

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations of Article 15  
of the Environmental Conservation Law and Part 608  
of Title 6 of the Official Compilation of Codes, Rules  
and Regulations of the State of New York

**ORDER**

DEC Case No.  
R4-2002-0906-110

– by –

PASHKO GJOKAJ,

Respondent

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**WHEREAS:**

1. Respondent is an owner of property in the Town of Masonville, Delaware County (“site”) on which he has constructed four ponds.

2. Respondent installed an approximately 250 foot long pipe and constructed a spillway structure (“drop inlet structure”) in the bed of a class C(t) stream without having obtained a permit from the New York State Department of Environmental Conservation (“Department”).

3. Pursuant to a notice of hearing and complaint dated December 6, 2002, an administrative enforcement hearing was held before Administrative Law Judge (“ALJ”) Susan J. DuBois on February 13, 2004. The Department appeared by Christopher Ritaccio, Esq. and Anthony London, Esq., of the Division of Environmental Enforcement, Albany, New York. Respondent appeared by Joseph A. Ermeti, Esq., 9 Division Street, Sidney, New York.

4. A copy of the hearing report of ALJ DuBois is attached to this order, and I adopt the Findings of Fact, the Conclusions and the Recommendation contained therein, subject to my comments in this order.

**NOW, THEREFORE**, having considered this matter, it is **ORDERED** that:

I. Respondent’s installation of an approximately 250 foot long pipe and construction of a drop inlet structure violated section 15-0501(1) of the Environmental Conservation Law (“ECL”) and section 608.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

II. Respondent is assessed a civil penalty in the amount of twelve thousand nine

hundred dollars (\$12,900). Five thousand dollars (\$5,000) of this amount is to be paid to the Department within 30 days of respondent's receipt of this order. Payment of the five thousand dollars (\$5,000) shall be by cashier's check, certified check or money order drawn to the order of "NYSDEC" and delivered to: Regional Director, New York State Department of Environmental Conservation Region 4, 1150 North Westcott Road, Schenectady, New York 12306-2014. The remaining amount of seven thousand nine hundred dollars (\$7,900) shall be suspended and extinguished on the condition that respondent complies with the terms and provisions of this order. In the event that Department staff notify respondent that he has not complied with the terms and provisions of this order, respondent must pay the suspended portion of seven thousand nine hundred dollars within thirty (30) days of that notification to the Regional Director at the Department's Region 4 office.

III. In addition to the payment of a civil penalty, respondent shall undertake the following restoration work at the site:

A. respondent shall open the valve on the spillway structure in order to drain the pond. The valve shall be opened at a time and in a manner to be specified by Department staff; and

B. respondent shall restore the stream channel by removing the approximately 250 foot long pipe to within four feet of the fence and stone wall on the west side of Cummings Road, and remove the north (upstream) face of the drop inlet structure including the 10 inch diameter pipe. Such work is to be completed by September 1, 2004 and in compliance with any written directions of Department staff, provided that Department staff may extend the September 1, 2004 work completion date upon a showing of good cause by respondent.

IV. Respondent shall notify Department staff of the commencement of the restoration work at least two business days in advance of the commencement of the work.

V. Respondent shall comply with any written directions of Department staff to control erosion and turbidity during removal of the pipe and the north (upstream) face of the spillway structure.

VI. All communications between respondent and the Department concerning this order shall be made to the Regional Director, New York State Department of Environmental Conservation Region 4, 1150 North Westcott Road, Schenectady, New York 12306-2014.





## PROCEEDINGS

Pursuant to part 622 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR part 622), an administrative enforcement hearing was held to consider allegations by the New York State Environmental Conservation Department (Department or DEC) against Pashko Gjokaj (Respondent), RD #1, Box 155, Cummings Road, Sidney Center, New York, 13839. DEC Staff alleged that Respondent constructed a pond and a spillway structure in a class C(t) stream without a permit and placed a buried plastic pipe in the streambed without a permit. The violations allegedly took place at Respondent's residence on Cummings Road in Sidney Center.

Respondent was served with a notice of hearing and complaint on or about December 9, 2002, and counsel for Respondent submitted an answer on or about May 29, 2003. DEC Staff and Respondent met at the Region 4 office on at least one occasion to discuss the matter but no settlement was reached. DEC Staff submitted a statement of readiness which the DEC Office of Hearings and Mediation Services received on November 4, 2003.

Respondent was represented in the hearing by Joseph A. Ermeti, Esq., Sidney, New York. DEC Staff was represented by Christopher J. Ritaccio, Esq. and Anthony London, Esq., Division of Environmental Enforcement, Albany, New York.

The hearing took place on February 13, 2004 before Susan J. DuBois, Administrative Law Judge. DEC Staff called as its witnesses Jerome Fraine, Conservation Biologist 1, of DEC Region 4. Respondent called as his witnesses Environmental Conservation Officer (ECO) Harry Young, of DEC Region 4, and Mr. Fraine. Respondent also testified on his own behalf.

The transcript of the hearing was received at the Office of Hearings and Mediation Services on March 2, 2004. On February 19, 2004, DEC Staff requested that the hearing report be circulated to the parties as a recommended decision. On March 9, 2004, DEC Staff modified this request to ask for an opportunity to submit a closing brief, and that if this request was not granted, a ruling be made on the earlier request for a recommended decision. The parties were allowed to submit briefs and reply briefs, with the replies due on April 5, 2004. The record of the hearing closed on April 5, 2004.

### Charges and Relief Sought

DEC Staff alleged that Respondent constructed a pond and a spillway structure in a protected stream without a permit and placed a plastic pipe of undetermined length in the streambed without a permit, in violation of Environmental Conservation Law (ECL) Article 15 and 6 NYCRR 608.2(a). DEC Staff requested that the Commissioner issue an order directing Respondent to ensure that the shut off valve of the spillway remain open and to restore the stream channel by removing most of the pipe and the north (upstream) side of the spillway structure. The complaint specified the period between June 15, 2003 and September 1, 2003 as

the time during which this work should be done. DEC Staff asked that a civil penalty of \$12,900 be imposed, \$7,900 of which would be suspended conditioned on strict compliance with the Commissioner's order.

### Answer

Respondent denied most of the allegations in the complaint, and denied that the pond and the pipe were located in a stream bed. As affirmative defenses, Respondent stated that the complaint fails to state a cause of action, that the alleged pond is not in a protected stream, and that the alleged stream is not a protected stream. Respondent also stated, as an affirmative defense, that he was informed by DEC that no permit was required for construction of the pond, that ECO Young observed the construction and did not object, and that Respondent would suffer damages of over \$50,000 that he spent on the pond construction and related work if he were forced to remove the pipe after relying on the "good faith and fair dealing" of DEC.

### FINDINGS OF FACT

1. The site of the alleged violations is an approximately 80 acre property located west of Cummings Road, Sidney Center, New York. The site is in the Town of Masonville, Delaware County. Pashko Gjokaj (Respondent), of 747 Cummings Road, Sidney Center, New York, 13839, is an owner of the site. Respondent bought the site as two parcels, the first in 1976 and the second in the mid-1980's. Tony Gjokaj is identified as an owner of the site on a permit application dated August 4, 1999.
2. A stream flows through the site, generally from north to south, and crosses under Cummings Road adjacent to the site. This stream is a protected stream for which the Department has adopted the classification and standard C(t). The stream is a tributary of Trout Brook and is listed under Item No. 859, waters index number D-71-20-11 and tributaries, in 6 NYCRR 815.6. Class C fresh surface waters are those for which the best use is fishing (6 NYCRR 701.8). C(t) streams are class C streams inhabited by trout (Tr. 96-97). The section of the stream that is on and upstream from Respondent's property is near the headwaters of the stream. In dry weather there is only a small amount of flow, but a DEC witness observed water flowing in the stream during all five site visits he made.
3. There is also a state-regulated freshwater wetland on or near the site, west of the tributary in which the alleged violation took place. The wetland is designated as wetland number TC-3 on the Department's freshwater wetlands map. These features are shown on the map that is Exhibit C of the hearing record (see Appendix A of this report).
4. The pond, the spillway structure and the buried pipe that are the subject of the alleged violations are located in the class C(t) stream, a short distance west of Cummings Road and near the southern boundary of Respondent's property. These features are shown on a sketch map

drawn by Jerome Fraine, Conservation Biologist 1, which is Exhibit E of the hearing record (see Appendix B of this report).

5. As of the fall of 2003, there were four ponds on the site, one near Cummings Road, two uphill from there near Respondent's house, and one farther uphill. The pond near Cummings Road is the one that is a subject of the complaint in this hearing. The three upper ponds are not on a protected stream. Starting in 1997, Respondent built the pond farthest uphill, pursuant to a permit that probably was a dam safety permit (Hearing transcript pages (Tr.) 180-181, 191). He also built the two ponds near his house. These receive water that flows down from the first pond. No permit was required for the two ponds near the house due to their size. Water flows from the ponds near the house to the pond near Cummings Road (Tr. 179-182).

6. On August 4, 1999, Tony Gjokaj applied for a permit from the DEC to create a pond approximately 100 feet by 125 feet by 10 feet deep, to stock trout. The application form identified Respondent as the agent/contact person for the application. In the box where the type of permit sought would be identified, the box for "water supply" was checked. The form was accompanied by a short environmental assessment form. If a member of the public asks DEC Staff whether a permit is needed for a project, DEC Staff typically sends the person a copy of a topographic map showing both wetlands and protected streams for the person to mark with the location of the proposed project (Tr. 49-52). For the 1999 permit application, Respondent marked an oval area on the map to show the proposed pond location (Tr. 213-215). The map is at a scale of approximately one inch to 2,000 feet (Tr. 109).

7. The oval marked on the map is located between Cummings Road and wetland TC-3, approximately halfway between these two features. It is not located at the place where Respondent created the pond near Cummings Road. On August 24, 1999, Christopher M. Hogan, of DEC Region 4, wrote to Mr. Gjokaj stating that DEC Staff had reviewed the application and had determined, based on the information Respondent had provided, that a permit would not be required for construction of the pond.

8. In the late summer or fall of 1999, Richard Popp, who at that time worked for DEC, visited the site in connection with a dispute about construction of one of the upper ponds. Respondent discussed with him his plans for building the fourth pond and removing debris from the area. Based upon his discussion with Mr. Popp, Respondent believed that the area was not a protected stream and not a wetland (Tr. 191-193). Mr. Popp retired from the DEC before August 1, 2002, the date of the first inspection described below (Tr. 162, 225-226).

9. In the late fall of 1999, Respondent removed debris such as tires and scrap metal from the location of the fourth pond, cut trees, and removed rocks from the area. The debris had been dumped on the property before Respondent bought it (Tr. 228-231). On several occasions from 2000 through 2002, Respondent brought in a bulldozer and started constructing the pond (Tr. 193-194).

10. Respondent also buried a 24 inch diameter PVC pipe for a distance of approximately 250 feet, extending between an 18 inch culvert that runs under Cummings Road and the north end of the pond. The class C(t) stream flows under Cummings Road through the 18 inch culvert, and the buried pipe is located approximately along the same line as the class C(t) stream shown on the map. A stream channel exists south (downstream) of the spillway at the south end of the pond. At least part of the pipe, plus the soil burying it, are located in the class C(t) stream (Tr. 35-36, 194-195, Ex. E, Ex. F pictures 5-8, Ex. I pictures 4-5).

11. On August 1, 2002, Environmental Conservation Officer Harry Young and Mr. Fraine visited the site in response to a complaint about a possible dam safety problem. At that time, the pond area had been cleared and excavated into a bowl shape. There was earthmoving equipment on the site. A trickle of water was flowing through the area but the water had not been impounded as a pond. At the south end of the pond area, a wooden form had been built for a drop inlet structure (or spillway) to control the water level in a pond but no concrete had been poured. Immediately south of the wooden form was an embankment with a culvert through it. The approximately 250 foot pipe upstream from the north end of the pond was in place as of August 1, 2002 (Tr. 15-20, 28, 113, 117, 155, Ex. F).

12. ECO Young and Mr. Fraine spoke with Respondent at the site on August 1, 2002. They told him they believed he was in the course of a protected stream, but said they would need to confirm that and get back to him. They told him not to proceed with further construction of the pond, other than to mulch and seed the area, until further notice. Respondent showed them the letter from Mr. Hogan and Mr. Fraine said that the pond location as indicated on the map attached with the letter was not the location where the pond actually was. Respondent told DEC Staff that Mr. Popp had seen no problem with putting the pond at its location. Respondent also showed the DEC Staff members some of the debris he had removed from the stream (Tr. 25-26, 161-162, 166-169, 172-174 188-189, 200).

13. On August 26, 2002, Mr. Fraine wrote to Tony Gjokaj at his address in Thornwood, New York, describing the August 1, 2002 inspection and stating that, "It has been determined that Section 15:0501 of the ECL and Part 608.2 of 6NYCRR have been violated. Specifically, disturbing the bed and banks of a protected stream without a permit." The letter further stated, "To avoid incurring greater potential liability, you are advised to cease the alleged unlawful activity" (Ex. D, Tr. 43-45). The letter stated that the matter was being referred with a recommendation for enforcement action.

14. On September 4, 2002, Respondent replied to the letter, stating that Tony Gjokaj is his son, who no longer lives at the Thornwood address and also does not live at Respondent's house in Sidney Center. Respondent stated that he is the permanent resident at the Sidney Center address and is the person doing the work. He asked that future correspondence be mailed to him at the Sidney Center address. The letter stated, "As soon as you mail me what is needed in regards to this issue, I will be able to proceed." (Ex. G).

15. DEC Staff made another inspection of the site on October 21, 2002. As of that date, Respondent had caused concrete to be poured in the wooden form and a concrete drop inlet structure was in place at the south end of the pond. A short rock retaining wall had been built on either side of the structure. Water was flowing out of the buried pipe, across the pond bed, and through the drop inlet structure. The structure was not impounding water on that date. The structure consist of a concrete box with an approximately 10 inch pipe through its upstream wall and the pre-existing approximately 52 inch pipe through its downstream wall. When the 10 inch pipe is closed, water backs up filling the pond to the level of the top of the concrete box. The water then flows over the top edge of the box and exits through the larger pipe. A structure of this kind allows for a pond to be drained periodically for cleaning or for harvesting fish (Tr. 63-70, Ex. I).

16. The concrete for the structure was poured between the August 1, 2002 inspection and the October 21, 2002 inspection, and possibly before the August 26, 2002 letter from DEC Staff. Prior to August 1, 2002, Respondent had arranged with a concrete company to pour concrete both for this structure and for a barn floor. Although ECO Young and Mr. Fraine told Respondent on August 1, 2002 to stop constructing the pond, Respondent did not contact the company to tell them not to pour concrete in the form for the structure at the pond area. This work occurred at a time when Respondent was at his other home in Westchester County. The concrete was poured after August 1, 2002 (Tr. 200-201, 226-228, 242-243).

17. On December 4, 2002, Mr. Fraine and another member of the DEC Staff visited the site again. The pond area looked similar to how it had looked on October 21, 2002. The stream was flowing through the bed of the pond and out through the 10 inch pipe, which was open (Tr. 70-73, Ex. L).

18. In early 2003, Respondent's attorney Joseph Ermeti, Esq. met with Mr. Fraine, who showed him the Department's map that depicts the C(t) stream on and near the site. The map is a topographic map on which the streams are marked with dark lines, and the stream along Cummings Road is labeled C(t).

19. At the time of an additional inspection on September 18, 2003, the concrete structure was still in place, with the 10 inch pipe open and a stream of water was flowing through the pond bed (Ex. M, Tr. 78-80).

20. Mr. Fraine and three other members of the DEC Staff visited the site on October 27, 2003. On that date, the batteries in Mr. Fraine's camera were dead so he directed John Boudreau, who at that time was a seasonal technician working with Mr. Fraine, to go to the site to take photographs. Mr. Boudreau took photographs at the site on October 31, 2003. On October 27 and 31, 2003, the pond had been filled with water and the water was over the top of the concrete structure. Respondent had built a concrete retaining wall at the downstream end of the pond and had filled near the wall to build up the embankment so that vehicles could drive on it both inside and outside his fence (Ex. N, Tr. 216-221).

21. Respondent did not apply for a permit to build a pond at the location where the pond was built. No DEC permit has been issued for the pond built by Respondent near Cummings Road or the other stream disturbances on the site as observed by DEC Staff on August 1, 2002 (Tr. 35, 55-56). There is no indication in the record that Respondent applied for a separate permit to enclose 250 feet of the stream in a culvert nor that he received such a permit. DEC Region 4 would not typically issue a permit for construction of a pond in a C(t) stream (Tr. 57).

22. The concrete drop inlet structure and the approximately 250 foot long pipe prevent fish from moving upstream. The inside of the pipe is not as rough as a natural stream bed and the flow makes it difficult for fish to swim upstream for that distance without a place to rest. The impounded water in the pond would heat up in the summer and the warm surface layer of the water would go through the structure and flow downstream (Tr. 122-123, 127-128, 141-148).

23. Mr. Fraine has not seen any trout in the stream in question, but trout can be found in streams smaller than that stream (Tr. 107, 123, 129). Respondent stocked the upper ponds with trout. Small trout may have gotten through the grill at the outlet of these ponds and been washed in the overflow down to where Respondent built the pond in the protected stream (Tr. 198-200).

24. Respondent spent approximately \$25,000 on construction of the pond, the pipe and related work. This amount does not include money he spent on building a stone wall and a fence around this corner of his property, work that is not the subject of the enforcement action, nor any cost for his own labor (Tr. 197).

25. The water in the two middle ponds comes partially from springs (Tr. 180-181). Both the overflow from the upper ponds and the flow in the class C(t) stream where it passes through the culvert under Cummings Road vary with the wetness of the season (Tr. 211, 249, Ex. V, EE, II, JJ, Ex. F photo 5, Ex. I photos 2 and 4). Although a portion of the water in the pond comes from the upper ponds and possibly from a spring near the 250 foot pipe, some of the water also comes from the Class C(t) stream (Tr. 77-78, 224, 233-234, 248-249).

26. The remediation proposed by DEC Staff would consist of removing the approximately 250 foot pipe except for an approximately 4 foot long section within four feet of the fence and stone wall on the west side of Cummings Road, and removing the north (upstream) face of the drop inlet structure so that the larger pipe through which water flows out of the concrete structure would be exposed. This would allow the water to flow unimpeded, returning it to being a stream rather than a pond, and would remove the barriers to fish movement (Tr. 94-95, 122-123, 127-128).

27. All or part of Respondents' property is surrounded by a chain link fence to keep in animals that he has on the property, including sitka deer, poultry and rabbits.

## DISCUSSION

### The Stream

The evidence demonstrates that Respondent installed the approximately 250 foot pipe, the pond, and the concrete structure and disturbed the soil in the bed and banks of a Class C(t) stream. The photographs in evidence, the map of classified streams in the area, the sketch map prepared by Mr. Fraine, and the related testimony demonstrate the location of the work done by Respondent in relation to the location of the stream.

Respondent asserted that the pond location shown on the map from the 1999 permit application is as accurate as the location depicted by DEC Staff, but this is not supported by the evidence. The location marked by Respondent is a substantial distance west of Cummings Road. Cummings Road is shown on the map and is labeled. The actual pond location, as seen from various photographs of the pond, is very close to Cummings Road. While the circle that DEC Staff marked on the Exhibit C map is not a precise depiction of the boundaries of the pond, and overlaps onto Cummings Road and land on the other side of the road, it shows the area in which the pond is located while Respondent's marking does not.

Respondent's reply brief stated that ECO Young "testified that he believed the origin of the stream to be below respondent's property." The reply brief did not contain a citation to the transcript for this statement. This may be a reference to a statement at page 162 and 163 of the transcript at which ECO Young testified that, just based upon driving by the area prior to Respondent's pond construction work, he had assumed that the source of the stream was in a ravine on the property immediately south of Respondent's property. ECO Young also testified, however, that after reviewing the property and the map and discussing these with Mr. Fraine, they determined the stream on the site was a protected stream (Tr. 166, 168-170, 172-173).

The fact that the pond is also fed by flow from the three ponds uphill from it does not negate the fact that the pond is located in a Class C(t) stream.

### Estoppel

DEC Staff's reply brief argued that Respondent should be precluded from asserting the affirmative defense of equitable estoppel since he did not explicitly assert this in his answer and did not provide a statement of facts as grounds for this affirmative defense. DEC Staff cited 6 NYCRR 622.4(d) in support of this argument, and stated that it did not have the opportunity to request clarification of this affirmative defense under 6 NYCRR 622.4(f) since it had not been placed on notice of the facts or legal theory on which this affirmative defense was based. Respondent replied that this affirmative defense had been raised in the answer through his assertions about the 1999 permit application, DEC's response to that application, Respondent's interaction with Mr. Popp, and ECO Young not objecting to the work prior to August 1, 2002. The answer itself also stated that Respondent "relied on the good faith and fair dealing of the

DEC in expending sums for pond construction and site work.” The facts Respondent intended to prove related to this affirmative defense are summarized in paragraphs 10 through 17 of the answer.

The answer did not use the words “equitable estoppel,” but Respondent’s fourth affirmative defense made assertions that are relevant to this concept and that put DEC Staff on notice of the facts Respondent intended to prove in support of an affirmative defense. “Equitable estoppel” is defined as, “A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way” (Black’s Law Dictionary 571 [7<sup>th</sup> ed 1999]). The affirmative defense of equitable estoppel is considered in this hearing report, but is rejected for the reasons that follow.

“The doctrine of estoppel is not applicable to the State acting in a governmental capacity.” (*Hamptons Hospital & Medical Center v Moore*, 52 NY2d 88, 93, 436 NYS2d 239, 241 [1981]). The hearing report in a recent DEC enforcement case involving violation of ECL Article 15 includes the following discussion of estoppel:

“As the New York courts have consistently held, the doctrine of estoppel has a very limited and narrow applicability to governmental agencies. The doctrine cannot be invoked against a municipal agency to prevent it from discharging its statutory duties. *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 525 N.Y.S.2d 176, 519 N.E.2d 1372 (1988). Moreover, the doctrine cannot be relied upon to create a right where none exists. *Grishman v. City of New York*, 583 N.Y.S.2d 425 (N.Y.A.D. 1 Dept., 1992). Accordingly, estoppel cannot be invoked to prevent the Department from discharging its statutory duty to review permit applications and to issue or refrain from the issuance of permits, as appropriate to the particular circumstances. In addition, estoppel cannot be invoked against the Department to authorize construction or repairs without the very permit otherwise mandated by the regulations. In the rare instances where estoppel has been invoked, there has been a showing that the governmental agency has acted or comported “itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice.” *Bender v. New York City Health & Hospitals Corp.*, 38 N.Y.2d 662, 382 N.Y.S.2d 18, 345 N.E.2d 561 (1976).” (*Matter of Anna Romer*, DEC Case No. R6-20000620-44, Hearing Report attached with Order of the Commissioner [July 2, 2003]).

With regard to the evidence in this hearing, the permit application documents submitted by Tony Gjokaj in 1999 did not show the location at which the pond was actually constructed. A letter from DEC Staff saying that no permit was necessary for pond construction at this other location was not something Respondent could rely on to build the pond next to Cummings Road. The difference in the locations is further underlined by references in Mr. Hogan’s letter to the need to avoid ground disturbance within 100 feet from freshwater wetland TC-3. The statements by Mr. Popp can be given little weight since Respondent did not call Mr. Popp as a witness and the account of his statements is hearsay testimony by Respondent. Although Respondent

asserted that ECO Young “continuously observed and inspected” the pond construction without objecting to it (Answer, paragraph 14), this was not supported by the testimony. ECO Young testified that he could not give an exact number of times he had been by the site in 2002, but that it might be once a month and that two or three months could pass without ECO Young driving by the site. ECO Young met with Respondent on the site in the 1990's concerning the upper ponds, but these were a separate project. He had not made specific visit to Respondent's property between that time and August 1, 2002 although he had driven past the property at times (Tr. 153-154, 159-160). Respondent did not testify to any inspections by ECO Young, prior to August 1, 2002, in which ECO Young inspected Respondent's work on the pond near Cummings Road. The \$50,000 amount asserted by Respondent as the amount he spent on the work “subsequent to the DEC's consent, confirmation, and approval” is not supported by the record. The total amount he spent on the pond construction was \$25,000, some of which occurred after he was told to stop on August 1, 2002.

### DEC Staff's argument concerning burden of proof

DEC Staff's reply brief argued that Respondent had the burden to prove that a permit was not required, and DEC Staff did not have the burden of proof to show that the existence of the protected stream caused a permit to be required. DEC Staff based this argument on 6 NYCRR 622.4(c) which states that, “Whenever the complaint alleges that respondent conducted an activity without a required permit, a defense based on the inapplicability of the permit requirement to the activity shall constitute an affirmative defense.”

Part 622, however, also states, “The department staff bears the burden of proof on all charges and matters which they affirmatively assert in the instrument which initiated the proceeding” (6 NYCRR 622.11(b)(1)). In the present case, the complaint alleged that the stream is a Class C stream with a standard of C(t) and is a protected stream as defined at 6 NYCRR 608.1(p), and that permits are required for actions of the kind undertaken by Respondent (complaint, paragraphs 5 through 7). The requirement for a permit is a basic element of the violation charged by DEC Staff, and DEC Staff bears the burden of proof on this question.<sup>1</sup>

DEC Staff did, however, meet its burden of proof to show that a permit was required for the activities that are the subject of the complaint.

### Remediation and penalty

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<sup>1</sup> The responsiveness summary prepared by DEC for adoption of the current language of part 622, which occurred in 1994, contains discussion of 622.4(c). This subdivision does not shift the burden of proof as suggested by DEC Staff in the present case, but instead has to do with exemptions contained in regulations that govern general classes of activities.

DEC Staff seeks an order that would require Respondent to restore the stream channel by removing the upstream face of the spillway structure (including the 10 inch pipe) and removing all but four feet of the approximately 250 foot long pipe buried upstream from the pond. The record supports requiring this remediation.

Respondent testified that exposing the 52 inch pipe that exits the spillway structure would allow his animals to escape and would allow predators into his property (Tr. 206-207). This is a problem of his own making, and it might be avoided if he were to relocate the fence so that the stream, which crosses a corner of his property, would be outside the fence. There may be other arrangements that could be made, but no record was developed concerning these. The presence of the fence and Respondent's animals does not support leaving the spillway structure in place.

The complaint asked that the Commissioner require Respondent to restore the stream channel between June 15, 2003 and September 1, 2003. These dates passed before the hearing took place. Similar dates in 2004 could be used in the present order. The record does not contain testimony regarding measures for controlling erosion or turbidity during removal of the pipe and the face of the concrete structure, but the order should give DEC Staff discretion to specify standard methods for this. The December 6, 2002 complaint also asked that the order direct Respondent to ensure that the shutoff valve on the spillway remain open. Respondent closed the valve and filled the pond sometime between September 18, 2003 and October 27, 2003. The hearing record does not include testimony concerning any impacts of draining the pond nor of any precautions to be taken in draining the pond in order to avoid such impacts. The order should direct Respondent to open the valve and drain the pond, at a time and in a manner to be specified by DEC Staff.

The penalty proposed by DEC Staff is within that allowed under ECL 71-1127. A substantial penalty is supported by the record since Respondent continued constructing the spillway structure and filled the pond despite being directed by DEC Staff on August 1, 2002 to stop work. Respondent was on notice at least by August 26, 2002 that DEC Staff considered the work to be a violation of ECL article 15 and 6 NYCRR part 608, and DEC Staff showed both Respondent and his attorney the mapped depiction of the protected stream prior to Respondent filling the pond. DEC Staff's request that a portion of the penalty be suspended conditioned on strict compliance with the order is appropriate and will increase the likelihood of the stream restoration work occurring.

## CONCLUSIONS

1. The stream where the alleged violations occurred is a Class C stream with a standard of C(t).
2. Pursuant to ECL 15-0501(1), "...no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2 [which includes C(t)]

streams], or remove any sand, gravel or other material from the bed or banks of such stream without a permit issued pursuant to subdivision 3 of this section.”

3. Pursuant to 6 NYCRR 608.2(a), “[with exceptions that do not apply here] no person or local public corporation may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part.”

4. Respondent violated ECL 15-0501(1) and 6 NYCRR 608.2(a) by constructing a drop inlet structure or spillway in a protected stream and by placing an approximately 250 foot pipe in the bed of a protected stream, without having obtained a permit for this work. This violation began prior to August 1, 2002 and continued until at least October 31, 2003.

5. Pursuant to ECL 71-1127, Respondent is liable for a civil penalty of not more than five hundred dollars for such violation and an additional civil penalty of not more than one hundred dollars for each day during which such violation continues, and in addition may be enjoined from continuing such violation.

#### RECOMMENDATION

I recommend that an Order be issued that:

1. finds that Respondent violated ECL article 15 and 6 NYCRR 608.2;
2. imposes a civil penalty of \$12,900 (twelve thousand nine hundred dollars), of which \$7,900 (seven thousand nine hundred dollars) would be suspended conditioned on strict compliance with the Commissioner’s order and \$5,000 (five thousand dollars) would be required to be paid within 30 days of service of the Commissioner’s Order on Respondent;
3. directs Respondent to open the valve on the drop inlet structure in order to drain the pond, at a time and in a manner to be specified by DEC Staff;
4. requires Respondent to restore the stream channel by removing the approximately 250 foot long pipe to within four feet of the fence and stone wall on the west side of Cummings Road, and removing the north (upstream) face of the drop inlet structure including the 10 inch diameter pipe, such work to be completed by September 1, 2004;
5. authorizes DEC Staff to specify standard methods for controlling erosion and turbidity during removal of the pipe and the north side of the concrete structure; and
6. requires Respondent to notify DEC Staff of the commencement of the restoration work at least two business days in advance of the work.

