted without a permit, but that they were disturbing neighbors and were extending into the evening hours.

Some of the testimony in the present appeals touched on issues concerning how the burns were conducted. The Fire Chief alleged that the Fire Department responded in October 2006 to a number of complaints of burns occurring during the evening. James LaMountain testified that the permit recited no time-of-day limit and that the statute allowing agricultural burns did not provide the Fire Chief with authority to limit the time at which a burn could be conducted because "permission [to burn] shall be based solely upon whether or not appropriate meteorological conditions exist to ensure safe burning." See M.G.L. c. 142L. Michael LaMountain testified that, before conducting a burn, he checks the weather and obtains permission from Huguenot Farms' forest warden.

Because DEP has not charged Northeast Concepts or James LaMountain with anything other than conducting a burn without a permit on November 1, 2006, I will not address the

testimony concerning the manner in which burns were conducted on the site on that day or any other day. Justice Fein addressed these issues in her ruling in the case brought by the Fire Department in the Housing Court as they were germane to the case before her.

In view of the specific violation alleged by DEP, the initial questions before me are whether any open burning occurred at the site on November 1, 2006 and, if so, whether it was permitted.

A. Open Burning on November 1, 2006

There is no dispute that open burning took place at the site on that day. Michael LaMountain testified to starting a fire there on November 1, 2006, and Loretta Oi of DEP testified that she and Holland Police Chief Gleason, whose report was placed in evidence, saw the fire.

James LaMountain questioned whether DEP obtained evidence of the fire legitimately. He argued that DEP entered Northeast Concepts' property without a warrant in search of evidence of a fire. Michael LaMountain testified that at least some of the photographs of smoke taken by Loretta Oi appear to have been shot while she was on Northeast Concepts' property.

I decline to disregard the evidence of burning. Whether or not some of Oi's photographs were taken while she was on Northeast Concepts' property, she first saw smoke emanating from the site when she was on a public street and at a private residence not owned by Northeast Concepts. Oi need not have obtained an administrative search warrant to make observations from the street.

Nor did she and the police chief need to obtain a warrant before they went on the site to confirm the existence of a fire. No warrant need be obtained if exigent circumstances exist that would make it impractical to obtain a warrant. See Commonwealth v. Marcione, 384 Mass. 8,

422 N.E.2d 1362, 1363 (1981). Entries of firefighters into a burning building or one where fire appears imminent are such exigencies. See Commonwealth v. Jung, 420 Mass. 675, 651 N.E.2d 1211, 1216 (1995)(fire department officials may enter a burning building and remain for a reasonable time to investigate the fire) and Marcione, 422 N.E.2d at 1364 (exigent circumstances exist for firefighters to enter basement based on report of cellar floor covered with volatile liquid in proximity to homemade incendiary device). So is the conduct of an open burn in violation of M.G.L. c. 48, §13. By statute, the forest warden or any duly authorized assistant "may arrest without warrant any person found in the act of setting, maintaining, or increasing a fire in violation of section thirteen." M.G.L. c. 48, §15. On November 1, 2006, Holland Fire Chief Foster, who is the town forest warden, was in training and unavailable at the time the complaint of an unpermitted open burn was made. It was permissible, under the circumstances, for the Police Chief, accompanying Ms. Oi, to enter Northeast Concepts' property for the purpose of investigating the existence of an unpermitted burn he had already observed, and to enforce the law by ordering that the burning cease.

B. Absence of Open Burning Permit

I also find that there was no valid burn permit for the burning that took place on the site on November 1. Foster introduced into evidence a copy of the burn permit application he approved.[4] This document lists October 31, 2006 as the expiration date of the permit. Because the permit, by its terms, expired on October 31, 2006, I find that any burning conducted the following day was unpermitted.

[4] According to Foster, this document is not the permit itself. He testified that LaMountain has the actual permit document. There is no dispute, however, that the date listed on the approved application is the actual expiration date.

LaMountain argues that agricultural burning does not need a permit, or at least a written permit, because burning brush from an agricultural land clearing operation "shall be allowed subject to the permission of the local fire chief which need not be in writing." M.G.L. c. 111, §142L.

I reject LaMountain's claim that no written permit was needed. The discretion the statute gives to local fire chiefs to issue oral permission to conduct agricultural burning does not mean that fire chiefs must operate this way. More importantly, DEP's regulations, at 310 CMR 7.07(3)(g)4, explicitly require that an agricultural burn be conducted with a burn permit obtained under M.G.L. c. 48, §13, which provides that permits be either in writing or that a written record be made of any oral permission to conduct a burn. Holland, consistent with both statutes, required that a written permit be obtained. One was issued, and as I have found, its terms applied to the burn at issue.[5]

The effort of LaMountain and Northeast Concepts to assert the validity of the permit issued by Huguenot Farms' forest warden Ed Mozdzierz is also unavailing. While it is creditable that the company appointed someone with forestry experience – Mozdzierz has worked in the forestry management industry for 20 years – to oversee its timber harvesting and forest clearing operations, that does not make Mozdzierz a legally appointed forest warden with the power to issue burn permits. By law, forest wardens are municipal officials appointed by city mayors or

[5] If LaMountain is claiming that DEP's regulation is inconsistent with the agricultural burning statute, I lack the jurisdiction to decide that claim. Administrative agencies are bound to follow their own regulations. See Royce v. Commissioner of Corrections, 390 Mass. 425, 456 N.E.2d 1127, 1128 (1983). In this administrative forum, I may examine only whether the agency did indeed follow its own regulations, not whether those regulations exceed its statutory authority. That is a question for the courts. I note that Justice Fein, while not explicitly ruling on this issue, considered the agricultural burning statute, M.G.L. c. 111, §42L, the burn permit statute, M.G.L. c.48, §13, and DEP's open burning regulations, 310 CMR 7.07, and found that they could be read consistently with each other, and hence she treated DEP's

town selectmen. See M.G.L. c. 48, §8. It was through this legally-sanctioned process that Fire Chief Foster became Holland's forest warden. Thus, any burn permit from a forest warden in Holland must be approved by Chief Foster, not by someone appointed by a company that manages land within the town.

C. Liability of Charged Parties

I turn next to whether Northeast Concepts and James LaMountain are liable for the unpermitted open burning that occurred at the site on November 1, 2006.

The Air Quality Regulations provide that "[n]o person shall cause, suffer, allow or permit the open burning of any combustible material." 310 CMR 7.07(1). The Regulations define person to include both individuals and corporations. See 310 CMR 7.00 (definition of person).

The breadth of this wording shows that the regulation is meant to cover a wide range of individuals or entities that may have some responsibility for an unpermitted open burn. But it is not just any person who is potentially liable. It is only persons who have some relationship to the fire either because they lit it, thereby causing a fire, or because they have some responsibility for the land or the activities on the land on which the fire occurred, so that even though they did not light the fire, they were nonetheless derelict in some manner by suffering, allowing, or permitting others to burn without a permit.

Neither LaMountain nor Northeast Concepts actually lit the fire – LaMountain because he was not there, Northeast Concepts because a corporation cannot act except through its human agents. Thus, if either is liable it is because of some responsibility to control actions on the land or otherwise prevent the burn that took place.

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regulations as valid. See Fein Ruling at 5-7.

The Air Quality Regulations in other sections treat owners or operators as persons responsible for air quality compliance. For example, the regulations provide that "[n]o person owning, leasing, or controlling the operation of any air contamination source shall ... permit any emission ... which will cause ... a condition of air pollution." 310 CMR 7.01(1).

Because this general regulation treats owners and operators as among the class of persons responsible for ensuring compliance with air quality standards, I assume the same or a similar approach applies throughout the Air Quality Regulations, and hence owners and operators are among the persons responsible for ensuring compliance with the open burning regulations.

An owner/operator, as defined in the Air Quality Regulations, is a person who has "legal title" or "care, charge, or control" of a facility. 310 CMR 7.00 (definition of owner/operator). While no facility is literally involved when burning takes place in the open on undeveloped land, the concepts of title and care, charge, or control can still be applied.

1. Northeast Concepts' Liability

DEP demonstrated that Northeast Concepts holds title to the land on which the open burning took place. This was all DEP needed to show to prove Northeast Concepts' responsibility for the burn, but it proved more. The evidence shows that the fire was started by Michael LaMountain, the person directing Huguenot Farms' operations at the site, and was tended by him and Huguenot Farms' employee Ed Mozdzierz. Huguenot Farms was acting as Northeast Concepts' agent in the agricultural development of the land and burning was one of its tasks. Hence, Northeast Concepts was responsible for the acts of the Huguenot Farms' employees who had the care, charge, and control of the fire. If that were not enough, Northeast Concepts' president, Chad Bingham, was present at the burn, effectively ratifying the burning.

2. James LaMountain's Liability

As for James LaMountain, however, DEP did not show that he was personally responsible for the burn. He was aware of the burning on November 1, as his conversation with DEP's Steven Ellis that day demonstrates, but that knowledge does not by itself make him an owner or operator with personal responsibility for the burn.

There is no evidence that LaMountain owns any interest in the land. He owns no Northeast Concepts stock and has no separate interest in the land.

There is also no evidence that he was an operator of the site. The operator was Huguenot Farms, which was charged with agricultural development of the site and burning to create pasture. That would make Huguenot Farms responsible for the burn.

LaMountain is both a shareholder and officer of Huguenot Farms. The evidence tends to show that LaMountain's actions associated with burning on the site were taken as an officer and shareholder of Huguenot Farms to benefit that corporation rather than to benefit him personally. His role, aptly described by his son Michael, was as an advocate for the agricultural development of the land. As such, he was the public face for agricultural activities, including the open burning conducted on the site. He obtained the burn permit. In doing so, he acted as a shareholder and officer of Huguenot Farms to further the interests of that company. Indeed, on the burn application he listed "James LaMountain/Huguenot Farms" as the applicant, thereby emphasizing that he sought the burn permit on behalf of Huguenot Farms, and not for himself personally.

Normally, corporate shareholders and officers are not personally liable for the obligations of a corporation. See Gram v. Liberty Mutual Insurance Company, 384 Mass. 659, 429 N.E.2d 21 (1981) and U.S. v. Normandy House Nursing Home, Inc., 428 F.Supp. 421, 424 (D. Mass.

1977).[6] That rule applies generally in the administration of environmental law for "[n]either Federal ... nor State environmental laws displace bedrock principles of corporate common law." Scott v. NG U.S. 1, 450 Mass. 760, 765-766 (2008). It has also been held applicable to DEP regulations. See Matter of Anger, Docket No. DEP-05-721, Recommended Final Decision, 15 DEPR 14, 15 (Mass. Div. of Admin. Law App., Mar. 6, 2008), *adopted by* Final Decision (Mass. Dep't. of Envt'l Prot., Mar. 28, 2008).

Corporate officers have been found personally responsible for violating environmental and other regulations when the government successfully demonstrated that a corporation was a nullity and, thus, the corporate veil should be pierced. See U.S. v. JG-24, 331 F.Supp.2d 14, 63 (D. Puerto Rico 2004)(corporate president held personally liable for response costs incurred in cleaning up hazardous waste site when corporate entity involved had no real existence) and U.S. v. WRW Corp., 986 F.2d 138, 143 (6th Cir. 1993)(officers liable for civil penalties against company for violating federal mine safety standards when corporate entity was severely undercapitalized and corporate formalities were not followed).[7]

Assuming a claim that the corporate form should be disregarded can be heard in this administrative forum, Massachusetts law requires that a host of factors be considered before a decision can be made to pierce the corporate veil. These factors are:

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6 There are, of course, exceptions. A corporate officer can be found personally liable for the tort of a corporation if he was a joint tortfeasor who personally participated in the commission of the tort. See Townsends, Inc. v. Beaupre, 47 Mass. App. Ct. 747, 716 N.E.2d 160, 164 (1999). DEP does not allege that this exception applies here.

7 I have found one case in which the language of the statute was so broad that it encompassed corporate officers as individuals. See New York v. Solvent Chemical Co., Inc., 218 Fed. Supp. 319, 334 (W.D.N.Y. 2002)(under CERCLA, corporate officer can be held directly liable for "arranging" disposal of hazardous waste). Though the general statutory language holding "persons" responsible for open burns is very broad, DEP does not argue that it is so broad as to make all corporate officials with some responsibility for an unpermitted open burn subject to penalties.

> common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate record; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.

Attorney General v. M.C.K., Inc., 432 Mass. 546, 736 N.E.2d 373, 380 n.19 (2000), *citing* Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 14-16 (1st Cir. 1985). DEP showed only that James LaMountain held all major corporate offices of Huguenot Farms. The agency did not present any evidence addressing the twelve factors listed by the Supreme Judicial Court in M.C.K. Thus, it did not present sufficient facts to find that Huguenot Farms' corporate form should be disregarded and that LaMountain can be held personally liable for the corporation's conduct.

DEP maintains, nonetheless that by "acting as the principal contact for both the Department and the Holland Fire Chief regarding previous instances of open burning at the Site, by signing a Housing Court Settlement Agreement regarding future open burning at the Site, and by applying for and receiving a written permit governing future open burning activities at the Site, LaMountain had the requisite care, charge or control of such activities and was thus a responsible 'operator' of the Site."

Although LaMountain acted as the contact between Huguenot Farms and the two government agencies, these factors do not demonstrate that he was acting for himself personally, rather than for Huguenot Farms' corporate interests. He may not, at times, have made it as clear as he could have that he was acting as a corporate official rather than as an individual. Nonetheless, I do not find particularly telling his signing of a settlement agreement with the Holland Fire Chief without referring to his corporate position. Holland, when it sued, named

LaMountain individually, as did DEP when it issued its enforcement order. Those government acts had no power to transform any of LaMountain's actions on behalf of Huguenot Farms into merely personal actions. LaMountain's signing a settlement agreement a few days after he was sued individually demonstrates no more than that he (on behalf of Huguenot Farms) wished to resolve quickly certain aspects of the case.

The most telling fact about LaMountain's role with respect to the burn permit is one I have already mentioned. He applied for the permit listing the applicant as "James LaMountain/Huguenot Farms." This amply demonstrates that he sought the permit on behalf of Huguenot Farms and was acting as a corporate agent at the time. Bolstering this conclusion is the absence of any testimony that LaMountain sought the burn permit for himself and Chief Foster's testimony that he would issue permits only to individuals, not entities. Hence, someone's name had to be listed on the application because the Chief would not issue a permit to Huguenot Farms itself.

Because I find that LaMountain was acting as a corporate official with respect to agricultural burning at the site and the permit for that burning, I conclude that DEP may not penalize him as an individual for his role.

D. Penalty Amount

Having found only Northeast Concepts liable for a penalty, I next evaluate the $1,000 penalty assessed against the company. DEP computed this amount by starting with an $860 base penalty and then twice increasing this amount by 25% for a past history of noncompliance and a lack of good faith. The resulting figure exceeded DEP's internal guidelines for the maximum penalty to be assessed for this type of violation, and hence DEP reduced the penalty to the $1,000 maximum. A single 25% upward adjustment would have raised the penalty amount above

$1,000. Therefore, DEP had to prove the validity of the base penalty and one adjustment in order to sustain the penalty to Northeast Concepts. There is no dispute that DEP had previously issued an unappealed enforcement order to Northeast Concepts for conducting open burning on the site without a permit. Thus, it demonstrated facts that could sustain the penalty absent other evidence or argument challenging the assessment of a $1,000 penalty under the present circumstances.

1. Statutory Maximum

The principal legal impediment to the $1,000 penalty for failure to have a burn permit issued under M.G.L. c. 48, §13 is the maximum fine of $500 established by the legislature for violating that statute. DEP argues that it is not literally enforcing the fire safety provisions of Chapter 48, but is instead enforcing its responsibilities to prevent air pollution under Chapter 111, which sets the maximum penalty for an air quality violation at $25,000, see M.G.L. c. 111, §142A, so that a $1,000 penalty amount is well within its authority under that statute.

This would be a convincing argument if DEP had assessed a penalty because the fire was lit when atmospheric conditions were unfavorable or because the burn caused a nuisance. See 310 CMR 7.07(3)(g)1 and 2. But that is not the case. DEP did not allege that the fire was in any way causing air pollution. Rather, DEP issued the penalty solely because Northeast Concepts lacked a burn permit. See 310 CMR 7.07(3)(g)4.

Legislative limits on penalties have particular significance because the Massachusetts Constitution assumes the judiciary is the branch of government with the power to impose penalties, not the executive. See Opinion of the Justices to the Senate, 375 Mass. 795, 376 N.E.2d 810, 824-825 (1978). An agency has no power to issue penalties except by legislative

enactment. 376 N.E.2d at 825. When the legislature limits the amount of a fine that can be assessed, agencies may not exceed that limit. ,

While it is true that DEP was acting under the power granted to it by the legislature to control air pollution, when the penalty relates solely to a failure to have a burn permit under a separate statute, M.G.L. c. 48, §13, DEP must act within the constraints established by the legislature under that statute. The legislature imposed a $500 limit on fines assessed for violation of this statute and DEP is bound by that limit here. I conclude that Northeast Concepts was potentially liable for a maximum penalty of $500.

2. Inadvertent Violation

That does not end the matter. The evidence shows that the violation was inadvertent, and hence the assessment of a maximum penalty is unwarranted.

In DEP's version of events, the company was issued an enforcement order, with which it complied for a brief period by obtaining a burn permit, but then, when the burn permit expired, it knowingly resumed open burning without a permit, thus justifying a maximum penalty. Northeast Concepts maintains that, to the contrary, it genuinely believed it had a valid burn permit and had no intention of acting in violation of the law.

These different perspectives boil down to a dispute about the conversation concerning permit renewal that James LaMountain had with Fire Chief Foster when he applied for the burn permit. LaMountain told Foster that he had obtained a year long burn permit in the Town of Oxford for a different farming operation with which he is associated. Foster replied that he would not issue a permit for that length of time. Rather, he would issue a permit for one month, renewable without charge.

DEP emphasizes that Foster did not promise explicitly to renew the permit. However, it is also true that Foster did not describe what, if anything, LaMountain would have to do to renew the permit. Foster's subsequent conversation with LaMountain on November 1, 2006 shows that he would have considered an oral request to renew.

More importantly, it would not necessarily have been clear to a reasonable person in LaMountain's shoes that any request to renew needed to be made at all. When a request for a year-round permit was met by a response that a permit would be issued month-to-month with no need to pay a fee for renewal, a reasonable person could have reached the conclusion that, while Chief Foster wished to retain more control over the process than an annual permit would allow, renewal would normally be automatic each month, without a new fee being required or even a formal request being made.

Under these circumstances, I conclude that the minimum $100 penalty is warranted. I am mindful in reaching this conclusion of the DEP Commissioner's opinion that a penalty reduction premised on the good faith of a violator is rarely warranted when the penalized party has violated an enforcement order. See Matter of Baghdasarian, Docket No. 2000-018, Final Decision, 9 DEPR 77 (Mass. Dep't. of Envt'l Prot., Mar. 14, 2002). Northeast Concepts was on notice, as a result of the prior enforcement order, that it needed a permit to conduct open burning. Following issuance of the enforcement order, it obtained such a permit. Although that permit had expired by November 1, 2006, when the burn at issue occurred, the company had reason to believe the permit would be renewed to include that date. Doubtless, because of the enforcement order, the company should have been more careful to make sure that its understanding was correct. But there is no evidence that the company deliberately sought to conduct burning

without a permit. Its failure to obtain a renewal was based on a mistaken, but reasonable, understanding of the Fire Chief's position on renewal.

Analysis of the twelve penalty factors set forth at 310 CMR 5.25 also suggests that no more than a minimum penalty is warranted.

The twelve factors that must be considered before DEP issues a penalty are:

> (1) The actual and potential impact on public health, safety, and welfare, and the environment, of the failure(s) to comply that would be penalized.
>
> (2) The actual and potential damages suffered, and actual or potential costs incurred, by the Commonwealth, or by any other person, as a result of the failure(s) to comply that would be penalized.
>
> (3) Whether the person who would be assessed the Penalty took steps to prevent the failure(s) to comply that would be penalized.
>
> (4) Whether the person who would be assessed the Penalty took steps to promptly come into compliance after the occurrence of the failure(s) to comply that would be penalized.
>
> (5) Whether the person who would be assessed the Penalty took steps to remedy and mitigate whatever harm might have been done as a result of the failure(s) to comply that would be penalized.
>
> (6) Whether the person being assessed the Penalty has previously failed to comply with any regulation, order, license, or approval issued or adopted by the Department, or any law which the Department has the authority or responsibility to enforce.
>
> (7) Making compliance less costly than the failure(s) to comply that would be penalized.
>
> (8) Deterring future noncompliance by the person who would be assessed the Penalty.
>
> (9) Deterring future noncompliance by persons other than the person who would be assessed the Penalty.
>
> (10) The financial condition of the person who would be assessed the Penalty.
>
> (11) The public interest.
>
> (12) Any other factor(s) that reasonably may be considered in determining the amount of a Penalty, provided that said factor(s) shall be set forth in the Penalty Assessment Notice.

310 CMR 5.25.

Two of these factors play no role in the analysis here. These are the ability of the charged party to pay and the catch-all other factors provision. Justice Fein's ruling mentions that several

thousand dollars in forest products have been sold from the site. While the sales volume is minimal, the company's ability to pay is not a key to determining the penalty level here as there is no basis on which to conclude that the company cannot afford to pay a penalty of $500 or less. See 310 CMR 5.25(10). As for the catch-all provision, no other factors are mentioned in the penalty assessment notice, and hence no other factors may be considered in determining the penalty amount. See 310 CMR 5.25(12).

Turning to the factors relevant here, there is little in the way of actual or potential damage to the public from the one day failure to renew the burn permit. See 310 CMR 5.25(1) and (2). Northeast Concepts may not have taken all the steps it could have to ensure it complied, but LaMountain, acting ultimately on behalf of the company, discussed permit renewal with the Fire Chief and his understanding that the permit would renew without additional steps by the company was reasonable under the circumstances. See 310 CMR 5.25(3).

The fire was extinguished when the police chief pointed out the lack of a permit for that day. See 310 CMR 5.25(4). No harm having occurred, there was no harm to mitigate except for the lack of a permit, which LaMountain attempted to correct by speaking with Fire Chief Foster that day about renewal. See 310 CMR 5.25(5).

There is no question that the company had previously failed to comply with the requirement that a permit be obtained for an open burn, but the company had obtained a permit and had reasonable grounds to believe that the permit would be renewed to cover a burn conducted one day after the expiration date listed on the permit. See 310 CMR 5.25(6).

Any penalty would make compliance less costly than noncompliance because the fee for a burn permit in Holland was miniscule. See 310 CMR 5.25(7). Future noncompliance by the

company should be adequately deterred both by the issuance and confirmation of some penalty and by the related action Fire Chief Foster brought against James LaMountain that will have cost the company both the penalty amount and the time and effort to defend against the assessment of a penalty. Since Justice Fein's ruling, the Fire Chief has resumed issuing permits for burns on the site and none of the witnesses related any subsequent problems. See 310 CMR 5.25(8).

The parties did not draw my attention to any other instance in which DEP has penalized anyone for failure to obtain an open burn permit, but given the absence of any apparent problem with obtaining compliance with the permit requirement, the issuance of a penalty here and the subsequent lengthy litigation over it should serve as an adequate deterrence against violations by others. See 310 CMR 5.25(9).

The public interest would be served best if the company and the town reached an understanding as to what burning is allowed on the property, thereby freeing up town (and DEP) officials to perform other tasks important to the public. As far as the penalty is concerned, which relates solely to the need for a burn permit, upholding the penalty in any amount confirms that need. There is reason to believe the company has received that message because permits for burns at the site have been applied for and received from the Fire Chief. See 310 CMR 5.25(11).

In sum then, the one day failure to have a burn permit that was based on a reasonable misunderstanding about permit renewal warrants no more than the minimum $100 penalty.

I am concerned, however, by the amount of time and effort local and state officials, as well as personnel of Northeast Concepts and Huguenot Farms, have expended over burning conducted at the site. While some matters are worth extensive litigation, this is one that should have been resolved more readily and with far less rancor. I would urge the parties to be guided by this decision and Justice Fein's ruling, which thoroughly explains the relevant regulatory

scheme and the facts pertinent to its application to burning on the site, and work to resolve any question about burning on the site.

Conclusion

The penalty DEP issued to James LaMountain is vacated because any responsibility he had for the unpermitted open burning was as a corporate official of Huguenot Farms Inc., not as an individual. The penalty against Northeast Concepts, Inc. is reduced to $100 because the failure to have a permit one day after a previously-issued burn permit expired was based on a reasonable misunderstanding regarding permit renewal.

Notice

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the Commissioner for her final decision in this matter. The decision is therefore not a final decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to the Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this recommended final decision or any portion of it, and no party shall communicate with the Commissioner's office regarding the decision unless the Commissioner, in her sole discretion, directs otherwise.

James P. Rooney
Administrative Magistrate

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In The Matter Of: James LaMountain & Northeast Concepts, Inc.

Dala Docket No. Dep-07-165
Formerly Docket No. 2006-177

File No. PAN-WE-06-7004

Dala Docket No. Dep-07-166
Formerly Docket No. 2006-179

File No. PAN-WE-06-7005

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Date: August 13, 2009