

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter of the Alleged Violations of Articles 15, 17 and 24 of the New York State Environmental Conservation Law and Title 6, Parts 608 and 663 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

- by -

ANTHONY COSTA a/k/a ANTHONY GAGLIARDI, TERRYANN GAGLIARDI, JEANETTE GAGLIARDI, KATHLEEN A. KRIEG, ALFRED GALPINE, CLOVER DRAINAGE, INC., THOMAS J. KEARNS individually and as owner of Clover Drainage, Inc., L. PETROSINO, INC., and JOHN IPPOLITO TRUCKING & EXCAVATING, INC.,

Respondents.

DEC File Nos.
R2-20050622-187
R2-20050622-188

AND

In the Matter of the Alleged Violations of Articles 15, 17 and 24 of the New York State Environmental Conservation Law and Title 6, Parts 608, 663 and 703 of the Official Compilation of Codes, Rules and Regulations of the State of New York

- by -

ANTHONY COSTA, TERRY ANN GAGLIARDI, KATHLEEN A. KRIEG, and ALFRED GALPINE,

Respondents.

DEC File No.
R2-20060718-296

DECISION AND ORDER OF THE COMMISSIONER

February 19, 2009

DECISION AND ORDER OF THE COMMISSIONER

Staff of the New York State Department of Environmental Conservation ("DEC" or "Department") commenced this administrative enforcement proceeding by service of two complaints dated, respectively, October 3, 2005, and February 22, 2007, for violations of the Environmental Conservation Law ("ECL") and its implementing regulations. The violations relate to unpermitted activities on adjacent properties located at 123 and 131 Keating Street, Staten Island, New York ("site"). Nine respondents were named in the first complaint, and four of those nine respondents were named in the second complaint.

The site contains a portion of a freshwater wetland regulated pursuant to ECL article 24 (wetland AR-33); the adjacent area to wetland AR-33; and a stream that is an unnamed tributary to Lemon Creek.

Department staff alleged that respondents conducted unpermitted activities at the site, including excavating, dumping and filling in a portion of freshwater wetland AR-33, as well as filling portions of the tributary to Lemon Creek. Among other things, a large concrete pipe was placed in the bed of the tributary and covered with fill.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick. During the administrative hearing process, a total of ten motions, including two motions for order without hearing,¹ were addressed in six ALJ rulings. These rulings are dated: (1) June 28, 2006; (2) December 13, 2006; (3) April 6, 2007; (4) December 11, 2007; (5) May 7, 2008; and (6) July 3, 2008.

In the ALJ's rulings dated June 28, 2006, April 6, 2007, and December 11, 2007, which addressed Department staff's motions for order without hearing, ALJ Garlick found a total of forty-one (41) violations. These included violations of ECL 15-0501(1) and section 608.2 of title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("6 NYCRR") which prohibit the changing, modifying or disturbance of a protected stream without a permit; and ECL 24-0701 and 6 NYCRR 663.3 which prohibit (among other things) excavating, dumping, filling, grading, erecting structures and construction in a

¹ Motions for orders without hearing are the administrative equivalent to motions for summary judgment (see 6 NYCRR 622.12; Matter of Locaparra, Decision and Order of the Commissioner, June 16, 2003, at 3).

regulated freshwater wetland and its adjacent area without a permit. None of the respondents had a permit or received any other Department approval to conduct the dumping, excavating, filling, erecting of plywood forms or grading in freshwater wetland AR-33, its adjacent area, or the stream on the site.

The ALJ determined that two respondents (Thomas J. Kearns, individually and as owner of Clover Drainage, Inc., and L. Petrosino, Inc.) were not liable for any of the alleged violations. Although the ALJ had initially determined that respondent Jeanette Gagliardi was liable for certain of the violations, in his hearing report the ALJ concluded that respondent Jeanette Gagliardi was not liable (see Hearing Report, at 33, Conclusion #7).²

The six respondents that the ALJ recommended be held liable include: (1) the owners of the properties where the violations occurred (respondents Kathleen A. Krieg and Alfred Galpine, as owners of 131 Keating Street, and respondent Terry Ann Gagliardi,³ as owner of 123 Keating Street); (2) respondent Anthony Costa, as a person responsible for arranging the unpermitted work at the site;⁴ and (3) the contractors who were

² The ALJ, in his Ruling on Motions dated June 28, 2006, found that Jeanette Gagliardi was the owner of the property at 123 Keating Street (see id., at 9 [Finding of Fact #1]) and, on that basis determined that she should be found liable for certain of the violations. However, the record establishes that Jeanette Gagliardi was not an owner at the times that the violations were committed (see Exh A to the Affirmation of John K. Urda dated March 23, 2007 in Support of Motion for Order Without a Hearing) and, accordingly, any determinations relating to her liability were not supported.

³ Terry Ann Gagliardi's first name is spelled "TerryAnn" in Department staff's initial complaint, but the second complaint and other papers in this proceeding (see Exh A to the Affirmation of John K. Urda, Esq. dated October 3, 2005), refer to her as "Terry Ann." The latter spelling is used in this order. The record establishes that Terry Ann Gagliardi had an ownership interest in 123 Keating Street which she relinquished in 1996 (see Exh A to the Affirmation of John K. Urda dated October 3, 2005) but that she reacquired ownership of this property in 2001 (see Exh A to the Affirmation of John K. Urda dated March 23, 2007 in Support of Motion for Order Without a Hearing [bargain and sale deed and real property transfer report]). Terry Ann Gagliardi was the owner of this property during the times that the violations at the site were committed.

⁴ In his hearing report, the ALJ indicates that the findings of liability for respondent Anthony Costa made in his first ruling were based on the error of fact that respondent Costa was an owner of 123

observed working at the site (Clover Drainage, Inc. ["Clover"] on June 6, 2005, and John Ippolito Trucking & Excavating, Inc. ["Ippolito"] on June 8, 2005).⁵

On July 28 and August 25, 2008, the ALJ conducted a hearing on civil penalty, in which the issue of remediating the impacted wetland area was also addressed. Thereafter, the ALJ prepared the attached hearing report.

Based upon my review of the record, I hereby modify the ALJ's rulings on liability and his recommendations on penalty and site remediation and, as modified, adopt the attached hearing report as my decision in this matter.

Liability

As noted, the ALJ found a total of forty-one (41)

Keating Street. The ALJ states, however, that the record supports findings of liability against respondent Costa made in the first ruling based on respondent Costa's actions at the site.

Department staff's first complaint refers to Mr. Costa as owner of the property at 123 Keating Street (see Complaint dated October 3, 2005, at ¶ 5; but see Department staff's [second] Complaint dated February 22, 2007, at ¶ 6 [referring to respondent Costa only as a resident of 123 Keating Street]). The first complaint also references respondent Costa's undertaking of unpermitted activities at the site (see, e.g., Complaint dated October 3, 2005, at ¶ 19). It is appropriate at this stage of the proceeding to conform the first complaint to the proof to reflect that respondent Costa, although not an owner of 123 Keating Street, is nonetheless liable for the violations as a result of his control over the operations relating to the unpermitted work at the site. Because the original complaint provided respondent Costa with adequate notice of the factual basis for and the actual nature of the allegations in this proceeding, and respondent Costa had the opportunity to challenge Department staff's assertions that he was liable for the violations as a result of his control over the operations, no prejudice would inure to this respondent by so amending the first complaint to conform to the proof (see CPLR 3025[c]; Matter of David Wilder, Hearing Report, at 3-4, adopted by Supplemental Order of the Commissioner, September 27, 2005).

⁵ In the attached hearing report, the ALJ has prepared charts that summarize the violations with respect to each the six respondents. The ALJ's first (June 28, 2006), third (April 6, 2007) and fourth (December 11, 2007) rulings in this matter address these violations in detail.

violations. Specifically, the ALJ determined that respondents Anthony Costa and Terry Ann Gagliardi, jointly, committed eight (8) violations; respondent Terry Ann Gagliardi, individually, committed eleven (11) violations; respondents Kathleen A. Krieg and Alfred Galpine committed fourteen (14) violations; respondent Clover committed four (4) violations; and respondent Ippolito committed four (4) violations.

Based upon my review of the record, I conclude that the record supports liability for twenty-eight (28) of the forty-one (41) violations that the ALJ found, but does not support liability for the two (2) violations relating to dumping that were alleged against the contractor respondents and the eleven (11) violations relating to disturbing the bed of a protected stream that were alleged against respondents.

1. Article 15 (Protection of Streams) Violations

Department staff alleged that respondents changed, modified or disturbed a stream bed in violation of ECL 15-0501 and 6 NYCRR 608.2. ECL 15-0501 provides that no person shall change, modify or disturb the course, channel or bed of any stream which the Department has classified as AA, AA(T), A, A(T), B, B(T), or C(T) without a permit (see ECL 15-0501[1], [2]). Pursuant to the Department's regulations, no person may change, modify or disturb a "protected stream," its beds or banks, nor remove from its bed or banks sand, gravel or other material without a permit (see 6 NYCRR 608.2[a]).⁶ "Protected stream" is defined to mean "any stream or particular portion of a stream for which there has been adopted by the department . . . any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t), or C(t)" (6 NYCRR 608.1[p]).

The Department's classification of New York City waters are found at 6 NYCRR part 890. Department staff states that the stream on the site is a tributary of Lemon Creek, "a navigable water of the State of New York and a Class B fresh surface water of the state pursuant to 6 NYCRR Part 890" (see Complaint dated October 3, 2005, ¶ 8). The Department has classified Lemon Creek in part as Class SC saline surface waters and in part as Class B fresh surface waters (see 6 NYCRR 890.6 [Item Class No. 26]).⁷

⁶ Section 608.2(b) establishes exceptions to the permit requirement that are not applicable here.

⁷ Lemon Creek is listed as Lemmon Creek in 6 NYCRR 890.6, but as Lemon Creek in the remainder of the evidentiary record and that latter spelling is used in this decision and order.

Lemon Creek and a tributary not at issue here appear as a line on Map Reference No. S-23sw and are labeled as SI 4 (see 6 NYCRR 890.11 [Arthur Kill Quadrangle Map]). The tributary at issue in this proceeding, however, does not appear as a line on the reference map and, thus, is not specifically designated under section 890.6 (see also 6 NYCRR 890.4[a]).

A freshwater stream not shown on the reference maps is Class D, unless it is a "continuously flowing natural stream" directly tributary to a classified stream (see 6 NYCRR 890.4[b]).⁸ In such a case, the stream would have the same classification and assigned standards as the water to which is it directly tributary (see id.). In this case, Department staff provided no evidence concerning whether the unnamed tributary at issue is "continuously flowing." Although the record contains contradictory information concerning whether the tributary flows into the SC or the B segment of Lemon Creek, it appears that the tributary may be flowing into the saline segment (see, e.g., Affirmation of John K. Urda in Support of Motion for Order without Hearing, dated March 23, 2007, ¶ 4 & Exh C [designating tidal wetland areas]; 6 NYCRR 890.9 [Item Class No.26 (designating tidal portion of Lemon Creek as SC)]). Thus, this record provides an insufficient basis to determine that the tributary at issue is classified as a "protected stream" and, therefore subject to the provisions of ECL 15-0501 and 6 NYCRR 608.2.

Accordingly, on this record, no liability can be found for changing, modifying or disturbing the bed of a protected stream, and the number of violations for the individual respondents that the ALJ found are hereby reduced: respondents Anthony Costa and Terry Ann Gagliardi, jointly, are found to have committed six (6) violations rather than eight; respondent Terry Ann Gagliardi, individually, eight (8) violations rather than eleven; and respondents Kathleen A. Krieg and Alfred Galpine ten (10) violations rather than fourteen.

Similarly, the determination that each respondent contractor (Clover and Ippolito) violated ECL 15-0501 and 6 NYCRR 608.2 for disturbing the bed of a protected stream is rejected.

⁸ Similarly, a tidal salt water stream not shown on the reference maps is Class SD, unless it is a "continuously flowing natural stream" directly tributary to a classified stream (see 6 NYCRR 890.4[b]).

2. Article 24 (Freshwater Wetland) Violations

With respect to respondent contractor Clover, Department staff alleged three freshwater wetland violations: a violation for filling, a violation for excavating, and a violation for dumping in freshwater wetland AR-33. The record supports the findings that it undertook excavation and filling in wetland AR-33 at the site (see, e.g., Affidavit of Environmental Conservation Officer Jason DeAngelis, sworn to September 2005 ["DeAngelis Affidavit"], ¶¶ 8, 9, 13 & 14), and thus committed these two violations.

The record does not support a finding that Clover engaged in dumping in wetland AR-33, separate and apart from the filling activity it conducted. Accordingly, respondent Clover committed two (2) violations at the site.

With respect to respondent contractor Ippolito, Department staff also alleged three wetland violations: a violation for filling, a violation for excavating, and a violation for dumping in freshwater wetland AR-33. Counsel for Ippolito contended that these violations should be considered a single violation.

The ALJ concludes that the activities of excavating, dumping and filling were distinct and constituted separate violations (citing Matter of Linda Wilton, Order of the Commissioner, February 1, 1991). During an inspection of the site conducted on June 8, 2005, an employee of Ippolito was observed "grading and leveling fill in the wetland and stream bed area" (see DeAngelis Affidavit, ¶ 17; see also Hearing Transcript [July 28, 2008], at 94) which supports findings that Ippolito engaged in excavating and filling activities in wetland AR-33. Based upon my review, I conclude that the record does not support a finding that Ippolito engaged in dumping on the site. Accordingly, Ippolito committed two (2) violations at the site.

Civil Penalty

For the six respondents determined to be liable for the violations, the civil penalties that DEC staff requested and that the ALJ recommended are summarized in the following table:

Respondent	Civil Penalty: DEC Staff Request	Civil Penalty: ALJ Recommendation
Kathleen A. Krieg/ Alfred Galpine (jointly)	\$50,000	\$50,000
Anthony Costa/ Terry Ann Gagliardi (jointly)	\$28,000	\$28,000
Terry Ann Gagliardi (individually)	\$39,000	\$39,000
Clover Drainage, Inc.	\$14,000	\$14,000
John Ippolito Trucking & Excavating, Inc.	\$14,000	\$8,000

The authority that DEC staff cited for these penalty amounts includes ECL 71-1107(1) and ECL 71-1127(1) (for violations of ECL 15-0501 and 6 NYCRR 608.2), ECL 71-2303(1) (for violations of the State's Freshwater Wetlands Act and its implementing regulations), as well as the Department's Civil Penalty Policy (Commissioner's Policy DEE-1, June 20, 1990 ["DEE-1"]) and the Department's Freshwater Wetlands (Enforcement) Guidance Memorandum (Commissioner's Policy DEE-6, Feb. 4, 1992 ["DEE-6"]).

- ECL 71-1107

Both the counsel for respondents Kathleen A. Krieg and Alfred Galpine and the counsel for respondent Ippolito argued that ECL 71-1107 imposed limitations on this proceeding. ECL 71-1107(1) provides that violations of ECL 15-0501 shall constitute a misdemeanor, punishable by fine or imprisonment but also that a civil penalty of not more than five thousand dollars may be imposed. According to counsel for respondent Ippolito, violations of ECL 15-0501 can only be heard in criminal court, based on his reading of ECL 71-1107(1). Counsel for respondents Krieg and Galpine contended that the Department cannot impose civil penalties pursuant to ECL 71-1107(1). The ALJ rejected counsels' arguments, referencing precedent (see Matter of Sandra Zatarain, Order of the Commissioner, July 17, 1992). Department enforcement guidance DEE-6 also references ECL 71-1107(1) as a basis to impose civil penalties (see DEE-6, at II.2 [Stream Protection Act]).

Because I have determined that the record is insufficient to establish liability for violations of ECL 15-0501 and 6 NYCRR

608.2 in this proceeding, it is not necessary to address this issue. If I were to address it, however, I would reject respondents' arguments. Contrary to counsels' arguments, ECL 71-1107(1) is not jurisdictional; it simply authorizes penalties, including civil penalties, for violations of various sections of ECL article 15, including ECL 15-0501.

Moreover, to the extent that any doubt exists that the Department is authorized to impose the civil penalties provided for in ECL 71-1107 through an administrative adjudicatory proceeding, ECL 71-4003 provides that "[a]ny civil penalty provided for by [the ECL] may be assessed following a hearing or opportunity to be heard." This provision authorizes the imposition of a civil penalty through the Department's administrative proceedings where, such as in ECL 71-1107(1), civil penalties are provided by the ECL (see also Portville Forest Products, Inc. v Commissioner, New York State Dept. of Env'tl. Conservation, 117 Misc2d 770, 772 [Sup Ct, Livingston County 1982][intent of ECL 71-4003 to permit imposition of civil penalties in administrative proceedings]; Sponsor's Letter to the Governor dated May 4, 1982, Bill Jacket, L 1982, ch 76).⁹

- Ippolito

Counsel for Ippolito in its post-hearing brief argues that the penalties sought by Department staff are excessive. The ALJ in his hearing report recommends that, in light of certain mitigating factors, the staff-requested penalty of \$14,000 be reduced to \$8,000.

I concur with the ALJ on the reduction of the penalty to be assessed against Ippolito but I would lower it further (to \$3,000) on the following basis. Department staff's proposed \$14,000 penalty was comprised of a \$5,000 penalty for modifying, changing or disturbing the tributary; and a \$3,000 penalty for each of three separate violations of excavating, dumping and filling in freshwater wetland AR-33 (\$9,000 total). Based on the prior discussion, I do not adopt the \$5,000 penalty for modifying, changing or disturbing the stream. In addition, I

⁹ Even if ECL 71-1107(1) did not authorize a civil penalty for violations of ECL 15-0501, an alternative basis for the civil penalty is provided by ECL 71-1127 which was also referenced by Department staff in its penalty calculations. The civil penalties requested by Department staff were within the penalty range provided for by ECL 71-1127, as well as ECL 71-1107(1). The Department is authorized to impose a penalty pursuant to ECL 71-1127 after an adjudicatory enforcement proceeding (see ECL 71-4003).

reduce the Department staff-requested penalty of \$9,000 for wetland violations to \$3,000. Because I have concluded that the record does not support a finding that Ippolito engaged in dumping on the site, it is not liable for any penalty in that regard. Thus, the wetland portion of the penalty is reduced (by \$3,000) to \$6,000. Finally, the mitigating factors cited by the ALJ justify a further reduction from \$6,000 to \$3,000 from the penalty requested for the violations relating to excavation and filling.

- Clover

Department staff requested \$14,000 in penalties, \$5,000 for disturbance of the protected stream, and \$3,000 for excavating, \$3,000 for dumping, and \$3,000 for filling in wetland AR-33. As previously discussed, I conclude that the record does not support a finding that Clover engaged in dumping on the site or disturbing a protected stream (\$3,000 and \$5,000, respectively), and therefore it is not liable for penalties in that regard. Accordingly, the penalty to be assessed against Clover is reduced from \$14,000 to \$6,000.

- Individual Respondents

In light of the determination that the record is insufficient to impose liability for disturbance of a protected stream, the penalties for the individual respondents are reduced accordingly:

- for Anthony Costa and Terry Ann Gagliardi, jointly and severally, from \$28,000 to \$18,000;
- for Terry Ann Gagliardi, individually, from \$39,000 to \$24,000; and
- for Kathleen A. Krieg and Alfred Galpine, from \$50,000 to \$30,000.

- Conclusion

Based on my review of the record, the civil penalties, as modified by this order, for the unpermitted activities that respondents undertook in this regulated wetland are warranted.

Environmental Remediation

In addition to civil penalties, Department staff requests that I direct full restoration of the impacted area to its condition prior to the time the violations occurred.

As proposed by Department staff, respondents are to submit a

Corrective Action Plan ("CAP") satisfactory to Department staff within thirty (30) days of any order. Following Department staff's approval of the CAP, respondents would be required to perform the remedial actions set forth in the CAP, including the removal of all illegal fill, removal of the concrete pipe, regrading of the area to its topographical profile prior to the violations, replanting the area with approved vegetation, and undertaking other appropriate and necessary actions to restore the site.

Although the ALJ questions whether Department staff sought to impose remedial obligations on all respondents or solely the property-owner respondents, my review of the record indicates that staff sought to impose remedial obligations on all respondents (see, e.g., Complaint dated October 3, 2005, at 13). In his hearing report, the ALJ recommends imposing the obligation to remediate the site solely on respondents Kathleen A. Krieg, Alfred Galpine and Terry Ann Gagliardi, and not the contractor respondents or Mr. Costa, who is presently incarcerated.

In the exercise of discretion, and in consideration of the mitigating factors cited by the ALJ, I concur with the ALJ's recommendation to exclude contractor respondents Ippolito and Clover from the requirement to prepare and implement a plan to remediate the site.

However, I do not agree that Mr. Costa should be excluded from the obligation to prepare and implement a remedial plan. The record indicates that Mr. Costa was responsible for arranging or otherwise directing much of the illegal activity at the site (see, e.g., DeAngelis Affidavit, ¶¶ 26 & 27; Affidavit of ECO Brandon C. Chamberlin in Support of Motion for an Order Without Hearing, sworn to March 9, 2007, ¶¶ 15, 17, & 18). Mr. Costa's incarceration does not relieve him of his responsibility to correct the environmental damage at the site that resulted from his actions.

During the proceeding, respondent Costa claimed that the ravine behind 123 and 131 Keating Street (which has been filled as a result of respondents' activities) was a "mini-Love Canal." Mr. Costa alleged that Staten Island University Hospital dumped "toxic" materials through an unpermitted outfall into the area of the site for many years. He further contended that the disturbance or removal of the fill from the ravine could release pathogens or otherwise create health risks. The record contains no evidence that supports the claim regarding the discharge of such "toxic" materials. Accordingly, this does not provide a

basis for any delay in directing the remediation of the site.¹⁰

The significance and value of wetland AR-33 is well documented on this record (see, e.g., Hearing Report Findings of Fact #10 and #11; Hearing Exh 1). The remedial measures requested by Department staff are authorized and appropriate, and shall be imposed, jointly and severally, on respondents Costa, Gagliardi, Krieg, and Galpine (see, e.g., ECL 71-2303).

Because of the current winter conditions, and the time required to develop the plan, I have determined to extend the time period for the submission of the CAP to Department staff from the staff-requested thirty (30) days until April 1, 2009.

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

I. Respondents are adjudged to have committed the following violations:

A. Respondents Anthony Costa and Terry Ann Gagliardi, jointly, committed the following violations:

1. on June 6, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
2. on June 6, 2005, dumping in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
3. on June 6, 2005, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
4. on June 8, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
5. on June 8, 2005, dumping in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3; and
6. on June 8, 2005, placing fill in regulated

¹⁰ Even if the evidence supported respondent Costa's claim, which it does not, it would not justify the filling of a regulated wetland without a permit or other approval from the Department.

freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3.

B. Respondent Terry Ann Gagliardi, individually, committed the following violations:

1. on May 26, 2006, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
2. on May 26, 2006, grading fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
3. on May 26, 2006, constructing plywood forms in a regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
4. on May 31, 2006, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
5. on May 31, 2006, grading fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
6. on May 31, 2006, constructing plywood forms in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
7. on January 17-19, 2007, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3; and
8. on January 17-19, 2007, grading fill in regulated freshwater wetland in violation of ECL 24-0701 and 6 NYCRR 663.3.

C. Respondents Kathleen A. Krieg and Alfred Galpine, jointly, committed the following violations:

1. on June 6, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
2. on June 6, 2005, dumping in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;

3. on June 6, 2005, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
4. on June 8, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
5. on June 8, 2005, dumping in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
6. on June 8, 2005, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
7. on May 26, 2006, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 & 6 NYCRR 663.3;
8. on May 26, 2006, grading fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3;
9. on May 31, 2006, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3; and
10. on May 31, 2006, grading fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 & 6 NYCRR 663.3.

D. Respondent Clover Drainage, Inc. committed the following violations:

1. on June 6, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3; and
2. on June 6, 2005, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3.

E. Respondent John Ippolito Trucking & Excavating, Inc. committed the following violations:

1. on June 8, 2005, excavating in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3; and

2. on June 8, 2005, placing fill in regulated freshwater wetland AR-33 in violation of ECL 24-0701 and 6 NYCRR 663.3.

II. The following civil penalties are assessed:

A. Respondents Kathleen A. Krieg and Alfred Galpine are assessed, jointly and severally, a civil penalty in the amount of thirty thousand dollars (\$30,000) which is due and payable within sixty (60) days of service of a copy of this order upon them.

B. Respondents Anthony Costa and Terry Ann Gagliardi, jointly and severally, are assessed a civil penalty in the amount of eighteen thousand dollars (\$18,000), which is due and payable within sixty (60) days of service of a copy of this order upon them. In addition thereto, respondent Terry Ann Gagliardi, individually, is assessed a civil penalty in the amount of twenty-four thousand dollars (\$24,000), which is also due and payable within sixty (60) days of service of a copy of this order upon her.

C. Respondent Clover Drainage, Inc. is assessed a civil penalty in the amount of six thousand dollars (\$6,000), which is due and payable within sixty (60) days of service of a copy of this order upon it.

D. Respondent John Ippolito Trucking & Excavating, Inc. is assessed a civil penalty in the amount of three thousand dollars (\$3,000), which is due and payable within sixty (60) days of service of a copy of this order upon it.

E. The civil penalties assessed in this paragraph II shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation" and shall be submitted by certified mail, overnight delivery or hand delivery to the Department at the following address: John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 2, 47-40 21st Street, Long Island City, New York 11101.

III. Respondents Anthony Costa, Terry Ann Gagliardi, Kathleen A. Krieg, and Alfred Galpine are jointly and severally responsible for preparing and submitting an approvable Corrective Action Plan ("CAP") to Department staff by April 1, 2009, and are jointly and severally responsible for implementing the CAP. The CAP shall include, at a minimum, plans for removal of the fill at the site, removal of the concrete pipe, regrading of the area to its pre-violation topographical profile, replanting the area with

appropriate native species, and an implementation schedule. Following Department staff's approval of the CAP, respondents Anthony Costa, Terry Ann Gagliardi, Kathleen A. Krieg, and Alfred Galpine shall undertake the CAP in accordance with the approved implementation schedule.

IV. All communications between respondents and the Department concerning this order shall be made to John K. Urda, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation Region 2, 47-40 21st Street, Long Island City, New York 11101.

V. The provisions, terms and conditions of this order shall bind respondents and their heirs, successors and assigns, in any and all capacities.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

/s/

By:

Alexander B. Grannis
Commissioner

Dated: Albany, New York
February 19, 2009

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter of the Alleged Violations of Articles 15, 17
and 24 of the New York State Environmental Conservation Law
and Title 6, Parts 608 and 663 of the Official Compilation
of Codes, Rules and Regulations of the State of New York, by

ANTHONY COSTA a/k/a ANTHONY GAGLIARDI, TERRYANN GAGLIARDI,
JEANETTE GAGLIARDI, KATHLEEN A. KRIEG, ALFRED GALPINE,
CLOVER DRAINAGE, INC., THOMAS KEARNS individually and as
owner of Clover Drainage, Inc., L. PETROSINO, INC., and
JOHN IPPOLITO TRUCKING & EXCAVATING, INC.,

Respondents.

DEC File Nos.
R2-20050622-187
R2-20050622-188

AND

In the Matter of the Alleged Violations of Articles 15, 17
and 24 of the New York State Environmental Conservation Law
and Title 6, Parts 608, 663 and 703 of the Official
Compilation of Codes, Rules and Regulations of the State of
New York, by

ANTHONY COSTA, TERRY ANN GAGLIARDI,
KATHLEEN A. KRIEG, and ALFRED GALPINE,

Respondents.

DEC File No.
R2-20060718-296

HEARING REPORT

- by -

/s/

P. Nicholas Garlick
Administrative Law Judge

INTRODUCTION

This hearing report is prepared pursuant to section 622.18(a)(1) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) and includes findings of fact, conclusions of law and recommendations regarding illegal activities that occurred on two parcels of property known as 123 and 131 Keating Street, Staten Island (the "site") in 2005, 2006 and 2007.

During the administrative hearing process, a total of 10 motions, including two motions for order without hearing (filed by the staff of the Department of Environmental Conservation or "DEC Staff" pursuant to 6 NYCRR 622.12), have been addressed in the prior six rulings in this matter. These rulings are dated: (1) June 28, 2006; (2) December 13, 2006; (3) April 6, 2007; (4) December 11, 2007; (5) May 7, 2008; and (6) July 3, 2008 (collectively, "earlier rulings").

A Notice of Hearing in this matter was issued on June 17, 2008. An administrative hearing on civil penalty and remediation was held on July 28, 2008 and concluded on August 25, 2008.

Based on the information in the record and as set forth in the six prior rulings and this hearing report, I recommend to the Commissioner the following.

PROCEEDINGS

The proceedings since the last ruling, July 3, 2008, are listed below. A complete recitation of the earlier proceedings is set forth in the earlier rulings.

By papers dated July 23, 2008, respondent Anthony Costa submitted a cover letter and final summation on behalf of himself and his wife, respondent Terry Ann Gagliardi.¹

The administrative adjudicatory hearing convened on July 28, 2008 at 10:00 a.m. at DEC's Region 2 headquarters,

¹ Terry Ann Gagliardi's first name is spelled "TerryAnn" in Department staff's initial complaint, but the second complaint and other papers in this proceeding refer to her as "Terry Ann." The latter spelling is used in this hearing report.

47-40 21st Street, Long Island City, New York. The hearing continued on August 25, 2008 at the same location. DEC Staff was represented by John K. Urda, Esq. Respondents Kathleen A. Krieg and Alfred Galpine were represented by Peter Sullivan, Esq., of the law firm Sullivan and Gardner, P.C., 475 Park Avenue South, New York, NY. Respondent John Ippolito Trucking & Excavating, Inc. was represented by Dennis O'Sullivan, Esq., 148-11 175th Street, Springfield Gardens, NY. No appearances were made on behalf of respondents Anthony Costa, Terry Ann Gagliardi, Jeanette Gagliardi or Clover Drainage, Inc.

At the hearing on July 28, 2008, DEC Staff called one witness, DEC Staff member Joseph Pane, Principal Fish and Wildlife Biologist. At the end of Mr. Pane's testimony, DEC Staff rested its case. Mr. O'Sullivan then called a single witness, John Ippolito.

At the request of Mr. Sullivan, the hearing was adjourned until August 25, 2008 to allow for additional investigation on his part with respect to newly discovered information. When the hearing reconvened, Mr. Sullivan called one witness, Ted Yan, a professional engineer. At the conclusion of Mr. Yan's testimony, Mr. Sullivan rested his case. A schedule for the receipt of briefs was then established.

By memo dated September 3, 2008, I informed all the parties of the briefing schedule and enclosed copies of the transcripts.

By papers dated September 29, 2008, Respondents Krieg and Galpine filed a closing brief.

By papers dated September 30, 2008, DEC Staff filed a closing brief.

By papers dated October 13, 2008, Respondents Krieg and Galpine filed a reply brief.

By papers dated October 14, 2008, DEC Staff filed its reply brief.

Mr. Costa submitted a late filed brief which was received on November 5, 2008.

By memo dated November 6, 2008, I informed the parties that the hearing record was closed. In this memo, DEC Staff was asked to clarify whether it continued its claim that

respondent Anthony Costa was also known as Anthony Gagliardi.

By letter dated November 12, 2008, DEC Staff responded that it no longer claimed Mr. Costa had ever been known as Anthony Gagliardi.

By letter dated December 17, 2008, I wrote to DEC Staff counsel asking if by its November 12, 2008 letter, it had withdrawn its contention that Mr. Costa was not liable for violations for violations that had occurred on June 6 and 8, 2005. The June 28, 2006 ruling in this matter had found Mr. Costa liable on the basis of DEC Staff's uncontested allegation that Mr. Costa was a part owner of a portion of the site of the violations.

By letter dated December 18, 2008, DEC Staff responded that it was not withdrawing its claim that Mr. Costa was liable for the June 2005 violations, and asserted liability could be found on the basis of Mr. Costa's actions at the site.

By letter December 30, 2008, counsel for respondents Kathleen A. Krieg and Alfred Galpine asked for an opportunity to reargue the findings of liability against his clients in the June 28, 2006 and December 11, 2007 rulings.

No response to my December 17, 2008 letter has been received from any other party, including Mr. Costa, although the responses were to have been postmarked no later than December 30, 2008.

FINDINGS OF FACT

The Respondents

1. Terry Ann Gagliardi owns the property at 123 Keating Street, Staten Island, New York. This property is also identified as Richmond County Tax Block 6699, Lot 30.
2. Anthony Costa is the husband of Terry Ann Gagliardi and before his incarceration resided with his wife at 123 Keating Street.
3. Kathleen A. Krieg and Alfred Galpine own the property at 131 Keating Street, Staten Island, New York. This property is also identified as Richmond County Tax Block 6699, Lot 35.

4. Clover Drainage, Inc. is a domestic business corporation whose filing with the New York State Department of State, Division of Corporations is currently inactive. Clover Drainage, Inc. maintains offices at 129 Whitman Avenue, Staten Island, New York.
5. John Ippolito Trucking & Excavating, Inc. is a domestic business corporation licensed to do business in New York with offices at 87 Delaware Avenue, Staten Island, New York.

The Site of the Violations

6. The properties located at 123 and 131 Keating Street are adjacent to one another and together are the site of the violations.
7. Both the 123 and 131 Keating Street properties contain a portion of regulated freshwater wetland AR-33 in a ravine on the property.
8. Both the 123 and 131 Keating Street properties contain portions of a stream that is an unnamed tributary of Lemon Creek in a ravine on the property. Lemon Creek has been classified as a navigable water of the State of New York and a Class B fresh surface water of the State pursuant to 6 NYCRR Part 890. Class B waters are suitable for fish propagation and survival as set forth in 6 NYCRR 701.7.
9. The homes at 123 and 131 Keating Street have both been the subject of a prior DEC administrative enforcement action, Matter of Jocrast Homes, Inc., 1994 WL 734484 (N.Y.Dept.Env.Conserv.), December 12, 1994, DEC Case No. R2-0562-92-11. In the Commissioner's order in Jocrast, respondents Terry Ann Gagliardi and Anthony Costa were found to have violated Environmental Conservation Law (ECL) 24-0701 and 6 NYCRR 663 by building a gabion wall on 123 Keating Street without a permit and were jointly and severally assessed a civil penalty of \$3,000. This fine was never paid (Page t. 20, 21). Also in the above-referenced Commissioner's order, other respondents (not named in the instant enforcement action) were directed to remove the rear decks on 123 and 131 Keating Street and restore the area to its former state. The decks were never removed. Respondents Krieg and Galpine took ownership of 131 Keating Street in July 1993, but were not named respondents in Jorcast.

10. The August 7, 1987 "Final Freshwater Wetland Classification" contained the following description of AR-33. "This wetland is found at the base and sides of a small ravine. Vegetation is dominated by wet woods shrubs such as spice bush and arrowwood. The ravine enters the salt marsh of Lemon Creek from the east, just south of Hylan Boulevard. Upstream from the marsh the ravine moves away from and then back toward Hylan Boulevard until it ends at an outfall pipe below a gas station at the corner of Hylan Boulevard and Seguine Avenue. The ravine probably once continued past Seguine Avenue but has been culverted and filled. The outfall pipe seems to now be part of the City's storm sewer system since it carried an appreciable amount of water during the field visit.

"This freshwater wetland is important for the salt marsh of Lemon Creek for several reasons. It provides an input of freshwater that helps maintain the salinity balance in the estuary and salt marsh of Lemon Creek. The wetland performs some cleaning, filtering and dilution of the water that enters through the storm sewer system. This freshwater wetland adds to the habitat value of the natural areas of Lemon Creek by increasing the diversity of local habitats. By demonstrating one of the ways in which a salt marsh can interface with inland freshwater systems this wetland increases the educational resources of Lemon Creek Park. Protection of this ravine is of great importance to the Lemon Creek salt marshes."

11. The August 7, 1987 "Final Freshwater Wetland Classification" also identified six benefits that AR-33 provided. First, AR-33 provided a wildlife habitat benefit by adding diversity to the local community, and thereby increasing the total species richness that can be expected in and around Lemon Creek. Second, AR-33 provided a recreation benefit because part of the wetland is in NYC's Lemon Creek Park and offers recreational opportunities to the public. Third, AR-33 provided a pollution treatment benefit by cleaning water that passes through it and enters Lemon Creek. This cleaning occurs through the removal of nutrients and pollutants by plants, by aeration that reduces biological oxygen demand, and dilution by the relatively clean water that enters through the drainage basin of the wetland. This dilution would be greatly reduced if the ravine was developed and all water piped directly to water courses. Fourth, AR-33 provided an

educational benefit by demonstrating one of the ways in which tidal wetlands and upstream freshwater wetlands join which is enhanced by it being adjacent to Lemon Creek Park. Fifth, AR-33 provided an open space and aesthetic benefit to Lemon Creek Park. Sixth, AR-33 provided fish habitat because the lower portion of AR-33 is accessible to fish and provides habitat, including nursery areas.

12. The July 1992 report entitled "Significant Coastal Fish and Wildlife Habitats Program" prepared by the NYS Department of State describes Lemon Creek as an intermittent stream that drains approximately two square miles of rural and suburban land. Lemon Creek is the only undisturbed tidal wetland area remaining on the south shore of Staten Island and despite its small size, it is inhabited by a diversity and abundance of fish and wildlife species that is unusual in Staten Island. While Lemon Creek is not known to be a major spawning or nursery area for any particular species, it is a unique remnant of the estuarine ecosystems that formerly occurred along the south shore of Staten Island. The creek supports concentrations of many fish species that are now uncommon around the island and contributes to the biological productivity of adjacent marine water.
13. Due to the respondents' activities, the freshwater wetland at the site has ceased to exist. The filling of the wetland has effectively nullified the wetland benefits: stormwater runoff is impounded by the fill and can no longer be conveyed away from the residences, pollutants can no longer be absorbed by the wetland and the wetland vegetation, now destroyed, no longer serves to provide habitat for wildlife.

Violations

14. On June 6, 2005, Environmental Conservation Officer (ECO) DeAngelis observed excavation, dumping and filling in the stream bed and freshwater wetland on both the 123 Keating Street property and 131 Keating Street property. He also observed that a concrete pipe approximately 40 inches in diameter and 200 feet long had been placed in the stream bed and covered with a thin layer of fill. Employees of two companies were at the site: a dump truck crew from L. Petrosino, Inc. and an excavator crew from Clover Drainage, Inc. During this visit, ECO DeAngelis took photographs of the site.

On June 8, 2005, ECO DeAngelis returned to the site and observed an employee of John Ippolito Trucking & Excavating, Inc. grading and leveling fill in the stream bed and freshwater wetland on both the 123 Keating Street property and 131 Keating Street property. He also observed that the cleared and excavated areas had expanded since his visit two days earlier and additional fill had been brought to the site. During this visit, ECO DeAngelis took photographs of the site.

15. Anthony Costa was involved in arranging for the construction equipment, including the bulldozer, that did work at the site on June 6, 2006 and June 8, 2006 (Ippolito, t. 93-96). Mr. Costa also indicated to ECO DeAngelis that he was responsible for the illegal activity at the site.
16. On Friday, May 26, 2006, ECO Brandon C. Chamberlin responded to a report of unpermitted activity at the site. At the site, ECO Chamberlin observed that there was newly placed fill and that had been graded on both the 123 Keating Street property and 131 Keating Street property. He also observed that plywood foundation forms had been placed in the filled area on 123 Keating Street property. During his visit, ECO Chamberlin took photographs. These photographs show newly placed fill and grading of the fill in the area where the freshwater wetland and stream had been. The photos also show that the plywood foundation forms are in the freshwater wetland.
17. On Wednesday, May 31, 2006, ECO Chamberlin returned to the site with ECO Kurt Bush, and two DEC Staff biologists, Joseph Pane and Dawn McReynolds. At the site, ECO Chamberlin observed that additional fill had been deposited and graded in the wetland on both the 123 Keating Street property and 131 Keating Street property. He also observed additional work had been done since his May 26, 2008 visit on the plywood foundation forms on the 123 Keating Street property. During his visit, ECO Chamberlin took photographs. These photographs show newly placed fill and grading of the fill in the area where the freshwater wetland and stream had been. The photos also show that the plywood foundation forms are in the freshwater wetland.
18. On January 17, 2007, DEC Staff member Joseph Pane inspected the site and observed additional fill had

been placed and spread in the regulated wetland area at 123 Keating Street. He also observed on 131 Keating Street: a plastic bucket set in a depression in the wetland area attached to a hose discharging into the wetland; grass planted in the wetland area; a trench dug through the wetland area; and a pipe installed in the trench. Mr. Pane returned to the site on January 19, 2007 and took photographs which show that the additional fill and grading occurred on 123 Keating Street in the area where the stream had been.

19. The ravine at the site containing a portion of AR-33 has now been filled and graded and the unnamed tributary that flowed through the site has now been buried in a concrete pipe. The quantity of fill is estimated at 62,000 cubic feet (approximately 2,300 cubic yards) and the maximum depth of the fill is approximately 15 feet.
20. None of the Respondents has the necessary permits on file with the Department for the activities described in findings of fact 14-20, above.

DISCUSSION

As mentioned above, DEC Staff has filed two motions for order without hearing pursuant to 6 NYCRR 622.12 based on two different complaints; the first complaint was dated October 3, 2005; and the second complaint was dated February 22, 2007. Both complaints alleged violations for filling a ravine at the site, 123 and 131 Keating Street, that contained a portion of a protected stream and Class 1 freshwater wetland AR-33. The first complaint alleged violations that occurred in the Spring of 2005 and the second complaint alleged violations in 2006 and 2007. For a more detailed discussion, please see the earlier rulings in this case, which are incorporated by reference in this document, except where specifically corrected, herein.

Liability

The first complaint alleged 71 separate violations for activities in the Spring of 2005 against nine respondents. The first and third rulings determined DEC Staff had proven a total of 24 violations.

The second complaint alleged 24 violations against four respondents for activities observed on May 26 and May 31,

2006 and January 17-19, 2007. The fourth ruling determined that DEC Staff had proven a total of 17 violations against three respondents.

The respondents liable for these violations fall into three categories: (1) the owners of the property where the violations occurred (respondents Kathleen Krieg and Alfred Galpine as owners of 131 Keating Street and respondent Terry Ann Gagliardi as the owner of 123 Keating Street); (2) respondent Costa, as a person responsible for arranging the work at the site; and (3) the contractors who were observed working at the site (Clover Drainage, Inc. on June 6, 2005 and John Ippolito Trucking & Excavating, Inc. on June 8, 2005).

Some confusion regarding the ownership of 123 Keating Street is present in this record. In DEC Staff's first complaint and in the first ruling in this matter, Anthony Costa a/k/a Anthony Gagliardi, Jeanette Gagliardi, and Terry Ann Gagliardi were identified as owners of 123 Keating Street and found liable for violations based on their ownership interests. This was based on a misreading of an earlier deed for this property which was attached to DEC Staff's first motion for order without hearing. This deed recorded the transfer of 123 Keating Street from Terry Ann Gagliardi, Jeanette Gagliardi and Anthony Gagliardi to Jeanette Gagliardi and Anthony Gagliardi, dated February 14, 1996. The most recent deed in the record for 123 Keating Street records the transfer of 123 Keating Street from Anthony Gagliardi and Jeanette Gagliardi, his wife, to Terryann Gagliardi on April 17, 2001. This deed and affirmation were filed with DEC Staff's second motion for order without hearing.

In his affidavit attached to his motion to vacate the first ruling and file a late answer dated August 11, 2006, Mr. Costa states that he has never been known as Anthony Gagliardi. By letter dated November 12, 2008, DEC Staff withdrew the claim that Mr. Costa was the Mr. Gagliardi referenced in the deed.

Since the most recent deed in the record shows Terry Ann Gagliardi as the sole owner of 123 Keating Street since April 17, 2001, finding of fact #1 in the first ruling in this matter, dated June 28, 2006, is corrected, above. Terry Ann Gagliardi was the sole owner of 123 Keating Street at the time of all the violations in this report.

Accordingly, it is also proper now to correct the first

ruling and find that respondent Jeanette Gagliardi was not an owner at the time of the violations. Furthermore, there is nothing in the record to indicate Jeanette Gagliardi had any participation in the activities that constitute the violations. Accordingly, the finding that she was liable for any of the violations must be vacated.

In addition, the findings of liability for respondent Anthony Costa made in the first ruling were in error because the first ruling established liability for Mr. Costa based on the fact that he was an owner of 123 Keating Street. It is now proper to hereby correct the first ruling because the record does not contain evidence to support a finding of liability against Mr. Costa based on ownership. However, the record does support findings of liability against Mr. Costa based on his actions at the site (see finding of fact #16).

Finally, with respect to Anthony Gagliardi, the first complaint does not name him as a respondent, other than to reference that name as an "a/k/a" of Anthony Costa. Since Mr. Gagliardi was not an owner of 123 Keating Street at the time of the violations nor is there any evidence in the record to indicate that he participated in any way in the activities that constituted the violations, it is proper to clarify that he is in no way liable for the violations.

After the third and fourth rulings, DEC Staff withdrew all unproven violations and requested an administrative hearing on civil penalty amount and remediation at the site pursuant to 622.12(f). Based on the above, DEC Staff has failed to demonstrate liability for any violations alleged to have been committed by: (1) Thomas Kearns, individually and as owner of Clover Drainage, Inc.; and (2) L. Petrosino, Inc.

In his December 30, 2008 letter, counsel for respondents Kathleen A. Krieg and Alfred Galpine asked for an opportunity to reargue the findings of liability against his clients in the June 28, 2006 and December 11, 2007 rulings. The letter offers inadequate grounds for such re-argument and provides no additional or newly discovered facts. Accordingly, this request is denied.

A total of 41 separate violations have been proven by DEC Staff. The charts below summarize these violations with respect to the six respondents. These charts are only a summary; for a full discussion of these violations, please see the first, third and fourth rulings in this matter.

**Violations by Respondents Anthony Costa
and Terry Ann Gagliardi**

	Date	Description	Section of Law Violated
1	6/6/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
2	6/6/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
3	6/6/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
4	6/6/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
5	6/8/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
6	6/8/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
7	6/8/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
8	6/8/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3

Violations by Respondent Terry Ann Gagliardi

	Date	Description	Section of Law Violated
1	5/26/06	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
2	5/26/06	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
3	5/26/06	Grading in AR-33	ECL 24-0701 & 6 NYCRR 663.3
4	5/26/06	Constr. in AR-33	ECL 24-0701 & 6 NYCRR 663.3
5	5/31/06	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
6	5/31/06	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
7	5/31/06	Grading in AR-33	ECL 24-0701 & 6 NYCRR 663.3
8	5/31/06	Constr. in AR-33	ECL 24-0701 & 6 NYCRR 663.3
9	1/17- 19/07	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
10	1/17- 19/07	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
11	1/17- 19/07	Grading in AR-33	ECL 24-0701 & 6 NYCRR 663.3

Violations by Respondents Krieg and Galpine

	Date	Description	Section of Law Violated
1	6/6/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
2	6/6/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
3	6/6/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
4	6/6/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
5	6/8/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
6	6/8/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
7	6/8/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
8	6/8/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
9	5/26/06	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
10	5/26/06	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
11	5/26/06	Grading in AR-33	ECL 24-0701 & 6 NYCRR 663.3
12	5/31/06	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
13	5/31/06	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3
14	5/31/06	Grading in AR-33	ECL 24-0701 & 6 NYCRR 663.3

Violations by Respondent Clover Drainage, Inc.

	Date	Description	Section of Law Violated
1	6/6/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
2	6/6/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
3	6/6/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
4	6/6/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3

**Violations by Respondent John Ippolito Trucking &
Excavating, Inc.**

	Date	Description	Section of Law Violated
1	6/8/05	Disturbing stream	ECL 15-0501 & 6 NYCRR 608.2
2	6/8/05	Excavating in AR-33	ECL 24-0701 & 6 NYCRR 663.3
3	6/8/05	Dumping in AR-33	ECL 24-0701 & 6 NYCRR 663.3
4	6/8/05	Filling in AR-33	ECL 24-0701 & 6 NYCRR 663.3

Civil Penalty Amount

The amount of civil penalty sought against each of the respondents by DEC Staff is summarized in the chart, below:

Respondent	Civil Penalty
Krieg/Galpine	\$50,000
Anthony Costa/Terry Ann Gagliardi	\$28,000
Terry Ann Gagliardi	\$39,000
Clover Drainage, Inc.	\$14,000
John Ippolito Trucking & Excavating, Inc.	\$14,000

The authority cited by DEC staff for these penalty amounts includes ECL 71-1107(1), ECL 71-1127(1), ECL 71-2303(1), as well as the Department's Civil Penalty Policy (DEE-1) and the Department's Freshwater Wetlands Guidance Memorandum (DEE-6).

In its closing brief, DEC Staff provides the analysis set forth in DEC's Civil Penalty Policy. Because the facts and arguments involving each respondent are different, the amount of civil penalty that the Commissioner should assess against each respondent is discussed separately, below. However, before this discussion, several preliminary points need to be addressed.

First, both the counsel for respondents Krieg and Galpine and counsel for respondent John Ippolito Trucking & Excavating, Inc. argue that the ALJ erred in finding their

clients liable for violations of ECL 15-0501. Counsels argue that these violations can only be heard in criminal court, based on a reading of ECL 71-1107(1). This argument has been considered and rejected in a past DEC administrative case (Matter of Sandra Zatarain, 1992 WL 289991). The Commissioner has imposed civil penalties pursuant to ECL 71-1107 after an adjudicatory hearing for violations of ECL 15-0501 in a number of cases since (e.g., Matter of Walter C. Katz, Jr., 1993 WL 393529). This argument also fails because ECL 71-1127(1) provides an alternative civil penalty provision for violations of ECL 15-0501 and even if ECL 71-1107(1) could not be used in an administrative forum, ECL 71-1127(1) explicitly authorizes a civil penalty in the amount requested by DEC Staff after an administrative hearing.

Second, counsel for respondents Krieg and Galpine argues that DEC Staff's civil penalty analysis should have been presented at the hearing and not left for the brief. There is nothing improper in DEC Staff performing this analysis in its closing brief and it is routinely done in DEC administrative enforcement hearings. Respondents were not prejudiced, because DEC Staff relied upon evidence in the record to do its analysis and respondents were provided with an opportunity to supply reply briefs so none of the respondents due process rights were violated.

Third, counsel for respondents Krieg and Galpine argues that DEC Staff acted improperly by citing administrative precedents in its closing brief that are prior to 2005, and therefore, unavailable to the public on-line. This is not accurate; DEC's administrative decisions are available on its website back until mid 1992. In addition, all of DEC's administrative decisions are available on Westlaw, in the database "nyenv-admin", which includes administrative decisions back to the creation of DEC. Finally, any DEC administrative decision can be obtained by contacting DEC's Office of Hearings and Mediation Services.

Civil Penalty Amount: Respondents Krieg and Galpine

DEC Staff seeks a civil penalty in the amount of \$50,000 be assessed against the respondents Krieg and Galpine by the Commissioner in his final order in this matter. Counsel for respondents Krieg and Galpine request a nominal penalty.

As discussed above, respondents Krieg and Galpine are liable for a total of fourteen violations: (1) four

violations of ECL 15-0501 & 6 NYCRR 608.2; and (2) ten violations of ECL 24-0701 & 6 NYCRR 663.3. DEC's Civil Penalty Policy states that the starting point for any penalty calculation should be a computation of the potential statutory maximum for all violations.

Statutory Maximum Penalty. In its papers, DEC Staff explains that the ECL provides two alternative civil penalty provisions for violations of ECL 15-0501. ECL 71-1107(1) provides for a maximum penalty of \$5,000 per violation of ECL 15-0501 or a maximum penalty of \$20,000 in this case. ECL 71-1127(1) provides for a maximum civil penalty of \$500 per violation plus \$100 for each day the violation continues; in this case DEC Staff calculates a maximum penalty of \$79,500.²

ECL 71-2303(1) provides a single maximum civil penalty for violations of ECL 24-0701 & 6 NYCRR 663.4 of \$3,000 per violation. For the ten violations proven, this a total of \$30,000.

Thus, the statutory maximum penalty in this case for respondents Krieg and Galpine is either \$50,000 or \$109,500, depending on whether ECL 71-1107(1) or ECL 71-1127(1) is used. Counsel for respondents Krieg and Galpine do not challenge this calculation.

Benefit Component. The next item the Civil Penalty Policy requires to be considered is the benefit to the respondent. In this case, DEC Staff argues that respondents Krieg and Galpine benefitted by having their backyard extended to be used as a lawn which enhanced the value of their property. Counsel for respondents Krieg and Galpine challenges DEC Staff's conclusion that the value of 131 Keating Street was increased because no evidence on this point was introduced at hearing.

² DEC Staff's calculation is the sum of the following: (1) for the violation that occurred on June 6, 2005, a penalty of \$500; (2) for 119 days it continued until the first complaint, a penalty of \$11,900; (3) for the violation that occurred on June 8, 2005, a penalty of \$500; (4) for the 117 days it continued until the first complaint, a penalty of \$11,700; (5) for the May 26, 2006 violation, a penalty of \$500; (6) for 272 days it continued until the second complaint, a penalty of \$27,200; (7) for the May 31, 2006 violation, a penalty of \$500; and (8) for 267 days it continued until the second complaint, a penalty of \$26,700.

Gravity Component. The next item the Civil Penalty Policy requires the civil penalty to contain a gravity component based on two factors: (1) the potential and actual damage caused by the violations; and (2) the importance of the violations to the regulatory scheme. In this case, DEC Staff argues that the actual damage of violations is great. The condition of AR-33 and the unnamed tributary prior to the violations is described in findings of fact #10, #11 and #12. The condition of the site after the violations is shown in photographs provided at the hearing (Hearing Exhs. 4-12) and other photographs in the record demonstrate conditions at the site during the filling. The testimony of DEC Staff biologist Joseph Pane and finding of fact #13 describes the condition of the site after filling. This evidence demonstrates that the actual damage in this case is great; this conclusion is bolstered by the fact that many of the wetland violations proven are incompatible with a wetland and its functions and benefits pursuant to 6 NYCRR 663.4(d). The importance of these violations to the regulatory scheme is similarly great as demonstrated by the above-referenced evidence.

Counsel for respondents Krieg and Galpine argues that the record does not contain any evidence of harm because no harm was ever caused. Counsel cites the testimony of his expert, Ted Yen, P.E., who testified that he went to the site on August 20, 2008 and took a soil sample from the backyard of 131 Keating Street which he determined to be primarily aggregate, gravels and sand, which is normally used in the City for dry wells. Mr. Yen testified regarding the flow of rainwater from the filled area behind 131 Keating Street into the remaining wetland, downstream, and that the illegal fill would provide a greater filtering effect for stormwater entering the remaining wetland. He also testified that the filled area was slowly coming back with new vegetation and that in ten years the vegetation would match that of the surrounding area. Mr. Yen did not address the information in Hearing Exhibit 1 (see finding of fact #10) regarding the benefits of the wetland, except as noted above. In fact, most of Mr. Yen's testimony is irrelevant to this proceeding.

Counsel for respondents Krieg and Galpine argues extensively about the off-site impacts from the violations, arguing that the remaining parts of AR-33 are unaffected or improved and that Lemon Creek and Lemon Creek Park continue to provide the benefits described in Hearing Exhibits 1 and 2. This argument completely misses the point that a portion of AR-33 and a tributary of Lemon Creek no longer exist due

to the violations.

Penalty Adjustments. The Civil Penalty Policy next directs penalty adjustments to provide flexibility and equity. Five adjustments are identified: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors.

Respondents Krieg and Galpine took ownership of 131 Keating Street in 1993, after AR-33 had been mapped and before the Jorcast Homes enforcement matter was decided, so they knew or should have known that their property contained regulated resources. On June 6, 2005, the date of the first violations, ECO DeAngelis left a business card in the door of 131 Keating Street. ECO DeAngelis returned to the site on June 16, 2005 and spoke with Ms. Krieg, informing her that all unpermitted work must stop and issuing her an administrative appearance ticket #AC727532. Despite this, the violations continued. These facts attest to culpability of respondents Krieg and Galpine. In addition, DEC Staff reports it has received no cooperation from these respondents. The record contains no information regarding: a history of non-compliance, the ability to pay or other unique factors regarding these respondents.

Counsel for respondents Krieg and Galpine argues that there is no evidence in the record that his clients did anything illegal or improper. Rather, counsel alleges that it was Mr. Costa who undertook the actions in the ravine on land owned by respondents Krieg and Galpine. While it is true that there is no evidence that either Ms. Krieg or Mr. Galpine personally drove truckloads of fill to the site or rode the bulldozers that moved the fill into place, their ownership of the site is sufficient to warrant the findings of liability and the imposition of a significant civil penalty.

Recommended Civil Penalty: Respondents Kathleen A. Krieg and Alfred Galpine. Based on the information in the record and the discussion above, DEC Staff has shown that its requested penalty is warranted in this case. I recommend the commissioner impose a fifty thousand dollar (\$50,000) civil penalty against respondents Kathleen A. Krieg and Alfred Galpine, jointly and severally.

**Civil Penalty Amount: Respondents Anthony Costa
and Terry Ann Gagliardi**

DEC Staff seeks a civil penalty of \$28,000 for the violations committed in June 2005 against Respondents Anthony Costa and Terry Ann Gagliardi, jointly. DEC Staff also seeks an additional civil penalty of \$39,000 for violations that occurred in 2006 and 2007 against Ms. Gagliardi, individually. Both these requested civil penalties are discussed below.

DEC Staff seeks a total civil penalty in the amount of \$67,000 be assessed by the Commissioner against these two respondents in his final order in this matter. As discussed above, respondent Anthony Costa and Terry Ann Gagliardi are liable for a total of eight violations: (1) two violations of ECL 15-0501 & 6 NYCRR 608.2; and (2) six violations of ECL 24-0701 & 6 NYCRR 663.3. In addition, Terry Ann Gagliardi is individually liable for a total of eleven additional violations: (1) three violations of ECL 15-0501 & 6 NYCRR 608.2; and (2) eight violations of ECL 24-0701 & 6 NYCRR 663.3. DEC's Civil Penalty Policy states that the starting point for any penalty calculation should be a computation of the potential statutory maximum for all violations.

Statutory Maximum Penalty. In its papers, DEC Staff explains that the ECL provides two alternative civil penalty provisions for violations of ECL 15-0501. ECL 71-1107(1) provides for a maximum penalty of \$5,000 per violation of ECL 15-0501 or a maximum penalty of \$10,000 for the violations proven against respondents Anthony Costa and Terry Ann Gagliardi jointly, and an additional \$15,000 for the violations proven against Terry Ann Gagliardi, individually, in this case. ECL 71-1127(1) provides for a maximum civil penalty of \$500 per violation plus \$100 for each day the violation continues; in this case DEC Staff calculates a maximum penalty of \$24,600³ for the violations proven against respondents Anthony Costa and Terry Ann

³ DEC Staff's calculation is the sum of the following: (1) for the violation that occurred on June 6, 2005, a penalty of \$500; (2) for 119 days it continued until the first complaint, a penalty of \$11,900; (3) for the violation that occurred on June 8, 2005, a penalty of \$500; (4) for the 117 days it continued until the first complaint, a penalty of \$11,700.

Gagliardi jointly, and an additional \$59,000⁴ for the violations proven against Terry Ann Gagliardi, individually, in this case.

ECL 71-2303(1) provides a maximum civil penalty for violations of ECL 24-0701 & 6 NYCRR 663.3 of \$3,000 per violation. For the six violations proven against respondents Anthony Costa and Terry Ann Gagliardi jointly, a total of \$18,000 is the maximum. For the eight violations proven against Terry Ann Gagliardi, individually, the maximum is \$24,000.

Thus, the statutory maximum penalty in this case for respondents Terry Ann Gagliardi and Anthony Costa, jointly, is either \$28,000 or \$42,600, and the statutory maximum penalty in this case for respondent Terry Ann Gagliardi individually is either \$83,000 or \$39,000 depending on whether ECL 71-1107(1) or ECL 71-1127(1) is used.

Benefit Component. The next item the Civil Penalty Policy requires to be considered is the benefit to the respondent. In this case, DEC Staff argues that respondent Terry Ann Gagliardi benefitted by having her backyard extended to be used as a lawn which enhanced the value of their property. However, as counsel for respondents Krieg and Galpine argues, there is no evidence in the record regarding any property values.

Gravity Component. The next item the Civil Penalty Policy requires the civil penalty to contain a gravity component based on two factors: (1) the potential and actual damage caused by the violations; and (2) the importance of the violations to the regulatory scheme. In this case, DEC Staff argues that the actual damage of violations is great. The condition of AR-33 and the unnamed tributary prior to the violations is described in findings of fact #10, #11 and #12. The condition of the site after the violations is shown in photographs provided at the hearing and other photographs in the record demonstrate

⁴ DEC Staff's calculation is the sum of the following: (1) for the May 26, 2006 violation, a penalty of \$500; (2) for 272 days it continued until the second complaint, a penalty of \$27,200; (3) for the May 31, 2006 violation, a penalty of \$500; (4) for 267 days it continued until the second complaint, a penalty of \$26,700; (5) for the January 17, 2008 violation, a penalty of \$500; and, (6) for the 36 days it continued until the second complaint, a penalty of \$3,600.

conditions at the site during the filling. The testimony of DEC Staff biologist Joseph Pane and finding of fact #13 describes the condition of the site after filling. This evidence demonstrates that the actual damage in this case is great; this conclusion is bolstered by the fact that many of the wetland violations proven are incompatible with a wetland and its functions and benefits pursuant to 663.4(d). The importance of these violations to the regulatory scheme is similarly great as demonstrated by the above-referenced evidence.

Penalty Adjustments. The Civil Penalty Policy next directs penalty adjustments to provide flexibility and equity. Five adjustments are identified: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors.

Culpability, Violator Cooperation, and History of Non-compliance. Respondent Terry Ann Gagliardi took ownership of 123 Keating Street after AR-33 had been mapped and she, and Mr. Costa, were found liable for freshwater wetlands violations in the Jorcast Homes enforcement matter. They were assessed a \$3,000 civil penalty in this matter, which was never paid. It is clear from the record that she knew her property contained regulated resources and that she has a history of non-compliance with DEC regulations.

On June 6, 2005, the date of the first violations in this case, ECO DeAngelis ordered the work stopped at the site and spoke to Mr. Costa. ECO DeAngelis returned to site on June 8, 2005 and again spoke with Mr. Costa, informing him all unpermitted work must stop. ECO DeAngelis issued Mr. Costa an administrative appearance ticket #AC727521. While the ECO did not speak directly to Ms. Gagliardi, it is fair to infer that she knew the violations were occurring on her property because of the small size of the parcel and the large amount of fill being placed there would have made it obvious. Despite this, the violations continued. These facts attest to culpability of respondents Anthony Costa and Terry Ann Gagliardi. DEC Staff reports it has received no cooperation from either Mr. Costa or Ms. Gagliardi.

Ability to Pay. In filings throughout this matter, both Ms. Gagliardi and Mr. Costa have claimed that Mr. Costa's incarceration has created a financial hardship that has impaired their ability to defend themselves in this matter. Neither Mr. Costa nor Ms. Gagliardi filed any papers in response to the first motion for order without

hearing. After the first ruling, they did retain counsel to appeal the first ruling (which the Commissioner denied in an interim decision dated June 22, 2007). Counsel also filed a motion to vacate Mr. Costa's and Ms. Gagliardi's default (which resulted in the second ruling finding a question of fact existed as to whether Ms. Gagliardi had been served; DEC Staff subsequently re-served her). By letter dated February 9, 2007, counsel for Mr. Costa and Ms. Gagliardi withdrew and asked for a 60 day extension for Ms. Gagliardi to answer. By letter dated February 10, 2007, Ms. Gagliardi wrote that she could not afford to continue retaining her counsel. The request for additional time was denied and Ms. Gagliardi's liability for the violations proven in the first complaint were affirmed in the third ruling. In the fifth ruling, Mr. Costa's request for legal assistance from DEC, due to his alleged impoverished state, was denied. Ms. Gagliardi's claim of inability to pay is again raised in Mr. Costa's final submission. Mr. Costa contends that due to the remaining time on his federal prison sentence that he and his wife will not be able to pay any civil penalty. Mr. Costa requests that no civil penalty be imposed, or in the alternative, that payment be delayed until his scheduled release, November 27, 2012. Despite the claims of inability to pay, there is no proof in the record to support this claim, in the form of tax returns or other documents. In addition, the respondents never completed or submitted DEC's "Personal Financial Statement" which is used in cases such as this.

Unique Factors. In his various submissions, Mr. Costa also makes a claim that can be considered a unique factor. Throughout his various submissions, Mr. Costa has claimed that the ravine (now filled) behind 123 and 131 Keating Street was a "mini-Love Canal". Specifically, that the failing septic system at Staten Island University Hospital (SIUH) had dumped toxic materials through an unpermitted outfall into the ravine for more than two decades. The filling of the ravine, he argues, was a form of self-help, to protect his family and wife's property from the damage from the discharges. The problem with Mr. Costa's claim, is that there is no proof in the record, other than his unsupported statements that this is the case.

The fifth ruling in this matter granted respondents Krieg and Galpine's discovery request for any and all information about these alleged violations (which DEC Staff subsequently complied with). No evidence from this discovery request was entered into the record at the hearing.

On July 28, 2008, after DEC Staff completed its case at the hearing, counsel for respondents Krieg and Galpine moved to delay their case for a month to allow them to obtain additional evidence of this illegal dumping by SIUH. Counsel explained that a Freedom of Information Law (FOIL) request had been made to New York City's Department of Environmental Protection (NYCDEP) for relevant information and that conversations with NYCDEP's counsel's office would result in document disclosure in the first weeks of August 2008. He also reported that an associate at his firm had contacted SIUH and that information from the hospital would be forthcoming before the August 25, 2008 hearing date. This motion was granted. No information regarding the discharges was supplied when the hearing resumed or otherwise entered into the hearing record. In addition, DEC Staff biologist Joseph Pane testified that he did not find any pipe, other than the culvert conveying stormwater into the ravine, on his inspections of the site.

There is no corroboration for Mr. Costa's claim of alleged discharges in the record and no evidence was produced at the hearing or at any other time that such discharges ever occurred. This is despite the fact that documents from DEC, NYCDEP and SIUH have been reportedly examined by the respondents. Mr. Costa's claims that DEC Staff is either remiss in not fully investigating his claim or is complicit in covering up SIUH's illegal discharges are just not supported by this record.

On this record, this unique factor has been alleged, investigated and not proven. As such, it cannot be the basis for a reduction in the penalty.

Recommended Civil Penalty: Respondents Anthony Costa and Terry Ann Gagliardi. Based on the information in the record and the discussion above, DEC Staff has shown that its requested penalty is warranted in this case. I recommend the Commissioner impose a twenty eight thousand dollar (\$28,000) civil penalty against respondents Anthony Costa and Terry Ann Gagliardi, jointly and a thirty nine thousand dollar (\$39,000) civil penalty against respondent Terry Ann Gagliardi, individually.

Civil Penalty Amount: Respondent Clover Drainage, Inc.

DEC Staff seeks a civil penalty of \$14,000 from Clover Drainage, Inc. for the four violations that occurred on June 6, 2006. Specifically, DEC Staff has shown that this respondent: (1) disturbed the stream at the site; (2)

excavated in wetland AR-33; (3) dumped in wetland AR-33; and (4) filled in wetland AR-33.

Statutory Maximum Penalty. In its papers, DEC Staff explains that the ECL provides two alternative civil penalty provisions for violations of ECL 15-0501. ECL 71-1107(1) provides for a maximum penalty of \$5,000 per violation of ECL 15-0501 or a maximum penalty of \$5,000 in this case. ECL 71-1127(1) provides for a maximum civil penalty of \$500 per violation plus \$100 for each day the violation continues; in this case DEC Staff calculates a maximum penalty of \$12,400.⁵

ECL 71-2303(1) provides for a maximum of \$3,000 per violation for violations of ECL 24-0701 & 6 NYCRR 663.3. For the three violations proven, this a total of \$9,000.

Thus, the statutory maximum penalty in this case for respondent Clover Drainage, Inc. is either \$14,000 or \$21,400, depending on whether ECL 71-1107(1) or ECL 71-1127(1) is used.

Benefit Component. The next item the Civil Penalty Policy requires to be considered is the benefit to the respondent. In this case, DEC Staff argues that respondent Clover Drainage, Inc. benefitted financially economically by presumably being paid for its work at the site. No invoices or estimate of the amount of economic benefit gained exists in the record.

Gravity Component. The next item the Civil Penalty Policy requires the civil penalty to contain a gravity component based on two factors: (1) the potential and actual damage caused by the violations; and (2) the importance of the violations to the regulatory scheme. In this case, DEC Staff argues that the actual damage of violations is great. The condition of AR-33 and the unnamed tributary prior to the violations is described in findings of fact #10, #11 and #12. The condition of the site after the violations is shown in photographs provided at the hearing and other photographs in the record demonstrate conditions at the site during the filling. The testimony of DEC Staff biologist Joseph Pane and finding of fact #13

⁵ DEC Staff's calculation is the sum of the following: (1) for the violation that occurred on June 6, 2005, a penalty of \$500; and (2) for 119 days it continued until the first complaint, a penalty of \$11,900.

describes the condition of the site after filling. This evidence demonstrates that the actual damage in this case is great; this conclusion is bolstered by the fact that many of the wetland violations proven are incompatible with a wetland and its functions and benefits pursuant to 663.4(d). The importance of these violations to the regulatory scheme is similarly great as demonstrated by the above-referenced evidence.

Penalty Adjustments. The Civil Penalty Policy next directs penalty adjustments to provide flexibility and equity. Five adjustments are identified: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors.

DEC Staff argues that respondent Clover Drainage, Inc. is experienced in the construction industry on Staten Island and should have known of the restrictions on excavating and filling in an area with many wetlands, like Staten Island, and therefore, is culpable for these violations.

Clover Drainage, Inc. has not appeared in any fashion in the proceeding, though DEC Staff has provided proof of service and it has been included on the mailing list for all communications in this matter. Based on this, it is reasonable to conclude that this respondent did not cooperate.

The record contains no information regarding: a history of non-compliance, the ability to pay, or other unique factors regarding this respondent.

Recommended Civil Penalty: Respondent Clover Drainage, Inc. Based on the information in the record and the discussion above, DEC Staff has shown that its requested penalty is warranted in this case. I recommend the Commissioner impose a fourteen thousand dollar (\$14,000) civil penalty against respondent Clover Drainage, Inc.

***Civil Penalty Amount: Respondent John Ippolito
Trucking & Excavating, Inc.***

DEC Staff seeks a civil penalty of \$14,000 from respondent John Ippolito Trucking & Excavating, Inc for the four violations that occurred on June 8, 2006. Specifically, DEC Staff has shown that this respondent: (1) disturbed the stream at the site; (2) excavated in wetland AR-33; (3) dumped in wetland AR-33; and (4) filled in

wetland AR-33.

In his Post-Trial Affirmation, counsel for this respondent argues that the penalties sought by DEC staff are excessive. He also argues that the three violations, for excavation, dumping and filling in AR-33 should be considered a single violation, though no authority for this claim is cited. In past administrative enforcement cases, the Commissioner has determined that distinct freshwater violations have occurred in similar situations (e.g., Matter of Linda Wilton, 1991 WL 94068).

Statutory Maximum Penalty. DEC Staff explains in its papers that the ECL provides two alternative civil penalty provisions for violations of ECL 15-0501. ECL 71-1107(1) provides for a maximum penalty of \$5,000 per violation of ECL 15-0501 or a maximum penalty of \$5,000 in this case. ECL 71-1127(1) provides for a maximum civil penalty of \$500 per violation plus \$100 for each day the violation continues; in this case DEC Staff calculates that the maximum penalty is \$12,200.⁶

ECL 71-2303(1) provides for a maximum of \$3,000 per violation for violations of ECL 24-0701 & 6 NYCRR 663.3. For the three violations proven, this a total of \$9,000.

Thus, the statutory maximum penalty in this case for respondent John Ippolito Trucking & Excavating, Inc. is either \$14,000 or \$21,200, depending on whether ECL 71-1107(1) or ECL 71-1127(1) is used.

Benefit Component. The next item the Civil Penalty Policy requires to be considered is the benefit to the respondent. In this case, DEC Staff argues that respondent John Ippolito Trucking & Excavating, Inc. benefitted financially economically by presumably being paid for its work at the site. No invoices or estimate of the amount of economic benefit gained exists in the record.

Gravity Component. The next item the Civil Penalty Policy requires the civil penalty to contain a gravity component based on two factors: (1) the potential and actual damage caused by the violations; and (2) the

⁶ DEC Staff's calculation is the sum of the following: (1) for the violation that occurred on June 6, 2005, a penalty of \$500; and (2) for 117 days it continued until the first complaint, a penalty of \$11,700.

importance of the violations to the regulatory scheme. In this case, DEC Staff argues that the actual damage of violations is great. The condition of AR-33 and the unnamed tributary prior to the violations is described in findings of fact #10, #11 and #12. The condition of the site after the violations is shown in photographs provided at the hearing and other photographs in the record demonstrate conditions at the site during the filling. The testimony of DEC Staff biologist Joseph Pane and finding of fact #13 describes the condition of the site after filling. This evidence demonstrates that the actual damage in this case is great; this conclusion is bolstered by the fact that many of the wetland violations proven are incompatible with a wetland and its functions and benefits pursuant to 663.4(d). The importance of these violations to the regulatory scheme is similarly great as demonstrated by the above-referenced evidence.

Penalty Adjustments. The Civil Penalty Policy next directs penalty adjustments to provide flexibility and equity. Five adjustments are identified: (1) culpability; (2) violator cooperation; (3) history of non-compliance; (4) ability to pay; and (5) unique factors.

John Ippolito Trucking & Excavating, Inc. has only been involved to a limited extent. This respondent was named in DEC Staff's first complaint, dated October 3, 2005, for actions undertaken at the site on June 8, 2005. John Ippolito, President of the respondent corporation, wrote to DEC Staff counsel by letter dated October 15, 2005, asking to be removed as a respondent. By letter dated January 3, 2006, DEC Staff counsel declined Mr. Ippolito's request.

Because this respondent did not answer, the first ruling found it liable for four violations that occurred on June 8, 2005. No communication was received into the record from this respondent until July 25, 2008, when Mr. Ippolito and his attorney appeared at the administrative hearing on penalty.

Culpability. DEC Staff argues that respondent John Ippolito Trucking & Excavating, Inc. is experienced in the construction industry on Staten Island having operated for over 47 years and should have known of the restrictions on excavating and filling in an area with many wetlands, like Staten Island, and therefore, is culpable for these violations.

At the hearing on July 28, 2008, Mr. Ippolito testified

regarding the circumstances of his employment at the site. He testified that he was contacted either on the evening of June 7, or the morning of June 8, 2005 by Mr. Costa who asked that a large machine (bulldozer) be brought to the site because the machine at the site (bobcat) could not handle the quantity of dirt at the site. Mr. Ippolito stated that no contract was executed for the rental of the machine and that Mr. Costa did not identify any environmental concerns or permits required. He continued that during the day of June 8, 2008, the operator of the machine, his employee, called back to the company office and said the machine had to be picked up because of the violations at the site. The machine was promptly removed from the site. Mr. Ippolito estimated that the bulldozer was used between five and six hours at the site on June 8, 2005. He also stated that since the date of the violation he has had no contact with the site.

Mr. Ippolito testified that the reason he thought no permit was required was that it was his belief that a home owner is allowed to bring 300 yards of fill onto a property without a permit. No citation to any law was provided, although he indicated that it may have been a New York City Department of Sanitation rule. DEC Staff member Pane testified that he estimated the total amount of fill on the two properties at over 62,000 cubic feet. So assuming the law cited by Mr. Ippolito does exist, the two homeowners would be allowed to bring 600 yards of fill onto a site (assuming no regulated resources existed), a quarter of Mr. Pane's estimate.

The record does not contain any information regarding the extent of any: violator cooperation; history of non-compliance; ability to pay; or unique factors for this respondent.

The record does not support respondent's argument that the Commissioner should not impose any civil penalty or that the penalty should be considerably less than that sought by DEC Staff. However, the record does support an adjustment, in the interest of fairness. This respondent is an experienced contractor operating in an area of the state with many mapped freshwater wetlands and should have checked the wetland maps to see if the proposed work was in or near a wetland. However, Mr. Ippolito appeared to be telling the truth in his testimony and specifically that Mr. Costa did not inform Mr. Ippolito that the work was being done in a wetland or that prior violations had occurred two days before. Given the fact that the record shows that Mr.

Ippolito has no prior history of environmental violations, that he promptly ceased operations and removed his equipment, and that he attempted to engage DEC Staff in negotiations at the beginning of the hearing process, a reduction in penalty is warranted based on his conduct, in contrast to the conduct of the homeowner respondents who continued to knowingly violate the law over the course of months, if not years.

Recommended Civil Penalty: Respondent John Ippolito Trucking & Excavating, Inc.: Based on the information in the record and the discussion above, DEC Staff has not shown that the maximum penalty is warranted in this case, but rather a reduced penalty is appropriate. I recommend the commissioner impose an eight thousand dollars (\$8,000) civil penalty against respondent John Ippolito Trucking & Excavating, Inc.

Environmental Remediation

In addition to the imposition of civil monetary penalties against the respondents (discussed above), DEC Staff requests the Commissioner include language in his order directing full restoration of the impacted area to its condition prior to the time the alleged violations occurred. DEC Staff sets forth in its post-hearing papers the process by which it seeks to have this accomplished.

Specifically, DEC Staff seeks submission by the respondents, within 30 days of the Commissioner's Order, a Corrective Action Plan (CAP) satisfactory to the Department. Following DEC Staff's approval of the (CAP), the respondents would be required to perform the remedial actions set forth in the CAP, including the removal of all illegal fill, removal of the concrete pipe, regrading of the area to its topographical profile prior to the violations, and replanting the area with DEC approved plants. This would lead to the full restoration of the site to its condition before the violations occurred.

It is not explicitly stated in DEC Staff's papers whether this restoration would be required only of the property-owner respondents (Krieg/Galpine and Terry Ann Gagliardi). Given the limited involvement of the contractor respondents in these violations, it would not be fair to require them to participate in remediation, in light of the recommended civil penalty. The record shows that John Ippolito Trucking & Excavating, Inc. was at the site for only approximately five hours on June 8, 2005. The record

contains no information as to the length of time Clover Drainage, Inc. was involved with the site. Based on this information, it is proper to require the property-owner respondents, who continued the violations over a matter of years, to be responsible for remediation at the site. In addition, Mr. Costa is presently incarcerated and, as a result, would be unable to undertake restoration activities at this time.

DEC Staff cites as authority for its request, ECL 71-2303(1) which states in relevant part:

"In addition [to imposing a fine], the commissioner or local government shall have the power, following a hearing held in conformance with the procedures set forth in section 71-1709 of this chapter, to direct the violator to cease his violation of the act and to restore the affected freshwater wetland to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the commissioner or local government."

DEC Staff also cites Department guidance on Freshwater Wetlands DEE-6 (issued February 4, 1992), which states:

"It is the policy of the Department to require complete restoration of the full functions and values of regulated wetland areas that have been illegally altered."

Findings of fact #10, #11 and #12 summarize the conditions at the site before the violations occurred and finding of fact #13 summarizes the conditions at the site afterwards. Mr. Pane testimony regarding his multiple visits to the site before, during and after the violations bolsters this information. Mr. Pane also testified that, if the wetland were restored and fill removed, the site would revert to its prior wetland characteristics within a year. Mr. Pane testified that if the fill were allowed to remain, sediment from the filled area would impact Lemon Creek Park, downstream from the filled area.

The respondents make various arguments in their post-hearing submissions, but none alters the recommendation that remediation be ordered. Each argument is discussed below.

Krieg/Galpine

Counsel for respondents Krieg and Galpine makes several arguments in his post-trial submissions that the illegal fill should not be removed. The argument includes assertions that: (1) the ravine performs its functions as well or better than before it was filled; (2) the wetland remains, although now in a flat form instead of its previous concave form; and (3) the area is returning to a wetland.

As discussed above, Respondents Krieg and Galpine called only one witness, Ted Yen, P.E., a civil engineer. Mr. Yen tried to make a case for leaving the fill in place. Mr. Yen testified that the fill, sand and gravel, placed in the ravine filtered stormwater entering the remaining portion of AR-33, but did not address any of the other wetland benefits addressed in finding of fact #10. He stated his observation that the neighboring, remaining, off-site portions of AR-33 appeared healthy. Counsel also argues that DEC Staff did not show an impact on Lemon Creek itself, ignoring the impact on the unnamed tributary.

All of these arguments try to obscure the fact that the portion of AR-33 which existed at the site is now buried under sand and gravel and the stream at the site is now buried in a concrete pipe.

Costa/Gagliardi

In his submissions, Mr. Costa again asserts that the ravine is filled with toxic waste from SIUH and that disturbing the fill could release the pathogens buried there. He also expresses concern for the workers engaged in any remediation that may be ordered, as well as the general public. He asks that the Commissioner not issue a final order until additional investigation is completed at the site and that it may be best to keep the alleged toxins that exist in the ravine permanently buried.

As discussed above, since there is no evidence in the record to support Mr. Costa's claim of illegal dumping in the ravine, except for Mr. Costa's own statements, I have no choice but to reject Mr. Costa's arguments.

Recommended Remediation: Based on the information in the record and the discussion above, DEC Staff has met its burden of demonstrating that the functions of the wetland at the site have been significantly impaired and that it is appropriate for the Commissioner to include in his final

order in this matter language requiring respondents Krieg and Galpine and respondent Terry Ann Gagliardi to remove all the fill from the site and restore the area to what it was before the filling. The record shows this area to be an important resource that provided multiple benefits to Staten Island and it should be fully restored.

CONCLUSIONS

1. The site of the violations, 123 and 131 Keating Street, Staten Island, NY, contains a portion of a freshwater wetland regulated pursuant to ECL article 24 (AR-33), its adjacent area, and a portion of a stream regulated pursuant to ECL article 15 (a tributary of Lemon Creek). Lemon Creek has been classified as a navigable water of the State of New York and a Class B fresh surface water of the state pursuant to 6 NYCRR Part 890.
2. ECL 15-0501(1) and 6 NYCRR 608.2 prohibit the disturbance of protected streams without a permit. ECL 71-1107 provides for a civil penalty of not more than five thousand dollars for each violation of 15-0501. ECL 71-1127(1) provides an alternative civil penalty for violations of ECL 15-0501 of five hundred dollars per violation and one hundred dollars for each day during which such violation continues.
3. ECL 24-0701 and 6 NYCRR 663.3 prohibit (among other things) the excavating, dumping, filling, grading and construction in a protected freshwater wetlands without a permit. ECL 71-2303(1) provides for a civil penalty not to exceed three thousand dollars for each violation of ECL article 24 and authorizes the Commissioner to direct the violator to restore an affected freshwater wetland to its condition prior to the violation, provided it can be done in a reasonable amount of time.
4. None of the respondents had a permit issued pursuant to ECL 15 or ECL 24 for any of the activities or violations described or referred to in this report.
5. Respondent Anthony Costa and respondent Terry Ann Gagliardi are liable for eight (8) violations, jointly. Mr. Costa's liability is based on his activities at the site and Ms. Gagliardi's liability is based on her ownership of 123 Keating Street, a portion of the site where the violations occurred. These violations are:

- a. on June 6, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - b. on June 6, 2005, excavating in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - c. on June 6, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - d. on June 6, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - e. on June 8, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - f. on June 8, 2005, excavating in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - g. on June 8, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3; and
 - h. on June 8, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3.
6. Respondent Terry Ann Gagliardi is liable, individually for eleven (11) violations based on her ownership of 123 Keating Street, a portion of the site where the violations occurred. These violations are:
- a. on May 26, 2006, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - b. on May 26, 2006, placing fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - c. on May 26, 2006, grading fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - d. on May 26, 2006, constructing plywood forms in a regulated freshwater wetland in violation of ECL

24-0701 & 6 NYCRR 663.3;

- e. on May 31, 2006, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - f. on May 31, 2006, placing fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - g. on May 31, 2006, grading fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - h. on May 31, 2006, constructing plywood forms in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - i. on January 17-19, 2007, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - j. on January 17-19, 2007, placing fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3; and
 - k. on January 17-19, 2007, grading fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3.
7. Respondent Jeanette Gagliardi is not liable for any of the violations alleged.
8. Respondents Kathleen A. Krieg and Alfred Galpine are jointly and severally liable for fourteen (14) violations based on their ownership of 131 Keating Street, a portion of the site where the violations occurred. These violations are:
- a. on June 6, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - b. on June 6, 2005, excavating in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - c. on June 6, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;

- d. on June 6, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - e. on June 8, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - f. on June 8, 2005, excavating in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - g. on June 8, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - h. on June 8, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - i. on May 26, 2006, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - j. on May 26, 2006, placing fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - k. on May 26, 2006, grading fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - l. on May 31, 2006, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - m. on May 31, 2006, placing fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3; and
 - n. on May 31, 2006, grading fill in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3.
9. Respondent Clover Drainage, Inc. is liable for the four (4) violations based on the activities of its employee(s) at the site. These violations are:
- a. on June 6, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - b. on June 6, 2005, excavating in regulated

freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;

- c. on June 6, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3; and
 - d. on June 6, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3.
10. Respondent, Thomas J. Kearns, individually and as owner of Clover Drainage, Inc., is not liable for any of the violations alleged.
11. L. Petrosino, Inc. is not liable for any of the violations alleged.
12. John Ippolito Trucking & Excavating, Inc. is liable for the four (4) violations based on the activities of its employee(s) at the site. These violations are:
- a. on June 8, 2005, disturbing the stream bed at the site in violation of ECL 15-0501 & 6 NYCRR 608.2;
 - b. on June 8, 2005, excavating in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3;
 - c. on June 8, 2005, dumping in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3; and
 - d. on June 8, 2005, filling in regulated freshwater wetland in violation of ECL 24-0701 & 6 NYCRR 663.3.

RECOMMENDATIONS

I recommend that an Order be issued that:

- 1. Finds respondents Anthony Costa and Terry Ann Gagliardi violated ECL article 15-0501 and 6 NYCRR 608.2 a total of two (2) times and violated ECL article 24 and 6 NYCRR 663.3 a total of six (6) times.
- 2. Finds respondent Terry Ann Gagliardi violated ECL article 15-0501 and 6 NYCRR 608.2 a total of three (3) times and violated ECL article 24 and 6 NYCRR 663.3 a

total of eight (8) times.

3. Finds respondents Kathleen Krieg and Alfred Galpine violated ECL article 15 and 6 NYCRR 608.2 a total of four (4) times and violated ECL article 24 and 6 NYCRR 663.3 a total of ten (10) times.
4. Finds respondent Clover Drainage, Inc. violated ECL article 15-0501 and 6 NYCRR 608.2 a total of one (1) time and violated ECL article 24 and 6 NYCRR 663.3 a total of three (3) times.
5. Finds respondent John Ippolito Trucking & Excavating, Inc. violated ECL article 15-0501 and 6 NYCRR 608.2 a total of one (1) time and violated ECL article 24 and 6 NYCRR 663.3 a total of three (3) times.
6. finds respondents Jeanette Gagliardi, Thomas Kearns, individually and as owner of Clover Drainage, Inc., and L. Petrosino, Inc. not liable for any of the violations alleged.
7. Imposes a civil penalty on the respondents in the following amounts:
 - (a) respondents Kathleen A. Krieg and Alfred Galpine a total civil penalty of fifty thousand dollars (\$50,000);
 - (b) respondents Anthony Costa and Terry Ann Gagliardi, jointly, a total of twenty eight thousand dollars (\$28,000);
 - (c) respondent Terry Ann Gagliardi, individually, a total of thirty nine thousand dollars (\$39,000);
 - (d) respondent Clover Drainage, Inc. a total of fourteen thousand dollars (\$14,000); and
 - (e) respondent John Ippolito Trucking & Excavating, Inc. a total of eight thousand dollars (\$8,000).
8. Directs that respondents Terry Ann Gagliardi and Kathleen A. Krieg and Alfred Galpine remediate the site to its condition prior to the time of the violations and under the direction of DEC Staff.