

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Violations  
of the Environmental Conservation  
Law (ECL) Article 15

**ORDER ON CONSENT**

- by -

File No. R4-2008-1001-143

John Ostuni

Respondent

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WHEREAS:

1. Respondent, John Ostuni, owns property along the banks of a tributary west of Berry Brook , which is classified as a C(ts) stream (“stream”).
2. Respondent is a person as defined at 6 NYCRR 608.1(n).
3. Regulations at 6 NYCRR 608.1(p)define a protected stream as: “any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t) or C(t). Streams designated (t)(trout) also include those more specifically designated (ts)(trout spawning).”
4. Regulations at 6 NYCRR 608.1(a) and (b)define banks and bed as the following:
  - (a) Banks means that land area immediately adjacent to, and which slopes toward, the bed of a watercourse, and which is necessary to maintain the integrity of a watercourse. For purposes of this Part, a bank will not be considered to extend more than 50 feet horizontally from the mean high water line; with the following exception: Where a generally uniform slope of 45 degrees (100 percent)or greater adjoins the bed of the watercourse, the bank is extended to the crest of the slope or the first definable break in slope, either a natural or constructed (i.e. road or railroad grade) feature, lying generally parallel to the watercourse.
  - (b) Bed means that land area of a watercourse covered by water at mean high water.
5. ECL 15-501(1) and 6 NYCRR 608.2(a) provide that no person or local public corporation shall 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.

6. On March 1, 2006, May 4, 2007, August 6, 2008 and September 24, 2008, Department staff conducted an inspection at Berry Brook Road, Colchester, New York (Delaware County) and observed that Respondent had caused work to be conducted in the stream without an Article 15 permit. This work involved the placement of two culverts and the creation of three ponds, two of which are in the course of the stream. The ponds are causing the temperature of the stream to rise.

7. During the September 24, 2008 inspection Department staff observed trout fingerlings in the stream.

8. Respondent's work in the stream without an Article 15 permit is a violation of 6 NYCRR 608.2(a) and ECL 15-501(1).

9. ECL 71-1127 provides for a civil penalty of not more than \$500 for a violation of any provision of Article 15 and an additional civil penalty of not more than one hundred dollars for each day during which the violation continues. Injunctive relief is also available.

10. Respondent has affirmatively waived his right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

NOW, having considered this matter and being duly advised, it is ORDERED that:

I. In respect of the aforesaid violations, a civil penalty in the amount of EIGHT HUNDRED DOLLARS (\$800) is hereby assessed against the Respondent. Payment of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by certified or bank check made payable to the NYS DEC.

II. The provisions of this Order shall be deemed to bind Respondent, his agents, employees, and all persons, firms, corporations acting under or for him.

III. The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

IV. Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, his directors, officers, employees, servants, agents, successors or assigns.

V. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

VI. Respondent shall allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

Jerry Fraine  
Regional Fisheries Office  
New York State Department  
of Environmental Conservation  
Region 4 - Stamford Office  
65561 State Highway 10, Suite 1  
Stamford, NY 12167-9503  
607-652-2645

IX. This Order is deemed effective on the date signed by the Department.

X. Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, his agents, his servants, his employees, his successors and his assigns;

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

D. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

XI. A. Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and applicable state and federal regulations and laws and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved plans and reports shall be incorporated into and become an enforceable part of this Order.

B. 1. If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within thirty (30) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department reserves its right to take whatever action it deems necessary after the second disapproval of a submittal.

XII. Within five days of the effective date of this Order, the Department will withdraw the Notice of Hearing and Complaint.

XIII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations in this Order.

DATED: \_\_\_\_\_, 2009  
Rotterdam, New York

Alexander B. Grannis  
Commissioner  
New York State Department of  
Environmental Conservation

BY: \_\_\_\_\_  
Eugene J. Kelly  
Regional Director  
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives his right to a hearing herein, and agrees to be bound by the provisions, terms and conditions contained herein.

\_\_\_\_\_  
John Ostuni

DATE: \_\_\_\_\_

STATE OF NEW YORK    )  
                                  )ss.:  
COUNTY OF                )

On the \_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_ before me, the undersigned, a Notary Public in and for the State, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public  
Qualified in the County of:  
My Commission Expires:

## SCHEDULE OF COMPLIANCE

1. Respondent shall remove Pond A and Pond B and associated dams as shown on the attached Diagram 1. Pond C may remain, however, Respondent shall remove all of the piping connected to Pond C, with the exception of the outlet pipe from Pond C. The stream shall be restored to its original conditions. Erosion and sediment control measures shall be implemented while any work is being conducted in or near the stream in order to prevent turbidity. Stream water must be controlled by pumping or piping around the work area so that no turbidity occurs downstream of the work area. Stream reaches downstream of the work area shall always remain clear as the reaches upstream of the work area. Respondent shall complete all of the remedial work between May 1 and June 15, 2009.
2. All exposed soil shall be seeded with a conservation mix and mulched within 7 days of project completion.
3. Respondent shall notify the Department upon the completion of work.