

# Minnesota Department of Natural Resources

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September 23, 2014

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**Re: In the Matter of Minnesota Department of Natural Resources Special Permit  
No. 16868 (December 21, 2012) issued to Lynn Rogers  
OAH Docket No. 84-2001-30915**

Dear Counsel:

Pursuant to Minnesota Statutes § 14.62, subdivision 1, I hereby serve the Findings of Fact, Conclusions of Law and Order, together with an accompanying Memorandum regarding the above-entitled matter. Judicial review of contested cases is provided for under Minnesota Statutes §§ 14.63-14.69.

Very truly yours,

A handwritten signature in black ink that reads "Kent M. Lokkesmoe". The signature is written in a cursive, flowing style.

KENT M. LOKKESMOE  
Administrator

cc: Honorable Tammy L. Pust, Chief Administrative Law Judge (w/encl.)  
James Patrick Barone, Assistant Attorney General (w/encl.)



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

In the Matter of Minnesota Department of  
Natural Resources Special Permit No. 16868  
(December 21, 2012) issued to Lynn Rogers

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

**OAH DOCKET NO. 84-2001-30915**

The above-entitled matter came before Chief Administrative Law Judge ("ALJ") Tammy L. Pust on February 24 through March 6, 2014. David P. Iverson and Linda S. Jensen, Assistant Attorneys General, appeared on behalf of the Minnesota Department of Natural Resources ("DNR, agency or Department") and David R. Marshall, Leah C. Janus and Jessica L. Edwards of Fredrikson & Byron appeared on behalf of Dr. Lynn Rogers ("Dr. Rogers"). On May 23, 2014, the ALJ issued her Findings of Fact, Conclusions of Law and Recommendation.

Commissioner of Natural Resources Tom Landwehr delegated the authority to issue a final order in this matter to Senior Administrative Officer Kent M. Lokkesmoe. By letter dated June 5, 2014, Mr. Lokkesmoe informed the parties of their right to file exceptions and argument with the Commissioner regarding the ALJ's Recommendation. Written exceptions were submitted by both parties. The record closed on June 27, 2014.

Based upon the facts, records and proceedings herein, the Commissioner makes the following:

## **FINDINGS OF FACTS**

1. The Commissioner adopts Findings 1 – 39.
2. The Commissioner replaces Finding 40 with the following: 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 Michael Don Carlos (Tr. 1279). 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>
3. The Commissioner replaces Finding 41 with the following: 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 does not have authority or responsibility to establish conditions on Dr. Rogers' permits; however, as the agency expert he may be consulted.<sup>76</sup>
4. The Commissioner adopts Findings 42 – 47.
5. The Commissioner replaces Finding 48 with the following: Dr. Rogers asserts that, at times, the DNR has released formerly collared and/or formerly habituated bears back into the wild in Minnesota.<sup>85</sup>

6. The Commissioner adopts Findings 49 – 62.

7. The Commissioner replaces Finding 63 with the following: In 1992, the DNR initiated proceedings which resulted in Dr. Rogers being criminally charged with violating Minnesota Statutes section 97A.405<sup>102</sup> by illegally killing two bear cubs outside the authority of his permit in 1989.<sup>103</sup> Dr. Rogers was acquitted of these charges because of the ambiguity of the permit language. Related to this incident, the DNR revoked Dr. Rogers' permit,<sup>104</sup> No. 6043, in 1992.<sup>105</sup> The court concluded that, "While perhaps additionally gratuitous, the finding of not guilty does not suggest that the State in issuing the permit contemplated such conduct or that the Defendant's conduct was within the terms of the permit, but only that the permit is ambiguous and that under our laws these kind of ambiguities must be resolved against the State" (Exh. 1020).

8. The Commissioner adopts Findings 64 – 67.

9. The Commissioner replaces Finding 68 with the following: DNR staff recommended not issuing Dr. Rogers a permit in 1999<sup>112</sup> (Tr. 1444).

10. The Commissioner replaces Finding 69 with the following: At that time, Allen Garber was the Agency's Commissioner. Commissioner Garber perceived that there was a "competition" between Dr. Garshelis and Dr. Rogers (Tr. 1507-1508).

11. The Commissioner adopts Findings 70 – 77.

12. The Commissioner notes there is not a Finding number 78 to adopt or reject.

13. The Commissioner adopts Findings 79 – 94.

14. The Commissioner replaces Finding 95 with the following: According to Dr. Rogers, from 1996 to 2011, at least 203 different bears have visited the WRI and local feeding sites with enough regularity to have been uniquely identified<sup>151</sup> (Exh. 84, p. 10).

Dr. Cornicelli reviewed Dr. Rogers' records, field notebooks, website, and bear id guide, and estimated that between 84-210 bears have been named<sup>152</sup> (Tr. 1351) and that at least 50 bears are habituated to human contact<sup>153</sup> (Exh. 595, p. 2). Between 7 and 15 of the bears are collared at any point in time.<sup>154</sup> (Footnote 154 is corrected to reference exhibit 84 p. 7 not exhibit 846. Exhibit 846 does not exist.) The majority of the bears that feed at WRI are uncollared.

15. The Commissioner adopts Findings 96 – 97.

16. The Commissioner replaces Finding 98 with the following: In addition to hand-feeding, Dr. Rogers has fed some bears by allowing the bear to eat pecans or other food from his lips, a practice that Mansfield described as not uncommon for him 157 (Tr. 2144, Exh. 708). The practice of mouth feeding is not being done anymore (Tr. 2101, 2144).

17. The Commissioner adopts Finding 99 – 101.

18. The Commissioner replaces Finding 102 with the following: Dr. Rogers and staff talk to the bears to facilitate bears to their presence. The bears know their voices and usually remain calm. Some bears recognize their voices and “will hold for us upon hearing our voices because they know it means food without danger.”<sup>165</sup> Dr. Rogers' 2000 annual report stated “On subsequent occasions, Dr. Rogers approached her (Blackheart) successfully if he talked, but could not see her if he approached quietly” (Exh. 159, p. 9).

19. The Commissioner adopts Finding 103.

20. The Commissioner replaces Finding 104 with the following: Prior to 1999, Dr. Rogers used tranquilizers to subdue a bear in order to place a tracking collar on it<sup>167</sup> (Tr. 2232).

21. The Commissioner replaces Finding 105 with the following: Since at least 1999, Dr. Rogers has placed tracking collars on bears without the use of tranquilizers. According to

Dr. Rogers' 2002 annual report he tranquilized 4 bears near Atikokan, Ontario on February 19 and tranquilized Shadow on June 14 (Exh. 159 p. 17). Instead of tranquilizing bears, Dr. Rogers now establishes a relationship with a female 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>

22. The Commissioner adopts Findings 106 – 114.

23. The Commissioner replaces Finding 115 with the following: When conducting den visits, Dr. Rogers has brought students and other members of the public along and allows them to hold cubs and interact with bears.<sup>187</sup> When conducting research for DNR, Dr. Garshelis has allowed students to engage in virtually identical activities involving bears and their cubs during den visits.<sup>188</sup>

24. The Commissioner adopts Findings 116 – 121.

25. The Commissioner replaces Finding 122 with the following: Each summer since 2003, Dr. Rogers has operated a four-day "Bear Field Study Course" at WRI. The courses are taught by Dr. Rogers and Mansfield<sup>197</sup> (Tr. 1513, 1301).

26. The Commissioner adopts Findings 123 – 124.

27. The Commissioner replaces Finding 125 with the following: There have been approximately 650 participants in the bear field study course. Prior to 2012, Dr. Rogers allowed 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> Dr. Rogers and some but not all of the participants engaged in the following activities:<sup>211</sup> pet bears,<sup>205</sup> kiss bears,<sup>206</sup> sit 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> 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>

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

29. The Commissioner adopts Findings 127 – 168. (Note that footnote 221 for Finding 130 should reference transcript page 2275 not 275.)

30. The Commissioner replaces Finding 169 with the following: The publication expectation was not listed as one of the permit's conditions. Even though Minnesota Statutes 94A.418 states in part that when a permit is required the commissioner may, "(1) issue a permit with reasonable conditions," the publication expectation was only included in the cover letter sent with the permit.<sup>271</sup> DNR did not believe that the expectation of publication should be included within the permit as a permit condition. Rather, publication is an expected outcome of any scientific research project permitted by DNR (Tr. 84-85, 1331-1332). The conditions found within the permit govern the permittee's activities and interactions with the animals that are the subject of the research.

In the present case, DNR special permits issued to Dr. Rogers included the activities that Dr. Rogers could undertake with the study bears while in pursuit of his scientific research. The activities included collaring, administration of drugs, the handling of the bears by others, the

requirement that DNR be notified of any injury caused by bears during the course of the research, the number individuals that can interact with the study bears, etc. (Exh. 158). DNR's numerous statements to Dr. Rogers, both verbally and written, regarding its publication expectation were a direct result of DNR's concern that Dr. Rogers was not conducting scientific research under the special permit. Publication constitutes accepted evidence within the field of wildlife ecology that scientific research is actually being conducted. Publication is an expected outcome of any scientific research in the field of wildlife ecology (Tr. 84-85, 1053-1054, 1331-1332).

31. The Commissioner adopts Findings 170 – 177.

32. The Commissioner adopts Findings 173 (p. 40), 174 (p. 40), 178, 179, 175 (p. 41), 176 (p. 41), 177 (p. 41), 178 (p. 42), and 179 (p. 42). (Findings 173-179 were repeated and used out of order. The duplicate Findings are referenced with the page number from the ALJ report to provide clarity.)

33. The Commissioner adopts Findings 180 – 186.

34. The Commissioner adds Finding 187. The terminology used in Dr. Rogers' permit reports changed over the years. Dr. Rogers request to amend his permit in July 2000 stated, "We eagerly await permission to capture and to radio-collar Whiteheart, Shadow, and the male yearling" (Exh. 597). Until 2007 Dr. Rogers' reports noted that the activity under the permit included "Handlings (captures and/or putting radio-collars on bears without capture)" or "Handlings (placing radio-collars with or without capture)." Dr. Rogers' more recent reports used the phrase "handlings (placing radio-collars)." In 1999 the permit arrived after the cutoff date for using tranquilizers. Dr. Rogers stated, "So there was no way I could capture and tranquilize bears to get started" (Tr. 2232). This resulted in Dr. Rogers using other methods to accomplish the



same result. Even though the terminology changed over the years the results were the same – bears were handled, captured, and collared.

Based on the foregoing Findings of Fact, the Commissioner makes the following:

### **CONCLUSIONS OF LAW**

1. The Commissioner adopts Conclusions 1 – 5.
2. The Commissioner adopts Conclusion 6, but corrects footnote 308 by replacing Minnesota Statutes 97B.09 with 97B.095.
3. The Commissioner adopts Conclusions 7 – 11.
4. The Commissioner replaces Conclusion 12 with the following: Dr. Rogers' activities of pursuing bears to affix a collar to them constitutes taking under Minnesota Statutes 97A.401, sub. 3a.
5. The Commissioner adopts Conclusions 13 – 24.

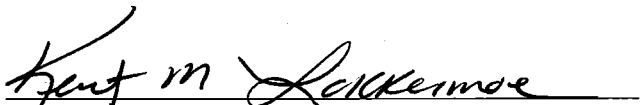
Based on the foregoing Conclusion of Law, the Commissioner makes the following order.

### **ORDER**

The June 28, 2013 decision denying Dr. Rogers' application for a permit related to his study of bears in northeastern Minnesota is AFFIRMED.

Dated: 9-23-2014

TOM LANDWEHR  
Commissioner

  
KENT M. LOKKESMOE  
Administrator  
Minnesota Department of Natural Resources  
500 Lafayette Road, Box 37  
St. Paul, MN 55155-4040

## MEMORANDUM

This matter comes before the Commissioner following Administrative Law Judge Tammy L. Pust's recommendation to the Commissioner of the Minnesota Department of Natural Resources. ALJ Pust presented a very thorough analysis to the Commissioner.<sup>1</sup> The two issues in this case are:

- (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.

Administrative Law Judge Pust recommended in the affirmative to both questions and after review of the extensive record, I concur.

Many but not all of Judge Pust's recommended Findings of Fact and Conclusions of Law are adopted. Each party filed timely exceptions. The Department submitted specific reasons for its exceptions and made recommendations regarding amending the Findings and Conclusions. Dr. Rogers' exceptions were more general in nature. Rather than provide an explanation for his objections to specific Findings or Conclusions. Dr. Rogers referred to the reasons as set forth in the memoranda filed to support the request for summary judgment, the directed verdict, and the post hearing memorandum of law. I thoroughly reviewed the record to determine the basis for specific exceptions to the Findings and Conclusions of Law.

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<sup>1</sup> The term Commissioner refers to the Commissioner's designee in this matter.

One uncontroverted issue is that bears are wild animals. Beyond that most issues had numerous points of view that are enumerated in over 2300 pages of transcript, approximately 800 exhibits, and 54 motions, orders and other legal filings.

Some of the Findings and Conclusions were amended to reflect a name change or to clarify a citation or reference. The reasons for more substantive changes are explained below:

Finding 63 – Dr. Rogers objected to this Finding and the actual language from the district court was added to assure the record reflected the decision accurately (Exh. 1020).

Finding 95 – Dr. Rogers objected to this Finding and the Finding was amended to reflect the sources of the statements.

Finding 98 – Dr. Rogers objected to this Finding but the record supports the Finding. The Finding was amended to reflect that Dr. Rogers has stopped the practice of feeding bears from his mouth.

Finding 102 – Dr. Rogers objected to this Finding and the Finding was amended to reflect that it was Dr. Rogers and others that were talking to the bears.

Finding 125 – Dr. Rogers objected to this Finding and the Finding was amended to reflect that not all of the 650 participants conducted each of the activities listed.

Finding 169 – The Department's exception was adopted; however, this did not change the conclusion of law regarding the applicability of peer reviewed publications as a criteria for permit denial.

Finding 172 and 179 – Dr. Rogers objected to these Findings; however, the testimony in the record supports the Findings as written.

Conclusion 12 – Conclusion 12 was replaced with a determination that Dr. Rogers' activities do constitute taking. Dr. Rogers argues that the bears are not killed, hunted, or removed

from their natural habitat and, therefore, his actions do not constitute a taking. The Department argues that the “pursuit” of a bear for research purposes is taking. The statutory definition of taking is: “taking means pursuing, shooting, killing, capturing, trapping, snaring, angling, spearing, or netting wild animals, or placing, setting, drawing, or using a net, trap, or other device to take wild animals. Taking includes attempting to take wild animals, and assisting another person in taking wild animals” (Minnesota Statutes 97A.015, sub. 47). This definition is often used in connection with the pursuit to kill and uses the word “take.” The definition of take (from The New College Edition of The American Heritage Dictionary of the English Language, 1979) is “to get into ones possession by force, skill or avarice.” Dr. Rogers uses the methods and skill he has developed over the last decade to habituate the bears so they could be collared. An analogy would be catch and release fishing. The fish may be on the line or in a dip net for a very short time before being set free. Even though the fish is returned to the wild and not killed for supper, pursuing the fish with no intent to keep it or kill it is within the statutory definition of taking. Similarly, pursuit of a bear to place a collar on it and leave the bear in the wild constitutes taking.

### **POSSESSION AND TAKING**

Administrative Law Judge Pust concluded and this order finds that Dr. Rogers’ activities constitute possession under the law. Possession occurs when a collar is placed on a bear even though that activity takes place in a short amount of time and the bears remain in the wild. Additionally, the collars provide continued access to the bears that the general public does not have and the bears are unable to avoid the continued human intervention.

When the taking and possession, no matter how temporary, results with a bear having a collar on it so it can be tracked and found again a permit is required. By contrast, the pursuit of a

wild animal by a photographer has the photographer leaving with a picture and the wild animal is left untouched. Although Dr. Rogers' activity constitutes both taking and possession, the result would be the same even if Dr. Rogers' activity did not constitute a taking. Dr. Rogers' possession alone would be sufficient to require a permit.

### **PUBLIC SAFETY / HABITUATED BEARS**

Administrative Law Judge Pust concluded and this Order finds that the Department has sufficient cause to refuse to renew Dr. Rogers' permit. Public safety is a paramount concern to the Department and the record reflects reasons for increased concern. Dr. Rogers' position is that habituated and food conditioned bears are not dangerous; however, expert witnesses at the hearing testified that activities which lead to the habituation of bears should be discouraged for safety reasons. The vast majority of wildlife professionals believe that human feeding of bears increase the safety risk to bears and humans and that bear/human interactions should be minimized. Feeding bears by hand is dangerous. Feeding bears is illegal in numerous states and National Parks that have bears also have very stringent guidelines that prevent or prohibit feeding bears. Feeding of bears is legal in Minnesota; however, to encourage that practice under a permit must be evaluated with public safety in mind. The evidence shows that the number of bears that have been habituated has increased substantially and consequently, the risk to the public has increased. When bears have no fear of people and approach people for food the public safety risk is real and must be managed (Tr. 484). The Department has a responsibility to protect the species from harm and exploitation and to protect the public. The Department should not wait until harm has occurred. Dr. Rogers' permit should not be renewed.

## STATUTORY INTERPRETATION

Dr. Rogers cites Minn. Stat. § 645.17 (2012) and argues that requiring a permit for the combination of two legal activities would yield an absurd result. Dr. Rogers appears to contend that it is the Department's position that a permit is required because he is both feeding and touching bears even though no permit is required for these separate activities of either feeding or touching bears. First, Dr. Rogers' argument ignores the fact that the permit is required because there is possession of the bears. Second, Minn. Stat. § 645.17 (2012) appears to support the Department's position rather than Dr. Rogers' position.

Minn. Stat. § 645.17 (2012) provides in relevant part:

- (1) The Legislature does not intend a result that is absurd, impossible of execution, or unreasonable.
- (2) The Legislature intends the entire statute to be effective and certain.
- (5) The Legislature intends to favor the public interest as against any private interest.

The Department has a statutory duty to manage the wild animals of the state through a permit program. It would be absurd and unreasonable to believe that collaring of wild animals so that the wild animals can continue to be found in the wild is an unregulated activity. For the Department to be effective and certain in fulfilling its statutory duties, it must consider the entire statute. Lastly, the public interest for safety and management of the species outweighs any private interest.

## **CONCLUSION**

Feeding bears, talking to bears, or touching them does not require a permit. Throwing a rock into a lake does not require a permit, but if enough rocks are thrown and a hazard is created that would constitute an activity that requires a permit. When Dr. Rogers' activities moved beyond mere feeding and touching bears and became possession of a bear to allow a radio-collar to be attached, a permit is required. This is consistent with the long standing position of the Department that radio-collaring of unrestrained bears requires a permit. The Department had sufficient cause to refuse to not renew the permit.

Dr. Rogers is not precluded from feeding bears or interacting with them. Education about bears can continue. What he cannot do is radio-collar bears without a permit from the Department.

**KML**