COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-1123

COMMONWEALTH OF MASSACHUSETTS,
by and through its DEPARTMENT
OF ENVIRONMENTAL PROTECTION,
Plaintiff,

vs.

NORTHEAST CONCEPTS, INC., and JAMES LaMOUNTAIN,
Defendants,

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT

This is an enforcement action brought by the Department of Environmental Protection of the Commonwealth of Massachusetts (hereafter "DEP") against Northeast Concepts, Inc. (hereafter "NCI") and James LaMountain (hereafter "LaMountain"), seeking a declaratory judgment, civil penalties and injunctive relief for violations of the Wetlands Protection Act (hereafter the "WPA"), G.L.c. 131, § 40 and the regulations promulgated thereunder. NCI is the owner of an approximate 75 acre site located on Mashapaug Road in Holland, Massachusetts, where the violations have occurred. LaMountain is the agent of NCI and has been primarily responsible for the activities which comprise the violations. On March 30, 2009, a judgment as

to liability only was entered against both defendants pursuant to Mass. R. Civ. P. 33(a), for failure to answer interrogatories. Thereafter, the DEP filed a motion for assessment of damages. On October 20, 21 and 22, 2009, I conducted an evidentiary hearing on that motion. At the conclusion of the evidence, at LaMountain's request, I took a view of the subject premises.

NCI's land (hereafter the "Site") is bounded in part at its southeastern edge by Amber Brook, and at its eastern edge by Hamilton Reservoir. Mashapaug Road crosses through the Site near its border with Hamilton Reservoir, dividing the Site into a small strip of land that borders Hamilton Reservoir and Amber Brook (the "Eastern Portion"), and a much larger parcel that lies west of Mashapaug Road and borders Amber Brook on the southeastern edge (the "Western Portion"). The Site contains a hill which is highest on the western end of the Site and which slopes downhill toward both Amber Brook and Hamilton Reservoir. Amber Brook conveys water in an easterly direction across the Site into Hamilton Reservoir. Water from the Site flows into Amber Brook, then through a culvert under Mashapaug Road, and ultimately into Hamilton Reservoir. According to the DEP's complaint, a "bank" is the portion of land which normally abuts and confines a water body, such as a lake, river or stream. The banks of both Amber Brook and Hamilton Reservoir are included within the definition of "bank" set forth in the regulations promulgated pursuant to the WPA. Moreover, according to the complaint, a "river front area" is the area of land between a river's mean annual high water line measured horizontally outward from the river and a parallel line located 200 feet away. At the Site, Amber Brook meets the definition of a "river" as defined in 310 CMR 10.58(2), and therefore Amber Brook has a protected riverfront area extending 200 feet along both sides of the river for its entire length at the Site. Thus, as a result of the defendants' failure to answer interrogatories and

the judgment as to liability which has been entered as a result thereof, it has been established that both the bank and the riverfront area at the Site are protected areas under the WPA. See Multi Technology, Inc. v. Mitchell Management Systems, Inc., 25 Mass. App. Ct. 333, 334-335 (1988) ("the factual allegations of a complaint are accepted as true for purposes of liability . . .")[1]

Timothy McKenna (hereafter "McKenna"), an environmental analyst for the Wetlands Protection Department of the DEP, was assigned to investigate complaints about possible violations of the WPA in July of 2006. He visited the Site at that time and met with both LaMountain and his son. LaMountain told McKenna that his intent was to harvest timber and to develop the Site into eleven lots for residential purposes. McKenna observed that work was being done on the Site, and that LaMountain had set up a camp to conduct his activities. He also observed piles of cut trees and stumps from cut saplings. At that time, the waterfront on the Eastern Portion was still covered with trees and undergrowth vegetation, and the Western Portion consisted generally of a forest. McKenna observed no evidence of erosion or instability (with one small exception) at that time. He advised LaMountain that his activities were in violation of the WPA and that he should obtain an Order of Conditions from the local Conservation Commission or the DEP before any additional work was done. He also advised

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[1] LaMountain correctly argues that "even after default it remains for the court to consider whether the unchallenged facts constitute a legitimate cause of action, since a party in default does not admit mere conclusions of law." Productora E Importadora De Papel v. Fleming, 376 Mass. 826, 834-835 (1978). However, his argument does not advance his cause, because it is clear that the unchallenged and detailed facts set forth in the DEP's complaint establish a cause of action against both him and NCI. During the hearing, he repeatedly attempted to offer evidence that Amber Brook is not a "river" and that he is entitled to an agricultural exemption for his activities, and I excluded that evidence because it was not relevant to the issue of damages and because the default establishes that the facts set forth in the DEP's complaint are true. Among the facts set forth in the complaint are that Amber Brook meets the definition of a river as defined in 310 CMR 10.58(2) (see Paragraph 16), and that the defendants' activities were not for agricultural purposes (see Paragraph 28).

him to work with the DEP to return the Site to compliance.

McKenna next visited the Site in August of 2008, and again in December of 2008 and August of 2009. On those visits, he observed that the clearing and excavation of the property had been greatly expanded, and that the land had been reshaped. An access road, which had been an old cart path, on the Western Portion had been both lengthened and widened, and many trees had been cut in furtherance of that activity. LaMountain had constructed a shed in the riverfront area, approximately 30 feet away from Amber Brook. In 2006, there had been a wall of forest where the access road makes a hairpin turn, but in December of 2008, that vegetation had been removed and the slope had been altered by moving earth. Drainage and additional excavation work had also been done, which affected the stability of the Site, caused significant sedimentation, and changed both its hydrology and its topography. All these alterations on the Western Portion were within the 200 foot riverfront area.

On the Eastern Portion, the area along Hamilton Reservoir had been converted from a heavily wooded area to a sandy beach. Trees and other vegetation had been cut and removed, and the land had been regraded to the extent that sand had been brought in and placed along the shoreline to create a recreational beach. McKenna also observed that docks had been placed on the shore and in the water. All of this had been done within the 200 foot riverfront area. Prior to those alterations, erosion had been largely intercepted by vegetation on the Site, but that was no longer true after the alterations had been done. Significant sedimentation of the riverfront area, the banks of the river and the reservoir, and the land under the water resulted from those alterations. I have reviewed photographs of the area, taken both before and after the alterations, and I conclude that the changes have been dramatic. My observations while on the view

reinforce that conclusion.

On all his Site visits after the initial one, McKenna repeated his advice to LaMountain that the activities were in violation of the WPA and that LaMountain should work with the DEP to return the Site to compliance. However, those admonitions evidently fell upon deaf ears, as LaMountain continued work on his project. He claims that he believed that he was allowed to do so because he was operating a farm and that his work was protected by an agricultural exemption. However, even after being assessed a civil administrative penalty of $12,500 in 2007, he and NCI continued the work. In fact, NCI sold two house lots to individuals in 2007 and 2008 for a total of $149,900. The deeds for both of those lots included easements to use the beach along Hamilton Reservoir.

As the DEP has pointed out, the defendants' various activities comprise separate violations of the WPA and the regulations promulgated thereunder. On the Eastern Portion, the defendants cleared trees and other vegetation and re-graded the land in both the riverfront area and on the banks of Hamilton Reservoir. On the Western Portion, they cut trees and cleared undergrowth in the riverfront area in order to widen and lengthen the preexisting access road and to create a new permanent road through the riverfront area. They also re-graded the land by making the hillside significantly steeper, which destabilized the soils and led to significant sedimentation of the riverfront area and the banks. On both the Eastern and Western Portions, the defendants failed to restore these alterations even after they were notified repeatedly of the violations.

The DEP correctly points to four factors which the Court may consider in assessing civil penalties under the WPA. Those factors include: (1) actual harm to the environment; (2) patterns of non-compliance; (3) deterrence to the public; and (4) economic benefit derived by the defendants from conducting their illegal activities. As to the first factor, both the riverfront area and the banks are important areas to which the law provides protection, because they help to maintain water quality and quantity. The defendants' activities altered those areas significantly, as sediment continues to be deposited into those areas. I accept the testimony of Robert McCollum (hereafter "McCollum"), the program chief of Wetlands and Waterways in the DEP Regional Office, that there has been substantial degradation of those areas on the Site. It may be true that there is no evidence that any fish or other animals have been killed or injured, but the WPA protects the habitat, not the animals. I agree that there has been damage done to the habitat by the defendants' activities.

As to the second factor, DEP officials repeatedly tried to engage LaMountain and to explain to him what had to be done in order for him to conduct his activities lawfully. LaMountain brushed aside those warnings and persisted in his environmentally harmful activities. Even a $12,500 civil administrative penalty assessed against NCI in 2007 did not deter him. In the face of overwhelming evidence, he continues to argue that the DEP is without jurisdiction in this case and to claim that he is a victim because certain officials in the town of Holland are biased against him. I agree with McCollum that the violations are egregious.

As to the third factor, all of LaMountain's activities occurred in full public view. The original investigation was prompted by complaints from the public, and I infer that members of

the public are fully aware of the defendants' continued violations of the WPA. The public can and should expect that the law will be enforced, and that penalties will flow if the law is flouted.

As to the fourth factor, although LaMountain continues to portray himself as a humble farmer, it seems reasonably clear that NCI has and will continue to derive economic benefit from the development of the Site into house lots, especially if those lots can be conveyed with easements to the beach. If that development is allowed to occur without the payment of fees for permits and the costs of hiring environmental consultants, NCI will derive more economic benefit than would a person who observes the law and plays by the rules. That cannot be tolerated. On the other hand, I have examined the tax returns submitted into evidence by NCI, and I see that the corporation has not, at least to this point, derived significant profits from this development. The DEP has also sought injunctive relief from the Court, requiring NCI to restore the altered land to compliance with the WPA. I infer that such work will be costly, and in my view it is more important that the environmentally necessary work be done than that the defendants receive penalties which could lead to financial ruin.

The statute allows penalties of up to $25,000 per day for each violation. Given the number of days that the defendants have been in noncompliance by failing to restore the alterations, those penalties could be as high as $72,000,000. Clearly, any penalty even approaching that amount would be excessive and unreasonable. The DEP has identified three separate violations on both the Eastern Portion and the Western Portion of the Site, for a total of six violations against each defendant. Accordingly, it has asked the Court to impose a penalty of $150,000 against each defendant, for a total of $300,000. While I appreciate the DEP's

reasoning and while I think it is being fair in its approach, I have decided not to grant the full relief which it requests. I do not think that it is appropriate to assess separate sets of penalties for both the Eastern Portion and the Western Portion, the effect of which would be to double the penalties. The Site consists of a single parcel of land, albeit one which is divided by Mashapaug Road. The mere fact that the Site is divided by a road does not, in my judgment, provide sufficient reason to assess separate penalties for violations on each of the two portions of the Site. The violations on the two portions are similar in nature and were motivated by the defendants' pursuit of a single development project. Moreover, as previously pointed out, I do not wish to make the penalties so onerous that the defendants will be unable to afford to do the work necessary to restore the alterations in order to bring the Site into compliance with the WPA. Therefore, I shall assess penalties of $25,000 against each defendant for each of the three distinct violations on the Site, resulting in a penalty against each defendant of $75,000 for a total of $150,000. It seems to me that such a substantial sum is sufficient to satisfy the goal of deterrence and constitutes an appropriate financial sanction for the economic benefits which the defendants have wrongfully derived from their conduct.

For the foregoing reasons, JUDGMENT shall enter as follows:

(1) The Court hereby declares that the defendants Northeast Concepts, Inc. and James LaMountain have violated the Wetlands Protection Act, G.L.c. 131, § 40 and the regulations promulgated pursuant thereto, with respect to the property owned by Northeast Concepts, Inc. at Mashapaug Road in Holland, Massachusetts.

(2) The Court hereby assesses a civil penalty of $75,000 against the defendant Northeast Concepts, Inc. and $75,000 against the defendant James LaMountain.

(3) The Court hereby permanently enjoins both Northeast Concepts, Inc. and James LaMountain, and their agents, servants, directors, officers, employees, subsidiaries, and assigns, and all persons acting in concert with them, from future violations of the Wetlands Protection Act and the regulations pursuant thereto with respect to the property located on Mashapaug Road in Holland, including any activity that either directly or indirectly alters protected resource areas by causing sedimentation of those areas. In addition, those entities and individuals shall immediately cease and desist from any activity that alters or is reasonably likely to alter protected areas as defined in the Wetland Protection Act and the regulations promulgated thereunder.

(4) The Court hereby enters a permanent injunction requiring that: (a) within 14 business days of the entry of Judgment the defendants shall retain an environmental consultant who is acceptable to the Massachusetts Department of Environmental Protection based upon the consultant's professional experience in developing and implementing plans for storm water management and restoration of riverfront areas; (b) within 45 business days of the entry of Judgment the defendants shall submit the following to the DEP: (i) a Site stabilization plan prepared by the consultant which shall specify erosion and sediment controls that are suitable for the entire Site and the defendants' use of the Site, which stabilization plan shall be reviewed and modified as deemed necessary by the DEP and fully implemented by the defendants within 15 business days of the DEP's approval of the stabilization plan; and (ii) a restoration plan prepared

by the consultant that shall specify measures to be taken to appropriately restore all protected areas at the Site, which restoration plan shall be reviewed and modified as deemed necessary by the DEP and implemented by the defendants by July 1, 2010. The defendants shall further require the consultant to monitor the entire Site for compliance with the stabilization plan and restoration plan for a period of at least two consecutive growing seasons beginning on the first full growing season after implementation of the restoration plan.

(5) The defendants are permanently enjoined to permit the DEP to inspect the Site at any time upon reasonable notice to the defendants or their counsel. DEP personnel may be accompanied by law enforcement officers while conducting any such inspections.

(6) The defendants are permanently enjoined from conducting any unpermitted open burning on the Site.

Daniel A. Ford
Justice of the Superior Court

DATE: October 28, 2009
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