

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (ECL) and Title 6, Part 608 et seq. of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

ORDER

-by-

DEC File No.
R4-2009-1120-176

ALAN GROUT,

Respondent.

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Alan Grout violated 6 NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook in a 500-foot long culvert pipe without a permit at a site that respondent owns on Fordham Road, Valatie, Town of Kinderhook, Columbia County, New York (site or subject parcel). In addition, a new farm pond had been created on the site.

DEC staff commenced this administrative proceeding by serving a notice of hearing and complaint upon respondent dated June 25, 2014 (*see* Hearing Exhibit 1). The complaint was subsequently corrected by a ruling of the presiding Chief Administrative Law Judge (Chief ALJ) of the Department's Office of Hearings and Mediation Services (*see* Ruling of the Chief ALJ dated December 12, 2014, at 5-6, 16).

Department staff seeks a civil penalty in the amount of one thousand, two hundred dollars (\$1,200) for the alleged violation. In addition, Department staff seeks an order directing respondent to restore the Stuyvesant Brook to its natural condition, including a stream channel of the same width, gradient, and elevation as the original stream, with the restoration work being undertaken in accordance with a Department-approved stream restoration plan.

Following an adjudicatory hearing, the Chief ALJ prepared the attached hearing report in which he recommends that the Commissioner's designee in this proceeding:

- dismiss respondent's affirmative defenses;
- hold respondent Alan Grout liable for his violation of 6 NYCRR 608.2(a);
- assess a civil penalty of one thousand, two hundred dollars (\$1,200) against respondent;

- direct respondent to submit to the Department, within sixty (60) days of service of this order, a plan to restore the Stuyvesant Brook to its natural condition, including a stream channel of the same width, gradient, and elevation as the original stream; and
- direct respondent to complete the work contained in the Department-approved stream restoration plan within one hundred twenty (120) days of service of this order.

See Hearing Report at 18-19.

I adopt the Chief ALJ's findings of fact, conclusions of law and recommendations as set forth in the Chief ALJ hearing report, subject to my comments below.¹

Factual Background

Respondent is owner and president of Golden Harvest Farms, Inc. (Golden Harvest), an apple orchard located in Valatie, New York (*see* Hearing Report at 3 [Finding of Fact no. 2; Testimony of Alan Grout [Grout], Transcript [Tr] at 126; Hearing Exhibits 15-17]). Respondent purchased the subject parcel, a 22.9 acre parcel of land located on the east side of Fordham Road, Valatie, New York (Tax ID No. 32.-1-11.121), on October 31, 2007 (*see* Hearing Report at 4 [Finding of Fact no. 11]; Stipulation, Hearing Exhibit 4, first ¶ 4).

Stuyvesant Brook is classified as a class C(t) stream pursuant to Department regulation at 6 NYCRR 863.6, Table 1, Item 531, Waters Index No. H-209-1 (*see* Hearing Report at 5 [Finding of Fact no. 13]; Stipulation, Hearing Exhibit 4, second ¶ 4). The subject parcel also contains a portion of State-regulated freshwater wetland K-113 (*see* Hearing Exhibit 10).

On July 24, 2008, Department staff met with respondent on the subject parcel to discuss the Stuyvesant Brook (*see* Stipulation, Hearing Exhibit 4, ¶ 11). Jerome Fraine, former Region 4 Regional Wildlife Manager and Habitat Biologist, and a Department expert on protected streams, testified that, at that time, no new farm pond had been constructed on the subject parcel, and no digging in the pond area or diversion of any portion of Stuyvesant Brook had commenced (*see* Fraine Testimony [Fraine], Tr at 24 [the pond at issue in this proceeding did not exist], 31-34 [observing water flowing through Stuyvesant Brook]; Grout, Tr at 237). Mr. Fraine informed respondent that the Stuyvesant Brook was a protected stream under ECL article 15 and that respondent would need a permit for any disturbance of the stream (*see* Fraine, Tr at 39, 79). Mr. Fraine took a photograph depicting the then conditions on the subject parcel (*see* Fraine, Tr at 36; Hearing Exhibits 6A [marked] and 6B [unmarked]).

Department staff also advised respondent that diverting Stuyvesant Brook into a new farm pond on the site would warm the water in the Stuyvesant Brook and cause adverse thermal impacts to trout habitat downstream (*see* Hearing Report at 6 [Finding of Fact no. 25]; Fraine, Tr at 46, 87-88; Grout, Tr at 179, 187-188). During that visit, respondent did not provide any

¹ This proceeding, in its early stages, was the subject of several ALJ rulings – Ruling of the Chief ALJ on Motions dated December 12, 2014; Ruling of the Chief ALJ on Motion for Leave to Reargue dated August 14, 2015; and Ruling of the Chief ALJ on Motion for Summary Judgment dated November 23, 2015.

indication to Department staff that he intended to bury Stuyvesant Brook (*see* Fraine, Tr at 39; Grout, Tr at 230).

Mr. Fraine testified that, upon a November 20, 2009 return visit to the subject parcel, he observed that a farm pond had been constructed where he previously had observed the Stuyvesant Brook. The Stuyvesant Brook was no longer flowing out in the open and was diverted into a 500-foot, 15-inch diameter culvert pipe buried on the west side of the new pond (*see* Hearing Report at 7 [Finding of Fact no. 37]; Fraine, Tr at 40-45, 55; Hearing Exhibits 5A, 7, 9A).² Mr. Fraine noted that approximately halfway down the buried stream was a drop inlet structure which allowed respondent to control the surface elevation of the pond, thereby allowing respondent the option of running the captured stream into the farm pond (*see* Fraine, Tr at 41-42).

The impact of burying the stream in the pipe was to destroy fish habitat for five hundred (500) feet (*see* Fraine, Tr at 42-43). In addition, the discharge of water from the new pond into the buried stream through the drop inlet warmed the stream during summer months and caused adverse thermal impacts to trout habitat downstream (*see* Hearing Report at 7 [Finding of Fact no. 33]; Fraine, Tr at 46-47, 85-88).

Respondent never applied to the Department for an Article 15 permit to divert and bury the Stuyvesant Brook (*see* Stipulation, Hearing Exhibit 4, ¶ 12; Fraine, Tr at 39-40).

Liability

Section 608.2 of title 6 NYCRR provides that “no person . . . may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part” (*see also* ECL 15-0501[1]). Section 608.1(aa) defines a protected stream as “any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t), or C(t)” (*see also* ECL 15-0501[2]). Waters with the symbol “(t)” are waters suitable for trout habitat (*see* 6 NYCRR 700.1[a][67]; 6 NYCRR 863.3[h]).

The ALJ concluded that Department staff carried its burden of proving by a preponderance of the evidence that the Stuyvesant Brook, a class C(t) stream, flowed through the subject parcel at the time of the 2008 site visit (*see* Hearing Report at 9-10). The ALJ also concluded that Department staff carried its burden of proving by a preponderance of the evidence that respondent disturbed the Stuyvesant Brook by burying the stream in a 500-foot long culvert pipe and that respondent never applied to the Department for a permit (*see* Hearing Report at 10). As noted in the Hearing Report, respondent failed to provide any evidence in rebuttal (*see id.*).

I concur with the ALJ’s determination. Based on the record before me, Department staff proved by a preponderance of the record evidence that respondent Alan Grout violated 6

² Mr. Fraine testified that sufficient area existed where respondent could have constructed a farm pond on the site without disturbing Stuyvesant Brook (*see* Fraine, Tr at 38, 50).

NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook (stream identification no. H-209-1), a class C(t) stream, in a 500-foot culvert pipe without a permit at respondent's site located on Fordham Road, Valatie, New York.

Respondent's Affirmative Defenses

Respondent pleaded four (4) affirmative defenses in his answer: 1) the inapplicability of the ECL 24-0701 freshwater wetland permit requirement to respondent's activity at the site; (2) laches or unreasonable delay; (3) equitable estoppel; and (4) failure to join a necessary party (*see* Hearing Exhibit 2 [Answer of Alan Grout dated July 7, 2014 (Answer)] at 3-13).

Under the applicable regulations, a respondent bears the burden on all affirmative defenses that it raises (*see* 6 NYCRR 622.11[b][2]). Whenever factual matters are involved, the party with the burden of proof must sustain that burden by a preponderance of the evidence (*see* 6 NYCRR 622.11[c]).

The affirmative defenses were first addressed in a ruling of the Chief ALJ dated December 12, 2014 (December 12, 2014 Ruling). With respect to the first affirmative defense, respondent pled that because the pond constructed on the subject parcel is a permissible agricultural activity under ECL 24-0701(4), respondent was not required to obtain a permit (*see* Hearing Exhibit 2 [Answer] at 3). However, Department staff did not charge respondent with a violation of the freshwater wetland permit requirement under ECL article 24. The exemption for agricultural activities included in ECL 24-0701(4) does not apply to the Department's charges with respect to the requirement of a protection of streams permit under 6 NYCRR 608.2 (*see also* ECL 15-0501). In the December 12, 2014 Ruling, the Chief ALJ rejected the first affirmative defense on the ground that respondent failed to state a defense to the permit requirement under ECL 15-0501 and 6 NYCRR 608.2 (*see* December 12, 2014 Ruling, at 11, 16). I concur with that determination and hereby dismiss respondent's first affirmative defense.

With respect to the second affirmative defense, respondent contended that the Department is guilty of laches or failure to bring the action within a reasonable period of time in accordance with the State Administrative Procedure Act, 6 NYCRR part 622 and the holding in *Matter of Cortlandt Nursing Home v Axelrod*, 66 NY 2d 169, 178 (1985), *cert denied* 476 US 1115 (1986) [*Cortlandt*] (*see* Hearing Exhibit 2 [Answer] at 4-12). In the December 12, 2014 Ruling, the Chief ALJ concluded, to the extent that respondent pled a laches defense, that the laches defense was unavailable against a State agency acting in a governmental capacity to enforce a public right. The Chief ALJ consequently rejected the second affirmative defense as it related to laches (*see* December 12, 2014 Ruling, at 12, 16). I agree with the Chief ALJ's determination and hereby dismiss that portion of the second affirmative defense as it relates to laches (*see Cortlandt*, at 177 n 2 [“It is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest”]).

The Chief ALJ in the hearing report has evaluated each of the remaining affirmative defenses that respondent has raised. With respect to that remaining portion of the second affirmative defense – that is, unreasonable delay – the hearing report fully evaluates this defense

in the context of applicable law. The Chief ALJ concludes that respondent failed to carry his burden of proof on the administrative delay defense (*see* Hearing Report at 14-15). Upon review of the record, I agree and hereby dismiss the remaining portion of the second affirmative defense.

Respondent, in its third affirmative defense, asserts that the Department should be equitably estopped from bringing an enforcement proceeding in light of alleged representations by the Department including that no permits were necessary (*see* Hearing Exhibit 2, at 12). As a general rule, equitable estoppel is not applicable to a State agency acting in a governmental capacity in the discharge of its statutory responsibilities (*see* Hearing Report at 16). Only in the rarest of cases may an agency be equitably estopped for wrongful or negligent acts or omissions (*see e.g. Parkview Assocs. v City of New York*, 71 NY2d 274, 282 (1988); *Matter of Modern Landfill, Inc.*, Decision and Order of the Commissioner, July 20, 1988, at 2 [“estoppel might be equitably applied against the Department in rare, unusual situations to avoid a manifest injustice where the Department is acting within the realm of its discretion”]; *Matter of Waterbury Square, Inc.*, ALJ Summary Report, at 14-15, adopted by Order of the Commissioner dated April 4, 2017).

The hearing report provides useful clarification to the discussion in the December 12, 2014 Ruling, by underscoring that equitable estoppel is only used in rare and unusual situations. The hearing report evaluates in detail respondent’s arguments with respect to alleged assurances of Department staff that a permit was not required (*see* Hearing Report at 16-17 [addressing in part the comments of Nancy Heaslip]). The Chief ALJ finds that respondent’s arguments are unpersuasive and lacking in evidentiary support and that respondent would not be prejudiced by the remedial relief sought in this matter. My review confirms that the record of this proceeding does not support a conclusion that Department staff advice afforded respondent Grout with any legal right to alter a protected stream (Stuyvesant Brook) without a permit (*see e.g.* Hearing Transcript at 5 [Finding of Fact no. 18], 6 [Finding of Fact no. 25]). I concur that respondent failed to carry his burden of proof on the equitable estoppel defense and I dismiss the third affirmative defense.

In the fourth affirmative defense, respondent contends that the Department failed to name Golden Harvest as a respondent, and that Golden Harvest is a necessary party to this proceeding (*see* Hearing Exhibit 2 [Answer], at 12-13). As the Chief ALJ noted, respondent failed to present any evidence in support of this affirmative defense at the hearing and did not raise the defense in post-hearing briefing (*see* Hearing Report, at 14). My review of the record confirms the Chief ALJ’s determination, and accordingly, I hereby dismiss the fourth affirmative defense.

Civil Penalty

ECL 71-1127, which is applicable to the cited violations, establishes that any person who violates any provision of, or who fails to perform any duty imposed by ECL article 15 or who violates or who fails to comply with any rule or regulation promulgated pursuant to article 15 shall be liable for a civil penalty of up to two thousand, five hundred dollars (\$2,500) for each such violation, and an additional penalty of five hundred dollars (\$500) for each day the violation continues. In addition, such person may be enjoined from continuing such violation.

Department staff seeks a penalty in the amount of one thousand, two hundred dollars (\$1,200) for respondent's violation of 6 NYCRR 608.2(a). As set forth in the hearing report, a penalty in the amount of one thousand, two hundred dollars (\$1,200) is well below the statutory maximum for the violation. Based on this record, the staff-requested penalty is authorized and appropriate (*see* Hearing Report at 10-11). Accordingly, I hereby impose a civil penalty of one thousand, two hundred dollars (\$1,200), to be payable within thirty (30) days of the service of this order on respondent.

Remedial Relief

Department staff requests an order directing respondent to submit to the Department for approval a plan to restore the stream to its natural condition, including a stream channel of the same width, gradient, and elevation as the original stream, within sixty (60) days of service of the Commissioner's order on respondent. Staff also seeks an order directing respondent to complete the work contained in the Department-approved stream restoration plan within one hundred twenty (120) days of service of the Commissioner's order on respondent (*see* Hearing Exhibit 1).

At hearing, Department staff addressed how Stuyvesant Brook could be restored (*see e.g.* Fraine, at 58-59 [noting the methods that can be used to restore Stuyvesant Brook], 108 [noting deficiencies in remedial plan proposed on behalf of respondent], 111 [describing the remedial response of "daylighting," that is recreating the stream in the open, "not in a pipe, but open to the air"]). Staff has outlined and proposed a reasonable approach for correcting the negative environmental impacts on Stuyvesant Brook.

Based on my review of the record, Department staff carried its burden of providing record evidence in support of the remedial relief requested in this matter. The requested remedial relief is authorized and appropriate. Accordingly, Department staff's request for an order directing respondent to restore Stuyvesant Brook to its natural condition pursuant to a Department-approved plan is hereby granted.

I hereby direct that respondent, within sixty (60) days of service of this order on him, to submit to the Department for its review and approval³ a stream restoration plan to restore Stuyvesant Brook to its natural condition. The restoration is to include a stream channel of the same width, gradient, and elevation as the original stream, as well as the reestablishment of the stream bed and banks. With respect to any revegetation under the Department-approved plan, respondent must ensure that invasive vegetative species are not introduced. The plan shall also provide information on any contractor or consultant that respondent will be using for the restoration activity, and a schedule/timetable for implementation of the plan and completion of the restoration activity.

Respondent is not to commence the restoration work until he is notified that the Department has approved respondent's stream restoration plan.

³ The plan submitted to Department staff must be in approvable form, that is a plan which can be approved by the Department with only minimal revision.

Upon completion of the work pursuant to the Department-approved stream restoration plan, respondent shall submit to the Department a narrative summary of the work undertaken, together with photographs of the restored Stuyvesant Brook.

I encourage respondent to contact Department staff to discuss the requirements for the stream restoration plan before submitting the plan to the Department.

I further direct respondent to complete the work contained in the Department-approved stream restoration plan within one hundred twenty (120) days of service of this order on respondent.

Upon good cause shown by respondent, Department staff may at its sole discretion extend the submission date for the stream restoration plan or the date by which the stream restoration is to be completed. Any request by respondent to extend the dates set forth in this order must be in writing and must set forth respondent's reasons in support of any extension.

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

- I. Respondent Alan Grout is adjudged to have violated 6 NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook (stream identification no. H-209-1), a class C(t) stream, in a 500-foot culvert pipe without a Department permit at respondent's site located on Fordham Road, Valatie, New York.
- II. Respondent Alan Grout's affirmative defenses are hereby dismissed.
- III. Respondent Alan Grout is hereby assessed a civil penalty in the amount of one thousand, two hundred dollars (\$1,200). Within thirty (30) days of service of this order upon respondent Alan Grout, respondent shall pay the civil penalty in the amount of one thousand, two hundred dollars (\$1,200) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation.
- IV. Within sixty (60) days of service of this order upon respondent Alan Grout, respondent shall submit a stream restoration plan to the Department for the Department's review and approval to restore the Stuyvesant Brook (stream identification number H-209-1), a class C(t) stream, to its natural condition.

The restoration is to include a stream channel of the same width, gradient, and elevation as the original stream, as well as the reestablishment of the stream bed and banks. With respect to any revegetation proposed by the plan, respondent must ensure that invasive vegetative species are not introduced. The plan shall also provide information on any contractor or consultant that respondent will be using for the restoration activity, and a schedule/timetable for implementation of the plan and completion of the restoration activities.

Respondent is not to commence the restoration work until he is notified that the Department has approved respondent's stream restoration plan.

Upon completion of the work pursuant to the Department-approved stream restoration plan, respondent shall submit to the Department a narrative summary of the work undertaken, together with photographs of the restored Stuyvesant Brook.

Within one hundred and twenty (120) days of service of this order upon respondent Alan Grout, respondent shall complete the work contained in the Department-approved stream restoration plan.

Upon good cause shown by respondent, Department staff may at its sole discretion extend the submission date for the stream restoration plan or the date by which the stream restoration is to be completed. Any request by respondent to extend the dates set forth in this order must be in writing and must set forth respondent's reasons in support of any extension.

V. Respondent Alan Grout shall submit the penalty payment referenced in paragraph III of this order and all the other submissions referenced in paragraph IV of this order to the following:

Victoria Ruglis, Esq.⁴
Regional Attorney
NYSDEC Region 4
1130 North Wescott Road
Schenectady, New York 12306-2014

Upon notification to respondent, Attorney Ruglis may designate another member of the Department's Region 4 staff to receive respondent's submissions relating to the stream restoration plan referenced in paragraph IV of this order.

VI. Any questions or other correspondence regarding this order shall also be addressed to Victoria Ruglis, Esq., at the address referenced in paragraph V of this order.

⁴ Karen Lavery, the Region 4 assistant regional attorney handled the matter initially for the Department. By notice of appearance dated August 15, 2017, Assistant (now Deputy) Counsel Mark D. Sanza was substituted as attorney-of-record. With Ms. Lavery now being employed at another state agency and the recent appointment of Victoria Ruglis as Region 4 Regional Attorney, Regional Attorney Ruglis is hereby designated as the DEC contact for receipt of the civil penalty payment and all other submissions in this matter. Attorney Sanza will however remain, together with Regional Attorney Ruglis, on the Service List for this matter.

VII. The provisions, terms and conditions of this order shall bind respondent Alan Grout, Inc. and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation⁵

/s/

By: _____

James Tierney
Deputy Commissioner for Water Resources

Dated: February 20, 2023
Albany, New York

⁵ Commissioner Basil Seggos previously delegated decision making authority in this matter to DEC Executive Deputy Commissioner Kenneth P. Lynch. Following Mr. Lynch's departure from the Department, Commissioner Seggos later redelegated the decision making authority in this matter to James Tierney, the Department's Deputy Commissioner for Water Resources.

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Article 15 of the Environmental Conservation Law (“ECL”) and Title 6, Part 608 et seq. of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”),

- by -

ALAN GROUT,

Respondent.

Appearances of Counsel:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Richard Ostrov, Karen S. Lavery, and Mark D. Sanza of counsel), for staff of the Department of Environmental Conservation¹
- Tooher & Barone, LLP (Meave M. Tooher and William F. Demarest of counsel), for respondent Alan Grout

In this administrative enforcement proceeding, staff of the Department of Environmental Conservation (Department or DEC) charges respondent Alan Grout (respondent or Mr. Grout) with disturbing a protected stream without a permit on property owned by respondent in Valatie, Town of Kinderhook, Columbia County. Respondent raises several affirmative defenses in response. Based on the preponderance of record evidence, Department staff has proven the violation and established that the requested penalty and remedial relief are warranted. Respondent failed to carry his burden of proof on his affirmative defenses. Accordingly, I recommend that the Executive Deputy Commissioner issue an order holding respondent liable for the violation and imposing the requested penalty and remedial relief.²

¹ By notice of appearance dated August 15, 2017, Assistant Counsel Mark D. Sanza has been substituted as attorney-of-record in place of Region 4 counsel.

² By memorandum dated December 8, 2015, then Acting Commissioner Basil Seggos delegated decision making authority in this matter to then Region 7 Director Kenneth P. Lynch. Mr. Lynch has since been appointed Executive Deputy Commissioner for the Department.

HEARING REPORT

DEC File No.
R4-2009-1120-176

I. PROCEDURAL BACKGROUND

Department staff originally commenced this administrative enforcement proceeding against respondent Alan Grout by service of a notice of hearing and complaint dated May 5, 2014. Staff subsequently withdrew the May 2014 complaint and served a notice of hearing and complaint dated June 25, 2014 (see Exhibit [Exh] 1). In its June 2014 complaint, as corrected by a December 12, 2014 ruling of the undersigned presiding Chief Administrative Law Judge (Chief ALJ), Department staff alleged that respondent violated 6 NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook (stream identification number H-209-1), a class C(t) stream, in a 500-foot long culvert pipe without a permit at a site located in the Town of Kinderhook, Columbia County. Department staff sought a civil penalty in the amount of \$1,250, an order directing respondent to submit to the Department for approval a plan to restore the Stuyvesant Brook to its natural condition including a stream channel of the same width, gradient, and elevation as the original stream, and an order directing respondent to complete the work in the Department approved stream restoration plan.

Respondent filed an answer dated July 7, 2014, denying the alleged violation, and raising four affirmative defenses (see Exh 2). Respondent's defenses included (1) the inapplicability of the permit requirement to respondent's activity at the site (see 6 NYCRR 622.4[c]), (2) laches or unreasonable delay, (3) equitable estoppel, and (4) failure to join a necessary party.

On July 13, 2014, staff moved to dismiss respondent's affirmative defenses. Respondent moved to dismiss the complaint. In a December 12, 2014 ruling, I denied respondent's motion to dismiss the June 2014 complaint. I also granted the Department's motion to dismiss respondent's affirmative defenses in part, and dismissed the first affirmative defense and that portion of the second affirmative defense that pleaded a laches defense. I otherwise denied the Department's motion to dismiss. In a ruling dated August 14, 2015, I denied Department staff's motion for leave to reargue that portion of the December 2014 ruling as denied the request to dismiss the equitable estoppel defense.

On September 28, 2015, I issued a notice of enforcement hearing and scheduling order setting the matter down for hearing on December 2, 2015 (see Exh 3). I also directed that any pre-hearing motions be filed and served by close of business, October 26, 2015.

On October 26, 2015, respondent filed and served a notice of motion for summary judgment seeking judgment on his defenses of equitable estoppel and administrative delay, and dismissal of the complaint or, in the alternative, dismissal of those portions of the requested relief as sought submission of a plan and restoration of the stream to its natural condition. Department staff opposed respondent's motion, and requested a ruling dismissing the two defenses and making findings of undisputed facts or law.

In a ruling dated November 23, 2015, I denied respondent's motion for summary judgment, denied staff's request to dismiss the two defenses, and adjourned decision on the

request to make findings of undisputed facts or law until after a pre-hearing conference with the parties. As agreed to during the pre-hearing conference, the parties filed a proposed stipulation of facts on December 1, 2015 (see Exh 4).

On December 2, 2015, an adjudicatory hearing was held in the Department's Region 4 office in Schenectady, New York. Department staff was represented by Richard Ostrov, Regional Attorney, DEC Region 4, and Karen S. Lavery, Assistant Regional Attorney. The Department called one witness, Jerome A. Fraine, former Regional wildlife manager and habitat biologist for DEC Region 4. Respondent was represented by Tooher & Barone, LLP (Meave M. Tooher and William F. Demarest of counsel). Respondent called one witness, respondent Alan Grout. A total of 22 exhibits were admitted into the record (see Exhibit List attached).

The stenographic transcript of the hearing was received and made available to the parties on December 10, 2015. Both parties filed post hearing briefs on January 25, 2016, and closing reply brief's on February 24, 2016. The hearing record closed upon receipt of the closing reply briefs.

By letter dated June 1, 2016, respondent forwarded a copy of the decision in United States Army Corps of Engineers v Hawkes Co., Inc. (136 S Ct 1807 [2016]), which respondent argued was relevant to the issue whether the Stuyvesant Brook's classification as a C(t) stream could be challenged in this administrative enforcement proceeding. In an email dated June 2, 2016, Department staff took exception to respondent's submittal and declined to address the merits of submission on the ground that the record was closed and the case speaks for itself. By email dated June 3, 2016, I indicated that both parties' submittals were received and, as requested by staff, directed that no further submissions were authorized.

II. FINDINGS OF FACT

The following findings of fact are based on a preponderance of the record evidence presented at the adjudicatory hearing and the stipulation of the parties.

1. Respondent Alan Grout is a person as defined in 6 NYCRR 608.1 (y). (Stipulation of facts [Stipulation], Exh 4, ¶ 1.)
2. Mr. Grout is owner and president of Golden Harvest Farms, Inc., an apple orchard located in Valatie, New York. (Grout Testimony [Grout], Transcript [Tr] at 126; Exhs 15-17, 21.)
3. In early 2006, Mr. Grout became interested in purchasing a 22.9 acre parcel of land located on the east side of Fordham Road, Valatie, New York (Tax ID No. 32.-1-11.121). The parcel is located south of and adjacent to Mr. Grout's existing orchard. The purpose of

purchasing the parcel was potentially to provide irrigation to his existing orchard and to plant more apple trees. (Grout, Tr at 132, 134, 137-139, 146; Exhs 13A, 13B, 17.)³

4. At that time, Mr. Grout was aware that any development on the parcel had to be approved by the Department. (Grout, Tr at 148.)

5. In August 2006, Mr. Grout contacted the Department. (Stipulation, Exh 4, ¶ 2.)

6. On August 18, 2006, Department staff and Mr. Grout met at the Fordham Road property to discuss the construction of a proposed irrigation pond on the property. (Stipulation, Exh 4, ¶ 3; Grout, Tr at 150.)

7. Nancy Heaslip, a wildlife and wetland biologist for the Department who met with Mr. Grout at the property, told Mr. Grout that although the parcel contained wetlands, no permit was required for the construction of an agricultural irrigation pond. (Fraine Testimony [Fraine], Tr at 20; Grout, Tr at 149-151, 153, 154.)

8. In April 2007, Mr. Grout contacted the New York State Department of Agriculture and Markets, the New York Farm Bureau, the Town of Kinderhook code enforcement officer, and the Town of Kinderhook assessor to determine whether any restrictions prevented him from farming the parcel. Representatives of each of those entities informed Mr. Grout that no restrictions on agricultural uses of the property existed. The code enforcement officer, however, informed Mr. Grout that the property contained wetlands and that all DEC regulations must be met. (Grout, Tr at 157-161; Exhs 15, 16.)

9. On October 18, 2007, Mr. Grout contacted the Department to indicate he was moving forward with the purchase of the property for the future construction of an irrigation pond. (Stipulation, Exh 4, ¶ 6.)

10. Mr. Grout contacted staff to make sure that no permit was needed to construct a pond on the property. Ms. Heaslip told Mr. Grout that she would contact Mr. Dangler from the Army Corps of Engineers to make sure a permit was not required. Mr. Grout did not receive a follow up email from Mr. Dangler, so he assumed that no permit was required for the property. (Grout, Tr at 155.)

11. On October 31, 2007, Mr. Grout purchased the property for the purpose of constructing an irrigation pond and planting future orchards. (Stipulation, Exh 4, first ¶ 4.) Mr. Grout financed the purchase with a \$150,000 loan. (Grout, Tr at 207; Exh 21.)

³ Exhibit 17 identifies the parcel's tax map ID no. as 32.-1-11.12. Columbia County's on-line assessment information database, of which I take judicial notice, indicates that the parcel's tax ID no. is 32.-1-11.121 (see <http://columbia.sdgny.com/propdetail.aspx?swis=104489&printkey=03200000010111210000>).

12. The Department's map shows the Stuyvesant Brook passing through several irrigation ponds on Mr. Grout's existing orchard (Golden Harvest Farms) and the new farm pond located on Mr. Grout's newly-purchased property (subject parcel). (Stipulation, Exh 4, ¶ 5; see also Exh 5A.)

13. The Stuyvesant Brook is classified as a class C(t) stream pursuant to Department regulation at 6 NYCRR 863.6, Table 1, Item 531, Waters Index No. H-209-1. (Stipulation, Exh 4, second ¶ 4.)

14. The subject parcel also contains a portion of State-regulated freshwater wetland K-113. (See Exh 10.)

15. On April 9, 2008, Mr. Grout met with Ms. Heaslip at the Department's Region 4 office to discuss the planned location for the irrigation pond. (Grout, Tr at 163-164; Stipulation, Exh 4, ¶ 7.)⁴

16. On April 20, 2008, Mr. Grout contacted the Department by phone, followed up by fax on April 21, 2008. (Stipulation, Exh 4, ¶ 8.) Mr. Grout informed Ms. Heaslip that he was beginning tree removal for the pond project and would like to have on-site suggestions for placement of excavated soil. (Exh 17.)

17. In July 2008, Department staff was notified of activity on the purchased property. (Stipulation, Exh 4, ¶ 9.)

18. On July 21, 2008, Ms. Heaslip phoned Mr. Grout and requested that he cease any work on the purchased property until they could meet on-site to discuss. (Stipulation, Exh 4, ¶ 10; Grout, Tr at 176-177.) Ms. Heaslip informed Mr. Grout that a "trout stream permit" might be required for the farm pond project. (Grout, Tr at 177-178.)

19. On July 24, 2008, Mr. Grout met with Department staff on the subject parcel to discuss the Stuyvesant Brook. (Stipulation, Exh 4, ¶ 11.)

20. Jerome Fraine, former Regional wildlife manager and habitat biologist for DEC Region 4, and an expert on protected streams for the Department, was one of the Department staff members that visited the subject parcel on July 24, 2008. (Fraine, Tr at 19.)

21. During Mr. Fraine's visit in July 2008, no pond was constructed on the subject parcel, and no work digging the pond or diverting any stream had begun. (Fraine, Tr at 31; Grout, Tr at 237.)

⁴ The parties' stipulation indicates that the meeting took place at the purchased property (see Stipulation, Exh 4, ¶ 7). However, Mr. Grout's testimony, which I credit, was that the meeting took place at the Department's Region 4 offices (see Grout, Tr at 163-164).

22. During his visit in July 2008, Mr. Fraine observed wetlands on and the main channel of the Stuyvesant Brook flowing through the subject parcel. (Fraine, Tr at 24, 27, 31, 35-36; Exh 6A.)

23. From a farm lane located on the northern portion of the subject parcel, Mr. Fraine observed flowing water and wetland vegetation that meandered down a valley on the parcel. The water flowed from an existing farm pond located to the north of the farm lane on Mr. Grout's existing orchard, Golden Harvest Farm. The water flowed through a culvert under the farm lane and discharged onto the subject parcel. (Fraine, Tr at 31-36, 67-68, 89, 103; Grout, Tr at 180-183; Exhs 5A, 6A.)

24. Mr. Fraine observed the bed and banks of the Stuyvesant Brook. He also observed that at the location of the subject parcel, the Stuyvesant Brook did not have a single defined channel for a portion of its course over the parcel. (Fraine, Tr at 31, 34-36, 68-69.)

25. During the July 2008 visit, Mr. Fraine informed respondent that the Stuyvesant Brook was a protected stream under ECL article 15 and that respondent would need a permit for any disturbance of the stream. (Fraine, Tr at 39, 79.) Department staff expressed the concern that diverting Stuyvesant Brook into a new farm pond would warm the water in the Brook and cause adverse thermal impacts to trout habitat downstream (Fraine, Tr at 46, 87-88; Grout, Tr at 179, 187-188).

26. Mr. Fraine stated that based on his observation in July 2008, sufficient vacant land existed beyond the farm road on the subject parcel to the east of the stream to create a farm pond without disturbing the Stuyvesant Brook. Relocating the pond to the east of the stream was one of the options Mr. Fraine discussed with Mr. Grout during the July 2008 visit. Mr. Fraine also indicated to Mr. Grout that staff would entertain moving the stream either to the west or east as part of a permit application. (Fraine, Tr at 50-51, 79, 90, 93, 104.)

27. After the meeting with Department staff at the subject parcel concluded and Department staff departed, Mr. Grout's contractor recommended diverting Stuyvesant Brook into a culvert so as to by-pass the new pond and avoid heating the water. The diversion was completed July 30, 2008. (Grout, Tr at 190, 192-195, 223-224, 228, 230-231.)

28. At no time during or after the July 2008 site visit did Mr. Grout inform Mr. Fraine or the Department about respondent's plan to divert the Stuyvesant Brook as part of his pond project or receive any approvals for the diversion. (Fraine, Tr at 39, 79-81, 104-105; Grout, Tr at 194-195, 224, 230-231.)

29. In November 2008, Ms. Heaslip called Mr. Grout and informed him that a permit might be required for the pond. Ms. Heaslip requested a site visit and indicated that she would call later to schedule one. (Grout, Tr at 195-196.)

30. Ms. Heaslip conducted a site visit in October 2009 with two other Department employees. During the site visit, Ms. Heaslip notified Mr. Grout that the construction of the pond required a permit and that the case was going to be referred to the Department's legal department. (Grout, Tr at 200.)

31. Mr. Fraine did not revisit the site or have any conversation with respondent after July 2008, until November 20, 2009, when Mr. Fraine was contacted by Ms. Heaslip about a possible violation of Article 15 at the Grout property. (Fraine, Tr at 40.)

32. Mr. Fraine visited the subject parcel on November 20, 2009. During the visit, he observed a new pond constructed on the site in the location where the Stuyvesant Brook used to flow. The Stuyvesant Brook was no longer flowing out in the open. Instead, the Brook was diverted into a 500-foot, 15-inch diameter culvert pipe buried on the west side of the new pond. About half way down, the pipe is connected to the new pond with a concrete structure -- a drop inlet -- used for controlling the level of the pond. Water from the new pond discharged into the culvert pipe through the drop inlet. (Fraine, Tr at 41-45, 53-55; Exhs 5A, 7, 9A.)

33. The impact of burying the stream in the pipe was to destroy all fish habitat for 500 feet. In addition, discharging water from the new pond into the buried stream through the drop inlet would have the effect of warming the stream during summer months and causing adverse thermal impacts to trout habitat downstream. (Fraine, Tr at 43, 46-47, 85-88.)

34. Mr. Fraine testified that the stream can be restored by creating a channel to the west of the pond with proper gradient and elevation, revegetating the channel with natural substrate, and diverting the stream from the buried pipe into the open channel. (Fraine, Tr at 57-59.)

35. Alan Grout never applied for an Article 15 permit to divert and bury the Stuyvesant Brook. (Stipulation, Exhibit 4, ¶ 12; Fraine, Tr at 39-40.)

36. After Mr. Grout was notified about the violation, he spoke with Steven Nack, the head of Columbia County Soil and Water, to assist Mr. Grout in working with the Department to remediate the violation. (Grout, Tr at 205.)

37. Mr. Nack's proposed remediation plan was submitted to the Department in June 2010 (Exh 12). Department staff did not accept the proposal because, among other reasons, the remediated portion of the stream would flow into the existing stream over a waterfall, which would prevent fish from using the remediated portion as habitat. The proposal also only brought 250 feet of the stream into daylight. (Grout, Tr at 206; Fraine, Tr at 96-97, 100-101, 107-108, 111, 115-116.)⁵

⁵ Mr. Grout testified that after the remediation plan was rejected by the Department, Mr. Nack modified the proposal and re-submitted it to the Department (see Grout, Tr at 206). Mr. Grout further testified that the modified proposal was also rejected by the Department (see *id.*). The

38. In or about 2012, Mr. Grout planted special red strain honey crisp apple trees on the purchased property. The trees were ordered in or about 2010 prior to planting due to a waiting list. (Stipulation, Exhibit 4, ¶ 13.)

39. Department staff served a first notice of hearing and complaint dated May 5, 2014. Respondent Grout, among other things, served an answer dated June 6, 2014, raising, among other defenses, a defense that the complaint was not properly served on respondent. On June 25, 2014, Department staff notified respondent and the ALJ that it was withdrawing the first notice of hearing and complaint. Thereafter, Department staff served a notice of hearing and complaint dated June 25, 2014. Respondent subsequently served a revised answer dated July 7, 2014. (See Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014, at 1-2; Exhs 1-2.)

III. DISCUSSION

A. Standards of Review

Pursuant to the Department's Uniform Enforcement Hearing Procedures (6 NYCRR part 622 [Part 622]), Department staff bears the burden of proof on all charges and matters affirmatively asserted in the complaint (see 6 NYCRR 622.11[b][1]). Respondent bears the burden of proof on all affirmative defenses (see 6 NYCRR 622.11[b][2]). Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

B. Violation

1. Liability

In its June 2014 complaint, as corrected by my December 12, 2014 ruling, Department staff alleged that respondent violated 6 NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook (stream identification number H-209-1), a class C(t) stream, in a 500-foot long culvert pipe without a permit at the property respondent owns on Fordham Road, Valatie, Town of Kinderhook, Columbia County (see Exh 1).

record contains no evidence, however, corroborating the existence of a modified proposal or the Department's review of such a proposal. Accordingly, I do not find the existence of a modified proposal as being supported by a preponderance of the evidence.

Section 608.2(a) provides that “no person . . . may change, modify or disturb any protected stream, its bed or banks, nor remove from its bed or banks sand, gravel or other material, without a permit issued pursuant to this Part” (see also ECL 15-0501[1]). Section 608.1(aa) defines a protected stream as “any stream or particular portion of a stream for which there has been adopted by the department or any of its predecessors any of the following classifications or standards: AA, AA(t), A, A(t), B, B(t), or C(t)” (see also ECL 15-0501[2]). Waters with the symbol “(t)” are waters suitable for trout habitat (see 6 NYCRR 700.1[a][67]; 6 NYCRR 863.3[h]).

Stream bed is defined as “that land area of a watercourse covered by water at mean high water” (6 NYCRR 608.1[b]). Stream bank is defined as “that land area immediately adjacent to, and which slopes toward, the bed of a watercourse, and which is necessary to maintain the integrity of a water course. For purposes of this Part, a bank will not be considered to extend more than 50 feet horizontally from the mean highwater line” (6 NYCRR 608.1[a]).

In this matter, respondent stipulates that Mr. Grout is a person under the regulations (see Finding of Fact No. 1, above). Moreover, Department staff established by a preponderance of the credible record evidence that a protected stream -- the Stuyvesant Brook -- flowed across the subject parcel. The Department’s regulatory stream map shows the source of the main channel of the Stuyvesant Brook (Waters Index No. H-209-1) as being located to the northeast of the ponds on Golden Harvest Farm (see 6 NYCRR 863.9, Map L-25nw Kinderhook). The map shows the stream flowing generally west-southwest through the six ponds on Golden Harvest Farm and generally southwest across the subject parcel, where it meets with the stream’s eighth tributary before flowing west under Fordham Road (see id.; see also Exh 5A [showing stream H-209-1 superimposed on an aerial photograph of the area entitled “Soil Map - Columbia County, New York (Golden Harvest Pond)”). The main channel of the Stuyvesant Brook continues generally to the southwest until it flows into Mill Creek (see id.; id. Map L-24ne Ravana). Mill Creek (Waters Index No. H-209) flows generally north-northwest until it joins the Hudson River north of the Hamlet of Stuyvesant (see id.).

Department regulations classify the main channel of the Stuyvesant Brook as a class C(t) stream (see 6 NYCRR 863.6, Table 1, Item 531). The Stuyvesant Brook has been designated a class C(t) stream since it was first classified by the Water Resources Commission, a predecessor agency to the Department, in 1964 (see 6 NYCRR 863.1, Adopting Order, effective Feb. 5, 1964; see 6 NYCRR 863.6, Table 1, Item 531, effective Feb. 5, 1964). The Water Resources Commission classified Stuyvesant Brook along with the other streams entering the Hudson River in Albany, Columbia, Greene, and Rensselaer Counties after study and public hearings (see id.; see also New York State Dept. of Health, Drainage Basins of Streams Entering the Hudson River in Albany, Columbia, Greene, and Rensselaer Counties, Lower Hudson River Drainage Basin Survey Series Report No. 11 [1962] [1962 Stream Study]).

Department staff’s stream expert, Jerome Fraine, confirmed the existence of the main channel of the Stuyvesant Brook on the subject parcel during the site visit in July 2008. While at the site, Mr. Fraine confirmed that the stream flowed from the existing farm ponds

north of the farm lane through a culvert under the farm lane, and meandered across and through the wetland on the subject parcel (see Findings of Fact nos. 20-24, above). Mr. Fraine noted the bed and banks of the stream and observed that Stuyvesant Brook did not have a single defined channel for a portion of its course over the parcel (see *id.*). Mr. Fraine explained that it is not uncommon for a stream to have multiple channels that are all part of the same body of water (see Fraine, Tr at 68-69).

Respondent argues that Department staff failed to clearly establish the existence of Stuyvesant Brook on the subject parcel. Respondent contends that Mr. Fraine's testimony merely established the presence of water in a wetland, and not the presence of a stream. Further, respondent contends that Mr. Fraine is not qualified as a stream expert. Finally, in support of his position, respondent relies on the testimony of Mr. Grout stating that he has not observed a stream on the subject parcel.

Respondent's arguments are unpersuasive. First, respondent's challenge to Mr. Fraine's qualifications as a stream expert are untimely. Respondent raised no objection to Mr. Fraine's qualifications at the hearing and did not object to any questions posed by staff seeking his expert opinion on the ground that he was unqualified to answer. Moreover, Mr. Fraine's education, training, and experience -- including his experience in stream surveying and identification -- qualify him to offer his expert opinion regarding the location of a stream and its bed and banks (see Fraine, Tr at 15-18). Contrary to respondent's assertions, Mr. Fraine offered his opinion based upon his observations in the field and he corroborated those observation with photographic record evidence. Finally, Mr. Grout has no experience or qualifications as a stream expert. Accordingly, his lay opinion about the existence or non-existence of Stuyvesant Brook is not competent to rebut Mr. Fraine's expert testimony. Accordingly, the preponderance of competent record evidence supports the conclusion that Stuyvesant Brook flowed through the subject parcel at the time of the 2008 site visit.

Department staff also carried its burden of proving that respondent disturbed the Stuyvesant Brook. Mr. Fraine testified that during his site visit in November 2009 that the Stuyvesant Brook had been diverted into a 500-foot long, 15-inch diameter culvert pipe buried on the west side of the new pond (see Finding of Fact no. 32, above). Mr. Grout also admitted diverting the stream into the culvert pipe on the recommendation of his contractor (see Finding of Fact no. 27). Finally, Mr. Grout stipulated, and Mr. Fraine confirmed, that respondent never applied for a permit to divert and bury the Stuyvesant Brook (see Findings of Fact nos. 28, 35). Accordingly, Department staff has established by a preponderance of the credible record evidence that respondent Grout disturbed the Stuyvesant Brook, a class C(t) protected stream, without a permit in violation of 6 NYCRR 608.2(a).

2. Penalty

Department staff seeks a penalty in the amount of one thousand two hundred dollars (\$1,200) for respondent's violation of 6 NYCRR 608.2(a). ECL 71-1127 authorizes a

civil penalty of up to two thousand five hundred dollars (\$2,500) for each violation of ECL article 15 and its implementing regulations, and an additional penalty of five hundred dollars (\$500) for each day the violation continues. Given the length of time that the violation has continued -- since at least July 30, 2008 through the date of the hearing -- a \$1,200 penalty is well below the statutory maximum for the violation, and is justified and warranted by the record in this proceeding.

3. Remedial Relief

Department staff requests an order directing respondent to submit to the Department for approval a plan to restore the stream to its natural condition, including a stream channel of the same width, gradient, and elevation as the original stream, within 60 days of service of the Commissioner order on respondent. Staff also seeks an order directing respondent to complete the work contained in the Department approved stream restoration plan within 120 days of service of the Commissioner's order on respondent.

Staff's request for remedial relief is supported by Mr. Fraine's testimony. At the hearing, Mr. Fraine testified that the impact of burying the Stuyvesant Brook in a culvert pipe was to destroy all fish habitat for 500 feet, and that the discharge of water from the new pond into the culvert pipe would have the effect of warming the stream during summer months with adverse thermal impacts to trout habitat downstream (see Finding of Fact no. 33). Mr. Fraine also testified that the Stuyvesant Brook can be restore by creating a channel to the west of the new pond with proper gradient and elevation, revegetating the channel with natural substrate, and diverting the stream from the buried pipe into the open channel (see Finding of Fact no. 34).

In response, respondent argues that Department staff failed to carry its burden of establishing the appropriateness of the remedial relief it is seeking. Staff's request for relief, as noted above, is supported by Mr. Fraine's credible record testimony, and respondent failed to provide any rebuttal evidence regarding the impacts of the stream diversion and the appropriateness of returning the stream as much as possible to its original condition.

Respondent further asserts that the diversion's impact is minimal, given the lack of evidence that trout used the portion of the stream at issue, and that requiring respondent to relocate the stream will cause "substantial and irreversible harm" and "'extreme injustice" to Mr. Grout by depriving him of his farm pond. Respondent's arguments regarding the environmental impacts of the diversion are significantly understated. First, to the extent respondent is again seeking to challenge the Stuyvesant Brook's designation as a class C(t) stream, as I have previously ruled, an administrative enforcement proceeding is not the appropriate forum to raise a challenge to a stream designation (see Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014, at 13). Rather, stream classifications were established through rulemaking

proceedings, and a specific, statutorily prescribed regulatory process is established for parties seeking modification of those designations (see ECL 17-0301[9]-[14]).⁶

Second, pursuant to statutory mandate, stream classifications are based upon the water's best usage (see ECL 17-0301[2]). A water's best usage may be based upon a water's potential as well as its present uses (see ECL 17-0301[3][c]; see also Flacke v Bio-Tech Mills, Inc., 95 AD2d 916, 917 [3d Dept], lv denied 60 NY2d 553 [1983]). Under the State's stream classification system, the "C" designation indicates that the water's best usage is for fishing (see 6 NYCRR 701.8).⁷ The "(t)" designation indicates that the waters are trout habitat (see 6 NYCRR 701.25[a]). The record reflects that studies in 1959 observed brown trout in the Stuyvesant Brook, justifying the Brook's best usage classification in 1964 as a class C(t) stream (see Exh 22). The circumstance that trout have not recently been observed in specific C(t) waters does not undermine the waters' best usage as trout habitat.

Finally, staff is not required to provide evidence that a particular section of stream is used by trout in order to uphold a stream's "(t)" designation. As the Department's expert, Mr. Fraine, explained, entire streams are designated as trout habitat, even if various portions are not suitable for trout, in order to protect the entire trout habitat ecosystem (see Fraine, Tr at 86-87). Thus, the destruction of 500 feet of trout habitat near the source of the main channel of a

⁶ In post-briefing submissions, respondent cites United States Army Corps of Engrs. v Hawkes Co., Inc. (136 S Ct 1807 [2016]) in support of his assertion that stream classifications may be challenged in administrative enforcement proceedings both with respect to liability and the appropriateness of the requested relief. The Hawkes Co. case is inapposite. That matter, which involved a challenge to an Army Corps of Engineers' jurisdictional determination under the federal Clean Water Act, addressed a statutory scheme entirely different from the scheme involved in this matter. Unlike the Corps' jurisdictional determinations, which are done on a case-by-case basis (see 136 S Ct at 1812), State stream classifications and modifications to those classifications are the subject of agency rulemaking procedures (see ECL 17-0301[9]-[14]). In addition, Hawkes Co. concerned whether the Corps' jurisdictional determination was a final agency determination subject to judicial review (see 136 S Ct at 1811). Hawkes Co. did not address whether jurisdictional determinations or rulemakings are subject to review in administrative enforcement proceedings. Thus, Hawkes Co. does not support the proposition that stream classifications under the ECL are subject to challenge in 6 NYCRR part 622 administrative enforcement proceedings.

⁷ The State's system of water classifications and quality standards was originally adopted by the Water Pollution Control Board, a predecessor to the Department and the Water Resources Board, in 1950 (see Sixth Official Supplement to the Office Compilation of Codes, Rules and Regulations of the State of New York at 208 [1951]; see also Matter of Town of Waterford v Water Pollution Control Bd., 5 NY2d 171, 175-176 [1959]). The Legislature approved and adopted the classification system (see ECL 17-0301[7]), and the classifications are codified at 6 NYCRR part 701.

protected stream is a significant environmental impact notwithstanding the lack of evidence of trout in that location.

In contrast, respondent's arguments concerning the impact the requested remediation would have on Mr. Grout's pond are overstated, unsubstantiated and lacking in any evidentiary basis. Respondent's theory is that relocating the stream out of the culvert will eliminate the source of water for Mr. Grout's new pond and, thus, will deprive him of a source of irrigation for his new apple orchard. The record evidence does not support respondent's argument. To the contrary, Mr. Grout himself testified that placing the Stuyvesant Brook in the culvert diverted the Brook around the new pond, not into it (see Grout, Tr at 190, 192-194, 228, 231). The record establishes that overflow from the new pond drains into the culvert through a drop inlet, not the other way around (see Finding of Fact no. 32). Moreover, respondent's own proposed remediation, which proposed to divert the Stuyvesant Brook around the new pond to the west, states that the plan would retain "sufficient capacity in the irrigation pond to meet Golden Harvest's agricultural needs" (Exh 12, at 1 and Fig 2).

Respondent offers no record evidence establishing that the Stuyvesant Brook is a source of water for the new pond, or that removing the Stuyvesant Brook from the culvert will result in dewatering the new pond. Moreover, it is not reasonably inferable that the Stuyvesant Brook is a source of water for the new pond. The record shows that the Stuyvesant Brook flows through what it is designated as Pond 2 to the north of the farm lane (see Finding of Fact no. 23, above; Exhs 13A and 13B). Water from Pond 2 flows into a culvert under the farm lane and discharges onto the subject parcel (see id.). Respondent already used Pond 2 for irrigation purposes, but needed an additional source of water for irrigating his new orchard. Accordingly, respondent constructed the new pond, designated Pond 1 on the exhibits (see Exhs 13A and 13B). No basis exists for concluding that the source of the water in Pond 1 is water from Pond 2, a pond to which respondent already had access and which was already being used for irrigation. Thus, respondent provides no reasonable basis for concluding that relocating the Stuyvesant Brook out of the culvert and returning it to the surface will have any impact on the viability of the new Pond 1.

In sum, Department staff carried its burden of providing record evidence in support of the remedial relief requested in this matter, and respondent failed to provide any evidence in rebuttal. Accordingly, Department staff's request for an order directing respondent to restore the stream to its natural condition pursuant to a Department approved plan should be granted.

C. Affirmative Defenses

Under Part 622, a respondent bears the burden of proof on all affirmative defenses (see 6 NYCRR 622.11[b][2]). Whenever factual matters are involved, the party with the burden of proof must sustain that burden by a preponderance of the evidence (see 6 NYCRR 622.11[c]).

Respondent pleaded four affirmative defenses in his July 7, 2014 answer: (1) the inapplicability of the ECL 24-0701 freshwater wetland permit requirement to respondent's activity at the site (see 6 NYCRR 622.4[c]), (2) laches or unreasonable delay, (3) equitable estoppel, and (4) failure to join a necessary party. By ruling dated December 12, 2014, I dismissed the first affirmative defense and that portion of the second affirmative defense as pleaded a laches defense (see Matter of Grout, Ruling of the Chief ALJ on Motions, Dec. 12, 2014, at 16).

Respondent failed to present any evidence in support of his fourth affirmative defense at the hearing, and failed to raise the defense in post-hearing briefing. Accordingly, the fourth affirmative defense of failure to join a necessary party should be dismissed on the ground that respondent failed to carry his burden of proof on the defense (see 6 NYCRR 622.11[b][2]). The remaining defenses of unreasonable delay and equitable estoppel are addressed in turn.

1. Unreasonable Delay

In the remaining portion of his second affirmative defense, respondent alleged that the Department failed to commence this enforcement proceeding within a reasonable amount of time in accordance with State Administrative Procedure Act (SAPA) § 301(1), Part 622, and the holding in Matter of Cortlandt Nursing Home v Axelrod (66 NY2d 169, 178 [1985], cert denied 476 US 1115 [1986]). To establish a defense under Cortlandt, respondent must establish substantial actual prejudice resulting from the Department's delay in convening the hearing (see Cortlandt, 66 NY2d at 177-178; Matter of Diaz Chem. Corp. v New York State Div. of Human Rights, 91 NY2d 932, 933 [1998]; see also Matter of Giambrone, Decision and Order of the Commissioner, March 1, 2010, at 11-13, confirmed in relevant part sub nom Matter of Giambrone v Grannis, 88 AD3d 1272, 1273 [4th Dept 2011]). Mere passage of time in rendering an administrative determination does not, standing alone, constitute prejudice (see Matter of Louis Harris and Assocs., Inc. v deLeon, 84 NY2d 698, 702 [1994]).

To determine whether a period of delay is unreasonable within the meaning of SAPA § 301(1), agencies and reviewing courts weigh certain factors, including (1) the nature of the private interest allegedly compromised by the delay; (2) the actual prejudice to the private party in the defense of the proceeding; (3) the causal connection between the conduct of the parties and the delay; and (4) the underlying public policy advanced by governmental regulation (see Cortlandt, 66 NY2d at 177-178). With respect to the actual prejudice to the private party, the relevant inquiry is into whether the administrative delay significantly and irreparably handicapped the private party in mounting a defense in the administrative proceeding (see Cortlandt, 66 NY2d at 180-181; Matter of Corning Glass Works v Ovsanik, 84 NY2d 619, 624-625 [1994]).

The period of "delay" relied upon by respondent in closing briefing runs from November 2008, when Department staff first became aware of the violation, to May or June 2014, when Department staff served the first and second notice of hearing and complaint,

respectively (see Findings of Fact nos. 29, 39). However, during the period from November 2008 to June 2010, the parties were engaged in efforts to resolve the violation without litigation (see Findings of Fact nos. 36-37). Accordingly, taking the parties' conduct into account, the relevant period of "delay" is from approximately June 2010 to May 2014.

With respect to actual prejudice to respondent occasioned by the "delay," respondent offered no evidence that the delay in commencing this proceeding had any adverse impact on his ability to mount a defense. Nor is any prejudice to respondent in the defense of this proceeding apparent on the record. To the contrary, respondent offered his own testimony and documents in response to Department staff's case. Accordingly, respondent has failed to carry his burden of establishing any relevant prejudice in his defense of this matter occasion by staff's four-year delay in commencing this proceeding (see Cortlandt, 66 NY2d at 180-181; Corning Glass Works, 84 NY2d at 624-625).

Finally, even assuming respondent established any relevant prejudice, which he did not, the Department's interest in enforcing the State's stream protection laws outweighs any prejudice to respondent. The protection of fish habitat, especially trout habitat, among other goals, has been a central aim of the State's modern stream protection program since at least the 1950s when the State's water classification program first began (see ECL 15-0103[8]; ECL 15-0105[7]).

Respondent argues that the private interests at issue in this matter include the debt respondent has incurred, the potential loss of his orchards and trees, the survival of his farm, and his right to be treated fairly by the Department. However, the record does not support these assertions. As noted above, respondent offered no evidence that relocating Stuyvesant Brook out of the culvert will have any adverse impact on the viability of his agricultural pond. Nor did he provide any evidence that relocating the Brook is beyond his financial means. Thus, respondent makes no showing that remediating the violation will result in the loss of his investments or his farm.

With respect to respondent's interest in being treated fairly by the Department, the record establishes that respondent was informed of the need to obtain a permit to relocate the Stuyvesant Brook at a time when he had options regarding the location of the farm pond and the Brook (see Findings of Fact nos. 25-26). Moreover, as noted above, the record establishes that respondent had a full and fair opportunity to defend against the Department's charges against him. Thus, no undue unfairness to respondent as a result of the delay is apparent from the hearing record.

In sum, the State's interest in protecting and maintaining trout habitat far outweighs any potential prejudice to respondent's private interests implicated by the four-year delay in commencing this proceeding. Respondent has failed to carry his burden of proof on his administrative delay defense and, accordingly, the remaining portion of his second affirmative defense should be dismissed.

2. Equitable Estoppel

In his third affirmative defense, respondent raises the defense of equitable estoppel. As a general rule, equitable estoppel is not applicable to a State agency acting in a governmental capacity in the discharge of its statutory responsibilities (see Matter of Wedinger v Goldberger, 71 NY2d 428, 440-441 [1988]; Matter of Parkview Assocs. v City of New York, 71 NY2d 274, 282, appeal dismissed and cert denied 488 US 801 [1988]; see also Matter of Bartell, ALJ Ruling, June 11, 2009, at 12). Estoppel is not available for purposes of ratifying an administrative error, and an agency may correct errors, even when that correction involves the modification of a permit or other approval (see Parkview Assocs., 71 NY2d at 282; see also Matter of Village of Fleischmanns, 77 AD3d 1146, 1148 [3d Dept 2010] [erroneous advice by a governmental employee will not give rise to an exception to the general rule]).

Only in the rarest of cases may an agency be equitably estopped for wrongful or negligent acts or omissions by the agency that induce reliance by a party who is entitled to rely and who changes its position to its detriment or prejudice (see Parkview, 71 NY2d at 282; Bender v New York City Health & Hosps. Corp., 38 NY2d 662, 668 [1976]; see also Matter of Martino, Rulings of the ALJs, April 28, 2008, at 3-4). As I have previously noted (see Matter of Grout, Ruling of the Chief ALJ on Motion for Leave to Reargue, Aug. 14, 2015, at 10), respondent bears a heavy burden to establish the defense to avoid liability for the failure to obtain a permit for the disturbance of the protected stream. The defense to liability for a violation of a statute should be allowed only when failure to do so would operate to defeat a right legally and rightfully obtained (see Waste Recovery Enterprises, LLC v Town of Unadilla, 294 AD2d 766, 768 [3d Dept 2002], lv denied 1 NY3d 507, cert denied 542 US 904 [2004]; Matter of Hauben v Goldin, 74 AD2d 804, 805 [1st Dept 1980]; Matter of McLaughlin v Berle, 71 AD2d 707 [3d Dept 1979], affd for reasons stated below 51 NY2d 917 [1980]).

Here, respondent argues that relying on Ms. Heaslip's repeated assurances that a permit was not required to construct a farm pond on the subject parcel, respondent incurred \$150,000 in debt to purchase the property, construct the pond, and planted a new orchard. Respondent argues that requiring a permit and remedial action at this time would prejudice him by depriving him of a source of water for his new orchard. Accordingly, respondent asserts, the Department should be equitably estopped from enforcing any violations under ECL article 15.

Respondent's arguments are unpersuasive and lacking in evidentiary support. First, Ms. Heaslip's advice that an ECL article 24 freshwater wetland permit was not required to construct an agricultural pond was correct provided respondent did not place fill in the wetland (see ECL 24-0701[4] [excepting certain agricultural activities from the freshwater wetland permit requirement]). Nothing in the record indicates that Mr. Grout described his agricultural pond project to Ms. Heaslip in anything more than the most general terms, and certainly not in sufficient detail to suggest that his project included relocating a stream. The record does not support a conclusion that Ms. Heaslip's advice provided Mr. Grout with the legal right to alter a protected stream without a permit. At most, Ms. Heaslip's failure to advise Mr. Grout that an ECL article 15 protection of waters permit might be needed constituted mere error on her part.

In any event, whatever error Ms. Heaslip may have committed, Department staff corrected that error at a time when Mr. Grout could have taken action to avoid any violations of ECL article 15 and still construct the farm pond and plant his new orchard. Specifically, on July 21, 2008, Ms. Heaslip called Mr. Grout and asked him to stop work on the pond project because a stream protection permit might be required for the project (see Finding of Fact no. 18). Only a few days later, during the meeting with Mr. Grout at the subject parcel on July 24, 2008, Mr. Fraine expressly notified Mr. Grout of the existence of a protected stream running through the parcel, and that any disturbance of the stream would require a permit (see Finding of Fact no. 25). At the time of the meeting, no work digging the pond or diverting the stream had yet taken place (see Finding of Fact no. 21). Moreover, Mr. Fraine discussed various options for constructing the pond with Mr. Grout, including relocating the stream, with a Departmental permit, to the west of the proposed pond (see Finding of Fact no. 26). Accordingly, at that time, Mr. Grout was on notice of the potential need for a permit to relocate the stream, and any subsequent actions he took in diverting the stream and constructing the pond could not have been in reliance on Ms. Heaslip's earlier advice. Thus, any prejudice Mr. Grout might suffer in remediating the violation is due to his own actions in ignoring Mr. Fraine's instructions,⁸ and not due to any earlier omissions or errors on Ms. Heaslip's part.

Moreover, as noted above, respondent failed to establish on this record that remediating the stream diversion will result in the loss of the farm pond and the source of water for his new orchard. As concluded above, no evidence exists that the Stuyvesant Brook is a source of the water for the new pond (see Section III.B.3, above). Rather, respondent diverted the Stuyvesant Brook to avoid the new pond, and the new pond drains into Stuyvesant Brook, not the other way around (see id.). Accordingly, respondent failed to carry his burden of proving that he will be prejudiced by the remedial relief sought in this matter.

⁸ Respondent argues that a conclusion that Mr. Grout "ignored" Mr. Fraine's instructions is belied by Mr. Grout's background and actions (see Resp's Closing Brief on Affirmative Defenses at 19). Respondent relies on Mr. Grout's background of government service in relation to agricultural regulations and his awareness of their importance, and Mr. Grout's action in contacting multiple governmental and non-governmental agencies to determine what requirements might apply to the subject parcel. However, a reasonably diligent good-faith search by someone of Mr. Grout's claimed background would have readily uncovered the Department's stream classification regulations and maps for the parcel that, at the very least, could have led to a more specific inquiry of the Department prior to his purchase of the property (see Parkview Assocs., 71 NY2d at 282). Both before and during the July 24, 2008 site visit with staff, Mr. Grout was informed that a permit might be required for disturbances of the stream. Moreover, Mr. Grout's actions in diverting the stream after its existence was brought to his attention demonstrate that he was aware of the problem. Given his background and actions, Mr. Grout's testimony that he did not hear Mr. Fraine's instruction that a permit was needed to divert the stream lacks credibility.

In sum, respondent failed to carry his burden of proof on his equitable estoppel defense. Accordingly, respondent's third affirmative defense should be dismissed.

IV. CONCLUSIONS OF LAW

1. Department staff proved by a preponderance of the record evidence that respondent Alan Grout violated 6 NYCRR 608.2(a) by burying a protected stream known as the Stuyvesant Brook (stream identification no. H-209-1), a class C(t) stream, in a 500-foot culvert pipe without a permit at respondent's site located on Fordham Road, Valatie, New York.
2. The \$1,200 civil penalty and remedial relief requested by Department staff is justified, warranted, and supported by the hearing record.
3. Respondent Alan Grout failed to carry his burden of proof on his remaining affirmative defenses.

V. RECOMMENDATIONS

Based on the foregoing, I recommend that the Executive Deputy Commissioner issue an order:

1. Holding respondent Alan Grout liable for his violation of 6 NYCRR 608.2(a);
2. Imposing upon respondent Alan Grout a civil penalty in the amount \$1,200;
3. Directing respondent Alan Grout to submit to the Department, within 60 days after service of the Commissioner order on him, for approval a plan to restore the Stuyvesant Brook to its natural condition, including a stream channel of the same width, gradient, and elevation as the original stream;
4. Directing respondent Alan Grout to complete the work contained in the Department approved stream restoration plan within 120 days of service of the Commissioner's order on him; and

5. Dismissing respondent's affirmative defenses.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: August 15, 2017
Albany, New York

Exhibit List attached

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

MATTER OF GROUT
DEC File No. R4-2009-1120-176

EXHIBIT LIST
Updated 12/10/15

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
1	Notice of Hearing and Complaint dated June 25, 2014	✓	✓	OHMS	As corrected by Chief ALJ Ruling Dec. 12, 2014
2	Answer dated July 7, 2014	✓	✓	OHMS	With first affirmative defense and a portion of the second affirmative defense struck as per Chief ALJ Ruling Dec. 12, 2014
3	Notice of Hearing and Scheduling Order dated Sept. 28, 2015	✓	✓	OHMS	
4	Proposed Stipulation of Facts dated Dec. 1, 2015	✓	✓		
5A	Figure 6 - Soils Map, marked	✓	✓	DEC	
5B	Figure 6 - Soils Map, unmarked	✓	✓	DEC	

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
6A	Photograph dated 7/24/2008, marked	✓	✓	DEC	
6B	Photograph dated 7/24/2008, unmarked	✓	✓	DEC	
7	Photograph dated 4/14/2010	✓	✓	DEC	
8	Photograph dated 7/24/2008	✓	✓	DEC	
9A	Grout Pond Google Earth imagery dated 7/15/2015, marked	✓	✓	DEC	
9B	Grout Pond Google Earth imagery dated 7/15/2015, unmarked	✓	✓	DEC	
10	Wetland K-113 Map	✓	✓	Respondent	
11	New York State Department of Environmental Conservation (DEC), Notification of Availability for Review dated June 23, 2006	✓	✓	Respondent	
12	Letter from Marc S. Gerstman to Karen Lavery, Esq., dated June 17, 2010	✓	✓	Respondent	
13A	Arial Photograph, large format	✓	✓	Respondent	Original exhibit 13 admitted at Transcript page 156-157, remarked as exhibit 13A by ALJ

Exhibit No.	Description	ID	Rec'd	Offered By	Notes
13B	Arial Photograph, 8 1/2 by 11 inch format	✓	✓	Respondent	Reproduction of Exhibit 13A, witness markings reproduced by ALJ
14	Letter from Nancy Heaslip, DEC, to Dominick and Richard Altobelli dated March 20, 2006	✓	✓	Respondent	
15	Memorandum from Alan J. Grout to Ron Mead dated April 20, 2007 RE: Agricultural District - Agriculture Use Restrictions	✓	✓	Respondent	
16	Various Memoranda and Letters dated April and May 2007	✓	✓	Respondent	
17	Memorandum from Alan J. Grout to Nancy Heaslip dated April 21, 2008 RE: Farm Pond - Agriculture	✓	✓	Respondent	
18	Letter from Andrew Dangler, Department of the Navy, to Alan Grout dated June 1, 2009 RE: Permit Application No. NAN-2008-798-WDA	✓	✓	Respondent	
19	Email Chain from Derek Grout to Andrew Dangler dated April 24, 2008	✓	✓	Respondent	
20	Chronology of Events dated November 2, 2009	✓	✓	Respondent	
21	Empire State Development, Project Summary and Approval Recommendation dated 10/31/2007 with attachments	✓	✓	Respondent	
22	DEC Bureau of Fisheries Biological Survey Unit, CV Survey Cover dated November 4, 2015	✓	✓	Respondent	