

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

---

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

-by-

**SUSAN E. GARDNER, LLC,**

Respondent.

---

**ORDER**

DEC Case No.  
R4-2008-1110-157

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (DEC or Department) that respondent Susan E. Gardner, LLC (respondent) disturbed the banks and bed of a classified stream and constructed a pond without a permit, in violation of section 608.2(a) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR).<sup>1</sup> Based on the record evidence, I adopt the attached hearing report of Administrative Law Judge (ALJ) Helene G. Goldberger (Hearing Report) as my decision in this matter, including the findings of fact set forth in the Hearing Report, subject to my comments below.

**BACKGROUND**

On September 11, 2003, respondent purchased property located in the Town of Stephentown, Rensselaer County from Richard Senter (Senter) (see respondent's answer ¶ 1 [admitting allegation in complaint ¶ 4]; see also Hearing Report, at 2, Findings of Fact [FF] 1 and 2 [citing relevant portions of the record]). A tributary of the Kinderhook Creek (Tributary 38, H-204-2-38, Class C [ts] [Tributary 38]) flows through the property. The Department has designated Tributary 38 as a trout spawning stream (id. FF 3; see 6 NYCRR 863.6 Table I, Item No. 392).

Prior to and following respondent's purchase of the property from Senter, Senter excavated certain portions of the property, and the Town of Stephentown purchased gravel from his excavations (id. FF 3 and 6 [citing relevant portions of the record]). After Senter ceased

---

<sup>1</sup> Although the original caption did not refer to alleged violations of any regulation, the body of the complaint refers to sections within 6 NYCRR part 608 (see complaint ¶¶ 5, 7-9), the cause of action in the complaint alleges a violation of 6 NYCRR 608.2(a) (id. ¶¶ 14-15), and staff's post-hearing briefing discusses the violation with respect to 6 NYCRR 608.2 (see Staff Closing Brief dated Nov. 1, 2012). The caption has therefore been modified to reference alleged violation of 6 NYCRR part 608 in addition to alleged violation of article 15 of the Environmental Conservation Law (ECL).

excavation, respondent continued excavation and completed the construction of the pond (id. FF 6 [citing relevant portions of the record]). Aerial photographs taken in 2007 by the New York State Office of Cyber Security reflect that a 4.3 acre pond exists on the site. The existence of the pond was confirmed during site inspections in 2009 (see Hearing Transcript [Tr.], at 9:23-11:13, and Ex. 9). Photographs taken in 2004 reflect that the pond did not exist at that time (see Hearing Report, at 3; see also Exhibits [Exs.] 16, 19). An enlargement of the 2007 aerial photograph reflects that Tributary 38 flows into the new pond (see Ex. 23; see also Tr., at 146:18-149:23).

Department staff commenced this enforcement proceeding by serving on respondent a notice of hearing and complaint dated August 23, 2010 (see Ex. 1). In its complaint, staff alleges: (i) respondent did not obtain a permit pursuant to 6 NYCRR 608.2(a) prior to disturbing the banks and bed of the tributary and constructing the pond (see complaint ¶ 14); and (ii) respondent's disturbance of the bed and banks of the tributary without a permit is a continuing violation of the 6 NYCRR 608.2(a) (id. ¶ 15). Staff requests that a civil penalty in the amount of six thousand four hundred dollars (\$6,400) be assessed against respondent, and that respondent be directed to remove the pond in its entirety, and restore the stream bed and banks to the original condition in form, width, depth and gradient, using approved erosion control measures (see complaint, WHEREFORE Clause ¶¶ 1-2).<sup>2</sup>

Respondent served an answer to the complaint dated September 1, 2010 (see Ex. 2). The matter was referred for hearing on November 23, 2010 and assigned to ALJ Goldberger on April 16, 2012 (see Ex. 4). The parties conducted pre-hearing discovery, and the hearing was conducted on September 11, 2012, involving testimony of five witnesses and the admission of 23 exhibits. Following post-hearing briefing and replies, the record closed on November 17, 2012 (see Hearing Report, at 1).

The ALJ has concluded that respondent "violated ECL § 15-0501 and 6 NYCRR 608.2 by disturbing the bed and banks of a protected stream – Tributary 38 – when the respondent continued to excavate and create the pond that currently exists on the subject property" (Hearing Report, at 3). The ALJ recommends that I order respondent to develop a restoration plan, submit the plan to Department staff for approval and, upon approval, complete restoration of the stream with staff supervision. The ALJ also recommends that I modify staff's request for a \$6,400 civil penalty by suspending \$4,000 of that amount, contingent upon respondent's compliance with the restoration requirements.

## DISCUSSION

In an enforcement proceeding, an ALJ's report is entitled to weight, especially to the extent that a determination of material facts may turn on resolving the credibility of witnesses appearing at hearing. A Commissioner, however, is not bound by, and may overrule, the ALJ's

---

<sup>2</sup> In its post-hearing briefing, staff states that the requested remedial relief should be "based upon a plan drafted by a qualified professional which would be reviewed and approved by Department staff prior to any action taken" (Staff Closing Brief, at third un-numbered page). In the alternative, staff states that respondent may "restor[e] the original stream channel and relocat[e] the pond a minimum of 100 ft from the original stream channel when the pond is full" (id.; see also Tr. 24:21-25:22).

findings of fact and make his or her own findings, provided they are supported by record evidence (see Matter of Jackson's Marina, Inc. v Jorling, 193 AD2d 863, 866 [3d Dept 1993]; see also Simpson v Wolansky, 38 NY2d 391, 394 [1975]; 6 NYCRR 622.18[e] [Commissioner's final determination must contain findings of fact and conclusions of law or reasons for the final determination]). I adopt the ALJ's findings of fact and recommendations in this matter, subject to my comments below.

Department staff bears the burden of proof on the charges and matters asserted in the complaint, and must establish factual matters by a preponderance of the evidence (see 6 NYCRR 622.11[b], [c]). I hold that Department staff satisfied its burden of proof in this matter. I agree with the ALJ's assessment of the credibility of the witnesses and their testimony concerning the documents (see Hearing Report, at 3-4). The documents and testimony presented at the hearing establish by a preponderance of the evidence that the pond at issue was created between 2004 and 2007, a period during which respondent owned the property (see Ex. 2, ¶ 1 [respondent's answer admitting allegation in complaint ¶ 4 that respondent purchased property on September 11, 2003]; see also Exs. 16, 19, 23 [photographs reflecting creation of pond between 2004-2007]). In addition, the evidence established that: (i) the stream at issue is a Class C trout spawning (C[ts]) stream (see Tr. at 16:7-18:12 [testimony of Department staff aquatic biologist Zielinski]; see also 6 NYCRR 863.6 Table I, Item No. 392); (ii) the State regulates C[ts] streams under ECL article 15 and 6 NYCRR Part 608 (see Tr. at 18:17-23); (iii) a permit is required to disturb the bed and banks of such a stream (*id.* at 18:24-19:2);<sup>3</sup> and (iv) the record contains no evidence that respondent obtained the required permit (see *e.g. id.* at 18:24-19:6).

Based on the record evidence, I hold that respondent violated 6 NYCRR 608.2, as alleged by Department staff, by disturbing the banks and bed of Tributary 38 and constructing the pond without a permit.<sup>4</sup> I also adopt the ALJ's recommendation regarding remedy, and hold that respondent must develop a restoration plan drafted by a qualified professional, and must submit this plan to Department staff for approval. I grant the Department's request that the stream channel be reconnected to the Kinderhook Creek (i) by restoring its original channel, which would require moving or removing the pond; or (ii) by implementing an alternative restoration plan approved by Department staff that results in the stream channel being located at least one

---

<sup>3</sup> Section 608.1(aa) of 6 NYCRR defines "protected stream" to include, among others, any stream classified by the Department as "C(ts)." Section 608.2(a) of 6 NYCRR states in relevant part that "no person ... may change, modify or disturb any protected stream, its beds or banks ... without a permit issued pursuant to this Part."

<sup>4</sup> Although Department staff has only alleged a violation of 6 NYCRR 608.2, I agree with the ALJ's conclusion that respondent also violated ECL 15-0501(1) (see Hearing Report, at 3, 5). Staff did not cite section 15-0501(1) in its pleadings, but made clear, at the hearing and in its post-hearing filings, that the evidence supported a finding of a violation of ECL article 15 as well as 6 NYCRR part 608 (see Tr. at 5:3-8; see also Staff Closing Brief, at first un-numbered page; Staff Reply Brief, at second un-numbered page). ECL 15-0501 contains virtually identical language to 6 NYCRR 608.2. Respondent was clearly on notice of the alleged violation of the statute as well as the regulation, and neither objected to the adequacy of the pleadings nor claimed any prejudice. Indeed, respondent claims in its post-hearing brief that the complaint alleges a violation of ECL 15-0501, and its third proposed finding of fact is that it "did not willful [sic] violate ECL § 15-0501" (see Respondent's Findings of Fact & Conclusions of Law, at 2 and 1, respectively). I therefore conform the pleadings to the proof, and hold that respondent violated both ECL 15-0501(1) and 6 NYCRR 608.2 (see 6 NYCRR 622.5[b]; CPLR 3025[c]; see also Werner v Katal Country Club, 234 AD2d 659, 661-662 [3d Dept 1996] [affirming trial court's *sua sponte* amendment of the complaint]).

hundred (100) feet away from the pond (see Tr. at 24:21-25:22 [testimony of Department staff aquatic biologist Zielinski]; see also Staff Closing Brief, at third un-numbered page). The stream bed and banks will be restored to their original condition in form, width, depth and gradient, using approved erosion control measures. Respondent shall, within forty-five (45) days of service of this order on respondent, submit the restoration plan to Department staff for approval, and shall not commence any work with respect to the restoration prior to obtaining staff approval of the plan. In addition, respondent's restoration of the stream bed and banks shall be conducted under the supervision of Department staff.

With respect to penalty, Department staff has requested in its complaint and post-hearing papers a penalty of \$6,400, basing its calculations on the version of the relevant statute in effect at the time the violation commenced. At that time, ECL 71-1127(1) provided, among other things, that a person who violates regulations promulgated under article 15<sup>5</sup> (with an exception not relevant here) shall be liable for a civil penalty up to five hundred dollars (\$500) for such violation, and an additional civil penalty of up to one hundred dollars (\$100) for each day such violation continues. Based upon the foregoing, Department staff has calculated the maximum possible penalty as \$143,800. Notwithstanding this calculation, however, staff seeks a civil penalty of \$6,400, stating without further elaboration that this amount is "more than reasonable" considering respondent's actions (see Staff Closing Brief, at third un-numbered page).

The ALJ has provided an analysis of the Department's Civil Penalty Policy (DEE-1, dated June 20, 1990) in the context of this case.<sup>6</sup> The ALJ states, among other things, that: (i) staff provided no evidence that respondent enjoyed any economic benefit from the violation, except perhaps saving the expense of applying for a permit; (ii) respondent's actions caused environmental harm including disrupting habitat features such as gravel bed, water flow, migration corridor, and stream temperature; (iii) the record contains some evidence of efforts by respondent to cooperate; and (iv) the circumstance that respondent's predecessor began the excavations that ultimately resulted in creation of the pond is a potential mitigating factor (see Hearing Report, at 4). Stating that the remedial work "will be costly," the ALJ recommends that I impose a civil penalty totaling six thousand four hundred dollars (\$6,400), but suspend four thousand dollars (\$4,000) of that penalty contingent upon respondent's completion of the restoration of the stream with staff approval and supervision (id. at 5). I adopt the ALJ's recommendation as to penalty.

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

- I. Respondent Susan E. Gardner, LLC is adjudged to have violated ECL 15-0501(1) and 6 NYCRR 608.2(a) by disturbing the bed and banks of the protected stream identified as Tributary 38, H-204-2-38, a Class C(ts) stream, without a permit.

---

<sup>5</sup> 6 NYCRR Part 608, which includes section 608.2 at issue here, was promulgated pursuant to, among other statutes, ECL 15-0501, which is entitled "Protection of certain streams; disturbances of stream beds; permits" (see 6 NYCRR Part 608, at page 8,657 [identifying statutory authority for Part 608, entitled "Use and Protection of Waters"]).

<sup>6</sup> Department staff's papers do not include a discussion of the Civil Penalty Policy.

II. Within forty-five (45) days of service of this order on respondent Susan E. Gardner, LLC, respondent shall develop a restoration plan drafted by a qualified professional, and shall submit this plan to Department staff for approval, in accordance with the terms and conditions of this order. Pursuant to such restoration plan, the stream channel of Tributary 38, H-204-2-38, a Class C(ts) stream shall be reconnected to the Kinderhook Creek (i) by restoring its original channel, which would require moving or removing the pond; or (ii) by implementing an alternative restoration plan approved by Department staff that results in the stream channel being located at least one hundred (100) feet away from the pond. The stream bed and banks will be restored to their original condition in form, width, depth and gradient, using approved erosion control measures. Respondent shall not commence any work with respect to the restoration plan prior to obtaining staff approval of the plan. In addition, respondent's restoration of the stream bed and banks shall be conducted under the supervision of Department staff.

III. Respondent Susan E. Gardner, LLC is hereby assessed a civil penalty in the amount of six thousand four hundred dollars (\$6,400), of which four thousand dollars (\$4,000) is suspended contingent upon respondent's compliance with the terms and conditions of this order. The two thousand four hundred (\$2,400) non-suspended portion of the civil penalty shall be due and payable within thirty (30) days of the service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation." The payment shall be mailed or otherwise delivered to the Department at the following address:

Karen S. Lavery, Esq.  
Assistant Regional Attorney  
Region 4, NYSDEC  
30 North Westcott Road  
Schenectady, New York 12306-2014

IV. All communications from respondent to the Department concerning this order shall be directed to Karen S. Lavery, Esq., at the address referenced in paragraph III of this order.

- V. The provisions, terms and conditions of this order shall bind respondent Susan E. Gardner, LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Joseph J. Martens  
Commissioner

Dated: July 2, 2013  
Albany, New York

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

In the Matter

- of -

Alleged Violations of Article 15 of the  
Environmental Conservation Law by:

**SUSAN E. GARDNER, LLC,**

Respondent.

DEC Case No. R4-2008-1110-157

HEARING REPORT

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

November 26, 2012

## Proceedings

Pursuant to a notice of hearing and complaint dated August 23, 2010, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against Susan E. Gardner, LLC for alleged violations of Article 15 of the Environmental Conservation Law (ECL) and Part 608 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). The Department staff alleges that without a permit, on its property located off County Route 26 near State Route 43 in the Town of Stephentown, Rensselaer County, New York, the respondent disturbed the banks of a classified stream (Tributary H-204-2-38, Class C [ts]), a tributary of the Kinderhook Creek, and dammed it. By answer dated September 1, 2010, the respondent, Susan E. Gardner, LLC denied the allegations in the complaint.

The parties engaged in a period of discovery and by statement of readiness dated April 12, 2012, Department staff asked the Department's Office of Hearings and Mediation Services (OHMS) to schedule a hearing. On April 16, 2012, the matter was assigned to me and a hearing date of May 7, 2012 was set. Based upon the parties' agreement, the matter was adjourned to September 11, 2012. The hearing proceeded on that date in the Department's Region 4 offices in Schenectady, New York. The hearing transcript was received by the OHMS on September 28, 2012; I sent the parties my corrections to the transcript on October 5, 2012 and invited same from the parties. I did not receive any additional transcript corrections. Closing memoranda were received by me on November 1, and reply briefs on November 15 and 17, 2012, respectively, closing the hearing record.

The Department staff was represented by Karen Lavery, Assistant Regional Attorney, DEC Region 4. The respondent was represented by James E. Long, Esq. of Albany, New York.

Department staff presented the following witnesses: Daniel Zielinski, DEC Aquatic Biologist 1, and Dennis Wischman, DEC Fish and Wildlife, Technician 3. Both individuals are employed by the Fisheries Unit of DEC's Division of Fish, Wildlife and Marine Resources.

The respondent presented the following witnesses: William Patrick Kneutter, excavator; Neil Gardner, principal of respondent; and Lawrence Eckhardt, Town of Stephentown supervisor and farmer.

## The Charges and Relief Sought

The Department staff alleged that between 2004 and 2007, the respondent constructed a pond on its property off County Route 26 near State Route 43 in the Town of Stephentown, Rensselaer County, by disturbing the banks and damming a portion of a tributary of the Kinderhook Creek. The staff maintained that the respondent failed to obtain a permit to disturb the bed and the banks of the tributary - H-204-2-38 - and therefore was in violation of 6 NYCRR § 608.2(a). The staff is seeking a penalty of \$6,400 and an order requiring the respondent to remove the pond in its entirety and restore the stream bed and banks to their original condition in form, width, depth and gradient, using approved erosion control measures. In the alternative, the staff is proposing that the pond be moved 100 feet away from the tributary.



## Respondent's Position

The respondent alleges that the pond in question has existed for “generations” and that a prior landowner excavated it. In its reply brief, the respondent contends that the small pond that both parties agree existed previously on the property was excavated by the prior owner and became larger. The respondent admits to having done some tree removal in the vicinity of the pond but claims that it did not perform any work in the stream bed. The respondent asserts that the staff did not prove that it had performed any of the alleged work in the tributary and that staff's evidence was “of poor quality, questionable provenance and unreliable.” The respondent also argues that in the event it is found liable, there should be no penalty and instead those financial resources should be put towards remediation. As for the selection of remedy, the respondent prefers, if required, to preserve the pond and route the tributary around it.

### FINDINGS OF FACT

1. The respondent, Susan E. Gardner, LLC, owns and controls property located off County Route 26 near State Route 43 in the Town of Stephentown, Rensselaer County, New York. Complaint, ¶ 2, Hearing Exhibit (Ex.) 1 and Answer, ¶ 1, Ex. 2.

2. The respondent purchased this property from Richard G. Senter on or about September 11, 2003. Deed, Ex. 21.

3. A tributary of the Kinderhook Creek, H-204-2-38, Class C (ts) (Tributary 38), flows through this property. This tributary is designated by the Department as a trout spawning stream. Ex. 14. On October 8, 2008, Tim Pokorny, of the Department's Fisheries Unit, performed a fish survey in this tributary upstream of the pond. Ex. 15; Hearing Transcript (TR) 19-21. Mr. Pokorny found 36 wild brook trout in addition to some wild brown trout and other species. Ex. 15; TR 22, 41.

4. Over a period of years, the former owner of the property, Richard Senter, commenced and continued excavation on this property. TR 94-95, 103, 107-109, 125-126, 128-129, 135-140. An aerial photograph of the property taken in 2004 by the State of New York reveals areas of disturbance in the western portions of the property. Ex. 20. The Town of Stephentown purchased gravel from Mr. Senter's excavation. TR 119-121, 125-127.

5. Prior to 2007, a small pond of approximately .15 acres in size existed on the property in the northwest area of the site in question. Ex. 1A; TR 86. The 2004 and 2007 aerial photography indicate that plant life has taken over this area and it is no longer a pond. TR 86, 88; Exs. 1B, 19.

6. After the respondent purchased the property, it allowed Mr. Senter to continue to excavate the property. TR 114, 128-129. Once Mr. Senter ceased excavating the property, the respondent continued and completed the pond construction including the damming of Tributary 38. TR 76, 123, 128, 136, 140-141; Exs. 9-11; 19. This pond is 4.3 acres. TR 75. Exhibit 10

depicts the pipe that allows water to flow into the pond and Exhibit 11 depicts piping that allows water to flow from the pond into a channel that empties into the Kinderhook Creek.

7. Trout require cool water temperatures and prefer gravel of a certain size in order to spawn. TR 23, 53. The pond's placement in the stream corridor allows for warmer waters to enter the stream and to potentially raise temperatures that would be incompatible with trout habitat. TR 22-23. In addition, the excavation of the pond disrupted the bed of the stream and also stymies trout migration. TR 23. The disruption of the stream may also have altered other aspects of trout habitat such as the types of insects available for food and the flow of the stream. TR 54.

## DISCUSSION

It is the conclusion of this ALJ, based upon the testimony and evidence produced by the DEC staff, as well as evidence submitted by the respondent, that Susan E. Gardner, LLC violated ECL § 15-0501 and 6 NYCRR § 608.2 by disturbing the bed and banks of a protected stream – Tributary 38 – when the respondent continued to excavate and create the pond that currently exists on the subject property.

With few specific exceptions that are inapplicable here, ECL § 15-0501 provides, “no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit issued pursuant to subdivision 3 of this section.” Section 608.2(a) of 6 NYCRR provides similarly.

I have found that based upon the 2004 and 2007 aerial maps that staff produced, there is definitive proof that the pond was created between these years. Mr. Wischman demonstrated his expertise in the areas of geographic information systems (GIS) and global positioning systems (GPS) and has previously performed aerial photography for the State Police. TR 57-59. He explained how the aerial photographs that are part of the record in this matter were produced by the NYS Office of Cyber Security which takes statewide aerial photographs every 3-4 years. TR 62-79. The aerial photographs admitted into evidence in this matter also contained backup information to verify the date, time and location. Exs. 16, 19. Based on these images, it is undeniable that the pond was created between 2004 and 2007.

Mr. Gardner, Mr. Kneutter and Supervisor Eckhardt testified to the ongoing excavation on the property prior to and during the respondent's ownership by Mr. Richard Senter, the prior owner of the property. TR 114-115, 119-120, 93-97, 136. The aerial photography supports their testimony by the depiction of disturbed areas on the western portions of the site shown in Ex. 22. While Mr. Gardner testified that the respondent's activities were limited to some “finishing up” of what Mr. Senter had started, in reality the respondent performed quite a bit more work to complete the pond as indicated by Mr. Eckhardt. TR 140-141; Exs. 19 and 23.

The respondent questions the quality and provenance of the documentary evidence provided by staff (Respondent's Brief, pp. 6-7). However, I found the staff's witnesses credible and they clearly explained these documents. While respondent's counsel concludes that Exhibit

1b - the color orthoimagery of 2007 - is of little use to the “court,” I find otherwise. Based on examining the documents and reviewing the witnesses’ testimony, I fail to find another explanation for the images depicted in these photographs but the creation of a pond during the years between 2004 and 2007. Exs. 16, 19, 22, 23; TR 67-69. While the prior owner commenced this activity, the respondent completed it.

In respondent’s reply brief, counsel posits that the large pond that exists today is merely the result of Mr. Senter’s excavation of the smaller pond. Respondent’s Reply Br., pp. 1-3. However, this theory is not supported by the evidence before me. An examination of the photographs shows the progression of the small pond from a pond of .15 acres (1994-1999) to an area that became vegetated (by 2007). Exs. 1a, 1b, 20, 20a, 22; TR 86,88. As seen in the aerial photography, the large pond (4.3 acres), which is the subject of this hearing, is distinct from this smaller area and is not an enlargement of it. Exs. 1b, 20, 20a, 22.

### Remedy and Penalty

The staff has requested a penalty of \$6,400 and restoration of the stream to its prior condition. As noted by the Department staff, for the relevant period, ECL § 71-1127 provides that any violation of Article 15 or any regulation promulgated pursuant thereto is subject to a civil penalty of a maximum of \$500 for the violation and an additional penalty of \$100 for each day the violation continues.

The 1990 Civil Penalty Policy sets forth a number of factors upon which to base the development of a penalty – economic benefit, environmental harm, violator cooperation, deterrence, and mitigating factors. The starting point is the maximum penalty. The staff has calculated a maximum penalty of \$143,800 based upon 1433 days of violation. Staff’s Closing Brief, p. 3. Staff provided no evidence of economic benefit in this matter. By not applying for a permit, the respondent did save that expense but otherwise, there is no obvious financial benefit. While the respondent’s predecessor sold gravel out of the site, there was no evidence presented that the respondent likewise benefited.

With respect to environmental harm, Mr. Zielinski detailed the habitat features that the respondent’s work disrupted such as the gravel bed, water flow, migration corridor, and stream temperature. TR 22-23, 42-43, 53-54. There was a stream survey performed in 2010 that indicated a healthy population of wild trout above the pond; however, we do not know whether the fish are doing as well downstream. TR 40-41, 54-55.

The witnesses did mention a meeting among the parties at some point which may point to respondent’s effort at cooperation, but ultimately a hearing was necessary. TR 122. The respondent has denied wrongdoing but has proposed that if liability is found it be permitted, without payable penalty, to perform remediation. Respondent’s Brief, pp. 12-14; Reply Brief, pp. 4-5. A potential mitigating factor here would be the fact that the respondent’s predecessor, now deceased, started the work.

Given the number of years that have passed since the pond was completed, there is no question that the penalty recommended by staff is far below the maximum allowed by statute. It

is certainly important to exact a significant penalty for this serious violation in order to deter other potential violators. As noted by the respondent, there could be significant deterrent value to requiring remediation in a small town because of the scrutiny community members will give it. *Id.*, p. 13. The precedential value of a penalty, however, goes beyond the immediate community where the violation took place. The remedial work requested is appropriate but will be costly. Therefore, I recommend to the Commissioner that the staff's recommended assessed penalty of \$6,400 be modified so that it is comprised of a payable penalty of \$2,400 and a suspended penalty of \$4,000 in the event that the respondent does not comply with the restoration requirements.

#### CONCLUSION

The respondent is liable for violating ECL § 15-0501 and 6 NYCRR § 608.2(a) by altering and damming the bed and banks of a classified stream – Tributary 38. I recommend that the Commissioner order the respondent to pay a payable penalty of \$2,400 and to develop a restoration plan that shall be submitted to the Department staff for approval. Once Department staff approves the plan, the respondent should complete restoration of the stream with staff supervision. In the event that the respondent does not comply with these requirements, it would also be liable for payment of a suspended penalty of \$4,000.

**EXHIBIT CHART**  
Matter of Susan E. Gardner, LLC  
September 11, 2012

<i>Exhibit No.</i>	<i>Description</i>	<i>ID'd?</i>	<i>Rec'd?</i>	<i>Offered By</i>
1	August 23, 2012 Notice of Hearing and Complaint	√	√	HGG
1a	Color copy of Ex. A to Complaint	√	√	HGG
1b	Color copy of Ex. B to Complaint	√	√	HGG
2	Answer dated September 1, 2010	√	√	HGG
3	Statement of Readiness dated April 12, 2012	√	√	HGG
4	Letter dated April 16, 2012 from James T. McClymonds, Chief ALJ to parties	√	√	HGG
5	Letter dated May7, 2012 from ALJ Goldberger to parties	√	√	HGG
6	Letter dated June 12, 2012 from ALJ Goldberger to parties	√	√	HGG
7	Response to Department's Discovery Notice dated November 20, 2010	√	√	KL
8	Memorandum dated April 28, 2009 from Daniel Zielinski to DFWMR	√	√	KL
9	Photo	√	√	KL
10	Photo	√	√	KL
11	Photo	√	√	KL
12	Photo	√	√	KL
13	Map	√	√	KL
14	§§ 863.6 and 863.9	√	√	KL
15	Fish Survey	√	√	KL

16	Aerial Picture – Pond Site – 2004 w/metadata	√	√	KL
17	E-mail from Tim Ruhren to Dennis Wischman dated September 5, 2012	√	√	KL
18	Aerial Photograph	√	√	KL
19	Aerial Photograph – Pond Site – 2007 w/metadata	√	√	KL
20	Aerial Photograph – Pond Site – 2004 – zoomed on view of larger 2004 image	√	√	KL
20a	Aerial Photograph – Pond Site – 2004 – zoomed on view of larger 2004 image w/added marks from witness	√	√	HGG
21	Deed	√	√	KL
22	Aerial Photograph – Pond Site – 2004 – zoomed on view of larger 2004 image	√	√	KL
23	Aerial Photograph – Pond Site – zoomed in view of larger extent 2007 image	√	√	KL