MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
CONTESTED CASE NO. 84-2001-30915

IN THE MATTER OF THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES SPECIAL PERMIT NO. 16868, DATED DECEMBER 21, 2012, ISSUED TO DR. LYNN ROGERS	**DR. LYNN ROGERS' POST-HEARING MEMORANDUM**

INTRODUCTION

Dr. Lynn Rogers submits this Memorandum of Law pursuant to Paragraph 1(b) of the Court's Amended Order Regarding Post-Hearing Submissions, dated March 20, 2014. The Court directed the parties to address the following issues:

> 1. Whether the Department of Natural Resources met its burden of establishing that Dr. Rogers' actions constitute actual or constructive possession of bears in Minnesota and, if so, whether the Department met its burden of establishing that it had sufficient cause to take action against the permit as specified in its correspondence on June 28, 2013.
>
> 2. Whether there is any difference between the legal standard for granting a permit, revoking a permit or refusing to renew a permit of the type at issue in the present case, together with an identification of which legal standard applies in this contested case matter.
>
> 3. How, if at all, the Department's granting of the permit on December 21, 2012 limits or affects the consideration of evidence that predates December 21, 2012 with respect to the determination of cause in support of the Department's 2013 decision related to the subject permit.

(Post-Hearing Order, ¶ 1(b)(1)-(3).)

First, the DNR has failed to meet its burden of establishing that Dr. Rogers' conduct constitutes actual or constructive possession of bears. That conclusion ends the Court's inquiry with regard to many of the issues in this proceeding.

Second, the governing legal standard is the same regardless of whether the DNR's June 28, 2013 decision is characterized as denying, revoking, or refusing to renew Dr. Rogers' permit. The legal standard mandates that the decision must be made "for cause."

Third, the fact that the DNR previously issued permits to Dr. Rogers—including on December 21, 2012—is relevant to the determination of whether the DNR established that it had cause for its June 28, 2013 decision. The DNR cannot establish that it had cause for its decision in June 2013 on the basis of (1) evidence that the DNR was aware of on December 21, 2012 that did not prevent the DNR from issuing a permit on that date, or (2) evidence of concerns that the DNR previously raised with Dr. Rogers and resolved.

Finally, based upon the applicable legal standard and the evidence presented, the DNR has failed to meet its burden of establishing that it had cause to deny Dr. Rogers' permit.

ARGUMENT

I. THE DNR DID NOT MEET ITS BURDEN OF ESTABLISHING THAT DR. ROGERS' ACTIONS CONSTITUTE ACTUAL OR CONSTRUCTIVE POSSESSION OF BEARS.

As a matter of law, Dr. Rogers needs a permit to radio collar bears only if his actions constitute "possession" of the bears he collars. Based upon the evidence presented, the DNR has not met its burden of establishing by a preponderance of the evidence that Dr. Rogers' conduct constitutes "possession." Moreover, interpreting the applicable statute to encompass Dr. Rogers' conduct would render the statute unconstitutionally vague and would result in criminalizing otherwise legal conduct.

A. "Possession," By Definition, Requires Control.

Possession requires the exercise of "control." Minn. Stat. § 97A.015, subd. 36 (defining possession as "both actual and constructive possession and control of the things referred to") (emphasis added). Actual possession "is evidenced by direct physical control." (Mar. 4, 2014,

Order Denying Dir. Verdict (the "Order"), at 4 (emphasis added).)[1] Constructive possession "is evidenced by the power and intention to exercise control, either directly or through others." (Order, at 4.) By definition, control requires an exercise of power or dominion over the thing controlled. See, e.g., Black's Law Dictionary (3d Pocket ed.) at 146 (defining control as: "To exercise power or influence over.").

1. As Applied To Wild Animals, "Possession and Control" Requires Confinement, Capture, Or Removal From Nature.

There are no Minnesota cases that analyze what constitutes "possession" of wild animals as that term is used in §§ 97A.015 and 97A.418. Cases from other jurisdictions that analyze the term in connection with wild animals are instructive. For example, courts have analyzed the issue of possession to determine whether individuals have acquired property rights in wild animals. As a general rule, whether property rights arise in wild animals depends upon whether an animal is reduced to a person's possession. See, e.g., Hollywood Park Humane Soc'y v. Town of Hollywood Park ("Hollywood Park I"), No. SA-03-CA-1312, 2004 U.S. Dist. LEXIS 783 (W.D. Tex. Jan. 23, 2004); Koop v. United States, 296 F.2d 53, 59 (8th Cir. 1961); see also 4 Am. Jur. 2d Animals, § 12 ("[N]o person owns [a wild] animal until it is reduced to possession. As a general rule, an individual has no property right in wild animals so long as they remain wild, unconfined, and in a state of nature.").[2] In addition, in some jurisdictions, whether a person "possesses" an animal is relevant to determining whether he may be liable for injuries caused by

[1] The DNR did not present any evidence that Dr. Rogers pens, traps, restrains, sedates, or in any way exerts "direct physical control" over the bears he radio collars. The DNR has not argued, and there is no evidence to support a finding, that Dr. Rogers' conduct constitutes actual possession of bears.

[2] As the Court previously noted, Koop and Hollywood Park both arose in different contexts—a claim for violating the Migratory Bird Treaty Act and a claim against the government for "taking" of property, respectively. The cases are nevertheless instructive. Both consider and analyze the concept of possession in connection with wild animals.

the animal. See, e.g., Restatement (2d) Torts § 507 (providing that a "possessor" of an animal is liable for injuries the animal causes); Calvert v. Zimmer ("Calvert I"), No. 95-2041, 1995 U.S. Dist. LEXIS 13401, at *14-17 (E.D. Pa. Sept. 11, 1995) (discussing the relevant Restatement principles and stating "the relevant question for this court is whether Hawkins either possessed or harbored the deer").

Texas has a well-developed body of law defining "possession" in the context of determining whether individuals have property rights in wild animals. Under Texas law, possession occurs only if an animal has been removed from nature and confined:

> Whether [property rights in wild animals arise] is determined by whether the animal in question has been reduced to possession, not the animal's habits. While it might legally be possible for an individual to acquire a property right in a wild animal, including a deer, this right is qualified and limited to those instances in which the person claiming ownership has removed the animal from nature, confined it, and placed it under the person's dominion and control.

Hollywood Park Humane Soc'y v. Town of Hollywood Park ("Hollywood Park II"), 261 S.W.3d 135, 140 (Tex. Ct. App. 2008) (emphases added) (citations omitted).[3] This definition of possession is consistent with long-standing common-law principles. E.g., Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977) (finding a person does not obtain a property right in a wild animal until it is "reduced to possession by skillful capture") (emphasis added)). The definition is also consistent with treatises and secondary sources regarding wild animals. See, e.g., 4 Am. Jur. 2d Animals, § 12; 3A C.J.S. Animals, § 8, at 478-79 (1973); Restatement (2d) Torts § 508,

[3] The Court previously cited Hollywood Park II and stated that the language quoted above is a "markedly different" definition of possession than the definition applicable in Minnesota. (Order, at 7.) Rather than being "markedly different" from Minnesota's definition, the Texas definition simply provides additional analysis of the concept of possession. Minnesota's definition is "actual or constructive possession and control." In the absence of any more detailed statutory or common-law guidance regarding what constitutes "possession" of wild animals in Minnesota, Texas' more developed body of law on the issue may guide the Court in interpreting the term.

cmt. a ("The possessor of the land does not acquire possession of these animals until he has brought them within his control, as for example by impounding them . . . . He does not acquire possession of the animals by providing shelter or food for them or protecting them from the depredations of other animals.").

Courts in several jurisdictions have held that activities such as (a) feeding, (b) providing shelter, (c) naming, and even (d) developing relationships with animals as though they were "pets," are not sufficient to reduce an animal to one's "possession and control." See, e.g., Koop, 296 F.2d 53 (8th Cir. 1961); In re Oriental Repub. Uruguay, 821 F. Supp. 950, 952-53 & n.2 (D. Del. 1993) (finding claimants did not have possession and control over, and thus had no property right in, ducks they had purchased and released on their property even though they "fed and cared for" the ducks and the "birds were more akin to pets than to wildlife"); Calvert I, 1995 U.S. Dist. LEXIS 13401, at *15-17 (concluding defendant did not "possess" deer that she fed and allowed to congregate); Calvert v. Zimmer ("Calvert II"), 1995 U.S. Dist. LEXIS 18297, at *2-3 (E.D. Pa. Dec. 7, 1995) (denying reconsideration and again rejecting argument that feeding and allowing deer to congregate on one's property is possession and control); Hollywood Park I, 2004 U.S. Dist. LEXIS 783 (W.D. Tex. Jan. 23, 2004).

Courts have also noted that an animal's "habits" are not the relevant consideration. See Hollywood Park II, 261 S.W.2d at 140 (citing State v. Bartee, 894 S.W.2d 34, 41-42 (Tex. Ct. App. 1994)); Calvert II, 1995 U.S. Dist. LEXIS 18297, at *2-3 (rejecting argument that feeding deer, which caused an "unnatural deer crossing," was possession and control).

B. The Evidence Does Not Support A Finding That Dr. Rogers' Conduct Constitutes Possession and Control.

In light of the plain meaning of "control" and the definitions developed by other jurisdictions, Dr. Rogers' conduct does not constitute "possession and control."

As an initial matter, the permitted activity is the use of radio collars. The DNR did not present any evidence regarding how Dr. Rogers places radio collars on bears or interacts with bears to maintain those collars. In fact, the DNR did not present any witness that had personally observed Dr. Rogers or Mansfield collar a bear.

On the other hand, the testimony from Dr. Rogers and Mansfield establishes the following:

- "[Y]ou can't just collar any old bear. Even a bear that – that you may have been around a lot and worked with a lot does not mean you can put a collar on it." (Tr. at 2113:7-10 (Mansfield).)

- "There's different levels of trust, bears have different personalities," and a bear's personality dictates Dr. Rogers' ability to collar that bear. (See Tr. at 2234:21-2236:10 (Rogers) (discussing the different "levels" of bears); Tr. 2054:23-2055:15 (Mansfield) (same); Tr. at 2237:1-2 (Rogers) (explaining some bears have "the calm, trusting personality in the first place that allowed me to put a collar on").)

- The bears who can be collared are not restrained in any way when a collar is placed on them. (Tr. at 2114:3-5 (Mansfield) ("Q. At the time the collar is being placed on a bear, is the bear restrained in any way? A. Absolutely not.").)

- "[I]t is not unusual for the collaring to fail . . . [b]ecause the bear may walk away." (Tr. at 2114:5-8 (Mansfield).)

- "All of these things [tightening, loosening, or adjusting collars] are a process that [Dr. Rogers and Mansfield] do as quickly as [they] can because you know the time is limited that – you know, that you have that bear's attention." (Tr. at 2114:11-21 (Mansfield).)

- "[T]he bear is definitely participating at their will, not at [Dr. Rogers' or Mansfield's]." (Tr. at 2115:2-3 (Mansfield).)

Rather than presenting evidence about how Dr. Rogers places radio collars on bears, the DNR presented evidence about Dr. Rogers' use of food and interaction with the bears. At the close of the DNR's case (before Dr. Rogers presented his case), the Court listed several factors that, if "considered collectively and viewed in the light most favorable to the Department could

be sufficient to establish possession." (Order, at 8-9.)[4] As set forth below, each of these facts or conclusions is directly contradicted by the evidence and/or cannot support a finding of possession and control as a matter of law:

- The Order stated that Dr. Rogers "feeds bears by offering food from his hands and from his mouth, as well as by placing food in troughs and on the ground where bears can easily access it." However, the evidence establishes that, although Dr. Rogers feeds bears at times, (a) hand-feeding occurs "[i]nfrequently" and is "not a common occurrence," and (b) mouth-feeding does not occur anymore. (Tr. at 2101:12-16, 2103: 3-16 (Mansfield).) The DNR did not offer any evidence regarding the frequency of feeding.

- The Order stated that "[o]n most occasions, Rogers is physically present when the bears are fed" at WRI. However, the evidence establishes that (a) most of the feeding at WRI occurs at night, when Dr. Rogers and Mansfield are not present, (Tr. at 2282:25-2283:4 (Rogers)) and (b) if Dr. Rogers and Mansfield are at WRI when the bears visit to feed, they are usually inside the cabin and do not typically go outside to interact with the bears while the bears feed. (Tr. at 2103:17-24 (Mansfield).) The DNR did not offer any evidence to the contrary.

- The Order stated that Dr. Rogers "has named the bears and is able to distinguish them one from another." This statement is both inaccurate and irrelevant. First, Mansfield testified that "[n]ot all the bears are named," and that Dr. Rogers is not always able to distinguish them. (Tr. at 2103:25-2104:10 (Mansfield).) Second, and more importantly, the fact that Dr. Rogers assigns names to bears is no different than the practice of assigning identifying numbers to animals. It allows researchers to track data about particular animals. There is no legally significant difference between a bear being known as "Shadow" or "Number 35."

- The Order stated that Dr. Rogers "regularly vocalizes around the bears and thereby acclimates them to the sound of his voice issuing various commands and other communications." However, the evidence establishes that Mansfield and Dr. Rogers are generally quiet around the bears, and that they speak only a few words as they first approach a bear. Dr. Rogers and Mansfield testified that they do not issue "commands," and that they do not have the ability to cause a bear to respond to vocal commands. (Tr. at 2104:11-2105:19 (Mansfield) ("In general, when we're around the bears, we're quiet."); 2144:23-2145:2 (Mansfield) ("teaching the bear certain commands to follow . . . is not something that we do, and I can't imagine a bear following commands."); see also Tr. at 2237:11-15 (Rogers) (testifying his work does not "train" bears).) The DNR did not offer any evidence to the contrary.

[4] While the Order stated that the DNR had presented evidence of the listed factors, the record shows that most of the factors are not supported by the DNR's evidence.

- The Order stated that Dr. Rogers "physically interacts with the bears on a regular, even daily, basis, and thereby accustoms them to his touch." However, the evidence establishes that Dr. Rogers and Mansfield "don't interact with [the bears] on a daily basis." (Tr. at 2106:11-12 (Mansfield).) Mansfield testified, "[i]f we interact with a particular bear once a week, that would be often." (Tr. at 2106:6-15.) She further testified that she and Dr. Rogers do not interact with some bears "for weeks on end." (Tr. at 2106:6-15.) The DNR did not offer any evidence to the contrary.

- The Order stated that Dr. Rogers collars bears without sedatives or drugs "by conditioning them, through feeding, to feel sufficiently safe in his presence such that they choose to allow a collar to be placed around their neck." The evidence shows that Dr. Rogers collars bears without using sedatives or drugs. The evidence also establishes, however, that some bears, such as "June," were already habituated and food conditioned prior to Dr. Rogers ever attempting to collar them. (See, e.g., Tr. at 2106:22-24 (Mansfield) (testifying "June was already habituated" before Mansfield began working with her); Tr. at 1608:15-18 (Meyer) (responding to the DNR's questioning: "Q. Are you the person who food-conditioned June to come to your hand when she was a cub or a yearling? A. Probably, yes."); Tr. at 2242:20-2243:7 (Rogers) ("Q. And is it your understanding that those bears would have been habituated by other folks in the area feeding bears? A. Yes. Yes. . . . I have a picture of June when she was – before we met her, just sitting there, and there's a couple of kids sitting with her. . . . This is before we even met her.").)

  If Dr. Rogers interacting with and feeding a bear prior to collaring it amounts to possession and control, then the Court would need to analyze the issue on a case-by-case (and bear-by-bear) basis. To collar a bear like June, who was habituated and food-conditioned by someone other than Dr. Rogers, Dr. Rogers would not need a permit because he is not the one who engaged in the predicate feeding and conditioning behavior. On the other hand, other residents of Eagles Nest Township who engage in the legal conduct of habituating and food conditioning bears would need permits.

- The Order stated that "[b]y monitoring the coordinates transmitted by their radio collars, Rogers is constantly aware of the bears' locations and can, and does, interrupt and join them at his will." However, the evidence establishes that while Dr. Rogers collects location data, and he and Mansfield are able to monitor the bears on their computers to see where they are, they only "interrupt" a bear if they need to maintain its collar. (Tr. at 2107:8-16 (Mansfield).) Mansfield testified that she is out in the field with a bear (and not the same bear) only a couple of times per week, and that Dr. Rogers is out in the field with a bear "[l]ess than once a week." (Tr. at 2108:4-11.) Further, the evidence establishes that even though Dr. Rogers and Mansfield are able to monitor bears' locations, it can be "difficult" and sometimes not possible to find the collared bears in the field. (E.g., Tr. at 1517:24-1518:4 (Stein).) The DNR did not offer any evidence to the contrary.

- The Order stated that Dr. Rogers "was able, on at least one occasion, to coax a bear to enter the field house at the Wildlife Research Institute via a front window." Although the DNR offered photographs depicting this occurring on one occasion in 2008, there is no evidence that it has occurred at any time since 2008. (See, e.g., Tr. at 1533:5-18 (Stein) ("Q. Were there ever any bears lured into the cabin, at all [during courses in 2011, 2012, and 2013]? . . . A. Oh, absolutely not. No. No, no, no."); Tr. at 309:3-6 (Lindsey) (testifying no bears entered WRI through the bay windows during her study course in 2011); Rogers Depo. at 208:18-209:2 (testifying course participants were allowed to touch bears through the windows at WRI in 2005, but are no longer allowed to do so); Exs. 666, 667 (photos dated August 30, 2008).) The DNR has imposed additional conditions on Dr. Rogers' permit to limit contact between people and bears at WRI since 2011, and Dr. Rogers has complied with these conditions. Accordingly, the DNR may not rely upon a five-year-old, isolated incident as evidence that Dr. Rogers possesses and controls bears.

- The Order stated that Dr. Rogers was "able, on at least one occasion, to punch a bear in the face when the bear approached too close, without causing the bear to strike back or flee." However, Mansfield testified that, based on her experience studying black bears, the bear's reaction was a "normal reaction of a wild bear." (Tr. at 2108:24-2109:2.) Furthermore, this was an isolated incident that occurred in August of 2005. (Tr. at 2275:24-2276:4, 2277:6-8 (Rogers).) The DNR issued Dr. Rogers at least 10 permits after the date of this incident (see Ex. 158), and the Commissioner expressly testified that this video (which the DNR views as "unprofessional conduct") was not a basis for its decision to deny the permit. (Tr. at 109:21-111:15 (Landwehr).)

- The Order stated that Dr. Rogers "has placed cameras in bear dens, allowing him to access cubs while still denned." However, the evidence establishes that the den cams allow Dr. Rogers to "observe from a distance," and they do not provide "anything other than behavioral observations of mothers and cubs." (Tr. at 2109:3-13 (Mansfield).) The fact that Dr. Rogers can observe cubs—through the lens of a camera—does not give him the ability to interact with or otherwise exert any control over the cubs.

- The Order stated that Dr. Rogers "physically handles cubs with the effect of conditioning them to his physical presence." However, the evidence establishes that Mansfield and Dr. Rogers do not have a practice of physically handling bear cubs. Mansfield testified that she has never held a healthy wild bear cub and that the only occasion on which she handled a wild bear cub involved the cub known as "Jason" when the cub had been abandoned by his mother and was dying. (Tr. at 2109:14-19; 2141:6-16.) Dr. Rogers testified that it would be "very rare" for him to handle bear cubs. (Tr. at 2274:23-25, 2275:21-23 ("Q. When you have occasion to go to a den, do you handle the bear cubs in any way? A. That – that would be very rare . . . . Q. So the practice of handling cubs is not something that you do frequently? A. No. No. No, it's a rare thing.").) The DNR did not offer any evidence to the contrary.

- The Order stated that Dr. Rogers "has conditioned bears to his physical presence to the extent that certain animals have allowed him to rest on the ground adjacent to them." While it is true that Dr. Rogers' research includes walking (and resting) with bears, the evidence establishes that Dr. Rogers has been able to do this with only a small number of bears. Mansfield testified that the ability to rest with a bear is "more a condition of the bear's personality, their basic personality. . . It's not something you can condition a bear for." (Tr. at 2111:3-6.) Mansfield further testified that, since 2004, there have only been two bears that she and Dr. Rogers have been able to walk and rest with. (Tr. at 2054:19–2055:19.) The DNR did not offer any evidence to the contrary.

- The Order stated that Rogers "has taught others to hand- and mouth-feed bears," and that Rogers has "encouraged and taught others to physically interact with bears, including by petting, kissing, and sitting next to bears." Although this conduct occurred in the past, it is undisputed that such conduct ended in 2011. (E.g., Tr. at 2111:9-20 (Mansfield); see also Rogers Depo. at 140:8-16 ("Q. At WRI bears are fed directly out the window and on the porch and out of people's hands in complete proximity to the visitors, correct? A. Used to. Q…. I'm sorry, until 2011 that was true, correct? A. Yes.").) The DNR added a condition to Dr. Rogers' permit allowing only certain people to hand-feed bears. The DNR did not present any evidence that Dr. Rogers violated this condition. (Tr. at 160:1-6 (Landwehr).) Moreover, even if these facts could be properly considered, the fact that Dr. Rogers may have taught or encouraged behaviors in the past has no bearing on whether his own actions constitute possession and control.

- The Order stated that "cubs conditioned to human contact disperse into the greater region, bearing no outward physical manifestation of their habituation." As a preliminary matter, it is unclear how this statement relates to possession and control. The evidence establishes that male cubs disperse, and that Dr. Rogers typically does not collar those cubs and does not otherwise mark them. However, this fact has no bearing on whether Dr. Rogers' conduct constitutes possession and control in the first instance. Moreover, the evidence shows that habituation is typically location-specific. (Tr. at 2111:21-2112:8 (Mansfield).) The DNR did not offer any evidence to the contrary.

- The Order stated that "[h]abituated, human-conditioned and/or tame bears approach people in an unnatural manner because their fear of humans has been altered," and that "[b]ears that are strongly human tolerant and habituated to food pose an increased public safety risk to people." As a preliminary matter, it is unclear how this statement relates to possession and control. Moreover, while the DNR tried to elicit facts to support these conclusions, the record is replete with contradictory evidence. The DNR offered anecdotal evidence and the testimony of three local property owners. However, nine residents (who have lived in Eagles Nest Township for a combined total of 166.5 years) testified that (1) they have never had problems with bears, (2) they are always able to scare off bears, even collared bears, and (3) the bears do not have an impact on their day-to-day activities. (See Dr. Rogers' Proposed Findings of Fact ("Prop. Findings"), at ¶¶

267–346.) Furthermore, while these considerations may be relevant to the issue of whether the DNR has established it had cause for its decision due to public safety concerns, these alleged consequences of Dr. Rogers' conduct do not have a bearing on whether the conduct constitutes possession and control in the first instance.

- Finally, the Order stated that the DNR "has historically interpreted its statutory authority to require a permit before allowing an individual to radio collar bears or other wild animals." Dr. Rogers does not dispute that traditional methods of collaring wild animals—using some type of drugs or restraints—would constitute exercising possession and control over the animal and thus require a permit. The evidence establishes, however, that Dr. Rogers' method of collaring bears without tranquilizers is unique. Accordingly, the DNR's interpretation of the statute as applied to traditional methods of radio collaring is not relevant to deciding whether Dr. Rogers' conduct constitutes possession and control. Moreover, contrary to Mr. Boggess's conclusory assertion regarding the DNR's position in this case, at least one court has held that the use of radio collars to monitor the movement of elk "[fell] far short of demonstrating control of the elk." Moerman v. State, 17 Cal. App. 4th 452, 458 (Cal. Ct. App. 1993).[5]

C. A Finding That Dr. Rogers' Legal Conduct, Taken In The Aggregate, Constitutes "Control" And Thus Becomes Illegal Would Be Illogical And Legally Indefensible.

The Minnesota Legislature has expressly provided that its laws should not be interpreted to produce absurd or unreasonable results, or results that are "impossible of execution." Minn. Stat. § 645.17(1) ("[T]he legislature does not intend a result that is absurd, impossible of execution, or unreasonable."). Furthermore, courts should guard against rulings that result in otherwise legally permissible conduct becoming illegal. See United States v. Chevron USA, Inc., No. 09-0132, 2009 U.S. Dist. LEXIS 102682, at *10-11 (W.D. La. Oct. 30, 2009) (finding that statutory language did not give defendant "fair warning" that its "perfectly legal" underlying activities would result in a violation of the Migratory Bird Treaty Act); United States v. Brigham Oil & Gas, L.P., 840 F. Supp. 2d 1202, 1212 (D. N.D. 2012) (same). In Brigham Oil, for

[5] Although the facts in Moerman were limited, as the Court previously noted, it is the only decision to address whether radio collars constitute possession or control. The court in Moerman concluded that the use of radio collars did not demonstrate "that the elk are something other than wild animals." 17 Cal. App. 4th at 458.

instance, a North Dakota court considered whether an oil company's conduct, which resulted in injury to some migratory birds, constituted "taking" or "killing" as those terms are used in the Migratory Bird Treaty Act. See 840 F. Supp. 2d at 1212. The Court concluded that it did not, noting that to interpret the terms so broadly would result in "many everyday activities becom[ing] unlawful." Id. at 1213. Similarly, a Louisiana court considering the same issue in Chevron reached the same conclusion and declined to extend the Act's definitions to otherwise "perfectly legal" conduct. See 2009 U.S. Dist. LEXIS 102682, at *10-11.

It is undisputed that it is legal in Minnesota to feed and closely interact with bears. The DNR has argued that the combination of Dr. Rogers' legal conduct—feeding and closely interacting with bears—coupled with his use of collars constitutes "possession and control" and thus requires a permit.[6] This argument is illogical and would make the permitting statutes impossible to apply.

First, there is no legal theory that supports the conclusion that legally-protected conduct, when combined with other legally-protected conduct, transforms into illegal conduct.

Second, an interpretation that Dr. Rogers' conduct constitutes possession would be impossible to apply. As noted above, the evidence establishes that residents of Eagles Nest Township other than Dr. Rogers habituate bears, including the bear known as "June":

- Dr. Rogers testified that he was able to collar June and another yearling "very easily," and that both had been habituated "prior to [Dr. Rogers] ever having experience with those bears." (Tr. at 2240:4-13.) Mansfield testified that "June was already habituated before I got there." (Tr. at 2106:22-24.)

- Dr. Rogers further testified "I have a picture of June when she was – before we met her, just sitting there, and there's a couple of kids sitting with her. . . . This is before we even met her." (Tr. at 2242:20-2243:7.)

[6] Notably, the DNR's closing argument failed to even reference the issue of whether the DNR had established that Dr. Rogers' conduct constitutes possession and control under the applicable statutes.

- Charlie Meyer testified that he hand-feeds bears, and that he was the one who habituated the bear known as June. (Tr. at 1608:15-18 (Meyer) (responding to the DNR's questioning: "Q. Are you the person who food-conditioned June to come to your hand when she was a cub or a yearling? A. Probably, yes.").)

- Moreover, "many" bears in the Eagles Nest Township area have been habituated prior to Dr. Rogers ever having contact with those bears. (Tr. at 2242:13-23 (Rogers) ("Q. Have there been other bears that you have observed during your research that were habituated prior to you ever having experience with the bear or meeting with the bear? A. Oh, many, because we're one feeding site out of – oh, it varies a bit over the years, but 10 to 15 or so. Q. And is it your understanding that those bears would have been habituated by other folks in the area feeding bears? A. Yes. Yes."); Tr. at 2061:5-14 (Mansfield) ("Q. Other than June, are there other occasions where you have reached a conclusion that bears have been habituated before ever getting to WRI? A. Absolutely.").)

The DNR's own witnesses acknowledged that other residents of Eagles Nest Township feed and habituate bears:

- Dr. Garshelis testified that he is aware that residents of Eagles Nest Township feed bears, although he does not know the details of the feeding or how long it has been practiced. (Tr. at 1230:13-1231:10.)

- Andrew Urban testified that he is aware that several residents on the peninsula near his home feed bears at their homes, and he acknowledged that some of the bears that cross his property are "[p]robably" en route to those neighbors' feeding stations. (Tr. at 449:5-453:2.) Urban further confirmed that the Eagles Nest Township Community Bear Committee (of which Urban was a member) found that "Eagles Nest has a number of people who feed wildlife," including bears. (Tr. at 462:14-18; Ex. 16.)

- Barb Soderberg acknowledged that "bears are habituated by being provided food," and she testified that she is concerned about "all feeding of bears." Specifically, Soderberg testified that she is concerned about the fact that her neighbors in Eagles Nest Township feed and habituate bears. (Tr. at 1014:11-1015:19; Tr. at 1019:7-12 ("Q. So you don't know, do you, whether issues that you're having with bears are because those bears were habituated at [WRI] or whether they're being habituated at your neighbor's houses where they're fed? You don't know that? A. I guess I have to say I don't.").)

The evidence also establishes that the DNR releases bears into the wild that have been raised by humans. (See Tr. at 1410:17-1411:23 (Cornicelli) (testifying that he recalls an e-mail in which Garshelis stated that the DNR has released orphaned cubs raised by humans into the wild); Tr. at

2102:5-22 (Mansfield) ("I am aware that the DNR does release hand-raised bears into the wild, yes.").) If it is the combination of Dr. Rogers' interactions with bears over time that amount to possession and control, then Dr. Rogers might need a permit to collar some bears but not others. For example, if Dr. Rogers encounters a bear that has previously been habituated and places a collar on it, he would not be exercising possession and control over that bear. On the other hand, an area resident who does not use collars but who regularly hand-feeds and interacts with bears to the extent that those bears keep returning to his property would suddenly find himself in violation of the statute. Such a rule would thus require a case-by-case (and bear-by-bear) analysis that would be impossible to apply.

1. Interpreting The Statute To Encompass Dr. Rogers' Conduct Would Result In The Statute Being Unconstitutionally Vague.

A person who violates the fish and game laws may be charged with a crime. See Minn. Stat. § 97A.301, subd. 1. Accordingly, if a person is found to "possess" a bear without a permit from the DNR, that person may be subject to criminal prosecution. Because of the potential for criminal prosecution, the applicable fish and game laws that prohibit possession of a protected wild animals unless authorized by a permit must be construed in a way that (1) gives individuals fair notice of where the line between legal and illegal conduct is drawn, and (2) gives sufficiently clear guidance to avoid subjective or arbitrary enforcement of the law. E.g., United States v. Orchard, 332 F.3d 1133, 1137-38 (8th Cir. 2003) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)). The DNR's proposed construction of "possession" under the applicable statutes would not give fair notice and would be subject to subjective or arbitrary enforcement. As such, the DNR's interpretation should be rejected.

First, interpreting "possession" to encompass Dr. Rogers' conduct would fail to give fair notice. A statute is unconstitutionally vague if it "fails to give a person of ordinary intelligence

fair notice that his contemplated conduct is forbidden by statute." United States v. Harriss, 347 U.S. 612, 617, 624 (1954) (construing a statute to "meet[] the constitutional standard of definiteness"); see also Dunn v. United States, 442 U.S. 100, 112 (1983) ("No individual [may] be forced to speculate, at peril of indictment, whether his conduct is prohibited."). Stated differently, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear." United States v. Bass, 404 U.S. 336, 339, 348 (1971) (emphasis added) (refusing to adopt broad reading of statute proposed by the government). Further, when conduct that may result in a criminal violation is ordinarily legal, courts must consider whether the statute provides adequate notice that the conduct at issue could be a crime. See Liparota v. United States, 471 U.S. 419, 426-27 (1985) (interpreting statute to avoid "criminaliz[ing] a broad range of apparently innocent conduct"); see also Chevron, 2009 U.S. Dist. LEXIS 102682, at *10-11 (finding that statutory language did not give defendant "fair warning" that its "perfectly legal" underlying activities would result in a violation of the Migratory Bird Treaty Act and resulting criminal penalties).

Second, interpreting the statute to include Dr. Rogers' conduct could lead to subjective and arbitrary enforcement. A statute must provide clear guidance so that "those charged with applying the statute are not required to make basic policy decisions on a subjective or arbitrary basis." Fogie v. THORN Ams., Inc., 95 F.3d 645, 650 (8th Cir. 1996) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).

Here, as discussed above, an interpretation of "possession" that applies to Dr. Rogers' conduct of feeding and interacting with bears in the aggregate would create a gray area regarding when activities such as feeding, hand-feeding, and closely interacting with bears crosses the line

from legal activity to "possession " that is unlawful without a permit. If the Court finds that Dr. Rogers' aggregated conduct of feeding bears and interacting with bears over time constitutes "possession," members of the public would be left without fair notice of where the "line" is. The DNR would have wide-ranging discretion to determine whether other individuals who feed and interact with bears may also be crossing the line from legal activity into "possession and control." The residents of Eagles Nest Township, operators of the Vince Shute wildlife sanctuary, and other members of the public would be left to guess whether they could legally feed and interact with bears without committing a crime under Minn. Stat. § 97A.301, subd. 1.

2. Interpreting The Statute To Encompass Dr. Rogers' Conduct Would Violate The Rule Of Lenity.

The rule of lenity is a rule of statutory construction that requires ambiguous criminal statutes to be construed narrowly. E.g., State v. Stewart, 529 N.W.2d 493, 496-97 (Minn. Ct. App. 1995) (applying rule of lenity in misdemeanor prosecution for violation of fire sprinkler licensing ordinance); State v. Barsness, 795 N.W.2d 877, 882 (Minn. Ct. App. 2011) (applying rule of lenity in misdemeanor prosecution for violation of DNR regulations); State v. Sorenson, No. A06-746, 2007 Minn. App. Unpub. LEXIS 598, at *5 (Minn. Ct. App. June 7, 2007) (applying rule of lenity in prosecution for keeping more than two watercraft at a dock without obtaining a permit). While Dr. Rogers is not being criminally prosecuted in this contested-case proceeding, the fact that Dr. Rogers (or any other citizen) may be subject to criminal prosecution for the unlawful "possession" of a wild animal without a permit dictates that the statutes at issue must be narrowly construed based upon the rules applicable to criminal statutes.

Minnesota cases construing violations of other permitting and/or licensing laws and regulations are instructive. For example, in Stewart, a city ordinance required residents to obtain a license to "install, connect, repair, alter, or add to any fire sprinkler system." 529 N.W.2d at

496. The defendant was prosecuted for violating the ordinance because, without being licensed, he engaged in certain preparatory acts, including fabricating pipe segments with fittings on-site, drilling holes in walls, floors, and ceilings, and performing other tasks related to the installation of fire sprinkler systems. Id. at 495. The district court upheld the defendant's conviction on the ground that these tasks were "essential" to the fire sprinkler system. Id. at 497. The Court of Appeals reversed. It held that "[b]ecause the terms of the statute and ordinance are not defined, and do not clearly include [the defendant's activities], we construe the ordinance (and statute) in favor of lenity." Id. The court also concluded that the defendant's activities were not "covered by the ordinance merely because they are 'essential.'" Id.

Similarly, in Sorenson, the Court of Appeals reversed a defendant's conviction for "keeping" more than two boats at his dock, in violation of an ordinance. 2007 Minn. App. Unpub. LEXIS 598, at *7. The defendant admitted that he occasionally had three boats at his dock, but argued that the third boat belonged to a guest who only used the dock occasionally. Id. at *2. He argued that "to keep a [boat] means that it must be moored at the dock for 'an appreciable period of time for future use,' which would not prevent the intermittent use of the dock by a guest." Id. at *6-7. The court concluded that the statute was ambiguous regarding the meaning of "keeping" and, in light of this ambiguity, it reversed the conviction. Id. at *7-8.

In this case, Dr. Rogers' actions do not constitute "possession and control" where the statute does not further define those terms to clearly include such conduct. None of Dr. Rogers' activities confine the bears or restrain their freedom to come and go as they please. Because of the criminal aspect of these statutes, any ambiguity in the applicable statutes must be resolved in favor of Dr. Rogers.

II. THE DNR DID NOT MEET ITS BURDEN OF ESTBALISHING THAT IT HAD SUFFICIENT CAUSE TO DENY DR. ROGERS' PERMIT.

In addition to failing to meet its burden of establishing that Dr. Rogers' conduct constitutes possession and control, the DNR failed to meet its burden of establishing that it had "cause" to take action against the permit, as set forth in its letter dated June 28, 2013. As an initial matter, the permit allows Dr. Rogers to radio collar bears and to use den cams. The DNR set forth three reasons for its decision in its June 28, 2013 letter. It must establish that those reasons constitute cause to deny Dr. Rogers' permit, both with regard to den cams and with regard to radio collars.

As discussed below, (a) the governing legal standard requires that the DNR's decision be supported by "cause," regardless of whether it is characterized as a decision to deny, revoke, or refuse to renew the permit, (b) the DNR may not rely on evidence pre-dating December 21, 2012 to support a finding of "cause," and (c) the DNR did not present sufficient evidence to meet its burden of establishing that it had "cause" for any of the reasons it provided on June 28, 2013.

A. Regardless of How The DNR's June 28, 2013 Decision Is Characterized, the Applicable Legal Standard Requires It Be Supported By Cause.

The DNR's ability to revoke or deny Dr. Rogers' permit is governed by Minnesota Statutes § 97A.418. Section 97A.418 applies the same legal standard—"for cause"—to the DNR's decision regarding Dr. Rogers' permit, regardless whether that decision is characterized as a decision to revoke his permit or to deny a new permit:

> Whenever the game and fish laws specifically provide for the issuance of a permit by the [DNR] commissioner, the [DNR] commissioner may do the following . . .
>
> (1) issue a permit with reasonable conditions; and
>
> (2) deny, modify, suspend or revoke a permit <u>for cause</u>, including violation of the game and fish laws or rules adopted thereunder.

On its face, § 97A.418 requires that a decision to "deny" or "revoke" a permit be supported by cause. A decision not to grant a permit is the same as a decision to "deny" a permit, and is therefore governed by the same legal standard. Similarly, a decision not to renew a permit is equivalent to a decision to revoke a permit—it is a decision not to issue a permit after a permit was previously issued. See Minn. R. 6212.1400, subp. 8 (noting that a permit expires at the end of each year, or as otherwise specified in the permit itself, "and may be renewed"). In short, regardless of the label used to describe the DNR's June 28, 2013 decision, the legal standard is the same. The DNR must establish that is had cause.[7]

The fish and game laws and related regulations do not further define what constitutes "cause." While subparts of Minnesota Rule 6212.1400 provide guidance regarding permit decisions and permit conditions, including some examples of what types of findings may constitute "cause,"[8] nothing in Rule 6212.1400 actually defines the term. In addition, there are no Minnesota cases defining and analyzing "cause" in the context of Minn. Stat. § 97A.418. The concept of "for cause" has been developed by Minnesota courts in other contexts, however, and those cases are instructive.

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[7] The DNR has acknowledged that this is the applicable legal standard throughout this contested case proceeding, from its Notice of Hearing commencing the proceeding through its closing argument. (See DNR's Notice of Hearing at 12; Tr. at 2310:13-19 (quoting Minn. Stat. § 97A.418 and arguing "DNR submits that cause has been demonstrated . . . .").)

[8] The DNR also suggested in its closing argument that Subpart 2(E) of Rule 6212.1400 is relevant. (See Tr. at 2311:2-7.) Subpart 2(E) on its face does not apply. It sets forth criteria for "making a decision on issuing conditions for a permit." The DNR's June 28, 2013 decision did not issue conditions for Dr. Rogers' permit. It provided that Dr. Rogers would no longer have a permit—with any conditions—as of the end of July.

The Minnesota Supreme Court has approved a definition of "for cause" that requires the cause to be (1) "real," as opposed to arbitrary or capricious, and (2) something that a reasonable decision-maker acting in good faith would consider sufficient to support the decision:

> The term 'cause' generally means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice. That is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

Hilligoss v. Cargill, Inc., 649 N.W.2d 142, 146 (Minn. 2002) (emphases added) (adopting legal definition of "for cause" from Minnesota's Civil Jury Instruction Guides in employment termination case, where the term was not clearly defined elsewhere in the employment contract). Additionally, the Minnesota Supreme Court has held that the terms "good cause," "just cause," and "cause" are interchangeable. See id. at 148.

For the DNR to make a decision based on "cause," its decision must be based on "competent evidence in the record." See Ukkonen v. Gustafson, 244 N.W.2d 139, 142 (Minn. 1976) (noting city's decision to deny license to operate parking lot for "cause" must be substantiated by "competent evidence in the record," but finding adequate cause existed on other grounds despite one unsubstantiated finding).

B. The DNR's Reliance On Evidence Pre-Dating The Issuance Of A Permit On December 21, 2012 Should Be Limited.

The vast majority of the evidence presented by the DNR consisted of photographs and videos depicting events that occurred prior to December 21, 2012, and testimony describing events that occurred in 2011 or earlier. It is undisputed, however, that the DNR continued to issue permits to Dr. Rogers through June 2013—including most recently on December 21, 2012. The DNR's reliance upon evidence pre-dating the December 2012 permit decision in support of its position that it had "cause" to deny the permit in June 2013 is misplaced, and the Court's

consideration of such evidence should be limited. First, because the DNR was aware of evidence at the time it issued Dr. Rogers a permit on December 21, 2012, it may not rely on that same evidence as a basis for denying the permit six months later. Second, because the DNR imposed specific conditions or expectations upon Dr. Rogers as a result of events pre-dating the December 2012 permit—with which Dr. Rogers complied—the DNR should be estopped from now changing its position to deny Dr. Rogers' permit on the basis of those events.

1. The DNR may not base its decision on evidence of events or conduct that it was aware of when it issued the December 2012 permit.

The DNR may not base its June 28, 2013 decision on evidence it was aware of before issuing the December 2012 permit. Such evidence was not sufficient "cause" to deny the permit on December 21, 2012. In the absence of new evidence or a change in circumstances, the DNR cannot establish that a reasonable decision-maker could have considered the evidence and issued a permit in December 2012 only to later determine—in good faith—that the same evidence was cause to deny the permit six months later.

The Michigan appellate court decisions in King v. State are instructive. See No. 288290, 2010 Mich. App. LEXIS 117 (Mich. Ct. App. Jan. 21, 2010), aff'd King v. State, 793 N.W.2d 673 (Mich. 2010). In King, the Michigan Office of Financial and Insurance Services ("OFIS") granted King an insurance license, despite the fact that OFIS was aware that King had a prior felony conviction. 2010 Mich. App. LEXIS 117, at *1-2. King relied on the license for his career as an insurance agent. Id. at *8. Four years later, OFIS notified King that it was rescinding his license because of his felony conviction. Id. at *2. King sought, and was granted, an injunction preventing OFIS from rescinding his license. OFIS appealed. The Michigan Court of Appeals stated: "[t]he crux of this case is whether defendants could rescind plaintiff's license after the agency had already granted the license when the agency was fully cognizant of

plaintiff's prior . . . felony conviction when it issued the license in 2004." Id. at *7. The Court upheld the injunction and held that King's license could not be rescinded, because "defendants already granted plaintiff a license with full knowledge of plaintiff's felony conviction and plaintiff's criminal record has not changed in the last five years." Id. at *8; see also King v. State, 793 N.W.2d at 678 (Cavanagh, J., concurring) ("[OFIS] may not – in the absence of additional cause – revoke plaintiff's license solely on the basis of the fully disclosed and waived felony conviction known to OFIS when it issued plaintiff's license in 2004.").

In this case, the evidence presented by the DNR pre-dated the issuance of Dr. Rogers' December 21, 2012 permit. Despite having this evidence in hand in December 2012, the DNR decided to reissue Rogers' permit. Thus, at that time, the DNR did not believe that this evidence constituted "cause" to refuse to reissue Rogers' permit. Now, the DNR is attempting to use that same evidence to support its decision. Like in King, the agency may not base its decision to deny Dr. Rogers' permit upon evidence that it was aware of at the time it issued Dr. Rogers' previous permit.

2. The DNR should be estopped from relying upon evidence of concerns that it previously raised and resolved with Dr. Rogers.

Equitable estoppel applies to prevent a party from asserting some right or argument where, through the party's own language or conduct, it induced another to rely, resulting in injury, detriment, or prejudice. E.g., Beaty v. Minn. Bd. of Teaching, 354 N.W.2d 466, 470 (Minn. Ct. App. 1984); Schultz v. Minn. Bd. of Psych., No. C9-99-818, 1999 Minn. App. LEXIS 1276, * 6 (Minn. Ct. App. Nov. 30, 1999). A court has discretion to apply equitable estoppel. Schultz, 1999 Minn. App. LEXIS 1276, at *6. The remedy of equitable estoppel "is available against a government agency if justice so requires." Id. at *6-7.

Minnesota courts have estopped government agencies from enforcing licensing and/or permitting determinations where the applicant relied on advice, guidance, and/or information provided by the agency. In Beaty, for example, a teacher was informed by the Minnesota Board of Teaching that a training program at Mankato State University would be approved to meet the Board's licensure requirements. E.g., Beaty, 354 N.W.2d at 468. After taking the required courses for licensure, the teacher learned that the program was not being approved, and the Board denied the license. Id.at 468-69. The Court applied estoppel to prevent the Board from denying the license. Id. at 471. The Court further noted that the evidence in the case established that the Board was exercising its will, not its judgment, and that its decision was therefore arbitrary and capricious. Id. at 472.

Similarly, in Schultz, the Minnesota Board of Psychology denied Schultz's license application on the ground that she had not completed the required amount of supervised employment. 1999 Minn. App. LEXIS 1276, at *2. The Board based its decision on the fact that the applicant had completed 1,800 hours of employment in a nine-month period, while the relevant regulation required "full-time employment," which it defined to mean "at least 1,800 hours during a 12-month period." Id. at *3. While the Board had not expressly authorized the applicant to complete her requirements in less than 12 months, the Court found significant that: (1) Board staff followed "a policy of responding to all telephone inquiries about licensing requirements by quoting directly from the statute and the rule"—which were ambiguous—and thus would have done so in response to the applicant's inquiry, and (2) other applicants had submitted license applications "after having obtained 1,800 hours of supervised employment in less than 12 months." Id. at *7. Noting that the applicant had attempted to comply with the

licensing requirements as she understood them, the court estopped the Board from denying the application for licensure. Id. at *10-11.

Here, the DNR has imposed certain conditions on Dr. Rogers' permit over the years and has notified him of the agency's expectations. Like the applicants in Beaty and Schultz, Rogers has relied on the DNR's interpretations and guidance, and he has conformed his conduct to meet those interpretations.

a. The DNR may not rely on evidence of conduct at field study courses prior to February 2012.

The evidence presented shows that sometime in 2011 or early 2012, the DNR expressed a concern about participants in Dr. Rogers' field study courses hand-feeding and closely interacting with bears. The DNR did not determine that the feeding and interaction supported denial of a permit. To the contrary, the DNR addressed the issue with Dr. Rogers and included a new condition in Dr. Rogers' February 1, 2012 permit, stating that only Dr. Rogers, Mansfield, and four identified research associates could hand-feed the study bears. (Ex. 158, Feb. 1, 2012 permit, ¶ 9.) The same condition was included in Dr. Rogers' November 29, 2012 permit and his December 21, 2012 permit.

The DNR conceded that Dr. Rogers complied with this condition. (Tr. at 160:1-6 (Landwehr) ("Q. Now, at some point when you found out about some of the events of Dr. Rogers allowing his course participants to feed bears, you told him to stop; right? A. I did. Q. And he in fact stopped it; right? A. To the best of my knowledge."); Tr. at 1453:10-17 (Boggess) (testifying he had no knowledge that Dr. Rogers ever violated a condition of his permit).) Several witnesses testified that Dr. Rogers diligently complied with the condition. (See Tr. at 1525:6-1526:7; 1531:17-1533:4; 1535:2-8 (Stein) (describing instructions given to bear course participants and increasing restrictions since 2011, and testifying "[t]he hand-feeding did not

take place in 2012, and there was nothing like it in 2013. As I say, indeed, we couldn't even go outside on the patio when bears were there."); Tr. at 1852:9-12 (Starks) ("Q. Was there any feeding of the bears by the course participants [in 2012]? A. No, they made it very clear we weren't allowed to do that.").) However, the DNR presented photographs and evidence of hand-feeding of bears and interactions between students and bears at WRI in and prior to 2011. Because the DNR expressly raised the issue with Dr. Rogers in early 2012 and addressed the issue by including a condition in the permit, the DNR may not rely upon evidence of Dr. Rogers allowing course participants and members of the public to hand-feed and have physical contact with bears prior to 2012.

b. The DNR may not rely upon lack of peer-reviewed publication, because Dr. Rogers met the DNR's stated expectation.

The evidence shows that the DNR had concerns about Dr. Rogers' publication of peer-reviewed papers in 2012. In January 2012, the Commissioner sent Dr. Rogers a letter stating that the DNR expected Dr. Rogers to submit two articles for publication during the 2012 permit period. (Ex. 89, at 2 ("I believe it is reasonable to see at least 2 articles submitted for publication during this permit period, and at least 2 publications per year thereafter").) The evidence establishes that Dr. Rogers did submit two articles for publication during the period January to November of 2012. One was published in the Journal of Veterinary Diagnostic Investigations. (Ex. 48.) The other was Dr. Rogers' paper on black bear reactions to snakes, which he submitted to the journal Ursus in June 2012. (Ex. 813.) That article has been accepted for publication in the journal Ethology. (Exs. 152, 155; Tr. at 1961:25-1962:2 (Burghardt) ("[The article] has now been accepted by one of the leading journals in animal behavior, *Ethology*."); id. at 1966:15-22).)

Despite the fact that the DNR expressly notified Dr. Rogers of its expectation that he submit two papers and Dr. Rogers did so, the DNR purports to deny Rogers' permit on the

ground that Dr. Rogers has failed to produce peer-reviewed literature. (Ex. 124.) The DNR attempts to justify its position in two ways. First, the DNR attacked the credibility of the papers. Second, the DNR argued that the papers do not relate closely enough to data collected from permitted activities. Both arguments fail. The first argument fails because the DNR cannot have it both ways—it may not insist that peer-reviewed publication in scholarly journals is the single valid metric for determining what is "good science," while at the same time attempting to discredit a paper that has gone through the peer-review process and been published in a scholarly journal. The second argument fails because (a) the evidence established that the papers do relate to Dr. Rogers' permitted activities (Tr. at 2251:5-2253:17 (Rogers) (explaining his research methods, including the use of radio collars, enabled Dr. Rogers to locate a bear shortly after its death of natural causes, as reported in the Blastomycosis paper, Ex. 48); Tr. at 2259:9-2260:25 (Rogers) (testifying the paper on bear reactions to snakes, Ex. 152, involves research conducted under Dr. Rogers' current study), and (b) the Commissioner's January 2012 letter notifying Dr. Rogers of the DNR's expectation did not contain such a restriction (Ex. 89). The letter simply stated that Dr. Rogers would meet the expectation if two articles were submitted for publication. Dr. Rogers reasonably relied upon this statement. The DNR should be estopped from altering its stated expectation after-the-fact, and it may not rely upon Dr. Rogers' purported lack of peer-reviewed publication as "cause" for denying the permit.

C. The Evidence Does Not Support A Finding of "Cause."

1. Public Safety.

With respect to den cams, there is no basis for a finding of cause based upon public safety. First, the DNR has never taken the position that Dr. Rogers' den cams threaten public safety. (See Ex. 124 (stating in letter denying Dr. Rogers' permit that it is Dr. Rogers'

habituation practices that create a "very real public safety issue").) Second, the DNR presented no evidence that Dr. Rogers' use of den cams poses a public safety issue.

With respect to radio collars, the DNR's attempts to establish that Dr. Rogers' conduct in connection with radio collaring bears creates a public safety issue fail, as set forth in Dr. Rogers' Proposed Findings of Fact. (See Prop. Findings ¶¶ 255–477.)

2. Lack of Publication/"Science"

As an initial matter, as discussed above, the DNR may not rely upon evidence of Dr. Rogers' lack of peer-reviewed publication in light of its express statements to Dr. Rogers about its publication expectation and the fact that Dr. Rogers met that expectation. The Court should reject this as a basis for finding the DNR had "cause" for its June 28, 2013 decision.

Moreover, to the extent the Court chooses to look at this issue despite the fact that Dr. Rogers met the DNR's expressed expectation, the evidence shows that (a) Dr. Rogers submitted two papers for peer-reviewed publication in 2012 (Prop. Findings ¶¶ 122, 126, 240); (b) one of the two papers Dr. Rogers submitted in 2012 was published that same year, and the other was revised and has since been accepted for publication (Prop. Findings ¶¶ 122, 126); (c) Dr. Rogers has recently submitted a paper on denning behavior—based on observational data gathered using the den cams—for publication, and he is in the process of revising that paper to resubmit for publication (Prop. Findings ¶ 129); and (d) Dr. Rogers engages in many forms of peer-reviewed dissemination of his research in addition to the traditional publication of papers in peer-reviewed journals—activities which are becoming increasingly recognized and valued in academia (Prop. Findings ¶¶ 118–121, 147–157).

It is clear from the evidence that Dr. Rogers and Mansfield are performing scientific research. Based on the DNR's review of a portion of Dr. Rogers' data, the DNR has also asserted that Dr. Rogers has not adequately organized or analyzed his data. However, the DNR

has never imposed a requirement that Dr. Rogers organize or analyze his data in a specific fashion. Moreover, the DNR did not deny Dr. Rogers' permit based on how Dr. Rogers' data is organized. (See Ex. 124.)

3. Unprofessional Conduct.

The DNR has taken directly contradictory positions on whether Dr. Rogers' alleged "unprofessional behavior" was part of its claimed "cause" for denying the permit. Although this was one of the three reasons included in the DNR's June 28, 2013 letter, Commissioner Landwehr testified that he did not deny the permit on the basis of the photos, videos, or other allegedly "unprofessional behavior." (Tr. at 111:5–15 (Landwehr) (confirming he testified that "[t]he permit was not denied based on [Dr. Rogers'] professional conduct. It was denied based on public safety concern and the lack of published research.").) Accordingly, the Court should not allow the DNR to change its position yet again and rely upon the alleged "unprofessional behavior" as a basis for "cause" to deny the permit.

Moreover, the DNR failed to present any recent evidence of conduct by Dr. Rogers that it claims was unprofessional. The photographs and videos it presented were from 2011 and earlier. As set forth above, the DNR should not be allowed to rely upon this evidence in light of the fact that (a) the DNR continued to issue Dr. Rogers permits, and (b) the DNR expressly raised concerns with Dr. Rogers and added conditions to his permit, and Dr. Rogers complied with those new conditions. The Court should reject this as a basis for finding the DNR had "cause" for its June 28, 2013 decision.

CONCLUSION

For all of these reasons, and based upon the complete record in this matter, Dr. Rogers requests that this Court recommend that (1) the DNR has not established that Dr. Rogers' conduct constitutes possession and control, and Dr. Rogers thus does not need a permit to continue his work with radio collars; and (2) the DNR has not established that there exists "cause" to support denying Dr. Rogers' permit to conduct his work with den cams.

Respectfully submitted,

Dated: March 28, 2014

s/ Jessica L. Edwards

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