

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Minnesota Department
of Natural Resources Special Permit No.
16501 (Wildlife Rehab - General Class)
issued February 26, 2013 to Jody Benolken

**ORDER GRANTING
MOTION FOR
SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara Case pursuant to a Notice and Order for Prehearing Conference and Hearing filed with the Office of Administrative Hearings on March 17, 2015.¹

Nathan J. Hartshorn, Assistant Attorney General, represents the Minnesota Department of Natural Resources (Department). Erick G. Kaardal, Mohrman & Kaardal, P.A., represents Jody Benolken (Respondent).

On July 14, 2015, the Department filed a Motion for Summary Disposition. Respondent filed an initial response on August 31, 2015, and a supplemental response on September 18, 2015. The Department filed its reply on September 25, 2015.

Based upon the submissions of the parties and the record to date, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following recommendation.

ORDER

1. The Department's Motion for Summary Disposition is GRANTED.

Dated: November 5, 2015

s/Barbara J. Case

BARBARA J. CASE
Administrative Law Judge

¹ For administrative purposes, the docket number in this case was changed on October 20, 2015, from 82-2001-32339 to 82-2002-32339.

NOTICE

This Order is a recommendation, not a final order. The Commissioner of the Department of Natural Resources will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Order has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Order and the Commissioner must consider the exceptions in making a final decision. Parties should contact Commissioner Tom Landwehr, 500 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Order and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Order will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2014), the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Regulatory Background

The Department, as directed by its Commissioner, has “charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state.”² The Commissioner, acting through the Department, has the legal authority to take all actions “necessary to preserve, protect, and propagate the desirable species of wild animals” in the state.³

For over 30 years, the Department has issued wildlife rehabilitation permits as one means of seeking to protect the state’s wild animals.⁴ Issuance of these permits is governed by the provisions of Minnesota Statutes section 97A.401, subd. 3 (2014), which allows the Commissioner to issue “special permits ... to take, possess, and transport wild animals as pets and for scientific, educational, rehabilitative, wildlife disease prevention and control, and exhibition purposes.”

² Minn. Stat. § 84.027, subd. 2 (2014).

³ Minn. Stat. § 97A.045, subd. 1 (2014).

⁴ Affidavit of Heidi Cyr (Cyr Aff.), Ex. 9 at 8.

In the promulgation of Minnesota Rules Chapter 6244, the Department has established “reasonable standards for the rehabilitation of orphaned, sick, and injured wild animals, and ... a permit system and other criteria for such rehabilitation.” The rules regarding wildlife rehabilitation were developed in response to increasing evidence about:

... the questionable manner in which animals were being acquired, housed, cared for transported and released by some persons holding agency permits to engage in rehabilitation. ... [A] significant part of this concern relate[d] to known cases of rehabilitators allowing animals in their care to become habituated to humans or even intentionally trying to tame wild animals and thus, in effect, treating them as personal pets.⁵

The applicable rules provide that “[n]o person shall rehabilitate a wild animal without a [rehabilitation] permit from the [C]ommissioner.” In Minnesota, only “[a] person with a rehabilitation permit may capture, receive, possess, transport, or transfer an orphaned, sick, or injured wild animal for purposes of rehabilitation....”⁶ Every permittee must comply with all “conditions in the permit” and the Department’s rules,⁷ or face revocation of all or part of any issued permit.⁸

The rules identify three classes of rehabilitation permits: novice; general; and master.⁹ Each permit class requires that the applicant pass an examination demonstrating specific knowledge.¹⁰ Each successively higher permit classification allows the holder increased privileges related to the type of wild animals they may have in their care, for what purposes they may possess wild animals, and how many volunteers they may supervise in caring for the wild animals.¹¹ The rules also prescribe required record-keeping and reporting,¹² application for permit renewal every two years, continuing education, and retention of a veterinarian consultant.¹³ Wildlife rehabilitation is voluntary and permit holders “are not allowed to charge the public a fee for taking care of orphaned, sick or injured wildlife.”¹⁴ Wildlife rehabilitators are not authorized to publicly exhibit animals in their care.¹⁵

In contrast to the comprehensive rules governing wildlife rehabilitation permits, the rules governing wildlife educational permits consist of one line inserted in the rules governing “Rehabilitation Standards” in Minnesota Rule 6244.0800 (2015). The rule

⁵ Cyr Aff., Ex. 9 at 8-11.

⁶ Minn. R. 6244.0400, subp. 1 (2015).

⁷ *Id.*

⁸ Minn. R. 6244.1700 (2015).

⁹ Minn. R. 6244.0410 (2015).

¹⁰ Minn. R. 6244.0420, subp. 4 (2015)

¹¹ See Minn. R. 6244.0410.

¹² Minn. R. 6244.0600 (2015).

¹³ Minn. R. 6244.1600 (2015).

¹⁴ Cyr Aff., Ex. 9 at 13.

¹⁵ Minn. R. 6244.0800, subp. 2.C (2015).

states in its entirety that “[u]se of nonreleasable animals for scientific, educational, or exhibition purposes is allowed only under separate permit from the commissioner.”¹⁶

II. Factual Background

Respondent resides in Pengilly, Minnesota.¹⁷ She is the Executive Director of Dark Star Wildlife Center (Dark Star),¹⁸ formerly known as Dark Star Wildlife Nursery, a nonprofit corporation that operates summer day camps and school-based education programs focused on “getting kids back into the outdoors, wildlife”¹⁹ as well as “wildlife rehabbing and helping wildlife.”²⁰ Respondent operates Dark Star out of her home.²¹

A. Rehabilitation Permit

Defendant issued Respondent a Novice Class rehabilitation permit by the Department on August 9, 2007.²² This permit was renewed by the Department on March 5, 2009.²³

Respondent was issued a General Class rehabilitation permit by the Department on June 22, 2010.²⁴ This permit was renewed by the Department on April 8, 2011, and again on February 26, 2013 (2013 Rehabilitation Permit).²⁵

Respondent’s 2013 Rehabilitation Permit²⁶ contained several conditions, including the following which are relevant to this matter:

1. Possession of animals

(b) **Possession for rehabilitation.** Permittee may possess for rehabilitation orphaned, sick or injured wild animals that are neither endangered or threatened species under Minnesota or federal laws. Such animals may be captured by the permittee or received from others. ...

The following restrictions apply:

Birds – rehabilitation is authorized for all species of orphaned birds except those that are either endangered or threatened or of the order Falconiformes (*hawks, eagles, harriers, osprey, falcons, although kestrels*

¹⁶ Minn. R. 6244.0800, subp. 4.B (2015).

¹⁷ Aff. of Jody Benolken (First Benolken Aff.), ¶2.

¹⁸ First Benolken Aff, ¶3.

¹⁹ Deposition Testimony of J. Benolken (Benolken Dep.), 8:23-9:4; 11:25-12:2; Ex. 1.

²⁰ Benolken Dep., 13:3-9.

²¹ First Benolken Aff, ¶3.

²² Cyr Aff. ¶ 5, Ex. 1.

²³ Cyr Aff. ¶5.

²⁴ Cyr Aff. ¶5, Ex. 2.

²⁵ Cyr Aff. ¶5, Ex. 3.

²⁶ Cyr Aff. Ex. 3 (emphasis in original).

may be possessed for rehabilitation) [or] of the order Strigiformes (owls, although saw-whet and screech owls may be possessed for rehabilitation).

Mammals – rehabilitation is authorized for all species of orphaned, sick, or injured mammals except those that are either endangered or threatened. ...

(c) **Federal permit.** This permit is not valid for migratory birds unless permittee also has a valid federal permit for wildlife Rehabilitation and all other activities under this permit.

5. Minimal contact of animals with humans

- (a) Animals being rehabilitated are to have contact with the permittee and in-shelter assistants, only to the extent necessary for adequate care;
- (b) Under no circumstances are animals to be habituated to humans, tamed, treated as pets or used in inappropriate ways;
- (c) Public exhibition or display of animals undergoing rehabilitation is prohibited.

8. Release of animals

- (a) When, in the judgment of the permittee, and after discussion with the designated veterinary consultant and mentor, a wild animal undergoing rehabilitation ... is to the point where it has a reasonable chance to survive in the wild, the animal is to be released immediately in suitable habitat as near to the point where the animal was captured as practical. ...

9. Disposition of non-releasable animals – Animals determined to be incapable of surviving if released to the wild must be:

- (a) Euthanized under protocols established by the American Veterinary Medical Association; or
- (b) Turned over to the Department of Natural Resources; or
- (c) Transferred as directed by the Department of Natural Resources.²⁷

²⁷ Cyr Aff., Ex. 3.

- 10. Report** - A report of activities carried out under this permit is to be submitted to [the Department's] Division of Ecological and Water Resources on the form provided by January 15, 2014, for animals received in 2013, and by January 15, 2015, for animals received in 2014, respectively.

B. Educational Permit

A few weeks before the renewal of the 2013 Rehabilitation Permit, on February 21, 2013 Respondent emailed Lauri Naumann, a Nongame Wildlife Program Information Officer with the Department, to request a wildlife educational permit.²⁸ Respondent's submission to Ms. Naumann was titled "Educational Permit" and explained that Respondent wanted to begin a wildlife educational program with a raccoon and a hawk owl that were then in her care.²⁹ Respondent's submission also outlined her passion for and experience pertaining to the education of children related to the care of wildlife, as well as her background in teaching the public about wildlife.³⁰

Ms. Naumann responded to Respondent on February 22, 2013, stating: "OK, Jody, this works. The permit will specify what species you will have, so you are starting with a hawk-owl and a raccoon? This is what I will make the permit valid for."³¹ Ms. Naumann also requested that Respondent provide more examples of the educational programs in which wild animals would be involved under the permit.³²

On June 6, 2014, Respondent was informed that the Department had received a complaint regarding her use of wildlife to "teach kids."³³ Respondent emailed Ms. Naumann and asked, "Can I not be [using wildlife to educate kids] until I get a permit from you."³⁴ Ms. Naumann responded by email on June 13, 2014, stating that she would work on the educational permit for Respondent that day.³⁵ Still having not received the permit, Respondent again emailed Ms. Naumann on July 9, 2014³⁶ and July 22, 2014³⁷ to inquire about the status.

Respondent still had not received the educational permit by September 3, 2014, when she received an email from Ms. Naumann asking Respondent to specify where she

²⁸ First Benolken Aff., ¶ 9, Ex. 1.

²⁹ *Id.*

³⁰ *Id.*

³¹ First Benolken Aff., Ex. 2.

³² *Id.*

³³ First Benolken Aff., Ex. 3.

³⁴ *Id.*

³⁵ *Id.*

³⁶ First Benolken Aff., Ex. 4.

³⁷ First Benolken Aff., Ex. 5.

had obtained the animals in her care and confirm her address, and again confirmed her intention to “get started on” the educational permit.³⁸

In August 2014 shortly after Heidi Cyr, the Wildlife Rehabilitation Permit Coordinator for the Department, sent a letter introducing herself as the new permit coordinator to all holders of rehabilitation permits, Respondent called Ms. Cyr to inquire about the status of her application for a wildlife educational permit.³⁹ Although the parties dispute the specific content of the conversation, it was during this conversation that Ms. Cyr became concerned about the extent and nature of Respondent’s educational activities,⁴⁰ and Respondent became aware that she could not simultaneously hold both a wildlife rehabilitation permit and a wildlife educational permit.⁴¹ Respondent was willing to give up her rehabilitation permit and pursue an educational permit.⁴² Respondent communicated this to the Department, as evidenced in a November 19, 2014 letter which read: “In the past you have expressed interest in obtaining a wildlife educational permit. We will work with you to try to approve the permit that best fits your circumstances.”⁴³ Notwithstanding these assurances, the Department never did issue an educational permit to Respondent.

C. Complaints and Nonrenewal

In July 2014, Ms. Cyr received a call from a citizen who expressed concern about Respondent’s use of wild animals for educational purposes. The caller stated that Respondent was allowing people to play with and pet wild animals, and was habituating and then releasing deer back into the wild.⁴⁴ Following the call, Ms. Cyr made some inquiries into Respondent’s activities but at that time found no “emergent issues” with Respondent’s permit.⁴⁵

The Department began an investigation related to Respondent’s activities under her rehabilitation permit in or about late 2014.⁴⁶ The investigation centered on a review of Respondent’s activities published on Dark Star’s Facebook account.⁴⁷

On November 19, 2014, Jane Norris, a Conservation Management and Rare Resources Unit Manager for the Department, wrote to inform Respondent that if she wished to retain her 2013 Rehabilitation Permit she must:

³⁸ First Benolken Aff., Ex. 6.

³⁹ Cyr Aff. ¶ 9.

⁴⁰ Cyr Aff. ¶ 10.

⁴¹ Second Affidavit of Jody Benolken (Second Benolken Aff.) ¶ 10.

⁴² *Id.*

⁴³ Cyr Aff., Ex. 6 at 1.

⁴⁴ Cyr Aff. ¶ 7.

⁴⁵ Cyr Aff. ¶ 8.

⁴⁶ Cyr Aff. ¶ 25.

⁴⁷ Cyr Aff. ¶¶ 22- 25.

- Stop treating the animals in her care in a way that habituated them to humans by discontinuing any public exhibition of the animals and allowing them access to areas of her home;
- Turn over the owl hawk in her possession to a wildlife rehabilitator authorized to possess the animal;
- Obtain a federal rehabilitation permit if she planned to rehabilitate migratory birds; and
- Allow the DNR to dispose of the black bear and all other nonreleasable animals in Respondent's within 14 days of her receipt of the letter.⁴⁸

The letter also stated that “[w]e could allow you to keep the fox and squirrel under an educational permit. We will assist you in the disposition of all other animals in your possession that are non-releasable.”⁴⁹

On January 2, 2015, Ann Pierce, a Section Manager for the Department's Division of Ecological and Water Resources, wrote Respondent to inform her that the Department would not renew the 2013 Rehabilitation Permit and that Respondent had until January 31, 2015, to discontinue all wildlife rehabilitation activities.⁵⁰ The Department offered the following reasons for the nonrenewal:

- Respondent's possession and treatment of migratory birds not authorized under the 2013 Rehabilitation Permit;
- The manner in which Respondent cared for several wild animals resulted in those animals becoming habituated to people;
- Respondent treating wild animals as pets; and
- Respondent's use of wild animals in exhibits and programs in violation of the 2013 Rehabilitation Permit and the close interactions she allowed between wild animals and the public, including children, which created a public safety issue.⁵¹

⁴⁸ Cyr Aff., Ex. 5.

⁴⁹ *Id.*

⁵⁰ Cyr Aff., Ex. 6.

⁵¹ *Id.*

By its terms, the 2013 Rehabilitation Permit expired on January 31, 2015.⁵² Respondent filed a renewal application on January 22, 2015, which was denied.⁵³ Respondent requested an appeal, and the Department issued the Notice and Order for Prehearing Conference and Hearing for this matter, which sets forth the issue of whether the Department had “just cause to deny renewal of Respondent’s 2013 Special Rehabilitation Permit due to numerous violations of the terms of the permit and applicable state rules.”⁵⁴ An educational permit was never issued to Respondent and is not part of this appeal.⁵⁵

III. Summary Disposition

Summary disposition is the administrative equivalent of summary judgment.⁵⁶ Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.⁵⁷ A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.⁵⁸ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition in contested case matters.⁵⁹

The moving party must demonstrate that no genuine issues of material fact exist and that it is entitled to summary disposition as a matter of law.⁶⁰ If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.⁶¹ It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for hearing.⁶²

⁵² Cyr Aff., Ex. 3 at 2.

⁵³ Cyr Aff. ¶ 26. The Department’s proffered facts relating to the educational permit are confusing. Though Ms. Naumann sent emails to Respondent stating that she was working on her educational permit request, Ms. Naumann avers in her affidavit in support of the Department’s motion that “Ms. Benolken never submitted a written request for an education permit to DNR.” See Affidavit of Lori Naumann ¶ 12. At the same time, Ms. Cyr avers that “...DNR staff determined that Ms. Benolken’s request for an education permit for the animals ...should be denied...The primary reason the education permit was not granted was the public safety risk that Ms. Benolken’s conduct presented.” See Cyr Aff. ¶¶ 27-28. This confusion regarding whether Respondent did or did not apply for an educational permit and what action, if any, the Department took in response to Respondent’s submissions, appears to be attributable to the number of Department staff involved and the lack of any formal process in the Department’s rules regarding educational permits. The right to request and appeal the denial of permits is found in the rules regarding rehabilitation permits, Minn. R. 6244.1500-1700 (2015), and the section on wildlife exhibits at Minn. R. 6244.3000 (2015), but there is no comparable section specifically pertaining to educational permits.

⁵⁴ NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING at 7 (March 13, 2015).

⁵⁵ See *id.*

⁵⁶ Minn. R. 1400.5500(K) (2015).

⁵⁷ Minn. R. Civ. P. 56.03; Minn. R. 1400.5500(K).

⁵⁸ *Highland Chateau v. Minnesota Dep’t of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).

⁵⁹ Minn. R. 1400.6600 (2015).

⁶⁰ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

⁶¹ *Id.*

⁶² Minn. R. Civ. P. 56.05.

When considering a motion for summary disposition, the Administrative Law Judge must view the facts in the light most favorable to the non-moving party.⁶³ All doubts and factual inferences must be resolved against the moving party.⁶⁴ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.⁶⁵

IV. Positions of the Parties

A. Department's Position

For purposes of the Motion for Summary Disposition, the Department categorizes Respondent's alleged violations into fourteen categories, as follows:

1. Unlawful Exhibition of Rehabilitation Animals.
2. Unlawful Exposure of Wild Animals to Improper Handling and Petting.
3. Habituation of Wild Animals to Contact with Humans.
4. Violations of Caging Regulations Mandating that Rehabilitation Animal Facilities be Separated from Human Living Areas.
5. Unlawful Treatment of Wild Animals as Pets.
6. Unlawful Housing of Wild Mammals with Other Wild Mammal Species.
7. Unlawful Housing of Wild Mammals with Domesticated Pets.
8. Unlawful Possession of Migratory Birds without Proper Federal Permits.
9. Possession of Birds Not Authorized by General Class Rehabilitation Permit.
10. Retention of Nonreleasable Rehabilitation Animals without Legal Basis.
11. Unlawful Release of Nonreleasable Animals to the Wild.
12. Unlawful Refusal to Relinquish Wild Animals Held Without a Permit.
13. Unlawful Transfer of Nonreleasable Rehabilitation Animals.

⁶³ *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

⁶⁴ *Glarner v. Time Insur. Co.*, 465 N.W.2d 591, 594 (Minn. Ct. App. 1991).

⁶⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

14. Failure to Keep and Timely File Records Documenting Rehabilitation Activities.

In its voluminous submissions, the Department provides evidence and legal argument in support of each category.⁶⁶

B. Respondent's Position

In general, Respondent's defends the motion by claiming that the doctrine of estoppel bars the Department's attempt to deny the requested permits given the Department's representatives' promises to issue her an educational permit⁶⁷ and the fact that some Department's staff knew she was exhibiting wild animals.⁶⁸ Respondent also defends her actions by pointing out that representatives from the Department brought her several wild animals, including some birds that were illegal for her to possess.⁶⁹ Respondent argues that many of the animals came to her habituated to humans or were unavoidably habituated while she was rehabilitating them and therefore not releasable.⁷⁰

V. Legal Analysis

The Department claims that Respondent has committed hundreds of violations of state statutes, wildlife regulations, and her permit conditions.⁷¹ Citing Minn. Stat. § 97A.418 (2014), which provides that “[t]he commissioner may amend, revoke, or refuse to renew the permit of a person who violates sections 6244.0100 to 6244.2000 or any provision of a permit issued under sections 6244.0100 to 6244.2000,” the Department argues that it “need only show that Respondent has committed a *single violation* of (a) game and fish statute, (b) a Rule pertaining to rehabilitation permits, or (c) a restriction stated in the 2013 Special Permit. Any such violation – even if there were only one-would indisputably provide DNR with sufficient legal authority to refuse to renew Respondent's rehabilitation permit.”⁷²

A. Violations Established

It is not necessary for the Administrative Law Judge to consider each of the fourteen alleged categorical violations urged by the Respondent. The most significant violations of Respondent's wildlife rehabilitation permit are summarized below.

⁶⁶ DNR's Memorandum of Law in Support of Motion for Summary Disposition (Dept. Mem.) (July 13, 2015), with attached supporting affidavits and exhibits.

⁶⁷ Second Benolken Aff. ¶ 13.

⁶⁸ Second Benolken Aff. ¶¶ 8, 2, 3.

⁶⁹ First Benolken Aff. ¶ 18.

⁷⁰ Add cite

⁷¹ Dept. Mem. at 9.

⁷² *Id.*

1. Unlawful Exhibition of Rehabilitation Animals

Numerous photographs as well as Respondent's deposition and admissions establish that Respondent regularly exhibited animals held under the 2013 Rehabilitation Permit to various groups of people from the public, including young children.⁷³ Exhibition of the animals is a clear violation of the 2013 Rehabilitation Permit.⁷⁴ Many times Respondent allowed members of the public to handle the animals or to be very near the animals.⁷⁵ These actions by Respondent threatened the health and safety of the animals and the public.⁷⁶

Pursuant to Minn. Stat. § 97A.401, subds. 1 and 3 (2014), exhibition activities are only legally permissible when the exhibitor possesses the proper permit.⁷⁷ Public exhibition of animals being rehabilitated is prohibited except under a separate permit and only if the animal is unreleasable.⁷⁸

Although the parties' versions of the facts differ regarding whether Respondent ever requested a wildlife educational permit, there is no dispute that Respondent was never issued an educational permit for any of the animals in her possession.⁷⁹ Possessing and transporting wild animals for educational and exhibition purposes may only be done pursuant to special permits in which the commissioner prescribes the conditions for taking, possessing, transporting, and disposing of the wild animals.⁸⁰

The Department explains the policy rationale for limiting the handling and exhibition or other exposure to humans of rehabilitation animals as follows: the activities risk stress to the animals, disease transmission, danger of physical injury to human audience members, and habituation.⁸¹ Habituation undermines the ability to release the animal back into the wild.⁸² Even when a permit is issued allowing animals to be exhibited, the animals must experience limited handling and be kept a "...sufficient distance between animal acts and the viewing public to assume safety to both the public and the animals."⁸³ Respondent violated the terms of her 2013 Rehabilitation Permit and the law regarding the exhibition of wild animals when she allowed animals to be handled and petted, and to run loose at exhibitions.

Respondent's defense to her unlawful exhibition of the animals — that the animals exhibited were habituated and therefore education animals — fails because Respondent did not have an educational permit or a permit to exhibit wildlife. Even if she had been

⁷³ Cyr Aff. ¶¶ 42-47, Ex. ZZ.

⁷⁴ Cyr Aff., Ex. 3 at 2.

⁷⁵ Affidavit of Nathan J. Hartshorn (Hartshorn Aff.), Ex. D, E, F, G, H, K, M, N, O; Cyr. Aff., Ex. ZZ.

⁷⁶ Cyr Aff. ¶¶ 42-47; Affidavit of Renee Schott, D.V.M. (Schott Aff.) ¶ 11.

⁷⁷ Minn. Stat. § 97A.401, subds. 1, 3 (2014).

⁷⁸ Minn. R. 6244.0800, subps. 2(C), subp. 4(B) (2015); Minn. R. 6244.0100 (2015).

⁷⁹ Naumann Aff. ¶¶ 12-14; Cyr Aff. ¶¶ 48-51; First Benolken Aff. ¶ 20; Second Benolken Aff. ¶¶ 2-6, 8.

⁸⁰ Minn. Stat. § 97A.401, subds. 1, 3 (2014).

⁸¹ Cyr Aff. ¶ 40.

⁸² *Id.*

⁸³ Minn. R. 6244.2800, subp. 6 (2015).

granted an educational permit, the way in which she exhibited the animals violated the law and was still improper.

2. Unlawful Exposure of Wild Animals to Improper Handling

The record shows Respondent allowed adults and children to play with and pet rehabilitation animals at her facilities and in her home as well as at the public exhibitions described above.⁸⁴ Respondent permitted those who handled the animals, including young children, to do so without personal protective equipment, a basic requirement for handling wild animals.⁸⁵ Notably, the number of persons Respondent permitted to have contact with rehabilitation animals exceeds the maximum number of rehabilitation volunteers allowed by state law to handle rehabilitation animals.⁸⁶ Respondent's activities in this regard violated Minn. R. 6244.1000, subp. 5(c) (2015), and Minn. R. 6244.2800, subp. 6 (2015), as well as the terms of her 2013 Rehabilitation Permit.

The Department explains that petting and handling of rehabilitation animals presents the following risks: habituation; causing them undue stress; transmitting disease; threatening injury to handlers; and reducing the likelihood that the animals can ultimately be released back into the wild.⁸⁷ Respondent defends these violations by insisting that these animals were educational animals and not rehabilitation animals.⁸⁸ For example, when responding to the allegation that she allowed many young raccoons to climb on her grandchildren, Respondent stated that the grandchildren were "sitting still like trees" and insisted that exposure of young animals to humans does not lead to habituation."⁸⁹ This response supports the Department's position that Respondent does not sufficiently understand, or respect, the guidance provided by the Minnesota Wildlife Rehabilitation Study Guide⁹⁰ or the laws governing wild animal rehabilitation.

3. Habituation of Wild Animals to Humans

Habituation involves the lessening of an animal's fear of humans, sometimes as the result of daily contact and hand-feeding by the keeper, which undermines the purpose of rehabilitation: the release of wild animals back into the wild.⁹¹ The record substantiates the determination that Respondent habituated numerous rehabilitation animals to contact with humans, making it impossible for these animals to ever be returned to the wild.⁹² Photographs posted on Dark Star's Facebook page show that young animals were handled and petted by multiple members of the public and allowed to crawl over

⁸⁴ Cyr Aff. ¶¶ 54-57; Schott Aff. ¶¶ 7, 9, 15.

⁸⁵ See Schott Aff. ¶¶ 13, 15, 17, 18.

⁸⁶ Schott Aff. ¶ 7.

⁸⁷ Cyr Aff. ¶ 52.

⁸⁸ Hartshorn Aff. Ex. 3 at 72-73; Second Benolken Aff. ¶¶ 29-30.

⁸⁹ Benolken Dep. 73-77, 140-141.

⁹⁰ Cyr Aff. , Ex. 9 at 6. The Minnesota Wildlife Rehabilitation Study Guide is published by the Department to provide rehabilitators with a study tool to prepare for passing permit examinations related to law and best practices, as well as to provide a reference resource for permittees.

⁹¹ Cyr Aff. ¶¶ 58-67; Schott Aff. ¶¶ 9, 13.

⁹² See Cyr Aff. ¶¶ 64-67; Schott Aff. ¶¶ 9, 13.

children.⁹³ In addition to violating the Department's rules as well as the terms of the 2013 Rehabilitation Permit, these activities facilitated by Respondent effectively rendered the animals habituated and unable to be rehabilitated and released.⁹⁴ Given the young age of many of the animals, Respondent could not have determined that the animals were already habituated and not releasable.

4. Unlawful Treatment of Wild Animals as Pets

Wild animals make poor and dangerous pets, especially as they age.⁹⁵ Treating them as pets violates the law and Department guidance.⁹⁶ Moreover, treating wild animals as pets creates the risk of habituation and injury, and increases the likelihood that the animals can never be released back into the wild.⁹⁷ Numerous exhibits in the record show Respondent treating rehabilitation animals as pets by naming them, holding and petting them, allowing them to wander inside her home on furniture and appliances, allowing them to mix with her domesticated pets, and feeding them inappropriate human food.⁹⁸ Respondent argues that she was using "education animals" to "demonstrate to the public that they do not make good pets."⁹⁹ Yet her Facebook postings and her treatment of the wild animals in her possession likely sent the opposite message.

Minn. R. 6244.0900, subp. 1 (2015), requires, in part, that cages for rehabilitating wild animals "...must be sufficiently separate and protected from pets and human living or work space to prevent human contact with animals. Animals must be kept in separate facilities at all times except when removal is necessary for veterinary care, transfer to another licensed rehabilitator, or release to the wild."¹⁰⁰ Separation of wild animal living spaces from human living or work spaces decreases the chance of habituation, lessens stress to the animals, prevents disease transmission, lessens the risk of injury to animals and humans, and helps prevent accidental release.¹⁰¹ In her treating the wild animals in her care in the same manner that she treated her domesticated pets, Respondent violated Minnesota law and applicable permit conditions.

5. Housing Wild Mammals with Other Wild Mammal Species and with Domesticated Pets

Minn. R. 6244.0800, subp. 2(B) (2015) states that "[m]ammals being rehabilitated may be housed only with others of the same species."¹⁰² Housing different wild mammal species together risks dangerous habituation of each species to the other, which can be

⁹³ See Schott Aff. ¶¶ 9, 13.

⁹⁴ See Minn. R. 6244.0800, subp. 2(A); Minn. R. 6244.0900, subp. 1; Minn. R. 6244.1000, subp. 5(c); Cyr Aff., Ex. 3.

⁹⁵ Cyr Aff. ¶ 73.

⁹⁶ Minn. R. 6244.0800, subp. 2(A); Cyr Aff., Ex. 3.

⁹⁷ Cyr Aff. ¶¶ 73, 74.

⁹⁸ Cyr Aff. ¶¶ 76-78, Schott Aff. ¶¶ 9, 12, 14.

⁹⁹ First Benolken Aff. ¶ 20.

¹⁰⁰ Minn. R. 6244.0900, subp. 1 (2015).

¹⁰¹ Cyr Aff. ¶ 68.

¹⁰² Minn. R. 6244.0800, subp. 2(B) (2015).

detrimental in the wild once the animal is released.¹⁰³ Imprinting, injury, and the spread of disease are also risks.¹⁰⁴ Numerous photographs on Dark Star's Facebook page show that Respondent allowed different wild mammal species to play together, wrestle together, exchange mock bites, and sleep together.¹⁰⁵

Minn. R. 6244.0900, subp. 1 (2015), prohibits housing rehabilitation animals with domestic pets¹⁰⁶ for the same reasons set forth above.¹⁰⁷ The record is replete with examples of Respondent violating this rule.¹⁰⁸ The fact that Respondent does not agree with the rule, as evidenced in a post on the Dark Star Facebook page,¹⁰⁹ does not excuse her failure to comply with it.

6. Other Violations

The Department argues that Respondent violated many other rules and permit conditions. Many of these alleged additional violations related to the same permit conditions and rules as the violations examined above, and Respondent's defenses are also generally the same. For purposes of deciding this motion, it is unnecessary to assess the evidence and arguments on each of these additional allegations.

VI. Estoppel Defense

Respondent argues that the DNR misled her by claiming that it was processing her application for a permit to use certain wild animals for educational purposes when it had no intention of providing her with such a permit. Respondent also argues that the Department led her to believe she would be able to keep wild animals that were habituated to humans and use them under the terms of a wildlife educational permit. Respondent further argues that the Department was aware of all of Respondent's activities and, in a variety of ways, encouraged her activities.¹¹⁰ Therefore, Respondent argues the Department should be estopped from denying renewal of her general class rehabilitation permit or refusing to issue her a wildlife educational permit because the Department misrepresented material facts, knew the misrepresentation was false, intended the facts to be relied upon, and Respondent relied upon them to her detriment.¹¹¹

To prove application of equitable estoppel, the plaintiff must demonstrate that the defendant, through his language or conduct, induced the plaintiff to rely in good faith on identified language or conduct to his injury, detriment, or prejudice.¹¹² Thus, before a court will examine the conduct of the party sought to be estopped, the seeker of the

¹⁰³ Cyr Aff. ¶¶ 79-82

¹⁰⁴ Cyr Aff ¶ 79.

¹⁰⁵ *Id.*

¹⁰⁶ Minn. R. 6244.0900, subp. 1 (2015).

¹⁰⁷ Cyr Aff ¶¶ 83-85; Schott Aff. ¶ 18.

¹⁰⁸ Schott Aff. ¶ 18.

¹⁰⁹ Cyr Aff. ¶ 82.

¹¹⁰ Respondent's Response to the DNR's Motion for Summary Disposition (Resp. Mem.) at 1-2 (August 26, 2015).

¹¹¹ *Id.* at 11.

¹¹² *Ridgewood Development Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980).

equitable remedy must demonstrate that she suffered some loss through her reasonable reliance on the conduct.¹¹³

In this case, Respondent did not rely on the Department's representations to her detriment. Instead, the detriment claimed by Respondent is that the Department is now holding her public display of wild animals against her by denying renewal of her wildlife rehabilitation permit. This argument is not persuasive because Respondent clearly violated the terms of her 2013 Rehabilitation Permit. While some members of the Department's staff may have misled Respondent about whether the agency was going to issue her an educational permit, that fact does not alter the analysis. Without a wildlife educational permit, there was nothing for Respondent to rely upon as she displayed the wild animals to the public.

More importantly, even if Respondent had received a wildlife educational permit, the evidence of Respondent's violations of the law governing wildlife rehabilitation and exhibition is overwhelming. Respondent treated wild animals as domestic pets while professing that she was educating the public that wild animals do not make good pets. She allowed wild animals to be handled by the public in a manner that violates both the rehabilitation laws and the laws regarding public exhibition of animals.

As she acknowledges, Respondent shoulders a great burden in asserting equitable estoppel against the government. In applying equitable estoppel against the government, the Minnesota Supreme Court has said that "the equities of the circumstances must be examined and the government estopped if justice so requires, weighing in that determination the public interest frustrated by the estoppel.... We do not envision that estoppel will be freely applied against the government."¹¹⁴ But if justice demands, estoppel can be applied against the government even when it acted in a sovereign capacity if the equities advanced by the individual are sufficiently great.¹¹⁵

The equities in this case favor the Department, which is charged with the duty to "preserve, protect, and propagate desirable species of wild animals."¹¹⁶ Within the wildlife rehabilitation statute, the Department's responsibility is to provide for the care and release of wild animals in a way that provides humane care for the animals and protects humans from injury and disease.¹¹⁷ Therefore, the public interest at issue here, that of preserving all wildlife and protecting human life, is important and fundamental to the heritage of the state.

Though Respondent is emotionally invested in her role as a wildlife rehabilitator, her interest cannot be seen as greater than the Department's interest in this case. Respondent has no financial stake in her permit because individuals who rehabilitate wildlife are not permitted to charge fees for their services. Losing a wildlife permit is not

¹¹³ *Id.*

¹¹⁴ *Local Gov't Inf. Systems v. Village of New Hope*, 248 N.W.2d 316, 321 (Minn. 1976).

¹¹⁵ *Mesaba Aviation Division of Halvorson of Duluth, Inc. v. Itasca County*, 258 N.W.2d 877, 880 (Minn. 1977)

¹¹⁶ Minn. Stat. 97A.045 (2014).

¹¹⁷ Minn. R. 6244.0100 (2015).

comparable to losing a professional license. Respondent's rehabilitation activities do not contribute to her income.¹¹⁸ Respondent's interest is simply that she wants to personally possess wild animals and have an education center to teach children about nature and wildlife.

The Department has proven multiple instances of Respondent's violations of rule and law. The evidence establishes that the agency has met its burden of proof to show that it was justified in denying renewal of Respondent's wildlife rehabilitation permit.

VII. Conclusion

There is no dispute that Respondent cares about nature and wild animals. It is also clear that agency staff gave Respondent changing messages about whether the Department was going to offer Respondent a wildlife educational permit. However, Respondent's own statements and photographs provide sufficient evidence to prove that Respondent habituated young wild animals to humans, treated wild animals as pets, allowed wild animals to intermingle with domestic pets and other species, failed to abide by the terms of her 2013 Rehabilitation Permit, and refused to release animals to the Department when requested to do so. Respondent's actions violated several laws and rules, all of which are well-grounded in the Department's expertise regarding wild animals and its duty to protect them as well as the public. The Department has shown by a preponderance of the evidence that it had a reasonable basis for denying renewal of Respondent's rehabilitation permit. For the reasons set forth above, the Administrative Law Judge recommends that the Commissioner grant the Department's Motion for Summary Disposition. There are no genuine issues of material fact remaining for hearing, and the Department has demonstrated that it is entitled to judgment as a matter of law.

B. J. C.

¹¹⁸ First Benolken Aff. ¶ 2.