

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

In the Matter of Minnesota Department  
of Natural Resources Special Permit  
No. 16868 (December 21, 2012)<sup>1</sup>  
Issued to Lynn Rogers

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
RECOMMENDATION**

For fourteen consecutive years, Dr. Lynn Rogers (Dr. Rogers) has applied for, and the Department of Natural Resources (DNR, Agency or Department) has granted him, a permit to conduct research and educational activities related to the North American Black Bear in a defined area of northeastern Minnesota. Effective July 31, 2013, the DNR did not renew Dr. Rogers' permit.

On September 3, 2013, the Department filed a Notice and Order for Prehearing Conference and Order for Hearing providing for a contested case hearing before the Minnesota Office of Administrative Hearings.

The matter proceeded to hearing before Chief Administrative Law Judge Tammy L. Pust, on February 24 through March 6, 2014, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota, 55101.

David R. Marshall, Leah C. Janus, and Jessica L. Edwards, Fredrikson & Byron, P.A., appeared on behalf of Dr. Rogers.

David P. Iverson and Linda S. Jensen, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Natural Resources.

Pursuant to an Order of the Chief Administrative Law Judge, the parties filed required post-hearing submissions on or before April 2, 2014. The record initially closed on that date. Following the filing of post-hearing motions, the record was re-opened pursuant to an Order of Chief Judge Pust dated April 29, 2014. The record then closed again on May 2, 2014 with the parties' submissions of motions to supplement the record and supplemental proposed findings of fact.

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<sup>1</sup> The Department of Natural Resources erroneously captioned this matter with reference to the permit number at issue and its issuance date. Those errors have been corrected in the caption as noted above.

## STATEMENT OF THE ISSUES

1. Whether Dr. Rogers is exercising sufficient possession and control of the study bears such that he is required to obtain and maintain a permit under Minn. Stat. § 97A.401, subd. 3(a); and
2. If a permit is required, whether the Department had sufficient cause to refuse to renew Dr. Rogers' permit effective July 31, 2013.

## SUMMARY OF RECOMMENDATION

The Chief Administrative Law Judge finds that collaring a bear requires a permit under Minn. Stat. § 97A.401, subd. 3(a), and further finds that intentionally repeated handling of a bear also requires a permit under the statute. The undersigned also finds that the preponderance of the evidence established that the DNR had cause not to renew Dr. Rogers' permit. Accordingly, the Chief Administrative Law Judge recommends that the Commissioner's designee<sup>2</sup> affirm the Department's June 28, 2013 determination.

Based on the evidence in the hearing record, the Chief Administrative Law Judge makes the following:

## FINDINGS OF FACT

### Parties

1. Dr. Rogers is a wildlife biologist specializing in the study of the North American Black Bear (bear<sup>3</sup>). At all times relevant to this matter, Dr. Rogers has conducted his study activities in affiliation with the Wildlife Research Institute (WRI), a Minnesota nonprofit corporation.<sup>4</sup> Susan Mansfield (Mansfield) is employed by WRI and provides primary assistance to Dr. Rogers in support of his work.<sup>5</sup>

2. The Department is a state agency charged with "control of all the public lands, parks, timber, waters, minerals, and wild animals of the state."<sup>6</sup> The DNR

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<sup>2</sup> In a July 30, 2013 Order on Stipulation issued in the related action titled *Lynn Rogers and Wildlife Research Institute v. Minnesota Department of Natural Resources and Tom Landwehr, Commissioner of the Minnesota Department of Natural Resources*, filed in the Minnesota District Court for the Second Judicial District as Court File No. 62-CV-13-5408, The Honorable John H. Guthmann, Judge of District Court, directed that the Agency's "final decision upon review of the administrative law judge's report shall be made by a person not previously involved with the bear research permits granted to Dr. Rogers. Minn. Stat. § 14.61, subd. 1 (2012)."

<sup>3</sup> All references to "bears" herein refer to North American Black Bears unless otherwise indicated.

<sup>4</sup> Exhibit (Ex.) 600, p. 2.

<sup>5</sup> Testimony (Test.) of Susan Mansfield; Tr. 2045:4-6. All of Mansfield's activities, as identified in these Findings of Fact, were conducted on behalf of Dr. Rogers with respect to his work associated with the DNR permit at issue. Evidence related to Mansfield's actions are therefore included with reference to Dr. Rogers' activities.

<sup>6</sup> Minn. Stat. § 84.027, subd. 2.

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.<sup>7</sup>

## **Bears**

### **Species In General**

3. Bears are smart and inquisitive animals.<sup>8</sup> Individual bears have individual temperaments.<sup>9</sup> Female bears are territorial; adult males are more free roaming so as to allow for mating opportunities with several females.<sup>10</sup> Bears hibernate in “dens” for approximately five to seven months during the winter in Minnesota.<sup>11</sup> Typically, female bears reproduce once every two years, giving birth to litters of one to three cubs.<sup>12</sup> Cubs stay with their mother for the first year or two of their lives, at which time male yearlings disperse into the wild while female yearlings establish their own territories.<sup>13</sup> Female cubs reach sexual maturity at approximately six years of age in the wild, though this age can be lowered by several years in situations involving plentiful food availability.<sup>14</sup>

4. Bears forage for food. Naturally, they prefer berries, nuts, and other vegetation, but also eat insects and occasionally other animals.<sup>15</sup> Bears prefer wild food to any type of human-provided food.<sup>16</sup>

5. North American Black Bears are not aggressive by nature.<sup>17</sup> Historically, an average of one or two human fatalities is attributed annually to bears across the United States and Canada.<sup>18</sup> When frightened, attacked, or when they perceive a risk to their safety, bears may bluff charge, huff, paw the ground, or pop their jaws, but attacks are very rare.<sup>19</sup>

### **Bears in Minnesota**

6. Although it is illegal for the public to feed bears in several other states, it is not illegal to feed bears in Minnesota, whether by hand, in troughs, or in any other manner.<sup>20</sup>

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<sup>7</sup> Minn. Stat. § 97A.045, subd. 1.

<sup>8</sup> Test. of Dr. David Garshelis, Tr. 1212:1-3. Test. of Dr. Thomas Wood, 1729:12.

<sup>9</sup> Test. of D. Garshelis, Tr. 1211:22-25; Ex. 84, p. 14.

<sup>10</sup> Ex. 16, p. 3.

<sup>11</sup> Ex. 151, p. 3.

<sup>12</sup> A cub is a bear less than one year of age. Minn. R. 6232.2600, subp. 4.

<sup>13</sup> Test. of S. Mansfield, Tr. 2063:17-22.

<sup>14</sup> Exs. 15, p. 9 (numbered viii); 177, p. 19.

<sup>15</sup> Ex. 598, p. 41.

<sup>16</sup> Test. of Thomas Rusch, Tr. 623:21-23. Test. of Dr. David Telesco, 797:21-798:2. Exs. 159, p. 9; 177, p. 11.

<sup>17</sup> Ex. 16, p. 2.

<sup>18</sup> Ex. 573, p. 5.

<sup>19</sup> Test. of D. Garshelis, Tr. 1212:13-15.

<sup>20</sup> Test. of Commissioner Tom Landwehr, Tr. 159:18-25.

7. The DNR is aware of only five recorded instances of bear attacks in Minnesota that required overnight hospitalization.<sup>21</sup>

8. During the 1980s and 1990s there were an average of 1700 complaints made annually by Minnesota residents related to bears causing property damage or threatening physical injury (nuisance bears). Since the year 2000, fewer than 600 nuisance bear complaints have been made in Minnesota each year.<sup>22</sup>

9. During the 1980s and 1990s, approximately 150 nuisance bears were killed in Minnesota each year. Today, less than 20 nuisance bears are killed statewide each year.<sup>23</sup>

### **Scientific Study of Bears**

10. Wildlife biologists study the biology, behavior, and habitats of animal populations in the wild.

11. In the wildlife sciences, general standards of accountability require that research be conducted in accordance with the scientific method, even when conducting long-term longitudinal studies. Publication of research in peer-reviewed journals is the primary mechanism by which the profession of wildlife biology ensures quality and integrity of scientific research in the field.<sup>24</sup>

12. Education of the public is important with respect to the well-being of bears. Survival of these animals is tied “more to human attitudes than knowledge of their biology.”<sup>25</sup>

13. Cameras set up to capture the activities of bears in dens, known as “den cams,” provide a valuable form of education to both the scientific community and to the public.<sup>26</sup>

### **Bear - Human Interaction**

14. Bears tend to move into human-occupied territory when food in the wild is scarce.<sup>27</sup> Bear-related complaints generally increase as the density of people increases

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<sup>21</sup> Test. of D. Garshelis, Tr. 1143:14-1144:15; 1213:22-25; Ex. 582.

<sup>22</sup> Test. of D. Garshelis, Tr. 1214:23-1215:2; Ex. 573, p. 2.

<sup>23</sup> Test. of D. Garshelis, Tr. 1215:3-8; Ex. 573, p. 2.

<sup>24</sup> Test. of Dr. John Guidice, Tr. 897:8-899:3. Test. of Dr. Jerrold Belant, Tr. 1055:13-15; 1098:1-1099:4.

<sup>25</sup> Test. of Dr. Lynn Rogers, Tr. 2263:20-25.

<sup>26</sup> Test. of T. Wood, Tr. 1751:22-1752:5. Test. of Dr. Thomas Smith, Tr. 1936:1-16. Test. of Dr. Lou Cornicelli, Tr. 1401:25-1402: 2. Test. of D. Garshelis, Tr. 1233:20-22. Test. of L. Rogers, Tr. 2264:17-19.

<sup>27</sup> Test. of D. Garshelis, Tr. 1213:16-18.

in bear country.<sup>28</sup> When urban housing is adjacent to a forest, bear-related public safety calls increase.<sup>29</sup>

15. In the wild, bears are “inherently fearful of people and typically try to leave when humans approach.”<sup>30</sup>

16. It is neither possible to predict the behavior of each individual bear in every situation nor to predict how individual people will respond to bears in different circumstances. Neither is it possible to control or predict whether a particular human action will agitate a specific bear in any given circumstance.<sup>31</sup>

17. Bears are subject to habituation, including but not limited to habituation to humans. In this context, the term “habituation” refers to the waning of a bear’s natural response to a neutral stimulus.<sup>32</sup> When a bear is habituated to human contact, the bear’s natural response of wariness and avoidance is altered such that the bear appears to ignore the presence of a person.<sup>33</sup>

18. An extreme form of habituation is referred to as “taming.” An animal is tamed when it has been trained to expect food rewards after the animal engages in predictable interactions with humans, including but not limited to allowing people to touch it in a specific manner.<sup>34</sup>

### Human Feeding of Bears

19. Bears are also subject to “food conditioning.” Food conditioning is the attraction of bears to “anthropogenic” foods: foods that are human-related.<sup>35</sup> When a bear is food conditioned, it has learned not to avoid (natural response) or ignore humans (habituation response) but instead to approach humans because the animal recognizes a person as a potential source of food.<sup>36</sup> A food conditioned bear is attracted to people as a source of food.<sup>37</sup>

20. “Supplemental feeding” is an umbrella term which refers broadly to the act of humans providing food to bears in addition to the food the animals find in the wild. There are at least two types of supplemental feeding: diversionary feeding and recreational feeding.<sup>38</sup>

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<sup>28</sup> Ex. 177, p. 14.

<sup>29</sup> Test. of D. Garshelis, Tr. 1213:1-4. Test. of D. Telesco, Tr. 779:24–780:9.

<sup>30</sup> Ex. 573, p. 8.

<sup>31</sup> Test. of Dr. Stewart Breck, Tr. 853:13-854:3.

<sup>32</sup> Test. of L. Rogers, Tr. 2237:18-20. Ex. 177, p. 22.

<sup>33</sup> Test. of L. Rogers, Tr. 2241:17-2242:12. Test. of D. Garshelis, Tr. 1134:6-11, 1219:23-1220:4. Test. of D. Telesco, Tr. 788:13-15. Exs. 574, p. 4 (numbered p. 35); 600, p. 5.

<sup>34</sup> Test. of D. Garshelis, Tr. 1134:17-1135:7.

<sup>35</sup> Test. of D. Garshelis, Tr. 1121:12-18.

<sup>36</sup> Test. of D. Garshelis, Tr. 1133:15-1134:5.

<sup>37</sup> Ex. 600, p. 5.

<sup>38</sup> Test. of D. Garshelis, Tr. 1219:17-19; Test. of L. Rogers, Tr. 2283:14-22.

21. “Diversionary feeding” refers to the practice of providing food for bears at a specified location (Location A) for the purpose of diverting the bears from attempting to feed in a different location (Location B), often because their presence in Location B is problematic given other human activity in that area.<sup>39</sup>

22. “Recreational feeding” refers to the practice of providing food for bears for the purpose of human observation of the animals.<sup>40</sup>

23. Dr. Rogers characterizes his and other residents’ supplemental feeding of bears in the Eagles Nest Township area as diversionary feeding. He believes that the supplemental feeding diverts bears from locations other than those at which food is intentionally made available by humans.<sup>41</sup>

24. The vast majority of wildlife professionals hold to the scientific view that human feeding of bears increases the safety risk to bears and to humans.<sup>42</sup> Proponents of this view ascribe to the following statements as scientifically reliable facts:

a. Wild bears that receive food from people begin to lose their natural fear and wariness of humans, and “any time a bear has lost its fear of people, that is a public safety risk.”<sup>43</sup> Feeding alters bear behavior. When bears learn that people supply food, they become more attracted to people and bear-human interactions increase such that the risk of harm to people increases.<sup>44</sup>

b. The level of public safety risk associated with human feeding of bears differs depending on whether the animal locates human-provided food itself or is directly fed by, or in the presence of, a person. In the first case, the bear may habituate to the food and thereby learn to look for that type of food in a particular location. In the latter case, the bear may habituate to the presence of people and thereby learn to look for food whenever and wherever people are found. The latter case presents a higher risk to public safety in that the bears’ closer proximity and increased number of interactions with people increases the chances that a person will be injured.<sup>45</sup>

c. The risk to public safety further escalates with hand-feeding. The likelihood of a bear habituating to a person, through scent, voice, touch or other

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<sup>39</sup> Test. of D. Garshelis, Tr.1218:8-13; Test. of L. Rogers, Tr. 2283:14-22.

<sup>40</sup> Test. of D. Garshelis, Tr. 1218:25-1219:2.

<sup>41</sup> Exs. 177, p. 13; 598, pp. 4-43; 599, p. 11; 600, pp. 5-7.

<sup>42</sup> Test. of S. Breck, Tr. 849:9-13. Dr. Breck has been a research wildlife biologist with the United States Department of Agriculture’s National Wildlife Research Center in Fort Collins, Colorado since 2001. This federal agency’s purpose is to protect agriculture, human health and safety, and natural resources in the context of human-wildlife conflict.

<sup>43</sup> Test. of D. Telesco, Tr. 780:12-14. Dr. Telesco is the Bear Management Program Coordinator for the Florida Fish and Wildlife Conservation Committee, whose work focuses on human-bear conflict management. Test. of D. Telesco, Tr. 773:19-21; 779:1-10; 784:7-785:12.

<sup>44</sup> Test. of S. Breck, Tr. 846:24-847:15.

<sup>45</sup> Test. of D. Telesco, Tr. 781:24-782:6; 786:14-17.

variables, is greater than with feeding in troughs or merely leaving food on the ground in the woods for bears to find. Hand-feeding creates a positive association for a bear between being in the close presence of a person and receiving a food reward.<sup>46</sup>

d. Supplemental feeding of bears can have a harmful impact on the ecology of the bears. Because home range size and territory is driven by the availability of food, when the amount of food is artificially increased through human-provided supplemental feeding the population of bears increases due both to immigration (other bears move into the food-plentiful territory) and rising survival rates of cubs and yearlings (fewer die when food is readily available). Supplemental feeding also leads to enhanced reproduction rates in that better-fed bears mature earlier and so reproduce earlier, yielding extra litters of cubs which in turn leads to increased population growth of the species.<sup>47</sup>

e. Atypical behavior of bears, including accessing property conspicuously inhabited by humans, purposefully and closely approaching humans, and failing to avoid or retreat when confronted with sudden noises and movements of people, as in cases of arm waving, yelling, banging pots and pans, rifle shots, and other hazing activities, are evidence of an increased safety risk to both bears and people given the unpredictability of the behaviors of individuals in each species.<sup>48</sup>

f. As a result of the unpredictability of both bears and people, the most conservative wildlife management practice is to minimize interactions between people and bears. The vast majority of wildlife managers endorse this practice.<sup>49</sup>

g. The recognition and acceptance of this majority view led the National Park Service to eliminate the availability of anthropogenic foods found in garbage dump sites and restrict tourists from feeding bears in Yellowstone National Park and other national parks in the late 1960s.<sup>50</sup>

25. In Dr. Rogers' professional view, shared by a minority of wildlife biologists,<sup>51</sup> the following statements are true:

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<sup>46</sup> Test. of D. Telesco, Tr. 782:9-783:4; 785:23-786:4.

<sup>47</sup> Test. of S. Breck, Tr. 850:21-851:7; 852:9-25. Test. of D. Garshelis; Tr. 1136:5-10. Ex. 15, pp. 9 (marked viii) and 47 (marked 38).

<sup>48</sup> Test. of D. Telesco, Tr. 780:12-25. Test. of D. Garshelis, Tr. 1133:23-1135:15.

<sup>49</sup> Test. of S. Breck, Tr. 854:4-9. Test. of Dr. Gordon Burghardt, Tr. 1985:15-23.

<sup>50</sup> Test. of S. Breck, Tr. 849:16-850:15. Ex. 574.

<sup>51</sup> Test. of S. Breck, Tr. 871:9-18.

a. Habituated bears are not more likely than non-habituated bears to be dangerous to people.<sup>52</sup>

b. Habituation is limited to specific locations and situations.<sup>53</sup> Individual bears can learn to differentiate between which humans provide food and which do not, and what types of food are provided by humans at different locations.<sup>54</sup>

c. Human feeding of bears does not necessarily cause increased public safety problems.<sup>55</sup>

d. Contrary to the adage “a fed bear is a dead bear,” diversionary feeding can lead bears not into but out of trouble with humans.<sup>56</sup>

e. People often mistake a bear’s harmless bluster as an indication of aggression.<sup>57</sup>

26. Researchers around the country are currently conducting studies related to bears and food. These studies are of growing importance to the field of wildlife ecology.<sup>58</sup>

### Human Handling of Bears

27. Handling bears for any purpose involves safety risks to the bear and to the people involved. These risks may be minimized by appropriate training.<sup>59</sup>

28. To minimize stress on the animal and safety risk to people, capturing of bears has been most often accomplished historically through the administration of tranquilizing agents. Tranquilizers can affect a bear’s biology, cause harm or, in rare cases, kill the bear.<sup>60</sup>

29. Collaring a bear also carries risks. Putting a collar on a bear without anesthetics entails a greater risk of the bear reacting adversely and unpredictably, and thus resulting in harm to the bear or the people involved. If collars are not fitted correctly and adjusted appropriately to accommodate growth, the animal may suffer harm.<sup>61</sup>

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<sup>52</sup> Test. of L. Rogers, Tr. 2238: 7-2239:4; Ex. 599, p. 10.

<sup>53</sup> Test. of L. Rogers, Tr. 2235:17-20; Exs. 597, p. 3; 599, p. 10.

<sup>54</sup> Ex. 177, p. 11.

<sup>55</sup> Test. of T. Wood, Tr. 1717:12-1718:12.

<sup>56</sup> Ex. 84, p. 11.

<sup>57</sup> Ex. 599, p. 10.

<sup>58</sup> Test. of S. Breck, Tr. 878:5-879:24.

<sup>59</sup> Test. of S. Breck, Tr. 860:6-14. Test. of D. Garshelis, Tr. 1110:8-15.

<sup>60</sup> Test. of T. Wood, Tr. 1739:16-1741:25. Test. of G. Burghardt, Tr. 1960:13-25. Test. of S. Breck, Tr. 861:19-862:6. Test. of D. Garshelis; Tr. 1110:9-25.

<sup>61</sup> Test. of S. Breck, Tr. 861:19-863:15. Test. of D. Garshelis, Tr. 1111:1-23.



## **Eagles Nest Township**

31. Eagles Nest Township is a 36 square mile area located between the cities of Tower and Ely in Minnesota and within the Superior National Forest.<sup>62</sup>

32. Bear Head State Park is located in the southeastern corner of Eagles Nest Township, and Lake Vermillion State Park is located adjacent to its western boundary.<sup>63</sup>

33. There are approximately 600 property owners in Eagles Nest Township, some of whom reside there year-round and others who are only seasonal residents.<sup>64</sup>

34. Eagles Nest Township is located within “bear country” in Minnesota. Bears travel up and down the Walsh Road Corridor and travel throughout the area on visible “bear trails”<sup>65</sup> for the purpose of finding food.<sup>66</sup>

35. The Eagles Nest Township area has a long history of residents feeding wildlife, including bears, on private property. Residents began feeding bears as early as 1961,<sup>67</sup> well before Dr. Rogers moved his study operations to Eagles Nest Township in 1993.<sup>68</sup> In 2000, at least six residents regularly fed bears, and other wildlife, by putting food out in feeders located on or adjacent to private property.<sup>69</sup> Approximately a dozen residents currently feed bears in Eagles Nest Township.<sup>70</sup>

36. The WRI is located at 1482 Trygg Road in Eagles Nest Township.

37. The Vince Shute Wildlife Sanctuary (VSWS) is a privately-operated sanctuary located west of Orr, Minnesota, and approximately 50 miles from WRI. Approximately 100 bears are fed at the VSWS. In the past, the public was allowed to physically interact with and hand-feed bears at the VSWS. In response to a perceived public safety risk and working in collaboration with the DNR, prior to 2003 the VSWS eliminated hand-feeding and separated the bears from the public by restricting observation to a viewing deck, limiting vehicle access and bussing visitors into the site.

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<sup>62</sup> Ex. 214.

<sup>63</sup> Ex. 762.

<sup>64</sup> Test. of Dan Humay, Tr. 1820:19-1821:15. Test. of T. Rusch, Tr. 191:6-15.

<sup>65</sup> Similar to a hiking trail, a bear trail is a path made visible, to the trained eye, as a function of regular use by bears.

<sup>66</sup> Test. of Shelly Beyer, Tr. 242:19-243:15. Test. of Andrew Urban 450:13-23; 452:23-453:2.

<sup>67</sup> Ex. 84, p. 16.

<sup>68</sup> Test. of L. Rogers, Tr. 2292:15-17.

<sup>69</sup> Ex. 597, p. 3.

<sup>70</sup> Test. of L. Rogers, Tr. 2242:17-19; 2287:2-8. Test of S. Mansfield, Tr. 2045:11-2046:4; Test. of Charlie Meyer, Tr. 1549:19-20; 1550:11-1551:6; 1623:4-6; Test. of Larry Anderson, Tr. 1867:21-1868:3; Test. of Barbara Soderberg, Tr. 1010:21-25.

Bears are not confined at the VSWS but are instead free to roam to and from the site to obtain food at will.<sup>71</sup>

### **Minnesota Department of Natural Resources**

38. Tom Landwehr (Landwehr) was appointed Commissioner of the DNR in January 2011. Landwehr holds bachelors and masters degrees in wildlife management. Prior to his appointment as DNR Commissioner, he worked in management positions involving wildlife and other ecological issues at the DNR, Ducks Unlimited and the Nature Conservancy.<sup>72</sup>

39. Edward Boggess (Boggess) has been the Director of the DNR's Fish and Wildlife Division since January 2011. The DNR's Fish and Wildlife Division is primarily responsible for wildlife management, which includes responding to and documenting nuisance bear complaints.<sup>73</sup>

40. Dr. Lou Cornicelli (Dr. Cornicelli) has been the Wildlife Research and Policy Manager for the DNR's Fish and Wildlife Division since September 2011, replacing Boggess. Dr. Cornicelli holds a bachelor's degree in Natural Resources from Cornell University, a master's degree in Zoology (Wildlife Ecology) from Southern Illinois University, and a Ph.D. in Natural Resources from the University of Minnesota. He oversees the DNR's permitting process related to the Wildlife Section of the Division of Fish and Wildlife.<sup>74</sup>

41. As a DNR Research Scientist and its Bear Project Leader since 1983, Dr. David Garshelis (Dr. Garshelis) is the Agency's expert on bears. After attending the U.S. Air Force Academy, Dr. Garshelis earned his bachelor's degree in Zoology from the University of Vermont in 1975, his master's degree in Wildlife Biology from the University of Tennessee in 1978, and his Ph.D. in Wildlife Biology from the University of Minnesota in 1983. Dr. Garshelis works in the DNR's Forest Wildlife Populations and Research Group, through which he conducts research on and makes management recommendations regarding bears.<sup>75</sup> Dr. Garshelis is not involved in the review or approval of DNR permit applications.<sup>76</sup>

42. The DNR's Tower Field Station provides service to residents of Eagles Nest Township.<sup>77</sup> Thomas Rusch (Rusch) has been the DNR's Area Wildlife Manager in the Tower Field Station since 2003.<sup>78</sup> As part of the Agency's Enforcement Division,

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<sup>71</sup> Test. of T. Rusch, Tr. 566:22-572:12. Test. of D. Garshelis, Tr. 1231:11-1233:1. Test. of Dan Starr, Tr. 678:14-23.

<sup>72</sup> Test. of T. Landwehr, Tr. 43:1-10; 45:16-19.

<sup>73</sup> Ex. 595, p. 3.

<sup>74</sup> Test. of L. Cornicelli, Tr. 1261:9-13; 1264:15-17. Ex. 595, pp. 1-2.

<sup>75</sup> Test. of D. Garshelis, Tr. 1106:7-25; 1109:9-1110:7; 1188:2-5; Ex. 572, p. 1.

<sup>76</sup> Ex. 20, p. 1.

<sup>77</sup> Test. of D. Starr, Tr. 673:10-14.

<sup>78</sup> Test. of T. Rusch, Tr. 178:10-16.

DNR Conservation Officer Dan Starr (Starr) was stationed in the DNR's Tower Field Station from 2000 until January 2014.<sup>79</sup>

### **DNR's Bear Research**

43. Through his work with the DNR for the past 30 years, Dr. Garshelis has conducted long-term research projects involving bears in Minnesota, resulting in approximately 85 peer-reviewed publications.<sup>80</sup>

44. Dr. Garshelis has radio-collared over 500 individual bears in Minnesota, gathering data about their rates of reproduction, cause of mortality, movements, and habitat use.<sup>81</sup>

45. Several of the Department's research studies use anthropogenic foods, including bacon and fast food cooking grease, to attract bears.<sup>82</sup>

46. Dr. Garshelis performed a study of habituated and food conditioned bears at Camp Ripley in Morrison County, Minnesota. Dr. Garshelis fed bears anthropogenic foods, including chocolate-covered donuts. At the same time, he adulterated military rations which the bears had been eating in order to decondition this behavior. Dr. Garshelis also walked with a few of the Camp Ripley bears.<sup>83</sup>

47. At times, the DNR collars bears as part of its research activities, finding this an appropriate way to gather scientifically relevant information.<sup>84</sup>

48. At times, the DNR releases formerly collared and/or formerly habituated bears back into the wild in Minnesota.<sup>85</sup>

### **DNR's Permitting Process**

49. The DNR has the statutory authority to issue "special permits" (permits) that allow the permittee "to take, possess, and transport wild animals as pets and for *scientific*, educational, rehabilitative, wildlife disease prevention and control, and exhibition purposes."<sup>86</sup>

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<sup>79</sup> Test. of D. Starr, Tr. 672:3-4.

<sup>80</sup> Test. of D. Garshelis, Tr. 1115:5-21; 1123:16-1124:6; Ex. 572 at 3-9.

<sup>81</sup> Ex. 573, p. 3.

<sup>82</sup> Test. of D. Garshelis, Tr. 1186:18-1187:14; 1215:21-1218:7.

<sup>83</sup> Test. of D. Garshelis, Tr. 1117:16-21; 1221:1-10. Ex. 572.

<sup>84</sup> Test. of D. Garshelis, Tr. 1215:9-20.

<sup>85</sup> Test. of S. Mansfield, Tr. 2102:18-22.

<sup>86</sup> Minn. Stat. § 97A.401, subd. 3(a).

50. The DNR has a longstanding policy of requiring a permit before allowing an individual to place tracking location equipment on wildlife, including bears, or to install cameras in bear dens for research purposes.<sup>87</sup>

51. The DNR has the legal authority to place conditions on any permit it grants.<sup>88</sup>

52. In evaluating and determining whether to grant an application for a permit, the DNR considers, among other matters, whether the proposed activities will be detrimental to the species at issue and also evaluates the qualifications of the researcher and the scientific validity of the proposed research methods.<sup>89</sup>

53. Annually, the DNR issues approximately six research permits related to the state's wild animals.<sup>90</sup>

### **Dr. Rogers' Bear Study**

54. Dr. Rogers earned an associate's degree in 1959 and a bachelor's degree in 1968 from Michigan State University. He began researching bears in 1967, first as an intern with the Michigan Department of Conservation and then as a graduate student at the University of Minnesota, where he received his master's degree in 1970 and his Ph.D. in 1977. Dr. Rogers worked as a wildlife research scientist with the United States Forest Service (USFS) at its North Central Forest Experiment Station in Ely, Minnesota from 1976 to 1993, focusing primarily on bear research.<sup>91</sup>

55. From 1969 to 1985, Dr. Rogers focused his work on a region he called the "Isabella Study Area;"<sup>92</sup> from 1985 through 1991 his work was centered on the "Kawishiwi Study Area" located in the Superior National Forest north of Eagles Nest Township.<sup>93</sup> In these studies, Dr. Rogers captured, tranquilized and weighed bears. He then fitted them with radio collars and tracked them, following their signals by airplane or in vehicles, to determine their movements in relation to food at garbage dumps.<sup>94</sup>

56. Dr. Rogers was one of the first researchers to: (a) study the social organization of bears, (b) use radio collars to study a population of bears, (c) conduct a long-term study of bears, and (d) study teeth that were pulled from live bears to learn age and reproductive history.<sup>95</sup>

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<sup>87</sup> Test. of Edward Boggess, Tr. 1436:18-20.

<sup>88</sup> Minn. Stat. § 97A.401, subd. 3(a); Minn. R. 6212.1400, subp. 2D.

<sup>89</sup> Test. of L. Cornicelli, Tr. 1265:23-1267:22.

<sup>90</sup> Test. of L. Cornicelli, Tr. 1268:23-25.

<sup>91</sup> Ex. 634, p. 6.

<sup>92</sup> The Isabella Study Area is located southeast of Dr. Rogers' current "Mud Creek Study Area" located in and around Eagles Nest Township. Ex. 15, p. 15 (numbered 6).

<sup>93</sup> Exs. 177, p. 14; 600, p. 18.

<sup>94</sup> Ex. 15, p. 18 (numbered 9).

<sup>95</sup> Test. of L. Rogers, Tr. 2219:19-2220:5; 2223:4-2224:5.

57. In 1993, Dr. Rogers purchased property in Eagles Nest Township based, in part, on his understanding that residents had been feeding bears for years and had experienced very few nuisance bear problems.<sup>96</sup>

58. In his current “Mud Creek Study,”<sup>97</sup> Dr. Rogers’ work has focused primarily on the bears who were born to a bear he named “Shadow,” and her progeny. He refers to this group of biologically-related bears as “Shadow’s Clan.”<sup>98</sup>

59. Mansfield, a data analyst for 20 years in an earlier career, has assisted Dr. Rogers in his work since 2001, first as a volunteer, then as a master’s degree candidate conducting research from 2004 through 2007,<sup>99</sup> and later as an employee.<sup>100</sup>

60. Dr. Rogers’ conducts his activities for both scientific and educational purposes.

### **Dr. Rogers’ DNR Permit History**

61. During the period of time that Dr. Rogers worked for the USFS in Minnesota, his bear research required, and he obtained, DNR permits for research purposes.

62. On January 31, 1989, the DNR granted permit No. 5009 allowing Dr. Rogers to capture and release bears for research purposes under eight specified conditions related to his then-current study involving the Kawishiwi Study Area.<sup>101</sup>

63. In 1992, the DNR initiated proceedings which resulted in Dr. Rogers being criminally charged with violating Minnesota Statute section 97A.405<sup>102</sup> by illegally killing two bear cubs outside the authority of his permit in 1989.<sup>103</sup> Related to this incident, the DNR revoked Dr. Rogers’ permit,<sup>104</sup> No. 6043, in 1992.<sup>105</sup>

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<sup>96</sup> Test. of L. Rogers, Tr. 2229:7-10; 2230:23-2231:3; 2292:15-17. Ex. 599, p. 3.

<sup>97</sup> Ex. 600, p. 18.

<sup>98</sup> Test. of S. Mansfield, Tr. 2056:9-25.

<sup>99</sup> Exs 15; 159, p. 23.

<sup>100</sup> Test. of S. Mansfield, Tr. 2046:19-2050:23.

<sup>101</sup> Ex. 1020, pp. 2, 5.

<sup>102</sup> This statute mirrors that currently codified as Minn. Stat. § 97A.401, subd. 3(a).

<sup>103</sup> Ex. 1020, pp. 2, 5. Dr. Rogers had taken two male bear cubs away from their mother and replaced them with two female cubs of other origin. He later euthanized the two male cubs. Dr. Rogers was acquitted after a court trial submitted on stipulated facts. The Court’s Verdict was based on an ambiguity in the permit language such that it was unclear whether Dr. Rogers had permitted authority to kill the cubs by injection, an act for which he had sought to deny detection by stating that the cubs were found dead by other persons.

<sup>104</sup> Ex. 634, p. 7.

<sup>105</sup> Ex. 610, p. 2.

64. Dr. Rogers failed to seek or obtain a DNR permit between 1992 and 1999, during which time he continued to study bears in the same area of northeastern Minnesota.<sup>106</sup>

65. In 1999, the DNR discovered that Dr. Rogers had, in August 1998, radio-collared at least one bear in Minnesota without obtaining a DNR permit. The Agency informed Dr. Rogers that a permit was required for this activity.<sup>107</sup>

66. By letter dated April 22, 1999,<sup>108</sup> Dr. Rogers<sup>109</sup> applied to the DNR for a permit “to capture and radio-collar two bears in northeastern Minnesota” and conduct “a pilot study to test and refine predictive models of home range use based on optimal foraging theory.” The pilot study was to last from 1999 through 2000, with possible graduate study of the topics in 2001 and beyond.<sup>110</sup>

67. By letter dated June 18, 1999, the DNR notified Dr. Rogers that “placement of a radio collar on a black bear..., electronic tracking utilizing telemetry, bear den site visits and contact with the bear unattainable without the electronic tracking device” were “illegal” in Minnesota absent a DNR permit. The letter specifically informed Dr. Rogers that:

Any form of “possession” (97A.015, subd. 36) whether actual or constructive or control such as tracking for purposes of finding, interactions with the animal or den visits of a bear are illegal without a permit. Possession of the bear albeit temporary for purposes of radio collar placement also requires a permit.<sup>111</sup>

68. Within the Agency, Dr. Garshelis recommended against granting Dr. Rogers the permit in 1999.<sup>112</sup>

69. At that time, Allen Garber was the Agency’s Commissioner. Commissioner Garber perceived that there was a “competition” between Dr. Garshelis and Dr. Rogers related to the establishment of professional reputation and expertise regarding bears.<sup>113</sup>

70. After observing Dr. Rogers’ work in the field in June 2000,<sup>114</sup> Commissioner Garber approved and Dr. Rogers received DNR permit No. 9451, dated

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<sup>106</sup> Ex. 610, p. 2.

<sup>107</sup> Ex. 610, p. 1.

<sup>108</sup> It is impossible to determine when the letter was sent or received by the DNR as the exhibit’s date-received stamp is illegible. The attachment to the letter is dated April 24, 1999, which is some evidence that the full correspondence was not sent on the cover letter’s date: April 22, 2009. Ex. 596, p. 7.

<sup>109</sup> The permit application was made on behalf of Dr. Rogers and a “co-principal investigator,” Dr. Roger A. Powell, Department of Zoology, North Carolina State University. Dr. Powell remained on the permit through the year 2000.

<sup>110</sup> Test. of L. Cornicelli, Tr. 1273:21-1274:2; Ex. 596, p. 3.

<sup>111</sup> Ex. 609.

<sup>112</sup> Test. of E. Boggess, Tr. 1444:24-1445:1.

<sup>113</sup> Test. of Allen Garber, Tr. 1507:15-1508:5.

<sup>114</sup> Ex. 750.

August 3, 1999.<sup>115</sup> The permit authorized Dr. Rogers to “capture and release for research purposes” ... “not more than three (3) black bears on the Mud Creek study area (13 miles west of Ely), for purposes of bear habitat research....” The permit limited Dr. Rogers’ activities by application of 13 specified conditions.<sup>116</sup> The six relevant conditions are:

1. Pursue, capture, temporarily possess, and release for research up to three (3) bears. Bears shall not be possessed longer than necessary for scientific handling and shall not be kept in captivity.

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<sup>115</sup> All DNR permits were granted through a specified effective date but also included language allowing the Agency discretion to revoke the permit earlier.

<sup>116</sup> As noted in Ex. 158, pp. 1-2, the permit’s complete conditions were set forth as follows:

1. Pursue, capture, temporarily possess, and release for research up to three (3) bears. Bears shall not be possessed longer than necessary for scientific handling and shall not be kept in captivity.
2. Bears must be captured and handled in a safe and humane manner.
3. Bears may be injected with Ketamine HC2 (Ketaset) and Sparine; Ketamine shall not be used to immobilize bears from August 1, 1999, through October 17, 1999.<sup>116</sup>
4. Permittees may designate other representatives of the Northwoods Research Center of the Wildlife Research Institute to capture and handle bears provided they have in their possession a written authorization from permittees and a copy of the permit.
5. Any bears that die as a result of capture, associated processing, or other causes shall be immediately reported to the local Department of Natural Resources Conservation Officer.
6. Permittees shall be solely responsible for any and all damage or injury to person, domestic or wild animals, and real or personal property of any kind resulting from any activities undertaken pursuant to this permit. Any injuries to persons resulting from the permitted activities or personal injuries from any collared bear must be reported to the local Department of Natural Resources Conservation Officer within [sic] forty-eight (48) hours of the incident.
7. Permittees shall hold the Department of Natural Resources, its officers, agents, and employees harmless from any and all liability and damages resulting from any activities undertaken pursuant to this permit.
8. Permittees shall provide by January 31, 2000, a complete and detailed report of all activities carried out under this permit. The report shall include but not be limited to the identification number, sex, age, and physical status of all bears captured and released under this permit.
9. Bears that are captured and fitted with collars must be fitted with a collar of a breakaway design.
10. Permittees will provide within forty-eight (48) hours after radio collaring a bear the transmitter frequency of the radio collar(s) to Mark Lenarz, Forest Wildlife Populations and Research Group in Grand Rapids. Changes in radio frequencies must also be reported within forty-eight (48) hours.
11. Site visits to bear dens are limited to purposes of examining and weighing bears. Not more than four (4) persons including the principal investigators (Lynn Rogers and Roger Powell), may be present at a den site visit.
12. No person or institution may collect or receive money, equipment, supplies, or other compensation that might arise from activities involving bear that were radio collared under this permit. This includes but is not limited to payments or donations related to filming of these bears, assisting in research activities, watching them, or visiting their dens.
13. Visit [sic] to den of radio collared bears cannot be included as part of any program in which participants pay to attend.

2. Bears must be captured and handled in a safe and humane manner.

8. Permittees shall provide by January 31, 2000, a complete and detailed report of all activities carried out under this permit. The report shall include but not be limited to the identification number, sex, age, and physical status of all bears captured and released under this permit.

9. Bears that are captured and fitted with collars must be fitted with a collar of a breakaway design.

11. Site visits to bear dens are limited to purposes of examining and weighing bears. Not more than four (4) persons including the principal investigators (Lynn Rogers and Roger Powell), may be present at a den site visit.

13. Visit to den of radio collared bears cannot be included as part of any program in which participants pay to attend.<sup>117</sup>

71. Dr. Rogers filed the required annual report on January 18, 2000. The one-page report indicated that three female bears were collared for some part of the year and that a den cam had been installed.<sup>118</sup>

72. By letter dated July 17, 2000, Dr. Rogers applied for a renewal of the 1999 permit and submitted an updated research plan which included the following statements:

a. "To obtain detailed behavioral data, we propose to develop the trust of wild study bears to the extent that they will go about their business of making a living while allowing detailed, close range observations...."

b. The study involved eight members of Shadow's Clan.

c. One bear, "Blackheart," would only let Dr. Rogers, "whose voice she recognizes," be around her and her two cubs.

d. Dr. Rogers "on occasion" fed cubs sweetened condensed milk from his fingers for the purpose of habituating them to his presence. "Habituating the cubs is important for our research."<sup>119</sup>

e. Dr. Rogers proposed that the permit be amended to allow him to collar eight bears in 2000 and up to 25 bears in 2001.

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<sup>117</sup> Ex. 158, pp. 1-2.

<sup>118</sup> Ex. 159, pp. 1-2. The permit had not specifically authorized or prohibited the use of cameras in dens.

<sup>119</sup> Ex. 597, p. 2.



f. Dr. Rogers requested that the DNR clarify whether: (1) the permit's terms "capture and possess" included "collaring unrestrained bears that allow us to put collars around their necks;" and (2) the permit allowed his practice of swapping collars between bears such that there were more than three bears being studied but only three were collared at any one time.<sup>120</sup>

73. In the DNR's written response to Dr. Rogers dated August 15, 2000, the Agency notified him that his study proposal lacked clear research goals and methods and that he had violated the permit when he: (a) swapped collars between bears; (b) bottle-fed cubs, a type of unpermitted handling; and (c) intentionally circumvented the permit's restrictions on the number of people who could accompany him on den visits. The DNR also specifically notified Dr. Rogers of the following Agency directives:

a. The radio-collaring of unrestrained bears does require a permit for temporary possession.

b. Offering food to bears does not require a permit. However, restraining or handling bears in order to feed them would require a permit because it constitutes possession. Similarly, employing a radio-collared bear to enable you to feed another bear (such as cubs of the radio-collared bear) also must be specified under the permit, because the collared bear provides access to (temporary possession of) these other bears that is otherwise unattainable....<sup>121</sup>

74. Notwithstanding these concerns and directives, the DNR approved permit No.10128, dated August 15, 2000, which authorized Dr. Rogers to "capture, handle, radio-collar and monitor for research purposes" three identified bears subject to specified conditions. Though the conditions primarily mirrored those of the 1999 permit, the Agency also: (a) added the word "handle" as a parenthetical definition of the term "temporarily possess" used in the permit; (b) specifically limited collaring to three named bears, thus prohibiting the "swapping" of collars; (c) required that the annual report include a "description of all handlings of these bears;" (d) limited den visits to no more than once per day; and (e) excluded field assistants and graduate students from the existing prohibition on payment.<sup>122</sup>

75. Dr. Rogers submitted a three-page annual report of his 2000 study activities on January 31, 2001. The report included brief lists of the dates on which radio-collars were placed on four named bears.<sup>123</sup> It also listed the dates of den visits, noting that one involved the capture of video broadcast on television to over a million

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<sup>120</sup> Ex. 597.

<sup>121</sup> Ex. 610 (emphasis in original).

<sup>122</sup> Ex. 159, pp. 3-4.

<sup>123</sup> The record contains no evidence that the DNR objected to Dr. Rogers' collaring of four bears even though the permit allowed collaring of only three.

viewers in 1999. The report also detailed Dr. Rogers' successful efforts to habituate bears to his presence and the sound of his voice.<sup>124</sup>

76. On or about March 15, 2001, the DNR approved permit No. 10376, which removed the three-bear limit and authorized Dr. Rogers to "capture, handle, radio-collar and monitor for research purposes" an unspecified number of bears.<sup>125</sup> Less than a month later, on April 12, 2001 the DNR issued a replacement permit, No. 10416, which changed the conditions by: (a) allowing Dr. Rogers to administer antibiotics and other medical treatments under the direction of a licensed veterinarian; (b) limiting Dr. Rogers' duty to report injuries only to those "that require professional medical treatment;" (c) removing the once-per-day limitation on den visits for research purposes; and (d) clarifying that the Permit did not "preclude research fund raising that is not associated with permit activities (i.e., visits to den sites)."<sup>126</sup>

77. Dr. Rogers submitted a three-page annual report on January 2, 2002, which again expanded the focus of the study to include the following, in relevant part:

- a. Conducting a case study of a rural community in northeastern Minnesota to identify factors that create or minimize conflict between people and bears....
- b. Documenting direct and indirect consequences of people feeding bears and habituating them to humans.
- c. Identifying factors and circumstances that influence bear reactions to people.
- d. Assessing the effectiveness of new products for protecting food and new formulations of pepper spray for protecting people.
- e. Researching bear attacks across North America ...
- f. Determining the meanings of bear vocalizations and body language....
- g. Documenting use of forest cover types ...in order to identify forestry practices beneficial to bears...
- h. Observing, where possible, hibernation behavior, birthing behavior, and care of cubs via ...cameras ...[and making this information] available to the media and the internet. ... "Knowledge fosters tolerance."

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<sup>124</sup> Exs. 159, pp. 7-10; 624; 751.

<sup>125</sup> Ex. 158, pp. 5-6.

<sup>126</sup> Ex. 158, pp. 7-9.

i. Recording bear heart rates and how they change with activity and the annual cycle of bear physiology.<sup>127</sup>

79. From 2002 through 2011, the DNR issued to Dr. Rogers a series of annual permits to both conduct “a pilot research study of black bears and<sup>128</sup> black bear public education.”<sup>129</sup> The permits contained the same conditions as noted earlier.<sup>130</sup>

80. Relative to his study activities conducted in years 2002 through 2011, Dr. Rogers filed annual reports containing primarily a chronological list of his “handlings” of bears and his visits to bear dens. In later years, the reports also contained references to completed conference presentations and publication abstracts. The reports contained no identification or analysis of any data collected through his study activities.<sup>131</sup>

81. The hearing record contains no evidence that the DNR ever objected to the scope or content of Dr. Rogers’ annual reports.

82. On February 1, 2012, the DNR limited to 15 the number of bears Dr. Rogers was allowed to collar<sup>132</sup> and issued permit No. 16868 with the earlier specified conditions and the following new conditions:

a. Only Dr. Rogers, Mansfield and four named associates were allowed to “capture or handle” bears or to hand feed study bears;

b. Dr. Rogers was required to report to the DNR “any direct contact with a person by a study bear” by anyone other than himself, Mansfield and four

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<sup>127</sup> Ex. 159, pp. 13-14.

<sup>128</sup> Emphasis added. While earlier permits had been for research purposes only, from 2002 on Dr. Rogers’ permits have been for the dual purposes of research and education.

<sup>129</sup> Permit No. 10969 dated February 12, 2002 (Ex. 158, pp. 10-11); Permit No. 11497 dated January 21, 2003 (Ex. 158, pp. 12-13); Permit No. 12278 dated February 27, 2004 (Ex. 158, pp. 14-15); Permit No. 13283 dated September 26, 2005 (Ex. 158, pp. 16-17); Permit No. 14063 dated January 12, 2007 (Ex. 158, pp. 18-19); Permit No. 14822 dated January 31, 2008 (Ex. 158, pp. 20-21); Permit No. 15374 dated July 1, 2008 (Ex. 158, pp. 22-23); Permit No. 15698 dated January 30, 2009 (Ex. 158, pp. 24-25); Permit No. 16215 dated February 1, 2010 (Ex. 158, pp. 26-27); Permit No. 16868 dated February 1, 2011 (Ex. 158, pp. 28-29).

<sup>130</sup> In 2008, the DNR added a condition specifying that the bears remained subject to the state’s game and fish laws “including removal to protect property and removal by DNR or other public safety official if it is determined that a bear constitutes a public safety or property hazard.” (Ex. 158, p. 23.)

<sup>131</sup> See reports dated December 30, 2002 (Exs. 159, pp. 15-18; 625); January 31, 2004 (Exs. 159, pp. 19-22; 626; 748); January 16, 2005 (Exs. 159, pp. 19-22; 627); January 2, 2006 (Exs. 159, pp. 28-34; 628); January 6, 2007 (Exs. 159, pp. 35-39; 629); January 10, 2008 (Exs. 159, pp. 40-63; 634; 756); January 10, 2009 (Ex. 159, pp. 64-68); December 31, 2009 (Ex. 159, pp. 69-75; 635); January 12, 2011 (Ex. 159, pp. 76-86). The report is incorrectly dated January 10, 2010, but contains information for calendar year 2010 which indicates that the date should have shown January 12, 2011. It contains a summary of the research and education efforts undertaken in the year, and noted the economic and tourism benefits that resulted from Dr. Rogers’ efforts); January 4, 2012 (Exs. 159, pp. 87-95; 636); November 1, 2012 (Ex. 637). Most reports included only chronological listings of bear handlings and den visits with no identification of other data collected or analyzed.

<sup>132</sup> Ex. 89, p. 1.

identified associates, and any “injuries to persons resulting from the permitted activities” or “personal injuries from any study bear;”

c. No more than two den cams were permitted.<sup>133</sup>

83. The DNR extended the identical permit by reissuance on November 29, 2012.<sup>134</sup>

84. On December 21, 2012, the DNR amended permit No. 16868 again and made it valid only until July 1, 2013, this time limiting to 12 the number of bears Dr. Rogers could collar.<sup>135</sup> The December 21, 2012 permit was again made subject to the existing conditions<sup>136</sup> in addition to the following:

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<sup>133</sup> Ex. 158, pp. 30-31.

<sup>134</sup> Ex. 158, pp. 32-33.

<sup>135</sup> Ex. 113, p. 1.

<sup>136</sup> As noted in Ex. 159, pp. 34-36, in its entirety the December 21, 2012 permit included the following conditions:

1. Permittee may pursue, capture, handle, and place radio collars on up to 12 study bears within the Mud Creek study area. The permittee has until May 15<sup>th</sup>, 2013 to satisfy this condition of the permit. The study bears shall not be possessed longer than necessary for scientific handling and shall not be kept in captivity. These study bears may be monitored telemetrically, visually, and by camera as necessary to collect scientific data, both within and outside the Mud Creek study area. No new bears shall be marked under this permit.
2. Bears must be handled in a safe and humane manner.
3. When a bear is handled and hair has not previously been obtained, permittee must collect a hair sample with follicles from each bear in this study. This included marked and unmarked bears. Hair sample should be of sufficient quantity to conduct DNA analysis and must be submitted to the Forest Wildlife Research Group Leader in Grand Rapids within forty-eight (48) hours of collection.
4. Bears must also be marked with collars that include a unique combination of no more than two numbers and/or letters that can be clearly seen and identified from at least 50 feet.
5. Bears may be injected with ketamine hydrochloride, xylazine hydrochloride, or Telazol. If bears are injected with xylazine hydrochloride, yohimbine may be used as an antagonist. Ketamine hydrochloride shall not be used on bears from 30 days prior to the opening of the 2012 Minnesota bear hunting season through the end of that season, and Telazol shall not be used from 10 days before the opening of the 2013 Minnesota bear hunting season through the end of that season. Antibiotics and other medical treatments may be administered under the direction of a licensed Veterinarian after consultation with the DNR Veterinarian. Antibiotics shall not be used from 45 days before the opening of the 2013 Minnesota bear hunting season through the end of that season.
6. Only the Permittee, Sue Mansfield, and the 6 associates named in condition number 9 may capture and handle bears provided they have in their possession a written authorization from the Permittee and a copy of the permit.
7. Permittee shall immediately report the death of any study bears to the local Department of Natural Resources (DNR) Conservation Officer. Deceased study bears shall be immediately surrendered to the DNR or otherwise disposed of as instructed by the Conservation Officer.
8. Permittee shall be solely responsible for any and all damage or injury to persons, domestic or wild animals, and real or personal property of any kind resulting from any activities undertaken pursuant to this permit. Any direct contact with a person by a study bear other than those allowed in condition number 9, any injuries to persons resulting from the permitted

a. The permit defined: “study bear” to mean “any marked or unmarked bears that have been habituated under the prior permits;” “handle” to mean “temporarily possess or perform a task or function that involves physical contact with a study bear;” and “den visit” to mean “a disturbance of a bear in a den” and not activities outside the den.

b. Hair samples were required from both marked and unmarked study bears;

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- activities, or personal injuries from any study bear must be reported to the local Department of Natural Resources Conservation Officer immediately.
9. Under no circumstances shall anyone other than the Permittee, Sue Mansfield, and 6 associates whose names shall be provided by January 31, 2013 hand feed study bears. Substitution of up to 2 associates may be allowed only once, provided those names are submitted prior to participating in activities authorized by this permit. This hand-feeding prohibition includes individuals participating in bear field study courses and any individuals participating in any public or private events being conducted under this permit
  10. Permittee shall hold the Department of Natural Resources, its officers, agents, and employees harmless from any and all liability and damages resulting from any activities undertaken pursuant to this permit
  11. Permittee shall provide by June 1, 2013, a complete and detailed report of all activities carried out under this permit. The report shall include but not be limited to a description of all handlings of study bears.
  12. All radio-collars used on these study bears must be a breakaway design.
  13. When a study bear is radio-collared, the radio frequency must be reported to the Forest Wildlife Research Group Leader in Grand Rapids within forty-eight (48) hours. All changes in frequencies of radio-collared bears, dropped radio collars, and collars that cease functioning must be reported within forty-eight (48) hours to the Forest Wildlife Research Group Leader in Grand Rapids.
  14. Dens may be disturbed no more than once per week. No more than 2 dens may contain cameras under this permit. A record of all den site visits by Permittee including dates and times, will be included in the June 1, 2013 report, and made available to the Department of Natural Resources at other times, on request. A den visit constitutes a disturbance of a bear in a den as described in Minnesota Rules 6232.2800, subdivision 3. Activities outside the den will not be considered visits under this provision.
  15. During the bear hunting season, neither WRI staff nor volunteers shall engage in any activities under M.S. 97A.037. The activities include honking horns, yelling, whistles, or other methods that could be considered hunter harassment. The permittee is responsible for the actions of volunteers and violation of this provision may result in revocation of the permit.
  16. For safety reasons, individuals accompanying radio-collared bears during the bear hunting season shall wear blaze orange clothing commensurate with deer hunting regulations.
  17. All study bears radio-collared under this permit remain under the jurisdiction of the State and are subject to all provisions of the Game and Fish Laws (e.g., Minnesota Statutes [MS] 97A.037, MS 97B.411, MS 97B.415), including removal to protect property and removal by Department of Natural Resources or other public safety officials if it is determined that a bear constitutes a public safety or property hazard.
  18. This permit is valid from date of issuance through July 1, 2013. Failure to follow the conditions of this permit may result in revocation at any time.
  19. Any violation of these permit conditions may be cause for revocation of the permit.

c. Antibiotics and other medical treatments could still be administered by a licensed veterinarian, but only after consultation with the DNR Veterinarian and not within 45 days of the opening of or during the bear hunting season;

d. The number of people allowed to capture and handle bears, and to feed bears by hand, was increased from six to eight, including Dr. Rogers, Mansfield and six identified associates;

e. WRI staff and volunteers were prohibited from harassing hunters and were required to wear blaze orange clothing when accompanying bears during hunting season.<sup>137</sup>

85. Dr. Rogers filed the 2012 annual report on May 31, 2013. The report was much more detailed than in years past. It contained his responses to the Agency's newly proposed conditions and his assertions that "[a] major hindrance to our research and publishing is the constant DNR threats to end [the study]. ... [P]rime writing time was wasted defending against accusations from officials who have never set foot in the North American Bear Center or accepted our invitations to become familiar with the research, its bears, and the community that discovered an unconventional way to coexist with black bears for the last half century."<sup>138</sup>

86. Having by then made the decision to terminate permit No. 16868, on June 28, 2013 the DNR amended and reissued the permit for a period of one month for the purpose of allowing Dr. Rogers to remove all bear collars by July 31, 2013.<sup>139</sup>

87. Dr. Rogers filed a challenge to this action in the Minnesota District Court for the Second Judicial District, as Court File No. 62-CV-13-5408. Pursuant to an Order issued in that action on July 30, 2013 by The Honorable John H. Guthmann, Judge of District Court, the permit was continued in effect, with amended conditions, pending this contested case proceeding as required by the Minnesota Administrative Procedure Act.<sup>140</sup>

### **Dr. Rogers' Study Activities**

88. Dr. Rogers' current study area is approximately 19 miles long and 6 miles wide, totaling nearly 114 square miles located in and around the Eagles Nest Township area.<sup>141</sup>

89. Dr. Rogers is currently studying, among other things, the effect that supplemental feeding is having on the lives of the bears. He is studying whether the

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<sup>137</sup> Ex. 158, pp. 34-36; Ex.174.

<sup>138</sup> Exs. 159, pp. 96-109 (quotation on pp. 101, 102); 633.

<sup>139</sup> Ex. 158, pp. 37-38.

<sup>140</sup> Order on Stipulation, issued in *Lynn Rogers and Wildlife Research Institute v. Minnesota Department of Natural Resources and Tom Landwehr, Commissioner of the Minnesota Department of Natural Resources*, filed on July 30, 2013 in Court File No. 62-CV-13-5408.

<sup>141</sup> Ex. 15, p. 13 (numbered p. 4).

supplemental feeding changes the bears' territory sizes, travels, diet, social organization, reproduction rates, cub survival, and hibernation activities.<sup>142</sup>

90. Dr. Rogers' study methods include an activity he calls "walking with bears."<sup>143</sup> Since approximately 1985 when he walked with one bear and her cubs in an earlier study in an effort to closely observe and study the animals in their natural habitat,<sup>144</sup> Dr. Rogers has been closely interacting with bears by locating them through the use of tracking collars, approaching them in the wild, and then following or accompanying them on their daily activities while recording observations related to their behavior and feeding.

#### Habituation through Handling and Feeding

91. Dr. Rogers' study is built upon intentional activities that cause habituation in bears.<sup>145</sup>

92. During his many years of his study, Dr. Rogers intentionally has used food to habituate and food condition bears to his close presence in order to study their behavior and use of their natural habitat. He feeds bears, including both adult bears and cubs,<sup>146</sup> in order to habituate the bears so that they will allow him to spend time with them, closely observe them, "rest" with them, and allow him to place a collar around their neck.

[T]he bear just gets habituated to you, which means they learn to ignore you. They don't think of you as a friend. They have no desire to be near you unless you have an introductory handful of food to begin a walk. But you're not an enemy, either, and you're not a competitor, but you're not a significant food-giver. You're there. You're inconsequential, more or less. So you can sneeze, cough, rustle bushes, whatever. They know it's you. They don't pay attention.<sup>147</sup>

93. Residents other than Dr. Rogers and Mansfield have also begun or contributed to the habituation of bears in Eagles Nest Township, including the bears known as "June" and "Solo"<sup>148</sup> who became part of Dr. Rogers' study. Dr. Rogers easily included these two bears in his study activities due, at least in part, to their earlier habituation by others.<sup>149</sup>

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<sup>142</sup> Test. of L. Rogers, Tr. 2231:16-22.

<sup>143</sup> Test. of S. Mansfield, 2051:20-2052:3.

<sup>144</sup> Test. of S. Mansfield, Tr. 2169:3-7.

<sup>145</sup> Exs. 177, p. 11; 597, p. 2.

<sup>146</sup> As early as 2000, Dr. Rogers fed sweetened condensed milk on his fingers to cubs so that they would not be "fearful of a researcher" and climb trees. See Ex. 597, p. 2.

<sup>147</sup> Test. of L. Rogers, Tr. 2241:17-2242:12.

<sup>148</sup> Test. of L. Rogers, Tr. 2239: 23-2240: 8; 2242:13-19. Test. of S. Mansfield, Tr. 2060:4-15; 2061:5-14. Test. of A. Urban, Tr. 434:4-16. Test. of C. Meyer, Tr. 1608:15-18.

<sup>149</sup> Test. of L. Rogers, Tr. 2239:23-2240:8.

94. At Dr. Rogers' direction, bears are continually fed at WRI, both from feeding troughs and, until 2012, by hand. The WRI feeding troughs are continually stocked with food for bears, and continually draw both collared and non-collared bears to feed.<sup>150</sup>

95. According to Dr. Rogers, at least 203 different bears have visited the WRI feeding stations with enough regularity to have been uniquely identified;<sup>151</sup> as few as 84 and as many as 210 have been named.<sup>152</sup> At least 50 of them are habituated to human contact.<sup>153</sup> Between seven and 15 of the bears are collared at any point in time.<sup>154</sup> The majority of the bears that feed at WRI are uncollared.

96. Dr. Rogers hand-feeds bears at WRI and in the wild.<sup>155</sup>

97. Hand-feeding a bear typically involves physical contact between a person and a bear; the bear briefly touches the person's hand when mouthing the food offered in the person's hand.<sup>156</sup>

98. In addition to hand-feeding, Dr. Rogers feeds some bears by allowing the bear to eat pecans or other food from his lips, a practice which Mansfield described as "not unusual" for Dr. Rogers.<sup>157</sup>

99. Dr. Rogers and Mansfield gather bear weights by use of a scale located on a deck and near the bay window of the WRI building. A trough of food is placed on the scale as an attractant for bears.<sup>158</sup> Since 2009,<sup>159</sup> the scale automatically records the weight of the bear and takes a photograph of the bear for future identification.<sup>160</sup> Weights are recorded for any bear that gets on the scale, whether collared or non-collared.<sup>161</sup> Earlier, Mansfield, WRI volunteers and others manually recorded bear weights based upon observation.<sup>162</sup>

100. Dr. Rogers handles bears to take their pulse, a data point that he records for study purposes. Dr. Rogers takes bears' pulses both at WRI, in the wild and when visiting bears in dens.<sup>163</sup>

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<sup>150</sup> Exs 187; 768; 1004 (S. Mansfield Dep. Tr. 171:4-13). Test. of S. Mansfield, Tr. 2100:2-8. Test. of L. Rogers, Tr. 2282:7-17.

<sup>151</sup> Ex. 1004 (S. Mansfield Depo. Tr. 165:19-167:5). Ex. 84, p. 10.

<sup>152</sup> Test. of L. Cornicelli, Tr. 1351:5-22; Ex. 823.

<sup>153</sup> Ex. 595, p. 2.

<sup>154</sup> Ex. 846.

<sup>155</sup> Exs. 664, 666, 765.

<sup>156</sup> Ex. 685.

<sup>157</sup> Test. of S. Mansfield, Tr. 2144:1-4; Exs. 708.

<sup>158</sup> Exs. 84, p. 10; 189.

<sup>159</sup> Test. of S. Mansfield, Tr. 2073: 16-19; 2075:5-8.

<sup>160</sup> Exs. 187 and 800.

<sup>161</sup> Ex. 1004. (S. Mansfield Depo. Tr. 162:6-7; 170:20-171:13.)

<sup>162</sup> Test. of S. Mansfield, Tr. 2075:5-2076:16.

<sup>163</sup> Exs. 681, 682, 702, 703.



101. In addition to his handling of bears attendant to hand-feeding and recording bear heartbeats, Dr. Rogers also has a long history of handling bears by petting, patting, stroking and engaging in other physical contact with them in the wild, at WRI, and when conducting den visits.<sup>164</sup>

102. Dr. Rogers' uses a calm vocal intonation and a patterned choice of words as a tool to habituate bears to his close presence. As a result, some bears recognize his voice and "will hold for us upon hearing our voices because they know it means food without danger."<sup>165</sup>

103. Because cubs are biologically inclined to stay close to their mothers, Dr. Rogers' consistent feeding of adult female bears, which habituates them to seek out food from Dr. Rogers at WRI and in the wild, also allows him to establish a trusting relationship with the cubs.<sup>166</sup> Through this pattern of feeding and handling of the adults, Dr. Rogers has designed his study to create repeat study subjects from one bear generation to the next.

### Collaring

104. Prior to 1998, Dr. Rogers used tranquilizers to subdue a bear in order to place a tracking collar on it.<sup>167</sup>

105. Since at least 1998, Dr. Rogers has placed tracking collars on bears without the use of tranquilizers. Instead, Dr. Rogers establishes a relationship with a female bear by habituating and food conditioning the animal through consistent feeding over time. When a bear has become sufficiently accustomed to receiving food from Dr. Rogers, he is able to fasten a tracking collar around its neck while distracting the bear with food.<sup>168</sup>

106. The hearing produced no evidence directly depicting Dr. Rogers and/or Mansfield attaching a collar to a bear. Pictures of collared bears in evidence show that the collars are made of a sturdy material.<sup>169</sup> According to Mansfield, the collaring process involves "slipping the collar around their neck and there's two bolts that have to go through the collar, a metal plate that goes on the bolts and then nuts on the bolts and you tighten the nuts."<sup>170</sup> The collars appear to be cinched sufficiently tight around the animal's neck such that they do not easily slip up and off over the bear's head, though the record indicates that bears can and do get them off occasionally.<sup>171</sup> Common sense

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<sup>164</sup> Exs. 699; 787.

<sup>165</sup> Exs. 84, p. 7; 597, p. 1.

<sup>166</sup> Ex. 597, p. 2.

<sup>167</sup> Test. of L. Rogers, Tr. 2232:5-10.

<sup>168</sup> Test. of L. Rogers, Tr. 2232:11-2233:6.

<sup>169</sup> Ex. 628.

<sup>170</sup> Test. of S. Mansfield, Tr. 2113:24-2114:2.

<sup>171</sup> Ex. 597, p. 2.

dictates that some amount of physical touching of the bear is required in order to fasten the collar in the first instance and/or in the many necessary adjustments to the collar to accommodate the bear's growth and changing size,<sup>172</sup> as documented in the annual reports filed by Dr. Rogers throughout the years.

107. No matter how much or how often Dr. Rogers and Mansfield feed a bear and closely interact with it, not every bear will allow them to place a tracking collar on it.<sup>173</sup>

108. Dr. Rogers describes three categories of collared bears. A bear in "category one" allows Dr. Rogers or Mansfield to put a tracking collar on it at the WRI feeding station, but will not allow Dr. Rogers or Mansfield to be in close proximity to it in the wild. A "category two" bear allows Dr. Rogers and Mansfield to approach it in the forest, but will not allow them to walk with it. A "category three" bear allows Dr. Rogers and Mansfield to walk with it in the forest.<sup>174</sup>

109. Once equipped with a tracking collar, bears can be located by Dr. Rogers via the signal transmitted by the collar. Until 2009, Dr. Rogers used radio telemetry to locate the signal emitted by a bear's tracking collar, and thus locate the bear.<sup>175</sup> Since 2009, Dr. Rogers has attached GPS technology to the tracking collars, which collects and transmits information on the location of the bears via satellite for automatic downloading onto the WRI computers. By checking the GPS data, Dr. Rogers can identify, in nearly real-time,<sup>176</sup> where the collared bears are located.<sup>177</sup>

110. Through the signals emitted by the tracking collars, Dr. Rogers and Mansfield locate the bear in the wild, approach the bear's location and attempt to get the bear to come to them by calling to it and offering it food.<sup>178</sup> Once the bear is located, Dr. Rogers and Mansfield are able to observe it for data collection or other purposes such as maintaining collars by changing batteries, adjusting fit, and switching collars from one bear to another.<sup>179</sup>

111. The GPS technology allows Dr. Rogers and Mansfield to collect information about the bears' home range and how the bears are interacting with their habitat.<sup>180</sup>

112. Throughout the course of his study, Dr. Rogers has used between seven and 15 collars annually to track bear movements.<sup>181</sup> For at least the first ten years of the

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<sup>172</sup> Exs. 586; 638, 678.

<sup>173</sup> Test. of S. Mansfield, Tr. 2082:2-3.

<sup>174</sup> Test. of S. Mansfield, Tr. 2054:19-2055:15. Test. of L. Rogers, Tr. 2235:7-2236:10.

<sup>175</sup> Test. of L. Rogers, Tr. 2246:22-2247:19.

<sup>176</sup> The GPS transmits location signals in 10 minute intervals. Ex. 84, p. 10.

<sup>177</sup> Test. of S. Mansfield, Tr. 2072:12-2073:19.

<sup>178</sup> Ex. 1004. (S. Mansfield Dep. Tr. 19:9-14.)

<sup>179</sup> Ex. 84, p. 10.

<sup>180</sup> Test. of S. Mansfield, Tr. 2073: 3-19; 2074:11-15. Test. of L. Rogers, Tr. 2247:20-2248:3.

<sup>181</sup> See annual reports referenced in footnote 131.

study and perhaps throughout its length, Dr. Rogers freely swapped collars between bears. This resulted in only a limited number of bears being collared at one time, but a larger number of bears being collared at some point in the year.<sup>182</sup>

113. As part of his current study, Dr. Rogers has “walked with” six to eight bears to some degree but only two “category-three” bears: “June” and “Lily.”<sup>183</sup> From 2009-2011, Mansfield walked with “June” once every other week; in 2013, Mansfield walked with “June” only once.<sup>184</sup> Dr. Rogers considered “June” to be the most valuable of his study bears given her longevity in the study.<sup>185</sup>

114. During hunting season, Dr. Rogers and his volunteers often place ribbons and other brightly colored items on the bears’ collars in an attempt to notify hunters of their status as a study bear and thus protect them from the hunt.<sup>186</sup>

115. When conducting den visits, Dr. Rogers sometimes brings students and other members of the public along and allows them to hold cubs and interact with bears.<sup>187</sup> On behalf of the DNR, Dr. Garshelis has allowed students to engage in virtually identical activities involving bears and their cubs during den visits.<sup>188</sup>

### Den Cams

116. In the fall of 1999, WRI captured images of a bear named “Whiteheart”<sup>189</sup> in a den, which generated a million hits when posted on the discovery.com website.<sup>190</sup>

117. Since 2009, WRI has been using den cams to record footage of bears hibernating, the birthing process, cub care and other bear activities.<sup>191</sup>

118. Dr. Rogers’ study operation has been live-streaming den cam video since 2010<sup>192</sup> and has captured video clips with den cams, over 600 of which have been posted on YouTube.<sup>193</sup>

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<sup>182</sup> In 2001, Dr. Rogers reported the collaring of seven bears in 2000, though the permit at that time limited him to only three bears. Ex. 159, p. 8. In 2005, Dr. Rogers reported swapping eight collars with respect to 23 separately identified bears. (Exs. 159, pp. 24-26; 628.) In 2006 Dr. Rogers reported 25 collar (re)placements, all of which involved 20 separately identified bears, with 13 named bears radio-collared at year-end. (Ex. 159, pp. 35-39; Ex. 629.)

<sup>183</sup> Test. of L. Rogers, Tr. 2239:6-15; 2240:20-2241:8. Test. of S. Mansfield, Tr. 2055:16-21.

<sup>184</sup> Test. of S. Mansfield, Tr. 2210:3-24.

<sup>185</sup> Ex. 159, p. 101.

<sup>186</sup> Exs. 585, 586, 587.

<sup>187</sup> Test. of L. Rogers, Tr. 2228:19-20.

<sup>188</sup> Test. of D. Garshelis, Tr. 1226:16-1227:4. Exs. 51, 59.

<sup>189</sup> Test. of S. Mansfield, Tr. 2076: 16-21; 2077:5-7.

<sup>190</sup> Ex. 159, p. 9.

<sup>191</sup> Test. of S. Mansfield, Tr. 2076:16-2078:6; Ex. 151.

<sup>192</sup> Ex. 159, p. 101.

<sup>193</sup> Test. of L. Rogers, 2269:9-24; Ex. 180.

119. Educators have incorporated the den cams into school curricula.<sup>194</sup> Classrooms in more than 500 schools located in over 30 states and several other countries viewed the live den cam footage prior to the winter of 2013-14.

120. Dr. Rogers provides educational material to the public related to bears on his *bearstudy.org* website.<sup>195</sup> Not every statement included on the website is accurate. Details are deleted and descriptions are sometimes sanitized for public consumption.<sup>196</sup>

121. Other organizations link to the WRI's website as a way to educate the public about bears.

### **Bear Field Courses**

122. Each summer since 2003, Dr. Rogers has operated several sessions of a three-day "Bear Field Study Course" at WRI. The courses are taught by Dr. Rogers and Mansfield.<sup>197</sup>

123. During the course, up to eight individuals spend four days at WRI and engage in bear-related activities, at a current cost of \$2,500 per person.<sup>198</sup> Part of the course includes Dr. Rogers' locating one or more collared bears to permit participants to view and interact with a bear and any cubs.<sup>199</sup>

124. Bear Field Study Course participants are allowed to: observe bears feeding at WRI and in the wild; listen to lectures presented by Dr. Rogers and Mansfield; watch slide shows depicting bear activity; visit an unoccupied bear den; look for bear signs in the forest; analyze bear scat;<sup>200</sup> attempt to locate bears in the forest with Dr. Rogers; and tour the North American Bear Center.<sup>201</sup>

125. Prior to 2012, Dr. Rogers allowed approximately 650 Bear Field Study Course participants<sup>202</sup> to: hand feed collared and uncollared adult bears, yearlings and cubs on the deck of the WRI cabin<sup>203</sup> and in the wild;<sup>204</sup> pet bears;<sup>205</sup> kiss bears;<sup>206</sup> sit

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<sup>194</sup> Test. of L. Rogers, Tr. 2264:25-2265:23. Ex. 203. In connection with this proceeding, the DNR refused to allow Dr. Rogers to stream den cam footage. The DNR has stated that it is concerned that den cams cause the public to become emotionally attached to bears. Test. of T. Landwehr, Tr. 127:3-10.

<sup>195</sup> Test. of D. Garshelis, Tr. 1165:25-1166:10; Ex. 580. Test. of S. Mansfield, Tr. 2178:7-24.

<sup>196</sup> Test. of S. Mansfield, Tr. 2178:25-2179:16; 2182:13-2183:16.

<sup>197</sup> Test. of S. Mansfield, Tr. 2067:6-2068:13. Test. of J. Wheaton Lindsey, Tr. 296:23-297:11.

Ex. 84, p. 11.

<sup>198</sup> Test. of Sidney Stein; Tr. 1513:4-1520:13. Test. of L. Cornicelli, Tr. 1301:10-1302:1.

<sup>199</sup> Test. of Shirley Starks, Tr. 1833:6-18. Test. of Dr. Roberta Sonnino, Tr. 1650:24-1651:13. Test. of J. Wheaton Lindsey, Tr. 298:6-300:16. Test. of S. Stein, Tr. 1514:12-24. Ex. 837 (S. Thompson Dep. 8:11-14.)

<sup>200</sup> "Scat" is another term for excreta.

<sup>201</sup> Test. of S. Stein, Tr. 1515:1-1520:7.

<sup>202</sup> Ex. 84, p. 11.

<sup>203</sup> Exs. 662, 668, 669, 670, 671, 672, 673, 674, 675, 676, 685, 688, 689, 690, 691, 699, 700, 701, 702, 704, 705, 706, 707, 769, 770, 771.

<sup>204</sup> Exs. 676, 677, 678, 679, 680, 681, 692, 693, 709.

next to bears;<sup>207</sup> pose for pictures within inches of a bear's face;<sup>208</sup> lure bears into human-occupied buildings with food;<sup>209</sup> and mouth-feed bears.<sup>210</sup> Dr. Rogers engaged in these activities with course participants.<sup>211</sup> The bears showed no fear of the participants, who fed them continuously. Bears approached participants when at the WRI cabin and out in the forest. One of the study bears attempted to climb into the Bear Field Study Course participants' van in 2011.<sup>212</sup> Observing and participating in all of these activities related to the human handling of bears, at least one 2011 participant concluded that several of the bears had been "tamed."<sup>213</sup>

126. In 2011 and in years prior, Dr. Rogers provided participants with written directions on how to hand- and mouth-feed bears.<sup>214</sup> Participants were allowed to witness Dr. Rogers mouth-feeding a bear.<sup>215</sup>

127. At times, some of the bears have swatted at and attempting to "nip"<sup>216</sup> participants when they failed to offer food.<sup>217</sup> Dr. Rogers advises that "nips and slaps have been no worse than scratches from puppies and kittens."<sup>218</sup>

128. Dr. Rogers and Mansfield encouraged Bear Field Study Course participants not to post or otherwise publish pictures of bear handling and interaction taken during course activities, advising participants that the activities would not reflect well on the WRI.<sup>219</sup>

129. After the DNR inserted a condition in the permit prohibiting anyone other than Dr. Rogers, Mansfield and four identified study assistants from handling or hand-feeding bears in 2011, Dr. Rogers directed Bear Field Study Course participants that they were not allowed to feed or touch bears.<sup>220</sup>

### Other Handling Incidents

130. In August 2005, Dr. Rogers was videotaped punching a bear in the face upon its lunging at him, apparently when it discovered its human-provided food

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<sup>205</sup> Exs. 663, 682, 683, 684, 710, 768.

<sup>206</sup> Ex. 703.

<sup>207</sup> Exs. 659, 660, 662, 664, 671, 672, 673, 674, 675, 676, 694, 695, 696, 697, 698, 786.

<sup>208</sup> Exs. 712, 714, 715, 718.

<sup>209</sup> Exs. 661, 666, 667, 784, 789, 804, 805, 807, 808.

<sup>210</sup> Exs. 660, 725.

<sup>211</sup> Dr. Rogers Dep. Tr. 207:18-209:17.

<sup>212</sup> Exs. 769, 770, 771.

<sup>213</sup> Test. of J. Wheaton Lindsey, Tr. 350:4-20.

<sup>214</sup> Exs. 570, pp. 21-23; 608.

<sup>215</sup> Ex. 708.

<sup>216</sup> The word "nip" is used herein to indicate a bear's mouthing a person or other object without drawing blood.

<sup>217</sup> Ex. 837 (S. Thompson Dep. Tr. 6:10-17).

<sup>218</sup> Ex. 559, p. 12.

<sup>219</sup> Ex. 84, p. 11.

<sup>220</sup> Test. of S. Stein, Tr. 1531:17-1535:8.

container empty while Dr. Rogers rested next to it. On the video, Dr. Rogers is heard stating that he had been "a little rough" on bears lately.<sup>221</sup>

131. In 2008, a friend of Dr. Rogers was filmed at WRI teasing a bear with food for the purpose of making the bear "dance."<sup>222</sup> At hearing, Dr. Rogers testified that he was not present during the filming and, if he had been, he would have stopped the activity as it had nothing to do with research.<sup>223</sup> In 2011, Dr. Rogers reported the following to the DNR about the incident:

The picture that [X] took of his son [Y] interacting with yearling male Mickey in 2008 is wrongly portrayed as dangerous by people who haven't experienced it. It wasn't dangerous. [X] and [Y] have raised bears. [X] has worked closely with bears with us. [X] and [Y] were comfortable with the situation and so was I with my 45 years of experience and knowledge of Mickey's temperament. Black bears are not the unpredictable animals of the media.

*The pictures of [X] and [Y] interacting with the bears were to be kept strictly private because we don't advocate hand-feeding, we don't advocate close interactions, and we don't want to show photos that are contrary to DNR policy.*<sup>224</sup>

132. On August 23 and 30, 2008, Dr. Rogers attempted to teach [Y], the same teen-aged boy who filmed his father teasing the bear to "dance," to mouth-feed a bear, and posed for pictures while doing so.<sup>225</sup> The evidence did not reveal whether the dancing bear video was also filmed on August 23 or 30, 2008.

### **North American Bear Center**

133. Dr. Rogers opened the North American Bear Center (NABC) in 2007.<sup>226</sup>

134. The NABC has 60 television screens playing bear videos continuously. There are exhibits on different aspects of bear life, including courtship, mating, birth of cubs and care of cubs.<sup>227</sup>

135. Photographs and videos of bears, together with other data and materials collected by Dr. Rogers and Mansfield are used in the NABC to educate the public about bears.<sup>228</sup>

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<sup>221</sup> Test. of L. Rogers, Tr. 275:24-2277:8; Ex. 799.

<sup>222</sup> Ex. 802.

<sup>223</sup> Test. of L. Rogers, Tr. 2277:18-25.

<sup>224</sup> Ex. 84, p. 16 (emphasis in original).

<sup>225</sup> Exs. 708, 725.

<sup>226</sup> Test. of S. Mansfield, Tr. 2066:13-15.

<sup>227</sup> Test. of S. Mansfield, Tr. 2066:16-2067:2; Test. of L. Rogers, Tr. 2269:4-22; Ex. 182.

136. There is broad agreement that the NABC creates a unique opportunity for public education regarding bears.<sup>229</sup>

137. Dr. Rogers holds two DNR permits related to the operations of the NABC: a DNR game farm license, No. 14561, that allows him to keep three captive bears at the NABC; and DNR permit No. 14745, which allows NABC staff to salvage protected birds and mammals (except big game and gray wolves) for educational display purposes. The Agency's ultimate determination with regard to this matter involving Dr. Roger's research and education permit, permit No. 16868, is not related to and will have no effect on the activities allowed under the two NABC-related permits.<sup>230</sup>

## **Nuisance Bear Complaints**

### **DNR's Process and Records**

138. DNR conservation officers and wildlife managers, among other DNR staff, receive complaints from members of the public related to nuisance bears.<sup>231</sup> A typical nuisance bear complaint involves bears getting into bird feeders or overturning garbage cans; both activities relate to a bear's search for food.<sup>232</sup>

139. The DNR's policy related to responding to nuisance bear complaints is found in a written "Nuisance Bear Guide."<sup>233</sup>

140. In the past, the DNR's nuisance bear policy provided that the Agency would attempt to trap and relocate a nuisance bear in response to complaints from residents. This practice was discontinued due to its ineffectiveness and resource requirements in the late 1990s.<sup>234</sup>

141. Since the late 1990s, it has been the DNR's practice to advise nuisance bear complainants to remove any available food attractants including bird feeders, garbage cans, barbeque grills, and the like. If the removal of attractants does not solve the problem, the DNR recommends to the public that they haze the nuisance bear by making noise, waving their arms, throwing rocks or otherwise taking actions intended to scare the animal away.<sup>235</sup>

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<sup>228</sup> Test. of S. Mansfield, Tr. 2066:16-2067:2; 2172:7-11. Test. of L. Rogers, Tr. 2268:19-2269:4.2172:7-11.

<sup>229</sup> Test. of D. Garshelis, Tr. 1233:13-16. Test. of G. Burghardt, Tr. 1965:20-1966:12.

<sup>230</sup> Ex. 595, p. 2.

<sup>231</sup> Test. of D. Starr, Tr. 673:19-674:17.

<sup>232</sup> Test. of T. Rusch, Tr. 186: 21-187:5.

<sup>233</sup> Test. of T. Rusch, Tr. 182:15-183:16; Test. of D. Starr, Tr. 674:18-22. Ex. 593. (Year 2000 version).

<sup>234</sup> Test. of S. Williams, Tr. 550:18-551:3; Ex. 593, Appendix 11 ("Trapping and Relocation").

<sup>235</sup> Test. of T. Rusch, Tr. 183:17-184:8.

142. If a bear presents a public safety concern, Minnesota law allows a property owner or law enforcement officer, including the DNR's conservation officers, to kill the bear.<sup>236</sup>

143. The DNR collects information about nuisance bear complaints in various ways. The Agency's Fish and Wildlife Division staff record nuisance bear complaints in "nuisance bear logs." The DNR Enforcement Division's conservation officers complete Initial Complaint Reports (ICRs).<sup>237</sup> In addition, DNR conservation officers and wildlife managers are directed to provide to Dr. Garshelis a monthly tally of nuisance bear complaints received during the May through October timeframe.<sup>238</sup>

144. The DNR receives nuisance bear complaints from throughout the state.<sup>239</sup>

145. At hearing, Conservation Officer Starr testified that he fielded more nuisance bear complaints from Eagles Nest Township than any other area in his assigned territory.<sup>240</sup> Because he failed to make reports to Dr. Garshelis as required,<sup>241</sup> this testimony is unsupported by Agency records.

146. The Department's records relating to nuisance bear complaints are incomplete, inconsistent and, in some instances, inaccurate.<sup>242</sup>

147. As a result of the substandard record-keeping, the DNR's data is of minimal value with regard to conducting a comparative analysis of either the quantity or quality of bear-related incidents or nuisance bear complaints experienced by the public in Eagles Nest Township or elsewhere in Minnesota.

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<sup>236</sup> Test. of T. Rusch, Tr. 184:1-21. See Minn. Stat. §§ 97A.415; 97B.657; Minn. R. 6232.3300.

<sup>237</sup> Test. of T. Rusch, Tr. 682:6-21; Ex. 595, p. 3.

<sup>238</sup> Test. of D. Garshelis, 1164:4-1165:20.

<sup>239</sup> The following examples were admitted into evidence at hearing: In Carlton County in 2011, a large bear was roaming through a neighborhood, and a boy was trapped in a sauna by a bear. Test. of T. Rusch, Tr. 636:23-638:1. In Duluth in 2011, a bear was in a garage while two young children were present. Test. of T. Rusch, Tr. 638:8-639:9. In Washington County in 2012, a bear went through a screen porch. Test. of T. Rusch, Tr. 639:10-640:20. In Lake County in 2012, a bear tore a screen on a window and took food off a kitchen counter. Test. of T. Rusch, Tr. 640:21-641:12. In Lake County in 2012, a bear destroyed property, chased children, and broke into a shed. Test. of T. Rusch, Tr. 641:13-642:8. In Pine County in 2012, a bear was on a deck looking in windows and did not leave when a shotgun was discharged. Test. of T. Rusch, Tr. 642:9-644:5. Ex. 212.

<sup>240</sup> Test. of D. Starr, Tr. 679:21-680:3.

<sup>241</sup> Test. of D. Garshelis, Tr. 1157:9-13; 1164:16-1165:7.

<sup>242</sup> Test. of D. Garshelis, Tr. 1157:14 ("[S]o there's sort of a lot of slop in the system...." Exs. 140, 165, 166, 217, 595 at Ex. 8. On at least one occasion, DNR staff recorded a nuisance bear log entry that was not initiated by a member of the public intending to file a complaint.<sup>242</sup> In another instance, DNR staff added information to a nuisance bear complaint years after it was initially recorded. Test. of T. Rusch 597:24-598:12; Ex. 541. In another example, the ICR information related to a specific reported incident does not match, in every specific, all information reported in the bear nuisance log about the same incident. Ex. 505 refers to a collar. Ex. 547, which is the ICR for the same incident, does not refer to a collar. Test. of T. Rusch, Tr. 648:22-650:3. The complaint marked as Ex. 505 does not refer to bird feeders, but the ICR relating to the same incident does reference bird feeders.



## Community's Concerns and Response: 2005-2007

148. The community began experiencing increased complaints from residents concerning nuisance bears in or about 2005. The typical complaint was that the bears exhibited no fear of people. Instead of turning and running away, many of the bears approached people. Reports included bears coming onto decks, remaining on roads, and failing to react to typical hazing techniques such as yelling or throwing things.<sup>243</sup>

149. On August 17, 2007, the collared bear called "June" nipped two individuals who had approached her in imitation of Dr. Rogers but had no food to provide when she approached in apparent expectation of being fed.<sup>244</sup>

150. Bear Head State Park began experiencing atypical bear behavior in 2007, including collared and uncollared bears approaching vehicles and exhibiting an apparent lack of fear of humans. Speaking of these incidents, the Park Manager testified:

[T]hey're habituated animals. They're not afraid of people. They're unpredictable. I mean, I wouldn't want to have a dog, a domesticated dog displaying these behaviors, much less a wild bear, and as someone who is responsible for the public safety of hundreds of people a day, this is alarming to have occurring in the park.<sup>245</sup>

151. In 2007, 28 community members presented a "Citizen's Petition Concerning Nuisance Bears" to the Eagles Nest Township Board (Township Board) asking that the Township Board "negotiate an appeal on our behalf to the MN DNR to undertake appropriate remedial action and to alleviate" the problem with nuisance bears in the community.<sup>246</sup>

152. The Township Board established a Community Bear Committee made up of 14 residents, which met six times. After considering input from the DNR, from Dr. Rogers and from the public, the Community Bear Committee issued a report, on December 7, 2007. In the report, the Community Bear Committee recommended that the community: become better educated about bears; manage attractants more effectively; use physical deterrents wisely; make loud sounds to repel bears; feed bears, if at all, in a manner that shows respect for neighbors who may not appreciate being visited by bears expecting food; and develop a community action plan for future work on the topic of nuisance bears.<sup>247</sup>

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<sup>243</sup> Test. of T. Rusch, Tr. 546:20-548:3.

<sup>244</sup> Ex. 548.

<sup>245</sup> Test. of J. Westlund, Tr. 484:21-485:2.

<sup>246</sup> Exs. 16, 542.

<sup>247</sup> Ex. 16, pp. 1, 10.

153. In connection with the Community Bear Committee's work, the Township Board established a telephone help line as a resource for those with concerns about bears. Only three calls were received from 2008 to the present, none of which involved threats to public safety.<sup>248</sup>

## **DNR's Response**

154. In response to the increasing community concerns about nuisance bears, the DNR decided to undertake a peer-review of Dr. Rogers' study activities to determine whether his study methodology was jeopardizing public safety. In preparation for the review, the DNR required Dr. Rogers to submit an updated and detailed research proposal describing his study's research goals, experimental design, and publication intentions, with timelines.<sup>249</sup>

155. Dr. Rogers submitted his *2008 Research Plan and Public Safety Assessment* dated April 14, 2008. In the plan, Dr. Rogers set forth approximately 110 questions which WRI was studying. Dr. Rogers acknowledged that the "research is more qualitative than experimental. ...Qualitative research emphasizes in-depth description of study animals, behavior settings rather than setting up experiments." He described his field study methods as including "radio-tracking, direct observation, video-taping, field computer recording, scat analysis, Baerman sedimentation, GPS mapping, and weight recording..." and noted that collected data would be mapped and recorded in journals or on videotape for analysis.<sup>250</sup>

156. As suggested by Dr. Garshelis,<sup>251</sup> the DNR selected two wildlife biology experts to perform the peer-review of Dr. Rogers' study. Boggess reviewed the two experts' reports and found them to be "equivocal" on whether public safety was at risk due to Dr. Rogers' activities.<sup>252</sup> In June 2008 the DNR reissued Dr. Rogers' permit but also notified him that the permit could be revoked "if further information or experience indicates that your methodology is creating an unacceptable risk to public safety."<sup>253</sup>

## **New Agency Administration: Evolving Concerns**

### **Complaints Continue**

157. Less than a month following the appointment of Commissioner Landwehr in January 2011, the Department renewed Dr. Roger's permit with the same conditions

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<sup>248</sup> Test. of D. Humay, Tr. 1773:11-1775:10. Test. of Ronald James, Tr. 1917:2-21.

<sup>249</sup> Ex. 20, p. 1.

<sup>250</sup> Ex. 598.

<sup>251</sup> Test. of D. Garshelis, Tr. 1200:14-17. Dr. Garshelis recommended both Dr. Stephen Herrero and Dr. Martyn Obbard perform the review. Dr. Garshelis had worked with Dr. Herrero and was friends with Dr. Obbard. (Test. of D. Garshelis 1200:14-1201:1.) Dr. Rogers asked three other researchers to review his research protocol: Dr. Jane Tate; Dr. Steve Stringham; and Dr. Terry DeBruyn. All three found that Dr. Rogers' study presented no public safety issues. Test. of L. Rogers 2244:9-2246:16; Exs. 17, 18, 30.

<sup>252</sup> Test. of E. Boggess, Tr. 1420:9-1421:22. Exs. 645; 646.

<sup>253</sup> Ex. 32.

that had accompanied it throughout the past decade under the Agency's prior administrations.<sup>254</sup>

158. During the 2011 Legislative Session, Dr. Rogers requested that the DNR support a legislative proposal designed to protect collared bears from hunters. Dr. Rogers encouraged his supporters to contact the DNR. Hundreds did. Commissioner Landwehr did not appreciate the public pressure, and believed that Dr. Rogers' continual questioning of the Agency's motivations and his suggestions of a "long-term vendetta" were bullying tactics being used by Dr. Rogers to badger the DNR into supporting the legislative proposal.<sup>255</sup>

159. Members of the public, including at least one past participant in the 2011 Bear Field Study Course, emailed the Commissioner about their experiences with Dr. Rogers' bears. In addition, the Commissioner received reports from DNR staff regarding nuisance bears in general and collared nuisance bears in the Eagles Nest Township area.<sup>256</sup>

160. As the year progressed, the Department became aware of other reports of nuisance bear activity involving collared bears in Eagles Nest Township, which DNR staff considered a public safety hazard.<sup>257</sup>

a. In July 2011, a collared bear approached vehicles, in some cases leaning against vehicles or putting its paws on vehicles, and acting generally unafraid of people.<sup>258</sup> The Park Manager considered this to be a threat to public safety.

b. On August 12, 2011, a two-year-old boy was sitting on the ledge of the van door at his family's cabin on Peninsula Road, when his mother observed a collared bear less than three feet away from her son, sniffing and moving toward him. The mother yelled at the bear while waving her arms and the bear moved back and stopped, but did not leave until she rammed it with a wheelbarrow.<sup>259</sup>

c. Also in August 2011, an Eagles Nest Township resident got between a bear and her cubs and was swatted across the face, requiring a hospital visit for stitches.<sup>260</sup>

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<sup>254</sup> Ex. 158, pp. 28-29.

<sup>255</sup> Test. of T. Landwehr, Tr. 115:17-117:12; Ex. 57, p. 2.

<sup>256</sup> Test. of T. Landwehr, Tr. 55:21-57:10. Exs. 101, 102, 103, 104. 796.

<sup>257</sup> Test. of T. Landwehr, Tr. 56:24-57:10; 62:4-12.

<sup>258</sup> Test. of T. Landwehr, Tr. 57:1-10; 120:8-11. Test. of J. Westlund, Tr. 484:21-485: 2; Exs. 561, 562.

<sup>259</sup> Test. of T. Landwehr, Tr. 61:19-63:9. Test. of S. Beyer, Tr. 221:10-223:10. Test. of D. Starr, Tr. 700:12-21; Ex. 563, p. 2.

<sup>260</sup> Test. of D. Starr, Tr. 705:3-707:22. Exs. 561, 562.

161. After notifying Dr. Rogers of these incidents in a letter dated August 26, 2011 and seeking his assistance in “eliminating the public safety threat caused by these bears,”<sup>261</sup> the Commissioner met with Dr. Rogers on August 29, 2011 to discuss the Agency’s views of what it considered to be a growing public safety issue.<sup>262</sup>

162. Dr. Rogers responded to the Commissioner's concerns via email, providing suggestions on tracking the bear near Bear Head State Park and agreeing that he should publish more of his research in peer-reviewed journals.<sup>263</sup>

163. By letter dated November 17, 2011, the Commissioner reiterated to Dr. Rogers the DNR’s public safety concerns regarding human-tolerant bears' behavior. He also provided Dr. Rogers with the 2008 pictures of the teenaged boy being taught to mouth-feed bears on the WRI porch. Commissioner Landwehr set forth a number of proposed conditions that would attach to Dr. Rogers' permit upon its renewal in 2012, including the limitation that only Dr. Rogers, Mansfield and a few designated individuals could continue to hand-feed bears. The Commissioner also requested that Dr. Rogers provide the DNR with an updated research plan.<sup>264</sup>

164. Dr. Rogers produced his *2012 Research Plan Update* dated December 1, 2011, in which he reiterated the purpose of the research “as stated in a letter to the MN DNR on July 17, 2000, and detailed in our research proposal of 2008:”

The ultimate purpose of the project is to gather detailed behavioral data on movements, habitat use (including hibernacula), foraging, social interactions, and communication to test optimal foraging hypothesis and to refine models of home range. Based on our experience, we hypothesize that home range use depends upon the distribution of resources (food, cover, water) and the perception of danger from other bears, humans, and predators. To obtain detailed behavioral data, we propose to develop the trust of wild study bears to the extent that they will go about their business of making a living while allowing detailed, close range observations.<sup>265</sup>

The report noted that the study had identified 203 bears in the study area during 1996-2011; 136 of these were members of Shadow’s Clan. Dr. Rogers and Mansfield had collared 17 of these bears for direct observation.<sup>266</sup> In the report, they identified 16 research questions currently under study.<sup>267</sup>

165. The Commissioner did not find the document acceptable because it contained no adequate experimental design outlining either the research methods that

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<sup>261</sup> Exs. 67, 615.

<sup>262</sup> Test. of T. Landwehr, Tr. 64:16-65:19.

<sup>263</sup> Test. of T. Landwehr, Tr. 70:12-71:18; Ex. 70.

<sup>264</sup> Test. of T. Landwehr, Tr. 71:25-73:15; Ex. 79.

<sup>265</sup> Ex. 599, p. 3.

<sup>266</sup> Ex. 599, pp. 6-7.

<sup>267</sup> Ex. 599, pp. 8-12.

Dr. Rogers intended to use or the data he intended to collect to answer the general questions posed. It also lacked a research hypothesis or proposed method of statistical analyses.<sup>268</sup>

166. The DNR record does not indicate that the DNR ever indicated to Dr. Rogers that the plan was unacceptable.

167. As of November 17, 2011, Boggess did not believe that the DNR had cause to deny Dr. Rogers' permit.<sup>269</sup>

168. The DNR issued the 2012 Permit on January 31, 2012. Noting that Dr. Rogers' updated research plan referenced at least 15 times the importance of publishing his research in peer-reviewed journals, the Commissioner stated that he expected Dr. Rogers to submit two articles for peer-reviewed publication between January and November 2012 and to publish two peer-reviewed articles per year thereafter.<sup>270</sup>

169. The publication expectation was not listed as one of the permit's conditions. The Commissioner did include the publication expectation in the cover letter sent with the permit.<sup>271</sup>

170. In 2012, the DNR became increasingly aware of public safety issues associated with collared bears in the Eagles Nest Township area.

a. On May 2, 2012, a resident returned to his home from a walk and found the collared bear "June," her collared yearling named "Aster," and an uncollared bear in his yard. He tried to chase the bears away but they would not leave.<sup>272</sup>

b. Also on May 2, 2012, another resident was watching television on the second floor of his cabin, when he looked up to see a large collared bear pressing up against his window some two feet from his head.<sup>273</sup>

c. On May 4, 2012, Conservation Officer Starr encountered a collared bear named "Jo," her yearling cub "Victoria," and an uncollared bear at a resident's home. "Victoria" walked within four feet of the officer, stood up on her hind legs and put her left paw on Officer Starr's gun belt.<sup>274</sup>

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<sup>268</sup> Test. of T. Landwehr, Tr. 76:20-81:6; Ex. 599.

<sup>269</sup> Test. of E. Boggess, Tr. 1441:16-21.

<sup>270</sup> Test. of T. Landwehr, Tr. 133:24-134:16; 135:11-15; Ex. 89, p. 2.

<sup>271</sup> Ex. 89.

<sup>272</sup> Test. of D. Starr, Tr. 710:19-712:18; Ex. 559, p. 2.

<sup>273</sup> Test. of D. Starr, Tr. 712:21-713:25; Ex. 559, p. 2.

<sup>274</sup> Test. of D. Starr, Tr. 716:16-720:9; Ex. 558.

d. On May 22, 2012, the DNR received a report that “June” and her two cubs had been circling vehicles on a park access road at Bear Head State Park.<sup>275</sup>

171. In a letter dated May 23, 2012, Boggess communicated to Dr. Rogers about these and other occurrences which the DNR considered to be public safety concerns involving collared bears.<sup>276</sup>

172. Throughout the summer months, DNR conservation officers reported a continuing series of nuisance bear incidents raising additional public safety concerns:

a. On August 1, 2012, a resident left his house in Eagles Nest Township when a collared bear approached his porch and showed no fear of the complainant or his dog. After returning to his house to retrieve a rifle, he went back outside to find that the bear and his dog had moved off his porch and his dog was limping.<sup>277</sup>

b. On August 2, 2012, a collared bear entered a garage while a woman and her two small children were present and making noise. The woman yelled and the bear backed out of the garage but did not leave. The woman then hit the bear with a broom, threw sticks at it and activated an air horn, but the bear still would not move. DNR conservation officers arrived approximately one hour later and observed a small collared bear walk around parked vehicles and approach the officers. The bear sniffed the officer’s hand, opened its mouth and made contact with the officer’s hand with its teeth. Because it did not appear to be afraid of humans and did not leave the area, the officer determined the bear was a public safety concern and killed it.<sup>278</sup>

173. Based on a review of complaint information and the Agency’s historical records, on September 5, 2012 Dr. Cornicelli recommended to Boggess that the DNR not renew Dr. Rogers’ permit. Noting a continuing lack of a research study design, alleging violations of the permit conditions, and citing the “unreasonable burden on the public” to appropriately respond to the unsafe behavior of habituated bears, Dr. Cornicelli concluded that reissuance of the permit was not warranted.<sup>279</sup>

174. After considering the recommendation, Boggess and others, including Commissioner Landwehr, concluded that the DNR did not have cause to deny Dr. Rogers’ permit as of December 21, 2012.<sup>280</sup>

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<sup>275</sup> Ex. 617, p. 2.

<sup>276</sup> Ex. 617.

<sup>277</sup> Test. of D. Starr, Tr. 728:14-22; Ex. 556 at 2.

<sup>278</sup> Test. of D. Starr, Tr. 729:19-732:6; Exs. 554, 555.

<sup>279</sup> Test. of L. Cornicelli, Tr. 1312:1-22; Exs. 106; 109.

<sup>280</sup> Test. of E. Boggess, Tr. 1431:20-1432:8, 1442:7-23, 1443:2-13. Test. of T. Landwehr, Tr. 144:22-145:8. Boggess testified that shortly after DNR renewed Dr. Rogers permit in December 2012, his opinion changed as to the advisability of this action. The biggest factor in Boggess’ change-of-mind was a

175. By letter dated December 21, 2012 containing a list of the increasing complaints of "bear/human conflicts and potential threats to public safety in the Tower/Ely area," the Commissioner issued Dr. Rogers a six month permit with added conditions, but noted as follows:

We continue to be concerned about the lack of scientific publications resulting from your research. We have previously stated an expectation that you would begin to publish the results of your research in scientific journals so that it can be of use to other bear scientists and managers. Again, this year your supporting documentation for the permit has no mention of hypothesis testing, statistical, or other protocols that follow the scientific method and, while you have cited a couple of recent publications, neither are related to recent data or research methods associated with the bears collared under this permit.

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The pattern of unacceptable behavior by apparently habituated bears ... is creating situations for local residents and visitors that they should not have to tolerate and also has the potential to affect public safety. Your website indicates you have over 50 habituated study bears in the area. The long-term ramifications of this many habituated bears is troubling and, at a minimum, puts an undue burden on the public to: 1) tolerate behavior of habituated bears; and 2) be expected to recognize and interpret habituated vs. non-habituated bears and associated behaviors .... This type of bear behavior is also not healthy for the bears because it subjects them to an increased chance of being killed.<sup>281</sup>

176. Dr. Rogers submitted two articles for publication during the period January to November 2012: one article was submitted to and published by the *Journal of Veterinary Diagnostic Investigations* in November 2012; and a second article was submitted to the journal *Ursus* in June 2012.<sup>282</sup>

177. In response to the Agency's continued references to a lack of peer-reviewed publications, in his annual report for study year 2012 filed on February 17, 2013, Dr. Rogers represented his historical publication record as follows:

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progressively lower tolerance for risk associated with habituated bears in Eagles Nest Township together with his growing awareness that natural resources agencies in other states have been found legally liable for bear-inflicted human injuries and deaths caused by human-habituated and food-conditioned bears. (Test. of E. Boggess, Tr. 1432:4-1433:25.) The only record reference to governmental liability for bear-related injuries is found in affidavit testimony of Dr. Garshelis related to a 2013 ruling of the Utah Supreme Court against the USFS related to a 2007 incident involving a child in a campground, and a 1996 civil suit in Arizona involving a "\$2.5 million" settlement paid by the Arizona Game and Fish Department. See Ex. 573, p. 7.

<sup>281</sup> Exs. 113, pp. 1-2; 174, pp. 1-2.

<sup>282</sup> Test. of G. Burghardt, Tr. 1961: 25-1962: 2; Exs. 48, 152, 155, and 813. The submission to *Ursus* was rejected, but the same paper was published by the journal *Ethology* in or after February 2014. Ex. 814.

Far from a lack of publications, 13 of the 19 items listed on bearstudy.org (under Publications tab) since 1999 represent research conducted under this permit – 9 since 2007. The 13 publications include 3 peer-reviewed scientific papers, a peer-reviewed Smithsonian book chapter, an invited scientific commentary in a peer-reviewed journal, and a published summary of an invited presentation for a U.S. Fish and Wildlife Service Workshop. Beyond those, we presented 2 poster papers on diversionary feeding at professional bear conferences and completed a master’s thesis entitled “Effects of supplemental feeding on weights and reproductive success of black bears.” In addition, we recently submitted a scientific paper for peer review.”<sup>283</sup>

173. The Agency conducted a detailed review of the identified publications and determined that the items listed alternately did not: constitute peer-reviewed publications; rely on data collected during the term of the Permits; or address the research questions posed in the various submitted research proposals.<sup>284</sup>

### **Agency’s Decision Not to Renew Permit**

174. In February 2013, the DNR received for the first time the WRI document provided to Bear Field Study Course participants in 2011 containing instructions on how to feed bears.<sup>285</sup> The Agency considered the information in the document to raise a “huge public safety concern”<sup>286</sup> in that, in it, Dr. Rogers provided the 650 participants in the course over the years “some tips for reasonably safe hand feeding.” The document includes the following statements:

[k]eep the food coming at a rapid pace, handful after handful. Avoid dolling out one peanut at a time or making the bear anxious about what you are doing because you’re not performing the familiar rapid-feeding routine.

[s]ome bears may bite to tell you to keep the food coming. This hurts a bit and can cause bruises. This is not an attack.

[d]on't offer the bear food from your lips unless you know the bear is accustomed to doing that.<sup>287</sup>

178. Also in February 2013, the DNR received a video showing den cam footage that revealed members of the public finding one of Dr. Rogers’ den cams and mimicking Dr. Rogers' practice of calling out to bears.<sup>288</sup>

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<sup>283</sup> Ex. 119, pp. 2-3

<sup>284</sup> Ex. 167. See also Test. of J. Bellant, Tr. 1102:12-1103:25.

<sup>285</sup> Exs. 121, p. 2; 570, pp. 21-23.

<sup>286</sup> Test. of L. Cornicelli, Tr. 1300:24-1303:18.

<sup>287</sup> Ex. 608.



179. At some point after issuing Dr. Rogers a Permit in December 2012, the Agency also received the video showing Dr. Rogers punching a bear in the face.<sup>289</sup>

175. Based upon this information and the other information already known to the Agency, the DNR began to again consider whether continued issuance of the permit would provide a reasonable benefit to the citizens of the state of Minnesota.<sup>290</sup>

176. As bears left their dens in the spring of 2013, additional complaints related to nuisance bears were reported to the DNR.<sup>291</sup>

177. By letter dated June 28, 2013, the Commissioner informed Dr. Rogers that the permit would not be renewed.

This letter serves as notice that we will not be issuing you a new bear research permit. We have extended your current permit (enclosed) until July 31 because we understand that it will take you some time to remove radio collars currently on study bears.

The reasons for this action have been articulated to you in previous letters. To summarize:

1. You have produced no peer-reviewed literature based on the permitted activities, in spite of our insistence for many years that this is a critical element of legitimate research.
2. Your habituation of bears to humans-including hand feeding and close interactions between bears and people-creates a very real

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<sup>288</sup> Ex. 802.

<sup>289</sup> Test. of L. Cornicelli, Tr. 1321:5-1322:8; Ex. 799.

<sup>290</sup> Test. of T. Landwehr, Tr. 48:18-22; 109:9-14.

<sup>291</sup> The following complaints were reported:

a. On May 20, 2013, Conservation Officer Sean Williams received several nuisance bear reports involving a collared bear and her three yearling cubs getting into trash and possibly killing chickens. They exhibited no fear of humans making noise by clapping. Test. of S. Williams, Tr. 515:7-516:1; Ex. 546, p. 2.

b. That same month, another resident was awakened by the same collared bear at 3:00 a.m. as it was clawing and biting through the porch screen adjacent to her bedroom window. After yelling at the bear, it continued to attempt to tear its way onto the porch but eventually gave up and left. It returned five minutes later and climbed onto her deck, sat on her outdoor couch near the window and looked into the house. After more yelling, the bear left but returned the following day, with three cubs, which crawled under and onto the deck until additional yelling caused them to leave. Test. of S. Williams, Tr. 515:7-517:16; Ex. 546, p. 2.

c. On May 22, 2013, a resident was walking down a road when she encountered the same bear and three cubs. She stopped and made noise in an attempt to scare them off the road, but the bears would not move. She eventually flagged down a car to get past the bears. Ex. 546, p. 6.

d. On June 4, 2013, an uncollared bear charged an adult working in his garden and chased him back into his house. The use of pepper spray on the bear seemed to have no effect. The bear subsequently left, but later returned. Test. of S. Williams, Tr. 522:1-10; Ex. 547, p. 2.

public safety issue. You have stated that there are more than 50 bears in the Ely area that have been subjects of your work; this creates a large and long-term habituation issue.

3. We are aware of incidents that have been documented in various social media of extremely unprofessional behavior with research bears.<sup>292</sup>

Because of these ongoing concerns, it is clear the potential benefit of published research results is greatly outweighed by our continuing concerns for public safety. You may continue to conduct bear education in the Ely area with the captive bears you maintain under your DNR game farm permit, but after July 31, 2013 your activities may no longer involve radio-collaring wild bears or disturbing, handling, or videotaping wild bears in dens.<sup>293</sup>

178. Dr. Rogers' submitted an 82-page document titled *Permit Perspectives to the DNR* on June 21, 2013.<sup>294</sup> As the DNR's decision to deny the permit was made after December 21, 2012 and some "weeks or months" before June 28, 2013,<sup>295</sup> this document had no bearing on the Department's decision.

179. Commissioner Landwehr testified that the primary reasons he decided not to renew the permit were Dr. Rogers' failure to publish his research in peer-reviewed literature and the public safety concerns related to his activities. The incidents of unprofessional behavior were secondary and supporting reasons.<sup>296</sup>

180. In denying the permit, the DNR did not assert that Dr. Rogers had violated any conditions of his permit.<sup>297</sup>

181. As of June 28, 2013, the Agency did not know whether Dr. Rogers had submitted two articles for publication during the period January to November, 2012.<sup>298</sup>

182. As of June 28, 2013, the DNR did not know what data Dr. Rogers had collected or what data synthesis he had or had not completed.<sup>299</sup>

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<sup>292</sup> Commissioner Landwehr testified that the letter's reference to "unprofessional behavior" included mouth feeding, pictures of a young man feeding a bear in 2008, and the video of Dr. Rogers striking a bear. Test. of T. Landwehr, Tr. 100:17-25; 101:22-102:6; 109:21-110:4.

<sup>293</sup> Ex. 124.

<sup>294</sup> Ex. 600.

<sup>295</sup> Test. of T. Landwehr, Tr. 151:4-10.

<sup>296</sup> Test. of T. Landwehr, Tr. 111:2-15; 170:7-20.

<sup>297</sup> Test. of T. Landwehr, Tr. 157:21-158:13.

<sup>298</sup> Test. of T. Landwehr, Tr. 135:15-19.

<sup>299</sup> The DNR had not asked Dr. Rogers to allow inspection of his collected data until during discovery through these proceedings. In response to the undersigned's issued ORDERS REGARDING DNR'S MOTION TO COMPEL DISCOVERY AND DR. LYNN ROGERS' MOTION IN LIMINE dated February 12, 2013, Dr. Rogers produced his data for the Agency's review, but not until the hearing had commenced. The production

## **Community's Current Views on Its Public Safety**

183. Some long-term residents of Eagles Nest Township are extremely concerned about the public safety risk they believe currently exists in their community due to the presence of habituated bears, which they primarily attribute to the actions of Dr. Rogers and the WRI. These residents described bears, both collared and uncollared, that do not scare and leave when hazed. They also reported that they have had to alter the ways in which they use their property because of the changed behaviors of the bears.<sup>300</sup>

184. Other long-term residents of Eagles Nest Township, some of whom feed bears on their property and others who do not, reported no changes concerning or difficulties with the bears in the midst of their community. These residents denied that there is, or has been, a problem with bears in Eagles Nest Township and deny having any safety concerns related to bears.<sup>301</sup>

185. The fact that these individuals were called to testify at hearing does not establish that these two disparate views represent those of the majority of residents of the area. As noted by the Eagles Nest Township's Community Bear Committee in 2007, the community's views generally fall into three categories:

Most people seem to expect to see a bear occasionally pass through their property, and they enjoy the visit, providing it's temporary, and without incident (damage). Many of these people also expect the bear to leave when/if admonished. The other two categories represent the views of a smaller number of residents. One view is "I do not wish to have the bears around. If I don't see them, I'll be happy." The other, opposite view is "I love the bears and like having them visit us." The challenge is to address and satisfy the wishes represented by each of these views.<sup>302</sup>

186. There was no evidence at hearing that any resident of Eagles Nest Township ever asked any other resident of Eagles Nest Township to stop feeding bears. There was no evidence at hearing that the Eagles Nest Township Board, or any elected member thereof, ever directed or requested that any resident of Eagles Nest Township stop feeding bears.

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revealed that while Dr. Rogers, Mansfield and their research assistants had collected some amounts of observational data over the years, very little of it had been synthesized, analyzed or applied to answer any of the study's identified research questions. Some of the raw, qualitative and observational data is capable of yielding synthesis and analysis, most readily the 2009-2013 GPS data and the archived video footage recorded by Dr. Rogers' den cams. Test. of G. Burghardt, Tr. 1968:17-1970:16.

<sup>300</sup> Test. of S. Beyer; Test. of A. Urban; Test. of B. Soderberg.

<sup>301</sup> Test. of D. Humay; Test. of Lisa Hutchinson; Test. of Betsy Ann Flaten; Test. of D. Stage; Test. of R. James; Test. of Donna Surface; Test. of Sherry Hill; Test. of C. Meyer; Test. of L. Anderson.

<sup>302</sup> Ex. 16, p. 1.

## CONCLUSIONS OF LAW

1. The Chief Administrative Law Judge and the Commissioner have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 84.01, 97A.045, 97A.401, subd. 3(a), and 97A.418.

2. Notice of the hearing was timely given and all other relevant substantive and procedural requirements of law or rule have been fulfilled. Therefore, the matter is properly before the Chief Administrative Law Judge.

3. As the party proposing that certain action be taken, that being the denial of Dr. Rogers' application to renew his permit, the Department has the burden of proving by a preponderance of the evidence that its actions were authorized by law.

4. Minnesota law provides that 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."<sup>303</sup> In addition, the DNR has the legal authority to take all actions "necessary to preserve, protect, and propagate the desirable species of wild animals" in the state.<sup>304</sup>

5. Minnesota's game and fish laws<sup>305</sup> provide that "[t]he ownership of wild animals is in the state, in its sovereign capacity for the benefit of all the people of the state."<sup>306</sup> Black bears are protected wild animals in Minnesota.<sup>307</sup> Therefore, the state has ownership of all bears in Minnesota for and on behalf of all the residents of the state.

6. In Minnesota, no person may "disturb a burrow or den of a wild animal between November 1 and April 1"<sup>308</sup> without applying for and being granted a DNR permit.

7. The DNR Commissioner has the authority to issue permits to allow individuals to "take, possess, and transport wild animals as pets and for scientific, educational, rehabilitative, wildlife disease prevention and control, and exhibition purposes," and to impose conditions on those permits.<sup>309</sup>

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<sup>303</sup> Minn. Stat. § 84.027, subd. 2.

<sup>304</sup> Minn. Stat. § 97A.045, subd. 1.

<sup>305</sup> Pursuant to Minn. Stat. § 97A.011, Chapters 97A, 97B and 97C of Minnesota Statutes collectively constitute the state's game and fish laws.

<sup>306</sup> Minn. Stat. § 97A.025.

<sup>307</sup> Minn. Stat. § 97A.015, subs. 3; 39. *Accord, Swenson v. Holsten*, 783 N.W.2d 580, 583-84 (Minn. Ct. App. 2010).

<sup>308</sup> Minn. Stat. § 97B.09.

<sup>309</sup> Minn. Stat. § 97A.401, subd. 3(a).

8. The Commissioner has no lawful authority to issue a permit until he has first “determined that the permitted act will not be detrimental to the species or cause harm to natural resources.”<sup>310</sup>

9. The Commissioner is authorized to impose permit conditions “to protect species and enhance knowledge of the species” including limits on when, where, how and by whom authorized activities may be conducted.<sup>311</sup>

10. The Commissioner must consider the following criteria “when making a decision on issuing conditions for a permit:

- (1) whether the activity will advance knowledge, understanding, interpretation, or management of the species;
- (2) whether the activity will advance retention and recruitment of people involved in outdoor skills;
- (3) whether alternative locations for carrying out the activity are available;
- (4) whether the activity interferes with other public use, research, educational, or management activities;
- (5) whether there are other reasonable alternatives for conducting the activity; or
- (6) whether the applicant is qualified to conduct the activities authorized by the permit.”<sup>312</sup>

11. The Commissioner is legally authorized to immediately cancel any granted permit “upon determination that such cancellation is necessary for the conservation of the natural resources of this state, for the welfare of particular specimens, or is in the public interest.” Violations of the Agency’s rules or the terms of any issued permit “may result in immediate revocation of the permit, and may subject the permittee to other penalties established by law.”<sup>313</sup>

12. As determined in the Order Granting in Part and Denying in Part Rogers’ Motion for Partial Summary Disposition issued in this matter on February 18, 2014, Dr. Rogers’ activities related to bears do not meet the definition of “taking” as that term is used in Minn. Stat. § 97A.401, subd. 3(a).

13. For purposes of Minn. Stat. § 97A.401, subd. 3(a), the term “possession” is defined to mean “both actual and constructive possession and control of the things referred to.”<sup>314</sup>

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<sup>310</sup> Minn. R. 6212.1400, subp. 2D.

<sup>311</sup> Minn. R. 6212.1400, subp. 2D.

<sup>312</sup> Minn. R. 6212.1400, subp. 2E.

<sup>313</sup> Minn. R. 6212.1400, subp. 8.

<sup>314</sup> Minn. Stat. § 97A.015, subd. 36.

14. Actual possession is evidenced by direct physical control. Constructive possession is evidenced by the power and intention to exercise control either directly or through others.”<sup>315</sup>

15. Standing alone, feeding of bears does not meet the definition of “possession” as the term is used in Minn. Stat. § 97A.401, subd. 3(a). Accordingly, feeding of bears does not require a permit under the statute.

16. Standing alone, close human interaction with bears does not meet the definition of “possession” as the term is used in Minn. Stat. § 97A.401, subd. 3(a). Accordingly, close human interaction with bears does not require a permit under the statute.

17. Affixing a tracking collar to a bear for the purpose of locating the bear in the wild, in whatever manner the collar is attached, meets the definition of “possession” as the term is used in Minn. Stat. § 97A.401, subd. 3(a). Accordingly, affixing a tracking collar to a bear for the purpose of locating the bear in the wild requires a permit under the statute.

18. Intentional and repeated handling of a bear meets the definition of “possession” as the term is used in Minn. Stat. § 97A.401, subd. 3(a). Accordingly, intentional and repeated handling of a bear requires a permit under the statute.

19. The DNR Commissioner may deny a permit “for cause,” which may include but is not limited to violation of the game and fish laws or the Agency’s rules.<sup>316</sup> The Commissioner is legally required to immediately cancel any granted permit “upon determination that such cancellation is necessary for the conservation of the natural resources of this state, for the welfare of particular specimens, or is in the public interest.”<sup>317</sup>

20. Because the DNR failed to include a peer-reviewed publication requirement in Dr. Rogers’ permit, the Agency has no legal authority to rely upon Dr. Rogers’ failure to publish his research results in peer-reviewed literature as a basis for denial of his application for a renewal permit.

21. The Agency has demonstrated by a preponderance of the evidence that renewal of Dr. Rogers’ permit would not be in the public interest given the cumulative and continually increasing numbers of bears in the Eagles Nest Township area that are habituated and food conditioned, and which constitute a risk to public safety.

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<sup>315</sup> *Wells v. Cole*, 194 Minn. 275, 278, 260 N.W. 520, 521 (1935); *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 387, 46 N.W.2d 868, 871 (1951); *Hohlen v. Comm’r of Revenue*, 4885, 1989 WL 16571 (Minn. Tax Feb. 15, 1989) *amended*, 4885, 1989 WL 58990 (Minn. Tax May 19, 1989); *State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610-11 (1975).

<sup>316</sup> Minn. Stat. § 97A.418.

<sup>317</sup> Minn. R. 6212.1400, subp. 8.

22. The DNR has demonstrated by a preponderance of the evidence that cause exists to deny Dr. Rogers' application for renewal of his permit.

23. The Commissioner's determination dated June 28, 2013, requiring Dr. Rogers to remove all collars from his study bears, is a reasonable exercise of the Commissioner's authority and is in the public interest.

24. Any of the Findings of Fact more properly designated as Conclusions of Law are hereby adopted as such.

Based upon the foregoing Conclusions of Law, the Chief Administrative Law Judge makes the following:

### **RECOMMENDATION**

The Chief Administrative Law Judge recommends that the Commissioner AFFIRM the Department's June 28, 2013 decision denying Dr. Rogers' application for a permit related to his study of bears in northeastern Minnesota.

Dated: May 23, 2014

s/Tammy L. Pust  
TAMMY L. PUST  
Chief Administrative Law Judge

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## NOTICE

This Report is a recommendation, not a final decision. The Commissioner's designee will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner's designee must consider the exceptions in making a final decision. Parties should contact the Commissioner, Department of Natural Resources, 500 Lafayette Road, St. Paul, MN 55155-4037, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner's designee, or upon the expiration of the deadline for doing so. The Commissioner's designee must notify the parties and the Chief Administrative Law Judge of the date the record closes. If the Commissioner's designee fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner's designee must then return the record to the Chief Administrative Law Judge for further action.

Under Minn. Stat. § 14.62, subd. 1, the Department of Natural Resources is required to serve its final decision upon each party and the Chief Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

This case presents two legal issues. The first is whether the DNR has demonstrated by a preponderance of the evidence that a permit is required to conduct the activities undertaken by Dr. Rogers with respect to bears in northeastern Minnesota. If the first issue is answered in the affirmative, then a second legal issue must be addressed: whether the DNR has demonstrated by a preponderance of the evidence that it had sufficient cause on June 28, 2013 to deny Dr. Rogers' application for renewal of the permit. The parties disagree as to whether the Agency has met its burden of proof with respect to either issue.

### Applicable Legal Standard

Minnesota law provides to the DNR, as directed by its Commissioner, "charge and control of all the public lands, parks, timber, waters, minerals, and wild animals of the state."<sup>318</sup> Codifying deeply rooted<sup>319</sup> common law principles,<sup>320</sup> since 1919<sup>321</sup>

<sup>318</sup> Minn. Stat. § 84.027, subd. 2.

<sup>319</sup> See *State v. Dickerson*, 260 Or. App. 80, 84-86, 317 P.3d 902, 904-05 (2013), quoting *State v. Couch*, 196 Or. App. 665, 675, 103 P.3d 671 (2004), aff'd, 341 Or. 610, 147 P.3d 322 (2006):

For the better part of two centuries, American courts routinely have cited Blackstone for the proposition that all property rights in animals *ferae naturae* lie in the sovereign, which



Minnesota's game and fish laws<sup>322</sup> have provided that "[t]he ownership of wild animals is in the state, in its sovereign capacity for the benefit of all the people of the state."<sup>323</sup>

Black bears are protected wild animals in Minnesota.<sup>324</sup> Therefore, the state has ownership of all bears in Minnesota. The DNR does not own the state's wildlife for the agency's benefit; it holds ownership of this valued natural resource for and on behalf of the residents of the state. Whether they be research scientists, hunters, lakeside cabin dwellers or urban residents, all people of the state are entitled to the same access to and enjoyment from the wild animals that live in the state.

Due to the state's sovereign interest in Minnesota's bears, state law provides that no person may acquire a property right in or possess wild animals unless authorized under the state's game and fish laws.<sup>325</sup> The game and fish laws "further the important governmental interest in regulating the taking of wild animals and protecting the rights of individuals to hunt, fish, or otherwise take wild animals."<sup>326</sup> In pursuit of this interest, the

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rights were assumed by the colonies and, later, the states. ... The state's sovereign interest in wild animals ... is rooted in English common law, under which wild animals 'belong[ed] to the King by his prerogative.' *The Case of Swans*, (1592) 77 Eng. Rep. 435(KB) 439.

See also *State v. Barte*, 894 S.W.2d 34, 41 (Tex. App. 1994), quoting *State v. Ward*, 328 Mo. 658, 40 S.W.2d 1074, 1077 (1931):

At a very remote time the right and power of the sovereign authority to regulate and control the taking of wild animals were asserted and recognized. Originally, the title seems to have been regarded as vested in the sovereign as a personal prerogative; but, on the granting of Magna Charta and the Charter of the Forest by Henry III in 1225, the rights of the sovereign in unreclaimed wild animals were limited, and the rule of the Roman Law restricting the sovereign power to controlling and regulating the taking of such animals became the common law of England. The rule of the Civil Law recognizing the qualified title of the sovereign in wild animals, having been adopted by England, became the common law of the United States, and here the rule is that the general ownership of wild animals, as far as they are capable of ownership, is in the state, not as a proprietor, but in its collective sovereign capacity as the representative and for the benefit of all its citizens in common.

<sup>320</sup> See *State v. Rodman*, 58 Minn. 393, 400, 59 N.W. 1098, 1099 (1894).

<sup>321</sup> As reported in *Waldo v. Gould*, 165 Minn. 128, 129-30, 206 N.W. 46, 47 (1925):

The laws relating to wild animals were revised and codified by chapter 400 of the Laws of 1919, and, with a few amendments made in 1921 and 1923, appear as chapter 32 of the General Statutes of 1923, comprising sections 5495 to 5655, both inclusive, of that compilation. The statute is broad, sweeping and drastic. ... In section 5496, it declares that the ownership of wild animals rests in the state for the benefit of all its people in common. In section 5497, it declares that no person shall acquire any property in any wild animal in this state except as authorized by the act, and prohibits taking, having in possession or transporting any wild animal protected by law, or any part thereof, except as permitted by the act.

<sup>322</sup> Chapters 97A, 97B and 97C of Minnesota Statutes collectively constitute the state's game and fish laws. Minn. Stat. § 97A.011.

<sup>323</sup> Minn. Stat. § 97A.025.

<sup>324</sup> Minn. Stat. § 97A.015, subs. 3, 39. Accord, *Swenson v. Holsten*, 783 N.W.2d 580, 583-84 (Minn. Ct. App. 2010).

<sup>325</sup> Minn. Stat. §§ 97A.025; 97A.501.

<sup>326</sup> *State v. Miner*, 556 N.W.2d 578, 586 (Minn. Ct. App. 1996), review denied (Feb. 26, 1997).

DNR has the legal authority to take all actions “necessary to preserve, protect, and propagate the desirable species of wild animals” in the state.<sup>327</sup>

One means by which the Agency seeks to preserve and protect the state’s wild animals is through its regulatory permitting process. The DNR Commissioner has the authority to issue permits to allow individuals to “take, possess, and transport wild animals as pets and for scientific, educational, rehabilitative, wildlife disease prevention and control, and exhibition purposes,” and to impose conditions on those permits.<sup>328</sup> The statute, and the Agency’s rules promulgated thereunder,<sup>329</sup> require an individual to obtain a permit if her activities constitute either the “taking”<sup>330</sup> or “possession” of bears for scientific or educational purposes.

**A. Possession and Control Requires a Permit.**

The DNR’s permitting statute<sup>331</sup> defines “possession” as follows:

“Possession means both actual and constructive possession and control of the things referred to.”<sup>332</sup>

The statute does not further define the terms “actual possession,” “constructive possession,” or “control.”

In construing a statute’s terms, a court must attempt to ascertain and give effect to the intent of the legislature.<sup>333</sup> Words not defined in a statute should be given their plain and ordinary meaning<sup>334</sup> in light of the context in which the legislature employed them.<sup>335</sup> A state agency’s interpretation of the statutes it is charged with implementing is entitled to deference in appropriate circumstances.<sup>336</sup>

Possession “is a chameleon-like term which takes its meaning from its context both in common speech and in legal terminology.”<sup>337</sup> *Black’s Law Dictionary* defines “possession” as follows:

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<sup>327</sup> Minn. Stat. § 97A.045, subd. 1.

<sup>328</sup> Minn. Stat. § 97A.401, subd. 3(a).

<sup>329</sup> Minn. R. 6212.1400.

<sup>330</sup> For the reasons and upon the authorities set forth in the undersigned’s February 18, 2014 Order Granting in Part and Denying in Part Rogers’ Motion for Partial Summary Disposition, which is incorporated by reference herein with respect to this issue,” Dr. Rogers’ study activities do not constitute the “taking” of bears in Minnesota.

<sup>331</sup> Minn. Stat. § 97A.401, subd. 3.

<sup>332</sup> Minn. Stat. § 97A.015, subd. 36.

<sup>333</sup> Minn. Stat. § 645.16; see also *Swenson v. Holsten*, 783 N.W.2d 580, 583 (Minn. Ct. App. 2010).

<sup>334</sup> Minn. Stat. § 645.08(1); see also *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

<sup>335</sup> *City of Brainerd v. Brainerd Investments P’ship*, 827 N.W.2d 752, 759 (Minn. 2013) (noting statutory term should be defined by its context); *Harrison ex rel. Harrison v. Harrison*, 733 N.W.2d 451, 457 (Minn. 2007) (“[W]e examine the words of a statute in context rather than isolated from their setting.”)

<sup>336</sup> *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988).

<sup>337</sup> *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 536, 104 N.W.2d 661, 664 (1960).

1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. The detention or use of a physical thing with the intent to hold it as one's own. 4. Something that a person owns or controls; PROPERTY.<sup>338</sup>

This definition comports with the ordinary sense in which the term is generally used and understood: one has possession of that which one can sufficiently control.<sup>339</sup>

In the law, the term “possession” has variable meanings depending upon the legal context and factual circumstances in which the term is used.<sup>340</sup> For example, when examining the existence of possession in a claim for replevin, courts consider whether property is “in the actual possession of the defendant [or] ... under his control in the hands of another.”<sup>341</sup> Likewise, in the context of claims of bailment “possession” has been defined as follows:

In its ordinary as well as legal meaning, possession is control, custody, and charge. It implies a purpose and capacity to exercise corporal contact, to the exclusion of others. There must be the physical possibility of dealing with the thing as the possessor likes, and for him to be alone in its use [and enjoyment].<sup>342</sup>

As it is in the DNR's permitting statute, the concept of “possession” is often described in terms of its two subcategories: actual possession and constructive possession.<sup>343</sup> In the legal context in which they are most often used,<sup>344</sup> the terms “actual possession” and “constructive possession” are defined as follows:

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

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<sup>338</sup> *Black's Law Dictionary* (9<sup>th</sup> ed. 2009).

<sup>339</sup> See *State v. Spence*, 768 N.W.2d 104, 108 (Minn. 2009) (“Generally, ‘possession’ means control of the thing possessed....”)

<sup>340</sup> *Wells v. Cole*, 194 Minn. 275, 277, 260 N.W. 520, 521 (1935).

<sup>341</sup> *Burkee v. Great N. Ry. Co.*, 133 Minn. 200, 202, 158 N.W. 41, 42 (1916).

<sup>342</sup> *Wells v. Cole*, 194 Minn. 275, 278, 260 N.W. 520, 521 (1935) quoting *Dupont v. Moore*, 86 N.H. 254, 259, 166 A. 417, 420 (1933) (emphasis added).

<sup>343</sup> *Jacobson v. Aetna Cas. & Sur. Co.*, 233 Minn. 383, 387, 46 N.W.2d 868, 871 (1951) quoting *National Safe Deposit Co. v. Stead*, 232 U.S. 58, 67, 34 S. Ct. 209, 212, 58 L. Ed. 504, 509 (1914) (providing detailed analysis of the origins of the doctrine of constructive possession).

<sup>344</sup> The analysis of these terms is most prevalent in cases arising under Minnesota's criminal code related to claims of stolen property, drug cases and weapons cases. See *State v. Loge*, 608 N.W.2d 152, 161 (Minn. 2000); *United States v. Bryant*, 349 F.3d 1093, 1097 (8<sup>th</sup> Cir. 2003).

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion<sup>345</sup> or control over a thing, either directly or through another person or persons, is then in constructive possession of it.<sup>346</sup>

As these definitions make clear, the interdependence of “possession” and “control” are mirrored in the definitions of both actual and constructive possession. Therefore, the concept of control is foundational to a determination of either type of possession under these definitions, which are broadly accepted in other legal contexts.<sup>347</sup>

Whether viewed as foundational to each other or separate legal concepts as applied to the DNR’s permitting statute,<sup>348</sup> evaluating the existence of possession and control, or the lack thereof, requires a careful examination of the variable circumstances in each case.<sup>349</sup> Utilizing these definitions, courts have found sufficient direct control to

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<sup>345</sup> While most courts, including Minnesota’s courts, often cite to the exercise of both “dominion” and “control” as evidence of constructive possession, the Minnesota Court of Appeals, in *State v. Arnold*, 794 N.W.2d 397, 404-05 (Minn. Ct. App. 2011), recently held that the use of both terms is redundant:

We hold that ‘dominion’ simply means ‘control’ in the context of the ‘dominion and control’ standard for constructive possession of drugs under section 152.021, subdivision 2. At least in this context, ‘dominion and control’ is a legal redundancy, much like ‘null and void,’ ‘force and effect,’ ‘free and clear,’ ‘full and complete,’ and so on. Although lawyers (and courts) historically used redundant phrases, see Richard C. Wydick, *Plain English for Lawyers* 19–22 (4th ed.1998), they are usually unnecessary. The phrase ‘dominion and control’ has been part of the American judiciary in other contexts since at least 1806, see *D. & G. Ludlow v. Bowne & Eddy*, 1 Johns. 1, 10 (N.Y.1806), and in Minnesota since 1879, see *D.B. Coleman v. B.A. O’Neil & L.E. Pearce*, 26 Minn. 123, 132, 1 N.W. 846, 852 (1879). Courts originally used the phrase to describe tortious conversion of property, then criminal larceny, then, ultimately, constructive possession as applied to our drug-possession statute. But even in those other contexts, no apparent reason exists to distinguish between the terms. And we choose not to ascribe a distinction in a redundancy that has ‘persisted long after any practical purpose was dead.’ Wydick, *supra*, at 20.

<sup>346</sup> *Hohlen v. Comm’r of Revenue*, 4885, 1989 WL 16571 (Minn. Tax Feb. 15, 1989) *amended*, 4885, 1989 WL 58990 (Minn. Tax May 19, 1989) citing E. Devitt and C. Blackmar, *Federal Jury Instructions and Practice*, § 16.07 (1977 & Supp.1988) (other citations omitted). See also *State v. Florine*, 303 Minn. 103, 104-05, 226 N.W.2d 609, 610-11 (1975) (constructive possession).

<sup>347</sup> See *Fin. Ag, Inc., v. Hufnagle, Inc.*, 700 N.W.2d 510, 517 (Minn. Ct. App. 2005), *aff’d*, 720 N.W.2d 579 (Minn. 2006); *Koecher v. Koecher*, 374 N.W.2d 542, 546 (Minn. Ct. App. 1985), *review denied* (Minn. Nov. 26, 1985).

<sup>348</sup> An argument could be made that the game and fish laws’ definitional requirement of a finding of both possession and control is redundant, given the foundational requirement of finding “control” in order to establish “possession” at all. This argument was not raised by the parties and is beyond the scope of this decision.

<sup>349</sup> *Hohlen v. Comm’r of Revenue*, 4885, 1989 WL 16571 (Minn. Tax Feb. 15, 1989) *amended*, 4885, 1989 WL 58990 (Minn. Tax May 19, 1989) citing E. Devitt and C. Blackmar, *Federal Jury Instructions and Practice*, § 16.07 (1977 & Supp.1988) (other citations omitted); see also *Wells v. Cole*, 194 Minn. 275, 277, 260 N.W. 520, 521 (1935) (“Nor shall we attempt to decide this case by defining the word ‘possession’ in terms of common law, for it has variable meanings, depending upon the circumstances in which it is used.”).

establish actual possession when contraband is found on the defendant's person,<sup>350</sup> or under transport at his direction.<sup>351</sup> Application of these definitions has led to findings of constructive possession when an individual had been recently handling property<sup>352</sup> and by a person's "knowledge, close physical proximity, unfettered access, and occasional actual handling" of prohibited contraband."<sup>353</sup>

Necessarily, the analysis is somewhat different when evaluating whether there is sufficient indicia of "possession" of a live, wild animal. A proper analysis must take into account the type of animal at issue and the relative degree of control that is possible to exert over it.

An actual possession is a phrase which must be understood with reference to the subject. If the property be a living animal capable of locomotion and accustomed to run at large, subject only to be caught at the will of the owner, exercising the usual acts of ownership over such an animal must be understood as such a possession as will maintain an action.<sup>354</sup>

When seeking to establish a property right in animals, evidence of these "usual acts of ownership" has been found to include the feeding of animals,<sup>355</sup> marking them<sup>356</sup> or otherwise being able to tell them apart from others not in one's control,<sup>357</sup> and generally providing for their well-being.<sup>358</sup> Courts have found constructive possession when an individual knew the whereabouts of the subject animals, allowed them to be present on his property and communicated with others about where to find them,<sup>359</sup> or arranged for the animals to be transported to another location for safe keeping.<sup>360</sup> Conversely, another court found insufficient control to support a finding of constructive

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<sup>350</sup> *United States v. Lopez*, 416 F.3d 713, 715 (8th Cir. 2005) (holding a pistol); *United States v. Gillings*, 156 F.3d 857, 859 (8th Cir. 1998) (drugs found in pants pocket); *United States v. Rich*, 795 F.2d 680, 683 (8th Cir. 1986) (drugs found in luggage carried by defendant).

<sup>351</sup> *State v. Poole*, 93 Minn. 148, 100 N.W. 647, 648-649 (1904) (defendant found to be in actual possession of 2,498 wild ducks he had packed in ice and was escorting by wagon train to a railway station in Iowa).

<sup>352</sup> *State v. Arnold*, 794 N.W.2d 397, 401 (Minn. Ct. App. 2011).

<sup>353</sup> *United States v. Francis*, 462 F.3d 810, 814 (8th Cir. 2006).

<sup>354</sup> *Boston v. Neat*, 12 Mo. 125 (1848) (action in replevin).

<sup>355</sup> See *Yates v. City of New York*, 04 CIV. 9928 (SHS), 2006 WL 2239430 (S.D.N.Y. Aug. 4, 2006) (court approved search warrant for evidence of exotic animal); *Stevens v. Hulse*, 263 N.Y. 421, 423, 189 N.E. 478 (1934) (allowed visitors to feed chained bear).

<sup>356</sup> In other legal contexts, the mere fact of placing a collar on an animal can be evidence of ownership, and thus of actual possession. See *Ingraham v. Chapman*, 177 Mass. 123, 58 N.E. 171 (1900) (noting collar on dog is evidence of ownership).

<sup>357</sup> See *Koop v. United States*, 296 F.2d 53, 60 (8th Cir. 1961).

<sup>358</sup> See *Terral v. Louisiana Farm Bureau Cas. Ins. Co.*, 892 So.2d 732,738 (2005) (found individual had taken possession of dog "by regularly feeding it over a significant period of time and thus by assuming responsibility for its welfare").

<sup>359</sup> *State v. Urban*, 776 N.W.2d 110 (Iowa 2009).

<sup>360</sup> *State v. Jordan*, 776 N.W.2d 110 (Iowa Ct. App. 2009) *vacated*, 779 N.W.2d 751 (Iowa 2010); *Barnes v. Keller*, 94 Ohio App. 107 (1952).

possession when the person did not own the property on which the animal lived, did not stay in the animal's presence for long periods of time, and did not feed or interact with the animal.<sup>361</sup>

Determining what the relevant terms (actual possession, constructive possession and control) mean in the present case requires examination of the general legislative intent behind the permitting statute.<sup>362</sup>

The statute was enacted as a police measure to protect and preserve useful or valuable wild animals for the benefit of the public. It is to be construed as a whole in the light of the obvious purpose intended to be accomplished, and so as to harmonize and give effect to all its parts if reasonably possible. In construing the statute we must bear in mind that it is not dealing with pre-existing property rights. It declares that no property rights exist in wild animals in this state except as permitted by the act, and that such rights as are permitted by the act are forfeited by any violation of its provisions. That the Legislature may thus limit and restrict the rights in wild animals permitted in this state, whether they are taken here or elsewhere, is beyond question.<sup>363</sup>

#### **B. Denial of Permit Application Requires Cause.**

The parties agree that the DNR Commissioner may deny a permit "for cause," which may include but is not limited to violation of the game and fish laws or the Agency's rules.<sup>364</sup> A denial is a permitting decision, which the Commissioner must make in accordance with the Agency's statutory and regulatory authorities.<sup>365</sup> As the Commissioner has no lawful authority to issue a permit "unless [he] has first determined that the permitted act will not be detrimental to the species or cause harm to natural resources,"<sup>366</sup> so this regulatory criteria also applies to the Commissioner's decisions related to permit denials. The Commissioner is authorized to impose permit conditions "to protect species and enhance knowledge of the species,"<sup>367</sup> and may immediately cancel any granted permit "upon determination that such cancellation is necessary for the conservation of the natural resources of this state, for the welfare of particular specimens, or is in the public interest."<sup>368</sup>

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<sup>361</sup> *Muela v. Gomez*, 343 S.W.3d 491, 499 (Tex. Ct. App. 2011).

<sup>362</sup> *Wells v. Cole*, 194 Minn. 275, 277, 260 N.W. 520, 521 (1935) (examining the terms "in his possession," "under his control," and "in his hands" in light of the legislative intent underpinning the state's garnishment statute).

<sup>363</sup> *Waldo v. Gould*, 165 Minn. 128, 132, 206 N.W. 46, 48 (1925) (citations omitted).

<sup>364</sup> Minn. Stat. § 97A.418.

<sup>365</sup> Minn. R. 6212.1400, subp. 1.

<sup>366</sup> Minn. R. 6212.1400, subp. 2D.

<sup>367</sup> Minn. R. 6212.1400, subd. 2D.

<sup>368</sup> Minn. R. 6212.1400, subp. 8.

A legal determination of whether cause has been established presents “a mixed question of fact (what the [evidence] shows) and law (whether the showing amounts to good cause).”<sup>369</sup> Determining whether cause exists is a determination made by the Agency in the exercise of its discretion.<sup>370</sup>

## **The Parties’ Positions**<sup>371</sup>

### **A. Dr. Rogers**

Dr. Rogers asserts that he does not exercise sufficient control over the bears to constitute “possession” and therefore is not required to have a permit. Claiming that “the permitted activity is the use of radio collars,”<sup>372</sup> Dr. Rogers argues that the record is devoid of any probative evidence regarding how he collars the bears, and insists that evidence of his feeding of and interacting with bears cannot establish possession because these activities are legal and do not require a permit in Minnesota. Further, he alleges that the Department’s statutory interpretations are both “illogical and legally indefensible” as unconstitutionally vague and in violation of the criminal law’s rule of lenity.

Even if the Chief Judge determines that a permit is required, Dr. Rogers asserts that the Department has failed to meet its burden of establishing by a preponderance of the evidence that it had cause to deny his permit renewal application. He argues that the Agency should be precluded from considering evidence that predates the last permit issuance date (December 21, 2012) because the Agency waived its right to rely on then-known facts and given the bar established by the legal doctrine of equitable estoppel. Dr. Rogers also takes the position that: (1) the evidence at hearing established that he met the DNR’s publication expectation; (2) the Agency failed to present any evidence linking his use of den cams to any risk to public safety; and (3) an analysis of his activities evidences compliance with the decision-making factors identified in the Agency’s rules.

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<sup>369</sup> *Averbeck v. State*, 791 N.W.2d 559, 560-61 (Minn. Ct. App. 2010).

<sup>370</sup> *Gardner v. Moon*, 360 F.2d 556, 559 (8th Cir. 1966), quoting *Langford v. Flemming*, 276 F.2d 215, 219 (5th Cir. 1960).

<sup>371</sup> Both Dr. Rogers and the Department spent considerable time addressing the earlier filed ORDER REGARDING ROGERS’ MOTION FOR DIRECTED VERDICT which contained a list of evidence introduced in support of various potential findings during the Department’s case in chief. The parties’ separate efforts to distinguish or confirm these identifications is unnecessary given the different burden of proof which governs at that point in the proceedings as compared with the Agency’s current burden. When ruling on a motion for a directed verdict, the Chief Administrative Law Judge is required to “accept as true the evidence favorable to the adverse party and draw all reasonable inferences from that evidence.” *Gutafson v. Chestnut*, 515 N.W.2d 114, 116 (Minn. Ct. App. 1994). At the close of the hearing and considering all evidence admitted into the record, the Chief Judge is required to determine whether the Department met its burden of establishing, by a preponderance of the evidence, that Dr. Rogers was in possession of the subject bears and that the Agency had sufficient cause to deny the permit renewal application. The determinations made in the directed verdict context are no longer controlling.

<sup>372</sup> Contrary to Dr. Rogers’ argument, the permit did not allow him only to radio-collar bears. It also specifically authorized him to handle bears, inject bears with specific drugs, and visit bear dens, including for the purpose of filming den activity. Ex. 158 at 1-2.

## **B. Department of Natural Resources**

The Department argues that Dr. Rogers has “actual possession” of a bear when he places a radio collar around its neck and has “constructive possession” of the bear when he feeds, interacts with and habituates it to human contact. The Agency insists that it established by a preponderance of the evidence that the Commissioner had cause to deny the permit renewal due to: (1) Dr. Roger’s failure to publish his research findings in peer-reviewed scientific literature; (2) the existence of unacceptable risks to public safety; and (3) Dr. Rogers’ unprofessional conduct directed toward bears. The DNR asserts that it is legally authorized to consider all relevant evidence, no matter its recency, and that its interpretation of the permitting statute is fully supported by applicable law. In reply to Dr. Rogers’ arguments to the contrary, the Agency notes that the Chief Administrative Law Judge has no authority to consider constitutional challenges to statutory authority, and that the rule of lenity is inapplicable in the present case.

### **Legal Analysis**

#### **A. Possession Requires a Permit.**

Dr. Rogers is required to have a permit if his activities constitute either actual or constructive possession of bears. The analysis of each type of possession turns on the concept of control.

##### **1. Collaring Constitutes Constructive Possession**

Establishing that Dr. Rogers has constructive possession of the subject bears requires proof that he has the power and intention to exercise control over the animals. Citing cases from other jurisdictions,<sup>373</sup> Dr. Rogers argues that “possession” of a wild animal cannot be found absent proof of confinement, capture or removal from nature.<sup>374</sup>

In this argument, Dr. Rogers appears to confuse the term “possession” with the term “captive” or its verb form: “capture.” Minnesota’s game and fish laws define this term as follows:

"Captive" means all forms of human control including but not limited to confinement within physical barriers, limitation of movement through the use of any manner of attachment physically affixed to any wildlife, or

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<sup>373</sup> *Hollywood Park Humane Soc’y v. Town of Hollywood Park*, CIV.A.SA03CA1312-XR, 2004 WL 390807 (W.D. Tex. Jan. 23, 2004) (*Hollywood Park I*), aff’d after remand and retrial at 261 S.W.3d 135 (Tex. App. 2008); *Calvert v. Zimmer*, CIV. A. 95-2041, 1995 WL 549106 (E.D. Pa. Sept. 11, 1995), reconsideration denied 1995 WL 732838 (E.D. Pa. Dec. 7, 1995); *State v. Bartee*, 894 S.W.2d 34 (Tex. Ct. App. 1994); *In re Oriental Republic Uruguay*, 821 F. Supp. 950, 953 (D. Del. 1993); *Koop v. United States*, 296 F.2d 53 (8<sup>th</sup> Cir. 1961).

<sup>374</sup> Dr. Lynn Rogers Post-Hearing Memorandum, p. 4.



limitation of movement of wildlife by restraining in some manner the parent or offspring.<sup>375</sup>

If the legislature had intended to prohibit only confining or limiting the movement of animals without a permit, it could have used the words “captive” or “capturing” rather than the terms “possession” and “possessing” in the DNR’s permitting statute. It did not, which indicates that the legislature intended the permitting statute to apply to a broader set of activities.<sup>376</sup>

In addition to running afoul of the definitional parameters in Minnesota’s game and fish regulations, the definition of “possession” urged by Dr. Rogers arises out of cases focused on establishing an enforceable property right in wild animals.<sup>377</sup> These cases stand for the proposition that a person cannot be held liable for the actions of wild animals (in strict liability<sup>378</sup> or negligence<sup>379</sup> cases) or be responsible for the damage they cause or their value if taken by others (in constitutional takings,<sup>380</sup> replevin,<sup>381</sup> theft,<sup>382</sup> or bailment<sup>383</sup> cases), unless “the person claiming ownership has removed the animal from nature, confined it, and placed it under the person’s dominion and control.”<sup>384</sup>

This legal standard is not applicable in the present permitting matter. The DNR is not asserting that Dr. Rogers holds a property right of ownership in the bears. Minnesota law is clear that Dr. Rogers does not own the bears; they are owned by the state on behalf of all Minnesotans. The legal question at issue is not whether Dr. Rogers

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<sup>375</sup> Minn. R. 6244.2400, subp. 2.

<sup>376</sup> *Rasmussen v. Glass*, 498 N.W.2d 508, 518 (Minn. Ct. App. 1993) (noting rule of statutory construction that all statutory terms be given effect).

<sup>377</sup> See *Hollywood Park I*, 2004 WL 390807 \*6 (“Because no Plaintiff has a property right in any of the deer, no Plaintiff has a substantial likelihood of success on the merits on their takings claim....”); *Koop v. United States*, 296 F.2d 53, 59 (8<sup>th</sup> Cir. 1961) (court found that ducks were owned and not wild, rejecting a defense to prosecution under Migratory Bird Treaty Act). Similarly, *Sutton v. State*, 124 So.3d 453, 454 (Fla. Dist. Ct. App. 2013) quoting *State v. Lee*, 41 So. 2d 662, 663 (Fla. 1949) (“These animals are not subject to private ownership so long as they remain wild and unconfined, but such animals become property when removed from their natural liberty and made the subject of man’s dominion. It will be observed that animals *ferae naturae* become property, and entitled to protection as such, when the owner has them in his actual possession, custody or control and usually this is accomplished by taming, domesticating or confining them.”) (emphasis added); *Manning v. Mitcherson*, 69 Ga. 447, 450-51 (1883) (“The law of Georgia is, that to have property in animals, birds and fishes which are wild by nature, one must have them within his actual possession, custody or control, and this he may do by taming, domesticating, or confining them.”) (emphasis added).

<sup>378</sup> *Terral v. Louisiana Farm Bureau Cas. Ins. Co.*, 39,360 (La. App. 2 Cir. 1/26/05), 892 So. 2d 732, 736 (2005); *Stevens v. Hulse*, 263 N.Y. 421, 189 N.E. 478 (1934).

<sup>379</sup> *Muela v. Gomez*, 343 S.W.3d 491 (Tex. App. 2011); *Cowden v. Bear Country, Inc.*, 382 F. Supp. 1321 (D.S.D. 1974).

<sup>380</sup> *Scirpo v. McCarthy*, 3:09CV1626 WWE, 2013 WL 3539613 (D. Conn. July 11, 2013); *Moerman v. State of California*, 17 Cal. App. 4th 452, 21 Cal. Rptr. 2d 329 (1993).

<sup>381</sup> *Francis v. Guaranty State Bank of Texola*, 1914 OK 646, 44 Okla. 446, 145 P. 324 (1914).

<sup>382</sup> *Gray v. State*, 628 S.W.2d 228 (Tex. App. 1982).

<sup>383</sup> *Wells v. Cole*, 194 Minn. 275, 277, 260 N.W. 520, 521 (1935).

<sup>384</sup> *Hollywood Park Humane Soc. v. Town of Hollywood Park*, 261 S.W.3d 135, 140 (Tex. App. 2008).

can be held liable for the damage the bears do or can recover their value when bears are killed; the issue is whether Dr. Rogers “possesses” the bears through his activities such that a permit is necessary in order to protect the animals, by the imposition of conditions, on behalf of their actual owners: the residents of the state. Therefore, the caselaw interpreting the term “possession” in the context of ownership is not determinative in this matter.

Dr. Rogers is correct that, even in the context of the permitting statute, a finding of control is necessary in order to find that he has possession of the subject bears. But just as a person can be found to have possession of a weapon owned by another,<sup>385</sup> so Dr. Rogers can exercise control over the bears even though he has no enforceable property right over them in that “they remain wild, unconfined, and in a state of nature.”<sup>386</sup>

Though not determinative, the caselaw cited by Dr. Rogers is instructive in that it illustrates the operative meaning behind the term “possession” in the identified contexts. In these cases, courts found possession to exist in a person’s act of confining, removing from nature and dominating an animal in unique circumstances. All of these cases involve human actions designed to provide an individual with regular access to specific animals for the purpose of exercising, or evidencing an intent and power to exercise, control over some aspect of the animal’s natural abilities or freedoms. When a person confines an animal, the animal is no longer free to roam at will through its habitat but instead is forced to stay where the person intends. When a person marks an animal, the animal is no longer anonymous but instead is specifically identified for the person’s future purpose. When a person domesticates or trains an animal, the animal is no longer free to behave as it did naturally but is instead caused to behave differently, as the person intends. All of these actions reveal that the person in possession has access to the animal that the rest of the public does not. The person can find the animal, whether in a fenced pen on his property or when grazing on other land.<sup>387</sup> The person knows which ones are “his” as opposed to “not his” by the branding,<sup>388</sup> tagging<sup>389</sup> or leashing<sup>390</sup> and has the intent and the ability to interact with the animal at his will whether that be for sport, for food, for research, or for any other purpose.

In the present case, Dr. Rogers’ act of affixing a tracking collar to a bear allows him the power to intentionally exercise control over the animal, and its offspring in many cases. That statement is true no matter whether the collaring is done by tranquilizing the bear, wrestling the bear to the ground or just talking the bear into allowing a collar to be slipped around its neck. By placing a collar on the bear and tracking its transmitted GPS coordinates, Dr. Rogers is allowed access to the bear in a way that no other Minnesotan

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<sup>385</sup> *Salcido-Perez v. State*, 615 N.W.2d 846, 848 (Minn. Ct. App. 2000).

<sup>386</sup> 4 Am. Jur. 2d Animals, § 12.

<sup>387</sup> *Butler v. City of Palos Verdes Estates*, 135 Cal. App. 4th 174, 181, 37 Cal. Rptr. 3d 199, 205 (2005).

<sup>388</sup> *Dodge v. Jones*, 7 Mont. 121, 14 P. 707, 714 (1887).

<sup>389</sup> See *Ingraham v. Chapman*, 177 Mass. 123, 58 N.E. 171 (1900).

<sup>390</sup> *State v. Pollock*, 914 S.W.2d 1 (Mo. Ct. App. 1995).

enjoys. At his discretion, he can join the bear in the wild at his will. By the presence of the collar, he can tell which of the bears are “his bears” and which are not, which allows him to alter his own behavior in terms of how he approaches and interacts with any bear he encounters in the course of his study activities.

By putting a collar on a bear and using that collar to track its location, Dr. Rogers exercises an intentional power to alter the bear’s natural freedom in at least one critical respect: the bear is no longer free to avoid humans. It loses its natural ability to be left alone. Dr. Rogers is able to show up in the forest at any point in time to observe or attempt to join the bear in its activities. It is true that the bear does not have to allow Dr. Rogers to participate; it can run off and try to hide. What it can no longer do is exercise control over the presence of humans in its midst. Dr. Rogers has control of whether, and to what extent, humans intrude upon the bear’s natural world on a regular basis. In so doing, Dr. Rogers enjoys access to and control over a bear in a manner that is substantively different than any other Minnesotan, and in a manner that would be impossible without the use of the tracking collars. Therefore, Dr. Rogers’ placement and use of tracking collars on bears, in and of itself and no matter how the collars are affixed, establishes by a preponderance of the evidence that he has constructive possession of these wild animals such that a permit is required.

## 2. Intentionally Repeated Handling Constitutes Possession.

In addition to and not dependent on the above analysis, the undersigned also finds that Dr. Rogers’ intentionally repeated handling of a bear constitutes actual and constructive possession of that bear during the period of handling. Intentionally repeated handling constitutes actual possession in that it requires “direct physical control over a thing, at a given time.”<sup>391</sup> When Dr. Rogers engages in recurrent physical contact with a bear, he exercises direct control over the bear to the extent of his handling it. When he reaches underneath a bear to feel and record its pulse, when he cradles a cub in order to feed it milk from his fingertips or from a bottle, when he punches a bear for the purpose of asserting his dominance in order to cause it to move away, and when he pets, pats, strokes and kisses a bear for whatever purposes may suit him, Dr. Rogers is evidencing “a purpose and capacity to exercise corporal contact”<sup>392</sup> over the bear. Just as handling a weapon, illegal drugs or other contraband is sufficient to establish actual possession in other legal contexts, so much more does intentionally repeated handling evidence actual possession when dealing not with an inanimate object but a wild animal which allows only Dr. Rogers’ touch.

Intentionally repeated handling of a bear also constitutes constructive possession of it. The more handling of a specific animal that is accomplished by a person, including but not limited to Dr. Rogers, the more likely the animal will allow the handler to touch it

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<sup>391</sup> *Hohlen v. Comm’r of Revenue*, 4885, 1989 WL 16571 (Minn. Tax Feb. 15, 1989) amended, 4885, 1989 WL 58990 (Minn. Tax May 19, 1989) citing E. Devitt and C. Blackmar, *Federal Jury Instructions and Practice*, § 16.07 (1977 & Supp.1988) (other citations omitted).

<sup>392</sup> *Wells v. Cole*, 194 Minn. 275, 278, 260 N.W. 520, 521 (1935).

in the future. Given the nature of bears and their ability to adapt to changed circumstances including human contact, intentionally and repeatedly handling a bear (exercising actual possession) eventually gives one “the power and the intention, at a given time, to exercise dominion or control over [the bear], either directly or through another.”<sup>393</sup> Therefore, evidence of Dr. Rogers’ recurrent handling of bears is also sufficient to establish his exercise of constructive possession of the animals.

Contrary to Dr. Rogers’ suggestion, the temporary nature of his handling of bears does not abrogate the finding that intentionally repeated handling of a wild animal constitutes possession of it. As there is no recognized “fleeting-control exception” to a determination of possession in the criminal context,<sup>394</sup> neither is there any basis for the recognition of such an exception in the context of the important governmental interest of protecting and preserving the state’s wild animals.<sup>395</sup>

The determination that proof of intentionally repeated handling can evidence both actual and constructive possession is consistent with the Agency’s long-held and publicly-communicated interpretation of its permitting statute. In response to Dr. Rogers’ direct questions about the permit’s limitations, in 2000 the Agency informed him that “restraining or handling bears ... would require a permit because it constitutes possession.”<sup>396</sup> Since that time the Department has included the word “handle” in Dr. Rogers’ permit to define the term “temporarily possess.” The permit currently allows Dr. Rogers to “pursue, capture, handle, and place radio collars on” bears, and defines “handle” to mean “temporarily possess or perform a task or function that involves physical contact with a study bear.”<sup>397</sup> As such, the DNR has consistently informed Dr. Rogers that the intentionally repeated handling of bears which he conducts as part of his study requires a permit under the authority of Minnesota’s game and fish laws. The DNR’s interpretation of the statute is in conformity with the legislative intent behind the enactment, “to protect and preserve useful or valuable wild animals for the benefit of the public,”<sup>398</sup> and therefore is entitled to deference.<sup>399</sup>

Contrary to arguments raised by Dr. Rogers earlier in these proceedings, defining the term “possession” in this analytical framework does not require a finding of possession any time a child picks up a turtle from a stream. The difference is in the amount of control exhibited as a function of the amount of handling accomplished. A child’s one-time touching of a turtle randomly found in nature is possible only because a

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<sup>393</sup> *Hohlen v. Comm’r of Revenue*, 4885, 1989 WL 16571 (Minn. Tax Feb. 15, 1989) *amended*, 4885, 1989 WL 58990 (Minn. Tax May 19, 1989) citing E. Devitt and C. Blackmar, *Federal Jury Instructions and Practice*, § 16.07 (1977 & Supp.1988) (other citations omitted).

<sup>394</sup> *In re Welfare of S.J.J.*, 755 N.W.2d 316, 318-19 (Minn. Ct. App. 2008), *citing State v. Houston*, 654 N.W.2d 727, 734 (Minn. Ct. App. 2003), *review denied* (Minn. Mar. 26, 2003).

<sup>395</sup> *See Kottom v. Minnesota Dep’t of Natural Res.*, A07-2127, 2008 WL 4977414 \*2 (Minn. Ct. App. Nov. 25, 2008) (finding storage of pelts “required substantial, temporary possession” under Minnesota game and fish laws).

<sup>396</sup> Ex. 610.

<sup>397</sup> Ex. 159, p. 34.

<sup>398</sup> *Waldo v. Gould*, 165 Minn. 128, 132, 206 N.W. 46, 48 (1925).

<sup>399</sup> *George A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988).

specific animal happens to be where the curious youngster is also present at a particular point in time; the child has no ability to intentionally control the circumstances such that the event will be repeated with the same animal.<sup>400</sup> Dr. Rogers does not happen upon and touch random animals; he repeatedly and intentionally physically handles generations of specific bears from the time of their birth for the purpose of habituating them to human contact. In this behavior, Dr. Rogers evidences his ability to intentionally exercise control over these animals in a way different than any other Minnesotan enjoys, which in turn supports the determination that a permit is required.

### 3. Feeding and Habituation Do Not Constitute Possession.

While the above analysis leads to a conclusion that both collaring and intentionally repeated handling of a wild animal sufficiently evidence possession for purposes of the DNR's permitting statute, it just as strongly supports the conclusion that neither feeding nor habituating an animal necessarily signify unauthorized possession. Throughout the state, Minnesotans fill birdfeeders, leave food out for deer and, at least in Eagles Nest Township, leave food out for bears. Unlike in many other states, feeding bears is not illegal and does not require a permit in Minnesota. Therefore, feeding alone cannot constitute possession.<sup>401</sup> As feeding sometimes leads to habituation, whether intentionally or not, habituation based on feeding alone cannot constitute possession for purposes of the permitting statute. As detailed above, it is the intentionally repeated physical handling that leads to a finding of actual and constructive possession, not a person's feeding, walking with, resting beside or even posing for photographs with a bear. While these activities may be ill-advised for most people for obvious reasons, they are not illegal and do not require a permit in Minnesota. As such, the enforcement of the DNR's permitting statute does not require the application of the undefinable and unstandardized "case-by-case (and bear-by-bear) analysis"<sup>402</sup> of which Dr. Rogers warns, and so avoids his claims of unconstitutional vagueness<sup>403</sup> and violation of the rule on lenity.<sup>404</sup>

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<sup>400</sup> An exception to this statement exists when a child takes the turtle home and keeps it as his own, a situation which is specifically exempted from the permitting statute's consideration of the term "possession." See Minn. R. 6212.1400, subp. 9 ("Permits are not issued for the taking or possession of protected wild animals as pets, except for raptors as provided by chapter 6238.")

<sup>401</sup> If the feeding requires physical touch of the animal, as would typically be required for hand-feeding and would always be the case for mouth-feeding, then the feeding includes handling and could support a finding of possession under the analysis set forth above.

<sup>402</sup> Dr. Lynn Rogers' Post-Hearing Memorandum, p. 14.

<sup>403</sup> The Office of Administrative Hearings has no jurisdiction to hear constitutional claims in this or any other contested case proceeding. *Neeland v. Clearwater Mem'l Hosp.*, 257 N.W.2d 366, 368 (Minn. 1977).

<sup>404</sup> The rule on lenity, a rule of statutory construction, requires ambiguous criminal statutes to be narrowly construed. *State v. Sorenson*, A06-746, 2007 WL 1673929 (Minn. Ct. App. June 7, 2007); *State v. Stewart*, 529 N.W.2d 493, 496-497 (Minn. Ct. App. 1995). It is unclear how this rule is relevant in that Dr. Rogers is not being criminally prosecuted in this civil permitting matter.

**B. The Commissioner Had Sufficient Cause to Deny the Permit Renewal.**

Dr. Rogers asserts that the DNR Commissioner's act of denying the application for a renewed permit in 2013 was not authorized by law or supported by the evidence. The DNR identified three bases for its determination that it had sufficient cause not to grant the requested renewal permit: (1) Dr. Rogers' failure to publish any "peer-reviewed literature" based on his many years of permitted activities; (2) the "very real public safety issue" which had resulted from the long-term habituation of more than 50 bears involved in Dr. Rogers' study; and (3) instances wherein Dr. Rogers exhibited "extremely unprofessional behavior with research bears."<sup>405</sup> Commissioner Landwehr testified that the lack of publication and the public safety issue were the primary and overriding reasons for his decision to deny renewal of Dr. Rogers' permit; the instances of unprofessional conduct served only as "secondary reasons" that provided "supporting evidence" for his decision.<sup>406</sup> The undersigned has examined the evidence in the record on which the Agency relied with respect to each of these stated reasons in order to determine whether the DNR's actions were legally authorized and supported by a preponderance of the evidence.

1. The Lack of Publication is Not a Legally Sufficient Basis for Denial.

To evidence its basis for denial rooted in Dr. Rogers' failure to publish his research results in peer-reviewed scientific journals, the Agency called several expert witnesses to testify to the value of and criteria for peer-reviewed publication in the field of wildlife ecology, as well as to offer opinions on whether Dr. Rogers' study activities had been designed to or resulted in any scientific research.<sup>407</sup> Dr. Rogers called additional experts to rebut this testimony. Overall, the preponderance of the evidence at hearing established that while Dr. Rogers has given presentations at scientific conferences and other public events, and been featured in several renowned documentaries, website postings and other media, by June 28, 2013 he had not published in peer-reviewed scientific publications any significant research findings arising from his 15 years of permitted activities.

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<sup>405</sup> Ex. 124.

<sup>406</sup> Test. of T. Landwehr, Tr. 111:5-15; 170:7-20.

<sup>407</sup> After reviewing 1,866 electronic files produced by Dr. Rogers after the hearing had commenced, the Department's expert credibly opined that the study had, to date and in the main, resulted in only the collection of observational data which had not yet been synthesized, analyzed or applied to answer any of the study's identified research questions. Relying on this testimony, the Agency argued throughout the hearing that Dr. Rogers has not been conducting any scientific research throughout the 15 years of his study. Whether this assertion is accurate or not is not directly relevant to legal questions at issue in that the Agency did not cite this as one of the grounds for its denial of the renewal permit. The DNR identified a lack of scientifically peer-reviewed publication, not a lack of publishable data, as one of the three bases for its decision to deny the permit. Accordingly, the undersigned has not relied on the quality or quantity of Dr. Rogers' collected data in analyzing whether the Agency's decision was supported by a preponderance of the evidence in the record.

Notwithstanding this fact, this cited basis does not provide support for the DNR's decision to deny renewal of the permit. The permit did not include any condition which required Dr. Rogers to publish his findings in peer-reviewed journals or elsewhere. If this was a sufficiently important requirement such that its non-satisfaction would lead to a denial decision, the DNR should have included it in the permit's conditions. The Agency had the lawful authority to do so in any one of the 15 years in which the permit was granted. It chose not to do so. It now argues that Dr. Rogers should have realized that peer-reviewed publication was required because it reminded him of this expectation in correspondence sent over the years. The Agency cites to no legal authority allowing it to convert other communications into enforceable conditions of the granted permit; all identified authorities provide to the contrary.<sup>408</sup> The record at hearing established that when the Agency did add conditions to the permit related to other topics, including a limitation on hand-feeding and handling, Dr. Rogers complied with those conditions. Therefore, there is reason to conclude that he would have complied with a directive to publish if the Agency had included this as a condition of the permit.

While peer-reviewed publication may or may not be inherently expected when conducting wildlife biology research, the undersigned is not judging the field of wildlife biology but is instead evaluating the actions of a state agency with the power and authority to specify exactly what actions are required and prohibited. By failing to include a publication requirement in the permit, the DNR did not give Dr. Rogers fair notice that his failure to publish his research would lead to a denial decision.<sup>409</sup> The Agency is directed to deny a permit "for cause, including violation of the game and fish laws or rules adopted thereunder,"<sup>410</sup> which rules specifically allow the Agency to limit permits by imposing conditions. Because the DNR did not specify peer-reviewed publication as a condition in Dr. Rogers' permit, it acted outside its legal authority by relying on this factor in its denial determination.<sup>411</sup> Therefore, Dr. Rogers' failure to publish his research in peer-reviewed literature does not provide the Agency with cause to refuse to renew the permit.

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<sup>408</sup> See *United States v. Heuer*, 4 F.3d 723, 726 (9<sup>th</sup> Cir. 1993) (finding an enforceable condition "must be clear from the permit" and cannot be "derived from the history of dealings" between the parties); *United States v. City of Detroit, Mich.*, 940 F. Supp. 1097, 1100 (E.D. Mich. 1996) ("Other cases have denied enforcement of a condition not included in a permit ... and have enforced conditions which were specifically found to have been included in permits) (citations omitted). Recognizing the nonprecedential value of a recent unreported case but noting its use of similar analysis, see also *Axelsson v. Goodhue Cnty. Bd. of Comm'rs*, A12-0041, 2012 WL 3263901 (Minn. Ct. App. Aug. 13, 2012) (court found governmental concerns not included in a conditional use permit to be illegitimate reasons to support revocation.)

<sup>409</sup> See *In re Welfare of R.V.*, 702 N.W.2d 294, 300 (Minn. Ct. App. 2005) (examining issue in context of due process claim.)

<sup>410</sup> Minn. Stat. § 97A.418.

<sup>411</sup> See *Strauss v. Berkshire*, 132 F.2d 530, 534 (8<sup>th</sup> Cir. 1942) (In different statutory context, court noted "the power of the administrative officers after a permit has been issued is limited to determining, upon notice and hearing, whether the conditions of the permit have been violated and, if they so determine, to revoke, suspend or annul the permit.")

2. The Agency's Denial Based on Public Safety Concerns is Authorized by Law.

As a state agency, the Department of Natural Resources has inherent authority to consider the safety of the public in every decision it makes. Specifically with regard to decisions related to cancellation of previously authorized permits, the DNR is required to consider "the conservation of the natural resources of this state, ... the welfare of particular specimens, [and] ... the public interest."<sup>412</sup> Clearly, matters involving public safety impact the public interest.

The preponderance of evidence at hearing showed that 15 years of Dr. Rogers' study activities has significantly contributed to bona fide public safety concerns. Approximately 50 bears, each human-habituated and food conditioned to varying degrees, roam wild in the Eagles Nest Township area. The evidence established that some of these bears, both collared and uncollared, have exhibited unnatural behaviors around humans: failing to startle when confronted with loud and unexpected noises; learning to climb human-constructed stairs in purposeful efforts to locate food; closely approaching young children; remaining on human-occupied property in spite of hazing activities that would typically cause a bear to retreat; standing up and pawing at cabin and car windows; and nipping and slapping at people unable to provide them with expected food. For purposes of the public safety analysis, it is not critical whether Dr. Rogers is the only or merely the primary cause of these circumstances; it is critical that the risk is real and therefore must be managed. The DNR must take these circumstances into account in its efforts to appropriately "preserve, protect, and propagate the desirable species of wild animals" in the state.<sup>413</sup>

As established by the credible testimony of experts in the field of wildlife ecology, the vast majority of wildlife management professionals agree that the presence of habituated bears increases the risk of harm to the public. Based on this testimony, it is reasonable to conclude that - if one habituated bear represents an increased risk of harm to the public - then 50 habituated bears evidence a cumulatively increased risk of harm to the residents of the Eagles Nest Township area. Every expert witness who testified on the topic, other than Dr. Rogers, advised that the most conservative approach to wildlife management involves the discouragement of activities that lead to habituation of bears.

Dr. Rogers disagrees. He believes that habituated and food conditioned bears are not dangerous, and that these bears can and will differentiate between humans who are a source of food and those who are not. Dr. Rogers teaches that people often mistake bear behavior evidencing mere curiosity for shows of aggression; he seeks to change that association by engaging in education-related activities. Dr. Rogers' beliefs may be correct. In time, our ever-evolving understanding of science will prove his views to be accurate, or not.

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<sup>412</sup> Minn. R. 6212.1400, subp. 8.

<sup>413</sup> Minn. Stat. § 97A.025.



It is not the Department's job to lead that charge by ignoring the prevailing views of the scientific community in favor of the limited minority views espoused by Dr. Rogers. Instead, the Department's responsibility is to protect the species from harm and exploitation while it also protects the public. In a legitimate effort to meet that responsibility and based in part on the shared view of wildlife management agencies across the country, in or around June 2013 the DNR determined that the cumulative risk to the public was too high to allow further generations of bears to be habituated through collaring and intentionally repeated handling, even for scientific purposes. In these determinations, the DNR had sufficient cause to deny the renewal application as being contrary to the public interest.

As proven by the mirror-opposite testimony of several residents of Eagles Nest Township, reasonable people can and do differ regarding whether the many habituated bears present a significant public safety concern in and around that community. Even so, the law does not now allow the undersigned to substitute her judgment for that of the Agency given that the DNR's decision was sufficiently supported in the record. Like other determinations of cause,<sup>414</sup> the DNR's decision was the "result of investigation, consideration, and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power."<sup>415</sup> As such, it is deserving of deference.

At hearing, Dr. Rogers and Mansfield disagreed with the Agency's assessment of the public safety risk, noting that no person has been seriously harmed to date and arguing that there is insufficient evidence that future harm is likely to occur. While those facts are accurate, the conclusion is not. The law does not require the Agency to wait for harm to occur prior to taking action. The DNR has been charged by the legislature with the authority to, and responsibility for, protecting both the public and the state's wildlife. It did so in this case by balancing the value to scientific knowledge and education of the public about these animals with the potential for human harm.<sup>416</sup> The appropriate balance can be drawn only by exercising complicated and technical expertise in bear ecology, human-bear conflict, and its management. In exercising this expertise in the context of its statutory authority, the DNR determined that Dr. Rogers' permit should not be renewed. That decision was well within the Department's discretion and was supported by a preponderance of evidence in the record.

(A) Post-2012 Facts Were Appropriately Considered.

Dr. Rogers argues that the DNR's determination is unsupported by the evidence in that facts that occurred before December 21, 2012 should be considered waived. This argument is unpersuasive.

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<sup>414</sup> *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 525 (Minn. Ct. App. 2013).

<sup>415</sup> *Oakman v. City of Eveleth*, 163 Minn. 100, 108-09, 203 N.W. 514, 517 (1925).

<sup>416</sup> Test. of T. Landwehr, Tr. 48:18-22; 109:9-14.

The record clearly showed that the Agency continued to receive, and relied upon, information relevant to its public safety concerns after it granted Dr. Rogers a final permit on December 21, 2012. Specifically, the DNR received the 2011 instruction sheet for Bear Field Study Course participants, the video of members of the public approaching a bear den after finding a den cam, and the video of Dr. Rogers punching a bear.<sup>417</sup> The instruction sheet elevated the Agency's already growing public safety concerns in that it established that Dr. Rogers had provided up to 650 members of the public with "some tips for reasonably safe hand feeding" of bears, including the direction to "[k]eep the food coming at a rapid pace, handful after handful" to avoid "making the bear anxious;" the warning that "[s]ome bears may bite to tell you to keep the food coming," which hurts "a bit" and can cause bruises but "is not an attack;" and an admonition not to "offer the bear food from your lips unless you know the bear is accustomed to doing that."<sup>418</sup> While the record showed that Dr. Rogers discontinued use of this instruction sheet after the 2011 season, its use for years beforehand indicated to the DNR that far more members of the public had been trained in these activities, which the Agency deemed dangerous, than it had known about in the past. The videos provided further support for the Agency's determination regarding the unacceptable level of public safety risk that existed in and around the community related to Dr. Rogers' study bears.

As the factual record supports the Department's post-2012 change of position, so does the law. Government agencies are allowed, even encouraged, to constantly consider changed circumstances when making discretionary decisions.<sup>419</sup> Dr. Rogers has offered no Minnesota authority<sup>420</sup> for his position that the state waives the ability to exercise its sovereign power by failing to do so at any particular point in time. Governing precedent suggests otherwise.<sup>421</sup>

The public safety risk has matured along with Dr. Rogers' study. In the early years of the study, Dr. Rogers had enjoyed the opportunity to collar and study only a few bears and had been witness to only one or two reproductive cycles with these animals. As that time, very few bears could have grown habituated or food conditioned as a result of the study, and so the safety risk to the public was correspondingly low.

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<sup>417</sup> Exs. 608, 799, 802.

<sup>418</sup> Ex. 608.

<sup>419</sup> *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("Administrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider.") (citations omitted).

<sup>420</sup> The unpublished Michigan case relied upon by Dr. Rogers is distinguishable. In *King v. State*, 288290, 2010 WL 199577 (Mich. Ct. App. Jan. 21, 2010), *aff'd*, 488 Mich. 208, 793 N.W.2d 673 (2010), the Michigan court considered a claim made for equitable relief based on the fact that the applicable law had changed while the underlying facts remained the same. In the present matter the opposite is true: the law has remained constant while the facts have changed.

<sup>421</sup> IN THE MATTER OF THE REVOCATION OF THE FALCONRY PERMIT OF DOUGLAS E. JOHNSON, 2000 WL 35498863 \*7 (OAH Oct. 31, 2000) (refusing to recognize the concept of waiver by the state of its sovereign power to revoke an issued permit).

Over the next decade as Dr. Rogers collared and handled more bears and intentionally habituated them and their cubs, the population of bears in the study increased. At the same time and likely due to the plentiful feeding available at WRI and from other residents, the territories of adult female bears decreased, their reproductive success increased and more cubs survived to adulthood, all as documented in Mansfield's masters' thesis.<sup>422</sup> Human encroachment into bear territory expanded as more housing was constructed, and human-bear conflict continued to increase. At some point after 2012 and prior to June 28, 2013, the Agency decided that the public safety risk had grown to an intolerable level and so the permit should be denied. In this analysis, the DNR considered the historical, cumulative and continuing nature of the situation and decided that further collaring and handling of bears was no longer in the public interest. In its decision to deny Dr. Rogers' application for renewal of his permit, which is supported by the preponderance of the evidence in the record, the DNR acted within its lawful authority.

(B) The Doctrine of Equitable Estoppel Does Not Bar Pre-2012 Evidence.

The doctrine of equitable estoppel does not change this result. Equitable estoppel is grounded in the idea of fairness and, when asserted against the government, must include proof of the following:

[A] party seeking to establish equitable estoppel against a government entity must establish four elements. First, there must be "wrongful conduct" on the part of an authorized government agent. Second, the party seeking equitable relief must reasonably rely on the wrongful conduct. Third, the party must incur a unique expenditure in reliance on the wrongful conduct. Finally, the balance of the equities must weigh in favor of estoppel.<sup>423</sup>

Relying on this doctrine, Dr. Rogers argues that because the DNR granted him a permit on December 21, 2012 it would be unfair to allow the Agency to now reach back to facts which predate that issuance as evidence establishing cause for the 2013 denial.

In the majority of cases where equitable estoppel has been raised against the government, the argument has been rejected. A party attempting to assert equitable estoppel against a government entity bears a "heavy burden of proof"<sup>424</sup> as the courts do not "envision that estoppel will be freely applied against the government."<sup>425</sup> The reason for the high bar is that estoppel is often raised in situations where the proposed action is contrary to the public interest. The Minnesota Supreme Court has directed

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<sup>422</sup> Ex. 15.

<sup>423</sup> *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011).

<sup>424</sup> *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

<sup>425</sup> *Mesaba Aviation Div. v. Itasca County*, 258 N.W.2d 877, 880 (Minn. 1977).

triers-of-fact to weigh whether the public interest frustrated by the estoppel is greater or lesser than the equities of the case.<sup>426</sup>

In the present case, estoppel will not lie to prevent the Department's denial decision. The DNR did not misrepresent a material fact. It did not tell Dr. Rogers that it would not look to pre-2013 facts when examining permit renewal applications in the future. In fact, it said the opposite when it informed him that "[t]he pattern of unacceptable behavior by apparently habituated bears ... is creating situations for local residents and visitors that they should not have to tolerate and also has the potential to affect public safety."<sup>427</sup>

The Agency's exercise of its discretion in 2012, whereby it found a lack of cause and so granted the December 21, 2012 permit, did not prevent it from reevaluating the situation later. Its subsequent exercise of discretion led to the opposite result. As there is no wrongful conduct in an agency's changing its position on a topic as critically important yet fluid as public safety, the doctrine of equitable estoppel does not change the result in this case.

### 3. Unprofessional Conduct Supports the Denial Decision.

The DNR's June 28, 2013 denial letter cited to incidents of "extremely unprofessional behavior" with research bears.<sup>428</sup> The preponderance of evidence at hearing established that these incidents, though not primary motivators for the Agency's denial decision, supported the DNR's legitimate basis for denial: the risk to public safety.

Cited as evidence of unprofessional conduct, in one video a bear is made to appear to "dance" by being offered and then denied food rewards. In a second video, Dr. Rogers is seen engaged in a writing activity while lounging beside a bear eating human-provided food, and when the bear runs out of food and lunges at Dr. Rogers in an apparent quest for more Dr. Rogers punches it in the face. The third incident cited by the Agency relates to a photograph of Dr. Rogers mouth-feeding a bear. The hearing produced no evidence of a research-related purpose for any of these activities, and none is apparent.

This evidence supports the Agency's determination that Dr. Rogers' study bears engage in behaviors around humans that is atypical in nature. It indicates that, at least in these examples, specific bears have been habituated to human contact near to the point of taming. As such, the evidence bolsters the DNR's determination that at least some of Dr. Rogers' study bears present a potentially higher risk to the public's safety in that they have been trained to expect food rewards upon demand or in return for exhibiting human-initiated tricks.

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<sup>426</sup> *Brown v. Minnesota Department of Public Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

<sup>427</sup> Exs. 113, pp. 1-2; 174, pp. 1-2.

<sup>428</sup> Ex. 124.

In addition, this evidence relates to the DNR's legal obligation to preserve and protect the bears of Minnesota. The statutory scheme of the game and fish laws indicates that wild animals are to be maintained, to the extent possible, in their wild state. Viewed through that lens, it is clear that wild bears should not be made to dance for the enjoyment of human onlookers but instead should be glimpsed, as a matter of fortune, in the wild doing what nature dictates: simply being a bear. The videos of the punching and the dancing, and the photographs of Dr. Rogers and others kissing bears, stroking bears, posing with bears and mouth-feeding wild bears, indicate that these animals have not been accorded the level of respect for their nature that the law is designed to ensure. While people will always be curious about and will continue to observe, study and learn from and about bears, the law is in place to ensure that we do so in a manner that does not ignore their innate dignity or subordinate it to our human desire for power or control. The DNR, as the agency charged with managing the species for the benefit of all the people of the state, rightfully considered this supportive evidence when making its determination as detailed above.

## **Conclusion**

Dr. Rogers can continue to study bears in Minnesota. He can continue to feed bears and run Bear Field Study Courses at WRI to educate the public about these magnificent creatures. The already habituated bears may continue, for some period of time, to allow Dr. Rogers to walk with them, rest with them, talk to them, observe them, and record data about them. The bears that currently feed at WRI will likely continue to do so as will their cubs and yearlings, perhaps through their adulthood. Dr. Rogers can continue to record bear weights at WRI aided by feeding, as this activity requires no handling of the bears. If Dr. Rogers happens upon a bear in the woods, he is free to approach it and follow it as the bear allows. He can continue to offer the existing videotapes of den cam footage to schools and others for educational purposes.<sup>429</sup> What he cannot do, without applying for and being granted a DNR permit, is collar or intentionally and repeatedly handle bears, or visit the dens of bears, all of which are statutorily prohibited in Minnesota without a permit.

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<sup>429</sup> Without access to the bears through collaring, Dr. Rogers is unlikely to be able to continue his work with den cams, even if the Department were inclined to grant him a permit to do so. The collars allow him to locate the bears, and therefore locate their dens for the purpose of installing cameras. Without the collars, it will likely be very difficult for Dr. Rogers to record further bear behavior in dens. The inability to utilize den cams presents not only an obvious loss to Dr. Rogers' work but a loss to the public and to the scientific community as well. However, the fact that Dr. Rogers' den cams have been a public value does not change the necessary legal analysis. The statute clearly requires a permit for this activity. Minn. Stat. § 97B.095. Dr. Rogers has not applied for a permit to put up den cams absent the use of tracking collars. If he does, the DNR will need to exercise its discretion in a manner that is well-grounded in its authority to protect and enhance knowledge of the species while protecting the public interest in the state's wild animals. Minn. R. 6212.1400, subp. 8.