

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

In the Matter of the Applications to Renew
Special Licenses Issued Pursuant to Article
11 of the Environmental Conservation Law,

ORDER

-by-

**DEC CASE No.
OHMS 2013-68434**

JEFFREY ASH,

Applicant.

This administrative proceeding addresses the challenge of Jeffrey Ash to a determination by staff of the Department of Environmental Conservation ("DEC" or "Department") to deny his applications for renewal of two special licenses: "Endangered/Threatened Species: Propagation/Education/Exhibition License" Number 37 (issued pursuant to section 11-0535 of the Environmental Conservation Law ["ECL"] and 6 NYCRR part 175); and "License to Collect, Possess or Sell" Number 57 (issued pursuant to ECL 11-0515 and 6 NYCRR part 175) (see Hearing Exhibit 1, at 1). The licenses allowed him to possess various wild animals for exhibition as part of his game farm located at 468 Lick Springs Road, Greenwich, New York ("game farm").

Patricia Riexinger, Director of DEC's Division of Fish, Wildlife & Marine Resources, by letter dated June 29, 2011 ("Riexinger letter"), denied Mr. Ash's applications for renewal of the two special licenses. The basis for the denial was (i) Mr. Ash's noncompliance with conditions of the licenses; (ii) Mr. Ash's recent criminal conviction related to the game farm's operations in 2010; and (iii) the game farm's history of noncompliance with previously issued permit conditions, orders of the Commissioner, and "prior violations of the ECL or other statutes and regulations related to the permitting of the facility" (id.).

Mr. Ash requested a hearing on the denial (see Hearing Exhibit 2). Department staff rejected the request on the grounds that the request did not provide a basis to challenge

DEC staff's denial and that no adjudicatory hearing is required on denials of special licenses (see Hearing Exhibit 4).

Mr. Ash subsequently disposed of all the species subject to the DEC special licenses, with the exception of six American black bears (see Hearing Report, at 6 [Finding of Fact no 14]).

By petition dated August 26, 2011, Mr. Ash commenced a CPLR article 78 proceeding against DEC in New York State Supreme Court, Washington County, seeking to set aside the Department's determination insofar as it concerned his possession of the black bears. As confirmed in an order of settlement and discontinuance of State Supreme Court Justice Christine M. Clark dated June 4, 2013 ("Order of Settlement") (see Hearing Exhibit 5), Mr. Ash agreed to discontinue his court action and withdraw his claims "on condition that DEC provide [him] with an administrative hearing, pursuant to [part 175 of title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York ("6 NYCRR")] on the denial of his applications to renew his special licenses to possess and exhibit wild animals" (Hearing Exhibit 5, at 3). The Order of Settlement further provided that Mr. Ash could continue to possess the six American black bears currently in his possession at his facility, provided that he does not exhibit the bears, among other restrictions, and "until such time that a final DEC Commissioner's Order has been issued following [an] administrative hearing" (id., at 4).

On June 26, 2013 in accordance with the Order of Settlement and pursuant to 6 NYCRR 622.9, Department staff submitted to the DEC Office of Hearings and Mediation Services a statement of readiness for an adjudicatory hearing (see Hearing Exhibit 6). Chief Administrative Law Judge James T. McClymonds, assigned the matter to Administrative Law Judge ("ALJ") Edward Buhrmaster, who has prepared the attached hearing report. By agreement of the parties, the hearing proceeded consistent with the Department's enforcement hearing procedures at 6 NYCRR part 622 (see Hearing Exhibit 8, at 2; see also 6 NYCRR 622.1[a][6] & [8]). The parties further agreed that the ALJ would submit his hearing report to the Commissioner for issuance of a final decision as set forth in the Order of Settlement (see Hearing Exhibit 8, at 2; Order of Settlement [directing that the Commissioner issue a final order following an administrative hearing]; see also Hearing Transcript, at 17, 25, 32). In addition, by letter dated February 25, 2014 (a copy of which is enclosed), Director Patricia Riexinger delegated her decision-making authority under 6 NYCRR part 175 to me.

ALJ Buhrmaster prepared the attached hearing report, which I hereby adopt as my decision in this matter, subject to my comments below.

Based on the record before me, Department staff met its burden of proof (see 6 NYCRR 622.11[b][1]) on the matters affirmatively asserted in the Riexinger letter. The record documents numerous violations of the Environmental Conservation Law and of the issued licenses during Mr. Ash's operation of the game farm, which violations posed clear risks to the public. In particular, it was established that Mr. Ash was not capable of adequately and appropriately ensuring that wildlife held pursuant to the special licenses (a) could be held in accordance with license provisions, and (b) could not escape or pose a threat to the public (see, e.g., Hearing Report, at 5 [Findings of Fact 6 to 8 (conviction of reckless endangerment); 8-10 [Findings of Fact 23 to 35 (violations of the ECL and the special licenses)]; and 13 [discussing criminal conviction and other incidents affecting public safety]); see also Hearing Transcript, at 173-174 [risks to the public of maintaining the bears at the game farm]). The ALJ detailed a number of serious incidents that occurred including, but not limited to, an individual being bitten by a bear cub, the escape of a wolf and a tiger from the game farm, a four year old boy being cut by a tiger, ownership of animals not authorized by the licenses, and a seven year old child being bitten by a lemur (see Hearing Report, at 8-10).

The ALJ concluded that, upon review of Mr. Ash's compliance history, Mr. Ash is not fit to hold the DEC licenses and cannot be trusted to meet his obligations under them (see Hearing Report, at 12). The ALJ noted that denying renewal of Mr. Ash's licenses is consistent with the Department's Record of Compliance Enforcement Policy (DEE-16, dated August 8, 1991 and revised on March 5, 1993) (see Hearing Report, at 12-13).

The record demonstrates a multitude of violations relating to the operation of the game farm and the exhibition of animals, which has resulted in not only potential risks to the public but actual individual injury. I concur with the ALJ's determination that Mr. Ash is not fit to hold the DEC special licenses, and I hereby deny Mr. Ash's applications to renew those licenses.

With respect to the six American black bears that remain in the possession of Mr. Ash, Department staff stated in its closing brief that Mr. Ash should be ordered to divest himself

of the bears in accordance with the directives in the Riexinger letter. The Riexinger letter provided Mr. Ash with sixty (60) days to transfer the bears to "individuals that are authorized by law to possess them" (Hearing Exhibit 1, at 4; see also Hearing Transcript, at 25 [staff statement that Mr. Ash be allowed sixty [60] days to find a home for the bears]). Among the requirements with which Mr. Ash must comply, the Riexinger letter specified requirements governing transfers of the black bears within New York State and outside of the State (see Hearing Exhibit 1, at 4). It also directed that, if Mr. Ash failed to timely transfer the animals, the animals should stay at the game farm "until such time as they are transferred by the Department, euthanized, or removed by the Department from the facility" (Hearing Exhibit 1, at 4; see also Hearing Transcript, at 152).

The ALJ concurred with recommendations of Department staff, and found them consistent with law and regulation (see Hearing Report, at 20). Pursuant to 6 NYCRR 175.5(h), Mr. Ash must comply with written directives provided by DEC staff for the final disposition of the American black bears formerly possessed under license, and all liabilities and expenses relating to the final disposition of the bears are his responsibility (see Hearing Report, at 20; Hearing Transcript, at 26). Furthermore, the law makes no allowance for the black bears to be kept for personal purposes, for instance as pets (see ECL 11-0512).

DEC's special licenses unit has voluntarily assisted Mr. Ash to explore placement options for the bears within New York State, but without success (see Hearing Report, at 20; see also Hearing Transcript, at 139-142). DEC staff was under no obligation to provide this assistance, and I appreciate staff's efforts in this regard. The record, however, reflects the difficulties in finding suitable locations for adult bears which may not be wanted by zoos or other facilities (see Hearing Transcript, at 27-28, 142, 172; see also Hearing Exhibit 25, at 94).

Based on this record, it is unclear the extent to which Mr. Ash has investigated opportunities for out-of-state transfers of the bears (including transfers to other game farms, zoos, wildlife refuges, or facilities in other countries such as Canada). The investigation of such possibilities may require some additional time. Accordingly, I am modifying DEC staff's request and the ALJ's recommendation and am providing Mr. Ash an additional month (30 days) beyond the sixty (60) days requested by staff and recommended by the ALJ. As a result, Mr. Ash shall

have ninety (90) days from the service of this order upon him to transfer the bears to "individuals that are authorized by law to possess them" (Hearing Exhibit 1, at 4).

In the event that Mr. Ash fails to comply with this order and the directives set forth in the Riexinger letter (see Hearing Exhibit 1, at 4-5), the period allowed to Mr. Ash for the transfer of the black bears shall immediately terminate. Should Mr. Ash fail to timely transfer the black bears, the bears shall remain on his property until such time as they are addressed in accordance with the Riexinger letter (see id. at 4).

This order represents my final disposition in accordance with the directive in the Order of Settlement (see Hearing Exhibit 5, at 4).

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

I. The applications of Jeffrey Ash for renewal of his special licenses Number 37 and Number 57 are denied.

II. Jeffrey Ash shall be afforded ninety (90) days from the service of this order upon him ("90 day period") to transfer the American black bears that are on his property to individuals or entities that are authorized by law to possess them. The transfer ordered herein shall be subject to the conditions set forth in the June 29, 2011 letter of Patricia Riexinger, Director of DEC's Division of Fish, Wildlife & Marine Resources ("Riexinger letter"), including but not limited to, the following:

- A. The Department must pre-approve any transfers that take place within New York State before the transfer occurs;
- B. The Department's determination to approve or disapprove any transfer within New York State shall be in the sole discretion of the Department, and the Department shall not be obligated to approve a transfer based upon the fact that the transferee is currently licensed to possess or entitled to apply to the Department for permission to possess American black bears;

- C. Jeffrey Ash must notify the Department, in writing, of the proposed transferee before the proposed transferee applies to the Department for permission to possess black bears in New York State;
- D. For any transfer of the bears to persons or entities outside of New York State, Mr. Ash must, prior to such transfer, inform, in writing, any persons or entities that will be taking possession or ownership of the bears that it is illegal to possess, sell or exhibit in New York State the specific species to be transferred without first obtaining a license from the Department authorizing the right to possess, sell or exhibit the bears in New York State. The written notice must recite the name, address and telephone number of the transferee. Mr. Ash must also send a copy of this written notice to the Department by regular first class mail on the same date that it is sent or provided to any persons or entities that will be taking possession or ownership of the bears;
- E. Until such time that the black bears are transferred, or if they are not transferred within the 90 day period, until such time as they are transferred by the Department, euthanized, or removed by the Department from the game farm, the bears shall remain at the game farm. While at the game farm, Mr. Ash shall:
1. provide humane care for the bears at all times and shall be responsible for all costs associated with the care of the bears;
 2. not exhibit or breed any bears on or off of the game farm and shall not engage in any active breeding program for the bears at the game farm;
 3. maintain the cages for the bears so that the cages are secured at all times with a keyed or combination lock;
 4. keep members of the public at a distance such that they cannot have any contact with the bears or their primary enclosures;
 5. not allow the public to have any contact with the bears at any time prior to the disposition of the bears in accordance with this order and the Riexinger letter; and

F. Mr. Ash shall indemnify and hold harmless the Department, New York State, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description that arise as a result of any violation of this order or that relate to the bears and arise during the time that any of the bears have not yet been transferred to an authorized person or entity.

III. In the event that Jeffrey Ash violates this order or any of the directives in the Riexinger letter, the period of ninety (90) days from the service of this order upon him allowed to Mr. Ash for the transfer of the black bears shall immediately terminate.

IV. All communications from Jeffrey Ash to the Department concerning this order shall be made to Mark D. Sanza, Esq., Assistant Counsel, at the following address:

Mark D. Sanza, Esq.
Assistant Counsel
Office of General Counsel
New York State Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500.

V. The provisions, terms and conditions of this order shall bind Jeffrey Ash, and his agents, successors, and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: March 5, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550

In the Matter

- of -

the Applications of **JEFFREY ASH** to
Renew Special Licenses issued pursuant
to Article 11 of the Environmental
Conservation Law

HEARING REPORT

- **by** -

/s/

Edward Buhrmaster
Administrative Law Judge

December 13, 2013

PROCEEDINGS

This report addresses the challenge by Jeffrey Ash to a determination by Staff of the Department of Environmental Conservation ("DEC") to deny his applications for renewal of special licenses that allowed him to possess various wild animals for exhibition as part of his Ashville Game Farm, located at 468 Lick Springs Road, Greenwich, New York.

DEC Staff's determination was set out in a notice of denial of the applications for license renewal, dated June 29, 2011, signed by Patricia Riexinger, director of DEC's Division of Fish, Wildlife & Marine Resources. (The letter was received as Exhibit No. 1 at the hearing in this matter. A complete list of hearing exhibits is attached to this report.)

On behalf of Mr. Ash, his attorney, Robert M. Winn of Granville, New York, submitted two letters to DEC: the first, dated July 5, 2011, requesting a hearing on DEC Staff's determination; and the second, dated July 6, 2011, responding to DEC Staff's request for information about the disposition of certain animals unaccounted for during its inspection of the Ashville Game Farm on June 27, 2011. (These letters were received as Exhibits No. 2 and 3, respectively.)

By letter of July 14, 2011 (Exhibit No. 4), DEC Assistant Counsel Mark Sanza denied Mr. Ash's hearing request on the ground that DEC Staff's determination to deny the license renewals was not subject to a hearing before the agency, and was, therefore, DEC's final determination.

Subsequent to DEC Staff's determination, Mr. Ash disposed of all the regulated animals previously licensed by DEC, with the exception of six American black bears. Then, by petition dated August 26, 2011, he commenced a court proceeding pursuant to Article 78 of the Civil Practice Law and Rules against DEC seeking to set aside the agency's determination in so far as it concerned his possession of those bears. Among the claims in his petition, Mr. Ash argued that DEC had deprived him of due process of law by denying his license renewal applications without first affording him a hearing.

As confirmed in an Order of State Supreme Court Justice Christine M. Clark, dated June 4, 2013 (Exhibit No. 5), Mr. Ash agreed to discontinue his court action and withdraw his claims on condition that DEC provide him an administrative hearing pursuant to Part 175 of Title 6 of the Official Compilation of

Codes, Rules and Regulations of the State New York ("6 NYCRR Part 175") on the denial of his applications to renew his special licenses to possess and exhibit wild animals. Part 175 provides for hearings to contest a notice of intent to revoke a special license, and the non-renewal of a license has the effect of revoking it.

On June 26, 2013, Mr. Sanza submitted a Statement of Readiness (Exhibit No. 6) to DEC's Office of Hearings and Mediation Services, consistent with 6 NYCRR 622.9. Upon its receipt, Chief Administrative Law Judge James T. McClymonds assigned me to conduct the hearing in this matter, as confirmed in his letter of July 1, 2013 (Exhibit No. 7).

On July 3, 2013, I initiated a conference call with the parties' counsel: Mr. Winn for Mr. Ash, and Mr. Sanza for DEC Staff. During that call, summarized in my letter of July 5, 2013 (Exhibit No. 8), the parties agreed that the administrative hearing would be held on August 21, 2013, at DEC's headquarters, 625 Broadway, Albany.

In its letter of June 29, 2011, DEC Staff offered three bases for not renewing Mr. Ash's special licenses: (1) noncompliance with conditions of his calendar year 2010 license; (2) a criminal conviction related to Ashville Game Farm's operations in 2010; and (3) Ashville Game Farm's history of noncompliance with previously issued license conditions, orders of the Commissioner, and prior violations of the Environmental Conservation Law ("ECL") or other statutes and regulations related to the facility's permitting.

During the July 3, 2013, conference call, DEC Staff offered an additional ground for not renewing Mr. Ash's special licenses: the termination of Mr. Ash's federal Animal Welfare Act license pursuant to a September 14, 2012, Decision and Order of United States Department of Agriculture ("USDA") Judicial Officer William G. Jensen. At my request, DEC Staff's position was confirmed in writing by an e-mail of Mr. Sanza, dated July 8, 2013 (Exhibit No. 9).

The hearing occurred on August 21, 2013, as scheduled. Mr. Ash appeared with his attorney, Mr. Winn, but did not testify and offered no witnesses on his behalf. Mr. Sanza appeared on behalf of DEC Staff. One witness testified for DEC Staff: Joseph Therrien, leader of DEC's special licenses unit. Twenty-five exhibits were received. Exhibits No. 1 - 9, discussed above, were introduced at my behest, to explain how this matter

came forward. Exhibits No. 10 - 24 were introduced by DEC Staff, as part of its case. Exhibit No. 25 was introduced by Mr. Ash, as part of Mr. Therrien's cross-examination.

The hearing record includes not only the 25 marked exhibits, but a 197-page transcript that was received on September 18, 2013, and provided to the parties' counsel. DEC Staff submitted a list of proposed transcript corrections on September 25, 2013. Mr. Ash did not object to them; therefore, they were adopted. I proposed additional transcript corrections in a list I provided to the parties' counsel on November 5, 2013. These corrections have also been adopted, since the parties did not object to them.

Written closing briefs were received on October 22, 2013, consistent with the deadline agreed to by the parties. With the receipt of briefs, the hearing record closed.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, Mr. Ash's special licenses should not be renewed, due to a poor compliance record that includes failure to prevent the escape of animals from his facility, as well as repeated inability to prevent direct contact between those animals and the public, all in contravention of previous license conditions. Furthermore, DEC Staff says that renewal of these licenses is precluded by USDA's termination of Mr. Ash's federal Animal Welfare Act license, because, without that license, DEC licenses cannot be obtained.

According to DEC Staff, the failure to renew Mr. Ash's DEC licenses should be treated as a revocation of those licenses pursuant to 6 NYCRR 175.5(e)(3), requiring that Mr. Ash divest himself of the six American black bears known to remain at his facility. Staff maintains that should Mr. Ash fail to timely transfer or dispose of the bears, DEC should be entitled to transfer them itself, euthanize them, or take whatever other action Staff deems appropriate. According to DEC Staff, there is no special DEC license available to Mr. Ash that would allow him to continue possession of his bears without an associated propagation, scientific or exhibition purpose.

In summary, DEC Staff says that Director Riexinger's determinations, as reflected in her letter of June 29, 2011, should be affirmed and upheld in all respects.

Position of Mr. Ash

According to Mr. Ash, a decision to permanently revoke his DEC licenses at this juncture would be arbitrary and capricious, since he is not guilty of truly serious misconduct, and is alleged to have committed only minor transgressions of the law. Furthermore, Mr. Ash says there is no state law or regulation which conditions issuance of a state exhibitor's license upon receipt of a USDA exhibitor's license; therefore, he argues, DEC is not barred from renewing his licenses to possess and exhibit the American black bears, although the exhibiting portion of the license would be a nullity until a new USDA exhibitor's license is secured.

According to Mr. Ash, his DEC licenses should be reinstated by either dismissing this proceeding to revoke them or, in the alternative, directing a suspension period of "time served" since the issuance of Director Riexinger's 2011 letter. Also, Mr. Ash says any directive that his bears be euthanized should be rescinded pending an inspection of his facility by DEC Staff.

FINDINGS OF FACT

1. Jeffrey W. Ash is the operator of the Ashville Game Farm, located at 468 Lick Springs Road in Greenwich, Washington County.

2. Up until its closure in August 2012, the Ashville Game Farm exhibited various animals pursuant to special licenses issued by DEC pursuant to ECL Article 11, the renewal of which is the subject of this proceeding. (Transcript, page 33.)

3. For calendar year 2010, DEC Special License No. 37 (Exhibit No. 17) authorized Mr. Ash to import, transport, sell and possess 19 American alligators, five ringtail lemurs and one arctic wolf, all species deemed endangered or threatened, for educational or exhibition purposes only.

4. For calendar year 2010, DEC Special License No. 57 (Exhibit No. 18) authorized Mr. Ash to possess, transport, sell and exhibit two female and two male American black bears and one

male and one female bobcat, which were legally acquired from captive bred sources.

5. According to their conditions, each of these licenses was to be considered invalid without a corresponding USDA Animal Welfare Act Class C Exhibitor's License (Exhibit No. 17, Condition No. 2F; Exhibit No. 18, Condition No. 1G). Mr. Ash possessed this federal license when his special DEC licenses were renewed for 2010.

Conviction for Reckless Endangerment

6. On December 16, 2010, a 29-count criminal indictment (Exhibit No. 20) was returned against Mr. Ash by a Washington County grand jury for various offenses related to the operation of the Ashville Game Farm during 2010.

7. On April 29, 2011, Mr. Ash pled guilty to, and was thereby convicted of, "Reckless endangerment in the second degree," a Class A misdemeanor, in violation of New York State Penal Law Section 120.20. (Exhibit No. 21-A.) As a result of this conviction, Mr. Ash was sentenced to a three-year period of probation, to expire on April 29, 2014, unless terminated by the criminal court prior to that date. (Exhibit No. 21.)

8. The basis of the conviction was count 29 of the December 16, 2010, indictment. According to that count, Mr. Ash, "on or about August 10, 2010, in the Town of Greenwich, Washington County, New York, did recklessly engage in conduct which created the risk of serious physical injury to another person by running Ashville Game Farm and by not properly caging animals including lemurs, monkeys, bears, turtles, alligators, pigs, goats, deer and other animals, and by encouraging visitors to the game farm including children to feed the animals, and did allow visitors to the Game Farm to have contact with the animals, and did not have the animals vaccinated for rabies and did allow children to have contact with turtles know [sic] to carry salmonella, and did have reptiles such as snakes and lizards in unsecured cages, and did have a tarantula in a cage with an unsecured lid with a figurine of the cartoon character Sponge Bob in the cage with the poisonous spider making it likely a child would reach into the cage, and did have alligators in a cage with fencing which visitors could reach over and which visitors could reach through and which was not properly secured. Jeff Ash did fail to protect the public from attack, and disease."

Denial of Applications to Renew DEC Licenses

9. By letter of June 29, 2011, Patricia Riexinger, Director of DEC's Division of Fish, Wildlife & Marine Resources, denied Mr. Ash's applications to renew his special licenses for the year 2011, in part because of his criminal conviction for reckless endangerment. (Exhibit No. 1.)

10. Director Riexinger's letter informed Mr. Ash that his calendar year 2010 special licenses had expired and were no longer in force and effect. In light of this, the letter gave Mr. Ash 60 days to transfer all animals and species regulated by DEC pursuant to his special licenses to individuals authorized by law to possess them. (Exhibit No. 1.)

11. As noted in Director Riexinger's letter, Mr. Ash was also given 10 days to account for specified animals that had been in his possession but were not present during a June 27, 2011, inspection of Ashville Game Farm that was conducted in conjunction with his license renewal applications. (Exhibit No. 1.)

12. Mr. Ash, by letter of his attorney dated July 6, 2011, responded to Director Riexinger's inquiry about the missing animals. He reported that some had died, and that others had been transferred to new owners. (Exhibit No. 3.)

13. Also, by letter of August 11, 2011, Mr. Ash's attorney conveyed to DEC Staff counsel Mr. Ash's "desire and intention to terminate his work as an animal exhibitor while he is on probation and to re-consider his options in this field after his probationary period has terminated." (Exhibit No. 22.)

14. Mr. Ash subsequently disposed of all the regulated species previously under DEC licensure, with the exception of six American black bears. (Exhibit No. 5, page 2.)

15. At the time of the hearing, these bears remained onsite, but had not been exhibited since September 2011. (Transcript, pages 33 and 34.)

16. DEC's Special Licenses Unit has provided Mr. Ash a list of individuals licensed in New York State to accept the bears. Also, during 2011 and 2012, the unit contacted zoos within the state and other organizations about possible placement options. This was done to assist Mr. Ash, who had

requested DEC's help. DEC's efforts were fruitless, and did not continue into 2013. (Transcript, pages 140 to 143.)

17. Bears held in captivity for a long period may become habituated to and familiar with humans to the point of complete dependency. Placing bears like this is difficult, if not impossible. Relatively few locations are willing to accept "tame" bears, and many that will are limited in the number of bears they can accept. (Exhibit No. 25, DEC's 2006 New York State Black Bear Response Manual, page 94.)

Federal License Termination Proceedings

18. On August 31, 2011, USDA moved to terminate Mr. Ash's federal Animal Welfare Act license on the basis of his conviction for reckless endangerment, saying that allowing him to continue to hold that license would be "contrary to the Act's purpose of ensuring humane treatment of animals" because Mr. Ash had "endangered the public and the animals in his custody." (Exhibit No. 23.)

19. On September 20, 2011, Mr. Ash filed a response to USDA's order to show cause, which initiated the action against his federal license. He admitted his conviction of reckless endangerment, but said that New York State Penal Law Section 120.20, under which he was convicted, does not contain any element pertaining to the welfare and treatment of animals, and denied that his conviction resulted in any finding that he abused, mistreated, or neglected any animals or that he was not fit to exhibit animals. (Exhibit No. 24.)

20. On April 12, 2012, the assigned administrative law judge filed a Decision and Order granting summary judgment to USDA, concluding that the criminal conviction involved the possession and exhibition of animals, established that Mr. Ash's conduct was willful, and demonstrated that Mr. Ash was unfit to hold an Animal Welfare Act license. (Exhibit No. 24.)

21. On administrative appeal, the Decision and Order granting summary judgment was affirmed on September 14, 2012, by a USDA judicial officer, who terminated Mr. Ash's Animal Welfare Act license, effective 60 days from the order's service upon him. (Exhibit No. 24.)

22. Although judicial review of this decision and order was available, Mr. Ash did not appeal from it. (Exhibit No. 5, page 3.)

Violations of ECL and License Conditions

23. On April 8, 2004, DEC received a complaint from an individual who claimed that she had been bitten on the face by a bear cub possessed by a girlfriend of an employee of Ashville Game Farm, while the bear was being shown at an office in Queensbury. (Exhibit No. 10-A.)

24. In relation to this incident, Mr. Ash was subsequently ticketed by DEC for failure to comply with the conditions of his DEC license, which prohibit direct contact between the public and regulated animals. (Exhibit No. 10.)

25. In settlement of the ticket, Mr. Ash paid a \$100 penalty that was assessed in an order on consent executed in December 2004. (Exhibit No. 10.)

26. On May 3, 2004, a wolf escaped from the Ashville Game Farm; it was never recovered. (Exhibit No. 11; transcript, page 61.)

27. Mr. Ash was ticketed for this as a violation of his DEC license due to his failure to prevent the escape of the regulated animal. (Exhibit No. 11.)

28. For this violation of the ECL, Mr. Ash was assessed and paid a \$200 fine upon his conviction in the Greenwich Town Court on May 18, 2004. (Exhibit No. 11, certificate of conviction; transcript, page 60.)

29. On November 16, 2005, a four-year-old, 175-pound tiger escaped from the Ashville Game Farm. After a response that included DEC wildlife staff, the State Police and the Washington County Sheriff's Department, the tiger was captured and returned to the facility. (Exhibit No. 12, Significant Incident Report; transcript, pages 63 - 68.)

30. As a result of this incident, Mr. Ash was ticketed for two violations of his endangered species license: failure to prevent the escape of the animal, and failure to report the escape. (Exhibit No. 12, Simplified Informations; transcript, page 64.)

31. For the violation of failure to prevent the tiger's escape, Mr. Ash pled guilty and paid a \$125 fine upon his conviction in Greenwich Town Court on December 12, 2005.

(Exhibit No. 12, Certificate of Conviction; transcript, pages 64 and 65.) On that same date, the charge concerning failure to report the animal's escape was dismissed. (Exhibit No. 12, Certificate of Disposition; transcript, page 65.)

32. On July 18, 2006, a white tiger, while displayed by Mr. Ash at the Saratoga County Fair, struck a four-year-old boy in the forehead, causing a one-inch-long cut for which the boy was sent to the hospital as a precaution. (Exhibit No. 13, Significant Incident Report; transcript, page 72.)

33. The incident occurred when the tiger extended a paw through its cage, in front of which was a photo bench on which Mr. Ash had allowed the boy to be seated. The fencing on the cage was insufficient to prevent the tiger from reaching through the cage and scratching the boy. (Exhibit No. 16, Order on Consent, page 3.)

34. As a result of this incident, DEC ticketed Mr. Ash for violation of his endangered species license, as he failed to maintain the caging in such a manner as to prohibit contact between the tiger and humans. (Exhibit No. 13, Significant Incident Report; Exhibit No. 13-B, DEC tickets.)

35. The incident also triggered an inspection of the Ashville Game Farm on July 19, 2006, during which a DEC Environmental Conservation Officer discovered that Mr. Ash had one more tiger, one more leopard, and one more mountain lion than authorized under his endangered species license. (Exhibit No. 13-A.) Mr. Ash was ticketed for these violations as well. (Exhibit No. 13-B; transcript, pages 74 to 77.)

36. On November 19, 2007, Mr. Ash executed a Memorandum of Plea Bargain with the Saratoga County District Attorney's office in Ballston Spa Village Court in satisfaction of criminal charges filed against him stemming from the 2006 incident at the Saratoga County Fair. In exchange for his plea, he received a three-year probation sentence, a fine of \$1,000, and a directive to transfer all African lions, mountain lions, tigers and leopards held at the Ashville Game Farm to a licensed third party. (Exhibit No. 15, Memorandum of Plea Bargain.)

37. On March 6, 2008, DEC executed a Consent Order resolving the tickets issued as a result of the 2006 incident at the Saratoga County Fair and the follow-up inspection of the Ashville Game Farm. Mr. Ash waived his right to a hearing, consented to issuance of the Order on Consent, and agreed to be

bound by its terms, provisions and conditions. (Exhibit No. 16, Order on Consent; transcript, page 98.)

38. According to the Consent Order, Mr. Ash violated ECL Section 11-0305(2), 6 NYCRR 182.4, and a condition of his endangered species license "by failing to hold and/or house" the tiger in a manner that prevented direct contact with people attending the Saratoga County Fair. The Consent Order also said that Mr. Ash violated ECL Section 11-0535(2), 6 NYCRR 182.3 and conditions of his endangered species license by possessing more tigers, mountain lions and leopards than were allowed under that license during specified time periods in 2005 and 2006. The Consent Order acknowledged that Mr. Ash had informed DEC of his acquisition of the tigers, mountain lions and leopards that caused the total number of these species in his possession to exceed the number allowed by his license, but added that he had not obtained a license amendment prior to the acquisitions. (Exhibit No. 16, Order on Consent.)

39. Finally, the Consent Order said that Mr. Ash violated ECL Section 11-0515(2), ECL Section 11-0305(2) and conditions of his license to possess and sell wildlife by acquiring two American black bears on or about February 28, 2006, that were in addition to the two authorized under that license. Again, the Consent Order said that while Mr. Ash had informed DEC of his acquisition of the additional bears, he had not obtained a license amendment prior to the acquisition. (Exhibit No. 16, Order on Consent.)

40. Mr. Ash was assessed a \$500 civil penalty under the Consent Order and directed to meet a compliance schedule for transferring all African lions, mountain lions, tigers and leopards from his facility to individuals authorized by law to possess them. However, among his other animals, he was authorized to retain possession of one female and one male black bear, for exhibition purposes only. (Exhibit No. 16, Order on Consent. The compliance schedule is in Article II of the Consent Order; Appendix B of the consent order addresses the black bears.)

41. On or about July 31, 2010, a seven-year-old child was bitten on the thumb by a lemur being exhibited at the Ashville Game Farm. Subsequently, DEC seized three lemurs from the facility, and they were euthanized for rabies testing. (Exhibit No. 19, Significant Incident Report; Exhibit No. 19A, Letter of New York State Department of Health; transcript, pages 104 and 105.)

42. The lemur incident was addressed in the December 16, 2010, indictment of Mr. Ash, but as part of the plea agreement on Count 29, the counts related to this incident (Numbers 6 to 9) were dismissed. (Exhibit No. 20, Indictment; transcript, pages 112 to 115.)

43. Upon issuance of the indictment, DEC's Special Licenses Unit suspended its review of Mr. Ash's timely applications to renew his DEC licenses for the year 2011, pending the outcome of the legal proceedings. (Transcript, page 130.) After Mr. Ash's plea, which resolved the proceedings, DEC's Special Licenses Unit completed its review of the renewal applications, and recommended that they be denied. (Transcript, page 134.)

DISCUSSION

This hearing was held pursuant to a State Supreme Court order so that Mr. Ash could contest the denial of his applications to renew two DEC licenses to possess and exhibit wild animals.

Of these two licenses, the only one of direct concern is Special License No. 57, to the extent it governs the continued possession and potential future exhibition of the six American black bears still held at Mr. Ash's property on Lick Springs Road in Greenwich. Special License No. 57 was issued pursuant to ECL Section 11-0515(2), which addresses, among other things, the possession and exhibition of "protected wildlife," including wild game such as bears. [See definitions of "protected wildlife" at ECL Section 11-0103(6)(c), and "wild game" at ECL Section 11-0103(3).] The other license, Special License No. 37, addresses Mr. Ash's possession and exhibition of various species deemed endangered or threatened, all of which have been removed from his property, site of the former Ashville Game Farm.

As a result of his 2011 conviction of reckless endangerment in the second degree, Mr. Ash was sentenced to three years of probation. Also, the conviction itself was one of three grounds referenced explicitly in Director Riexinger's letter denying his applications to renew the DEC licenses.

Shortly after the applications were denied, Mr. Ash's attorney, Mr. Winn, wrote DEC a letter conveying his client's "desire and intention to terminate his work as an animal

exhibitor" during his probationary period, which ends in 2014, and to re-consider his options after that. However, at the hearing in August 2013, Mr. Winn proposed that Mr. Ash be granted a state license to possess and exhibit the bears he continues to hold, with the understanding that the bears would not be exhibited until his federal Animal Welfare Act license, now terminated, is reinstated. (Transcript, pages 28 and 29.) If the federal license is not reinstated, Mr. Winn says the state license would, as a practical matter, continue the existing arrangement now maintained by court order, under which Mr. Ash continues to possess the bears, provided he does not exhibit them at his facility or elsewhere. (Transcript, page 29.)

Evaluation of Licensee Fitness

Director Riexinger denied renewal of Mr. Ash's special licenses because of his criminal conviction for reckless endangerment, and because of a history of violations of the ECL and the conditions of previous DEC licenses that had been issued to him since 2003. More particularly, she said that it was well established and documented that Mr. Ash was not capable of adequately and appropriately ensuring that wildlife held pursuant to DEC's special licenses could be held in accordance with license provisions, and could not escape or pose a threat to the public. (Exhibit No. 1, page 4.)

In essence, Director Riexinger found that Mr. Ash was unfit to hold the DEC licenses, and could not be trusted to meet his obligations under them. Upon review of Mr. Ash's compliance history, as documented in my findings of fact, I agree with her assessment.

Record of Compliance Policy

Denying renewal of Mr. Ash's licenses is consistent with the Commissioner's Record of Compliance Enforcement Policy (DEE-16) of August 8, 1991, as revised on March 5, 1993. The policy is designed to ensure that persons who are unsuitable to carry out responsibilities under DEC licenses are not authorized to do so. The policy does not establish a strict code of standards; rather, it sets guidelines to be applied on a case by case basis to determine the appropriate DEC position in response to the submission of license applications. Also, it delineates various events to be considered as a basis for exercising DEC's discretion in denying, suspending, modifying or revoking licenses.

One of those events, of particular importance here, is whether the licensee "has been convicted of a crime related to the permitted activity under any federal or state law." As noted above, Mr. Ash pled guilty to, and was thereby convicted of, reckless endangerment in the second degree, a Class A misdemeanor in violation of New York State Penal Law Section 120.20, on April 29, 2011. The basis of this conviction was a series of acts in which members of the public visiting the Ashville Game Farm were exposed to potential attack, serious injury and disease. These acts included improper caging of animals, encouragement of and allowances for contact between the animals and the public, and failure to vaccinate animals for rabies.

By itself, the criminal conviction would support a finding that Mr. Ash is unfit to exhibit animals; however, in this case, it merely caps a string of other incidents also touching on issues of public safety. These incidents include animal escapes from the Ashville Game Farm: a wolf in 2004, which was not recovered; and a tiger in 2005, which was recovered. More significant, there is the 2006 incident in which a boy was scratched by a tiger at the Saratoga County Fair because Mr. Ash did not ensure adequate caging. The failure to maintain caging so that it would prohibit contact between the tiger and humans was a violation of his DEC special license, as were his acquisitions of various animals prior to DEC authorizations, as detailed in my findings of fact.

According to the Commissioner's policy, it is relevant to a licensee's fitness whether he "has been determined in an administrative, civil or criminal proceeding to have violated any provision of the ECL, any related order or determination of the Commissioner, any regulation of the Department, any condition or term of any permit issued by the Department . . . on one or more occasions and in the opinion of the Department, the violation that was the basis for the action posed a significant potential threat to the environment or human health, or is part of a pattern of noncompliance." For Mr. Ash, a pattern of noncompliance is demonstrated through the violations documented in the consent orders he entered into with DEC (Exhibits No. 10 and 16) and the records of his criminal convictions (Exhibits No. 11, 12, 15, 21 and 21-A).

USDA's termination of Mr. Ash's federal Animal Welfare Act Class C exhibitor's license is also relevant to his fitness, since the possession and exhibition of animals is governed by

both state and federal law. Among other things, the federal Animal Welfare Act is intended to ensure that animals subject to exhibition are provided "humane care and treatment" [7 U.S.C. Section 2131(1)]; pursuant to the Act, USDA Class C licenses (commonly referred to as exhibitor's licenses) are required for people who put animals on display to the public, or who conduct performances featuring animals.

As discussed in my findings of fact, the termination of Mr. Ash's federal license was ordered in September 2012, as the result of his conviction for reckless endangerment. (See Exhibit No. 24, USDA Decision and Order.) In USDA's administrative proceeding, it was determined that the conviction stemmed from willful conduct in connection with Mr. Ash's exhibition of animals at the Ashville Game Farm, and that the conviction demonstrated that Mr. Ash was unfit to hold an Animal Welfare Act license.

Though the termination of Mr. Ash's federal license occurred after Director Riexinger's determination not to renew his state licenses, DEC Staff brought it into this hearing as an additional basis for her action, with prior notice to Mr. Ash's counsel. (See Exhibit No. 9, an e-mail to me from Mr. Sanza, on which Mr. Winn was copied.) According to the Commissioner's policy, it is relevant to a licensee's fitness whether he "has been denied a permit for the same or a substantially similar activity . . . by any other state or federal authority."

According to DEC Staff, the termination of Mr. Ash's federal license is an independent basis for the denial of his state special license renewals, on the understanding that obtaining the federal license is a prerequisite to issuance of the state licenses in the first instance. In fact, DEC Staff argues that this hearing is solely to determine what to do about the bears in Mr. Ash's possession, and not to determine whether Mr. Ash's state licenses can be renewed. According to Staff counsel, the state licenses cannot be renewed because they are "to possess and exhibit bears. He does not have a federal license to exhibit animals any longer, which means he cannot have a license from the State for that purpose either, so he can't have them. So, the problem is what to do about the bears." (Transcript, page 12.)

Mr. Therrien testified that prospective applicants for state licensure to exhibit mammals are told that they must have a federal license first. According to Staff counsel, the reason for this is that, unlike USDA, DEC has no expertise in the

mammals' care and treatment, including their caging, and provides no training or supervision in that regard. (Transcript, page 19.) Mr. Therrien said that a copy of Mr. Ash's federal Animal Welfare Act license was received with his original license applications to DEC, and with each subsequent renewal of those licenses until the ones that were denied. (Transcript, pages 119 to 121.)

Mr. Therrien said it is the practice of DEC's special licenses unit to require a copy of the federal license as part of a complete state application for mammal exhibition; however, he conceded that this practice is not a written policy. (Transcript, pages 119 to 122). There is also no such requirement in the ECL or in DEC's special license regulations (6 NYCRR Part 175). The regulations contain general requirements for applications (6 NYCRR 175.3) and an allowance that at any time during the review of an application, DEC may request in writing "any additional information which is reasonably necessary to make any findings or determinations required by law or regulation" (6 NYCRR 175.6(b)). According to the regulations, the application itself must include a properly completed DEC application form (6 NYCRR 175.3(a)(1)); however, the regulations do not specify the content of that form. Mr. Therrien said DEC relies on the language in 6 NYCRR 175.6(b) (Transcript, page 125), but that is not specific either; it is a catch-all provision for information that DEC may seek during review of an application, which does not begin until after DEC has determined the application is complete. (6 NYCRR 175.4(a).)

Mr. Ash did not deny that his federal license had been terminated; however, his counsel said the termination did not preclude renewal of his state licenses, because Mr. Ash could still reapply for his federal license, in which case there is at least the potential for the license to be reinstated. In fact, the USDA order distinguishes between license revocation, as recommended by its presiding ALJ, which would have prohibited Mr. Ash from obtaining an Animal Welfare Act license in the future, and license termination, as sought and ultimately ordered by USDA, which does not.

In his closing brief, Mr. Ash argues that DEC may issue him a special state license authorizing possession and exhibition of his American black bears, although the exhibiting portion of the license would be a nullity until Mr. Ash again secures the federal license from USDA. I do not favor this approach, since the record demonstrates that Mr. Ash is unfit to hold a DEC special license. Also, it is doubtful such an arrangement would

be lawful, since there is no state license that allows the possession of bears without an associated propagation, scientific or exhibition purpose, as noted by DEC Staff. In other words, there are no separable portions of DEC's license, one for possession and the other for exhibition; mere possession of the bears, or possession of the bears as pets, is not an activity licensable by DEC, as discussed further below.

Pursuant to the Order of Settlement and Discontinuance of Mr. Ash's Article 78 proceeding (Exhibit No. 5), he and DEC agreed to the existing arrangement under which Mr. Ash continues to possess the six bears despite being unable to exhibit them. However, the Order provides that this arrangement shall continue only until such time that a final Commissioner's order is issued in this licensing proceeding.

Even if the Commissioner chooses to renew Mr. Ash's 2010 license, that license contains a condition that it is "invalid without a corresponding Federal USDA Animal Welfare [Act] Class C Exhibitors Permit." (Exhibit No. 18, Condition 1G.) Because such a permit no longer exists, the license would be invalid from the moment of issuance, and provide no authority for the bears' continued possession. To renew the DEC license, the Commissioner could remove that condition, or replace it with a notification, similar to those in other DEC permits, that Mr. Ash is responsible for obtaining any other permits that may be required to carry out the activities that are authorized by his license. This would allow for issuance of a valid DEC license, while Mr. Ash seeks reinstatement of his federal license. (Mr. Ash did not indicate that he had filed a new application with USDA, and approval of such an application would appear to be unlikely, given how recently USDA issued its termination order.)

I view USDA's termination of Mr. Ash's federal exhibitor's license as underscoring the seriousness of the criminal conviction on which that termination was based. Under the Commissioner's policy, USDA's termination order is certainly relevant to Mr. Ash's fitness to exhibit animals. However, it is not dispositive on the question of whether to renew DEC's special licenses; if it were, this hearing would not have been necessary. In fact, the order for this hearing acknowledged that Mr. Ash's USDA license had been terminated, and that Mr. Ash had not appealed and did not intend to appeal from that determination. (See Exhibit No. 5, Order of Settlement and Discontinuance, pages 2 and 3.)

Licensee's Arguments

In his closing brief, Mr. Ash argues that revoking his right to continue to possess and exhibit animals would be shocking to one's sense of fairness, given that he is alleged to have committed only "minor transgressions," rather than "truly serious misconduct." I disagree with Mr. Ash's characterization of the events described by DEC Staff. These events concern improper handling and caging of animals, which go to the heart of exhibiting as a regulated activity. Even in the absence of serious injury to any one person, the ways in which Mr. Ash's animals were displayed to the public presented clear risks of harm to the general public, including harm stemming from attack and disease.

Mr. Ash also argues that there is no proof that any bears have escaped from his facility, or that any member of the public, while at that facility, has been injured by a bear, or even had contact with one. At the hearing, Mr. Therrien, testifying for DEC Staff, admitted he had no evidence in this regard. (Transcript, pages 174 to 176.) However, asked what risk the bears still pose to the public, he noted, correctly, "The record reflects those issues. Escapes, scratches, bites, clawing. A history of years of non-compliance, and direct contact with the public where the public was put in direct threat by animals housed by Mr. Ash." (Transcript, pages 173 and 174.)

Finally, Mr. Ash argues that the evidence produced by DEC Staff was inadequate, and relied on hearsay rather than eyewitness accounts. In fact, DEC Staff's case consists primarily of documents produced from the files of its special licenses unit. These include copies of consent orders, certificates of conviction, and other documents detailing charges against Mr. Ash and how they were resolved. They also include incident reports prepared by DEC law enforcement personnel in the course of their official duties, which I received under the common law public document exception to the hearsay rule. (See Richardson on Evidence (11th Edition, page 688): "When a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports so made by or under the supervision of the public officer are admissible.")

Public documents are received under an exception to the hearsay rule because public officials have no motive to distort

the truth; therefore, their reports are considered inherently trustworthy, and may be admitted without the testimony of the official who made them. To the extent Mr. Ash disagreed with statements in the reports produced against him, he was provided the opportunity to give his own account under oath. However, at the conclusion of DEC Staff's case, he chose not to testify.

At the hearing and in his closing brief, Mr. Ash objected to the count of the indictment to which he pled guilty, on the ground that it was flawed and contained factual misstatements, such as a reference to a tarantula as a poisonous spider. (Transcript, pages 115 to 118.) These objections are untimely, and were waived when he took his plea.

In the USDA matter culminating in termination of his federal license, Mr. Ash similarly claimed that the count was "bombastic" and contained "misstatements of science," and said he pled guilty only because it was "financially more prudent" than incurring the expense of defending against the indictment. In its Decision and Order, USDA said that Mr. Ash's criminal conviction was a material fact in its proceeding, but the reason Mr. Ash pled guilty and the indictment's purported defects were not. The Decision and Order also said that Mr. Ash could not relitigate his past criminal conviction in the USDA proceeding, and that, if Mr. Ash wished to contest his conviction, he should do so through the New York State courts. (Exhibit No. 24, page 15.) I agree with USDA's analysis, and it applies here as well.

During the hearing, counsel for Mr. Ash objected to much of the compliance information produced by DEC Staff, which covers the decade since he was first licensed by the agency. His counsel noted that some of the material was "outside the statute of limitations of six years" (transcript, page 47); however, there is no such statute, and the Commissioner's policy anticipates a compliance review spanning 10 years. He also argued that DEC itself did not consider many of the older violations to be of a serious nature, since the agency continued, for many years, to renew Mr. Ash's licenses while, at the same time, the number of violations was growing. This ignores the fact that DEC did move against Mr. Ash's endangered species license in 2007 (see Notice of Intent to Revoke, Exhibit No. 14), a matter that was resolved by the 2008 consent order requiring him to give up his tigers, mountain lions and leopards (Exhibit No. 16, pages 4 to 6).

DEC Staff's determination not to renew Mr. Ash's licenses was based on a cumulative record of violations, which culminated

in his reckless endangerment conviction. In its sentencing on that conviction, the court made no provision for closure of the Ashville Game Farm, and DEC took no action when the plea was entered and the sentencing occurred, as counsel for Mr. Ash emphasized in his opening statement. (Transcript, page 31.) However, as DEC Staff counsel pointed out, Director Riexinger's letter was issued only two months later, citing the conviction and the preceding history of violations of law and the conditions of his DEC licenses. I consider this to be a reasonably prompt response.

Disposition of Bears

Should the Commissioner deny Mr. Ash's applications to renew his special licenses, an issue exists as to the disposition of the six American black bears still in his possession. At the time of the hearing, these bears remained caged at the former Ashville Game Farm, efforts to relocate them, consistent with legal requirements, having been unsuccessful. According to the court order that settled and discontinued Mr. Ash's Article 78 proceeding, Mr. Ash is not allowed to exhibit the bears at his facility or elsewhere, and is required to keep members of the public at a distance such that they cannot have contact with any of the bears or their primary enclosures.

In its closing brief, DEC Staff says that Mr. Ash should be ordered to divest himself of the bears in accordance with the directives in Director Riexinger's June 29, 2011, letter. That letter, which denied Mr. Ash's license renewal applications, provided him 60 days to transfer the bears, and all other animals regulated by DEC pursuant to his special licenses, to individuals authorized by law to possess them. To the extent the animals were not transferred in a timely manner, the letter said that DEC would be entitled to transfer or euthanize the animals, or take any other action with respect to them that it deemed appropriate.

At the hearing, Staff counsel requested that Mr. Ash be given another 60 days from issuance of a Commissioner's order "to try and find a home elsewhere for the bears," at a facility licensed to handle them. (Transcript, pages 24 and 25.) Otherwise, Staff counsel said, the bears should be euthanized. (Transcript, page 26.)

I agree with DEC Staff's recommendations, and find them consistent with law and regulation. According to 6 NYCRR

175.5(h), when a special license like those held by Mr. Ash has been revoked, the former licensee must comply with written directives, provided by DEC, for the final disposition of wildlife formerly possessed under that license. That same provision states that all liabilities and expenses for the final disposition of the wildlife are the responsibility of the former licensee.

Should he lose his license to possess his bears for exhibition purposes, Mr. Ash must divest himself of the bears because the law makes no allowance for them to be kept for personal purposes, for instance as pets. As DEC Staff points out, ECL Section 11-0512 explicitly prohibits the knowing possession of wild animals as pets in New York State, except pursuant to a license that is no longer available. More specifically, ECL Section 11-0512(3)(b) made certain allowances for people who possessed a wild animal as a pet when the statute took effect (in 2005) to retain possession of the animal for the remainder of its life, provided they applied for licensure within six months of the effective date.

Pursuant to ECL Section 11-0519(1)(c), Mr. Ash could surrender his bears to a DEC law enforcement officer, who would then determine their disposition, subject to law and DEC regulation. However, in the absence of a permit, he would be prohibited from willfully liberating them, according to ECL Section 11-0507(3). Also, liberating the bears would not be appropriate, as they are habituated to and dependent on people, and would not be able to fend for themselves in the wild.

In his closing brief, Mr. Ash contends that attempting to place his six American bears elsewhere would be a "fool's errand" and that DEC knows that such a transfer cannot be accomplished. In fact, DEC's Black Bear Response Manual acknowledges that it is difficult, if not impossible, to place bears that have been in captivity for long periods, and that relatively few locations are willing to accept "tame" bears. (Exhibit No. 25, page 94.) The fact that the bears are adults, rather than cubs, also makes placement more difficult, as DEC acknowledges. As recently as last year, DEC's special licenses unit was helping Mr. Ash explore placement options within New York State, but without success. DEC was not obliged to offer this assistance, and the fact that it did undermines Mr. Ash's assertion, in his closing brief, that DEC has an apparent desire to have the bears euthanized.

DEC's proposal that Mr. Ash be afforded another 60 days from issuance of a Commissioner's order to find other homes for his bears is a reasonable accommodation given that, in the absence of a special license, Mr. Ash has no right to retain possession indefinitely. At the hearing, DEC Staff said it preferred that the bears be transferred to an out-of-state facility that is capable of handling them, because DEC had already looked at zoos in New York, and none of them wanted adult bears. (Transcript, pages 25 to 27.)

In her denial letter, Director Riexinger similarly gave Mr. Ash 60 days to transfer the species regulated by the special licenses, including the bears, to individuals that are authorized by law to possess them. She said that DEC must pre-approve transfers that take place within New York, and that, in the event of an out-of-state transfer, DEC must be copied on a pre-transfer notice informing the recipient that it is illegal to possess, sell or exhibit in New York State the species to be transferred without first obtaining a DEC license for that purpose. These are reasonable requirements to ensure that in-state recipients are suitably licensed and trustworthy, and that out-of-state recipients are aware of relevant New York State law.

According to Mr. Ash, any directive that his bears be euthanized should be rescinded pending a DEC inspection of the bears' housing at his facility. Requiring an inspection, he says, would be consistent with the recommendations in DEC's Black Bear Response Manual for handling situations in which bears are found in captivity, under human possession. Those recommendations state that the court having jurisdiction over the legal case should direct selection of a legal, final location for the bear, and that if no suitable location exists and the existing facility is inadequate, then court-directed euthanization is the only remaining alternative. (Exhibit No. 25, pages 94 and 95.)

Mr. Ash argues that it would be "shocking and cruel" for DEC to embark on a path toward euthanization without first checking to see whether the bears are housed adequately. He says that the record contains no evidence concerning the caging, sheltering or treatment of the bears, and no evidence about the bears escaping from their enclosure, attacking humans or other animals, or being abused, neglected or mistreated. He contends that the bears are happy and well cared for, and pose no risk to the public, which a DEC inspection would confirm.

Public contact with the bears is prohibited under the order settling and discontinuing Mr. Ash's Article 78 proceeding. That order also explains how the bears are to be confined, and directs that they receive humane care, with Mr. Ash responsible for the associated costs. No evidence was produced that Mr. Ash is not complying with the order. However, compliance with the order, dated June 4, 2013, is not part of DEC Staff's case.

I agree with DEC Staff that an inspection of Mr. Ash's facility, either before or after a decision in this matter, is not required. Because the bears are no longer under exhibition, an inspection would not be helpful in gauging Mr. Ash's conduct as an exhibitor. Also, it would not be helpful in gauging the animals' treatment and caging, since Staff claims no expertise in these matters, as to which it relies on USDA. (Transcript, page 19.) The record indicates that while DEC has inspected the Ashville Game Farm, it has been to conduct an animal inventory, or to examine records.

Under the order settling and discontinuing Mr. Ash's Article 78 proceeding, the bears' caging, and the fencing around their enclosure, must meet or exceed standards under federal regulations for American black bears. An inspection to ensure compliance with those standards would be valuable to the extent the Commissioner is willing to entertain continuation of the existing arrangement, in which Mr. Ash possesses the bears essentially as pets, without the ability to exhibit them. However, as noted above, there is no license for such an arrangement; the existing license, under ECL Section 11-0515(2), is to possess the bears for exhibition purposes.

CONCLUSION

Because of his poor compliance history, as documented in this report, Mr. Ash is not fit to hold the DEC special licenses that allow for his exhibition of animals at the Ashville Game Farm.

RECOMMENDATIONS

Mr. Ash's applications to renew these licenses should be denied.

The Commissioner should direct that Mr. Ash dispose of the six American black bears still in his possession, consistent with the instructions in Director Riexinger's letter of June 29, 2011. Mr. Ash should be afforded 60 days to transfer the bears to individuals that are authorized by law to possess them, with DEC's approval of any transfers to occur within New York State. If timely transfer is not accomplished, DEC should be entitled to take any other action with regard to the bears that it deems appropriate, including euthanization. Consistent with 6 NYCRR 175.5(h), Mr. Ash should be held responsible for all liabilities and expenses for disposition of the bears.

EXHIBIT LIST

JEFFREY ASH

| Exhibit No. | Description |
|-------------|--|
| 1 | Notice of Denial of Applications for License Renewals, issued to Jeffrey Ash by Patricia Riexinger, DEC Director of Fish, Wildlife & Marine Resources (6/29/11) |
| 2 | Letter of Robert M. Winn, Esq., on behalf of Jeffrey Ash, requesting a hearing on application denial (7/5/11) |
| 3 | Letter of Robert M. Winn, Esq., addressing disposition of animals held by Mr. Ash, with attachments (7/6/11) |
| 4 | Letter of DEC assistant counsel Mark Sanza, Esq., to Robert M. Winn, Esq., denying request for hearing on application denial (7/14/11) |
| 5 | Notice of Entry for Order of Settlement and Discontinuance of Jeffrey Ash's Article 78 proceeding against DEC (6/25/13) (Order included as an attachment to the exhibit) |
| 6 | Letter of Mark Sanza, Esq., to DEC Chief ALJ James McClymonds, with attached Statement of Readiness for Hearing (6/26/13) |
| 7 | Case assignment letter of James McClymonds (7/1/13) |
| 8 | Notice of Hearing, in letter of ALJ Edward Buhrmaster, with distribution list attached (7/5/13) |
| 9 | E-mail memorandum of Mark Sanza, confirming additional ground for denial of license renewals (7/8/13) |
| 10 | Documentation including DEC ticket (AC0060734), order on consent (12/14/04), and receipt for payment of civil penalty re: incident of April 8, 2004, involving Mr. Ash's alleged failure to comply with conditions of DEC permit |
| 10A | Environmental Conservation Complaint re: bear bite in Queensbury (4/8/04) |
| 11 | DEC ticket (EC2197584) and certificate of conviction for Mr. Ash re: wolf escape on May 3, 3004 |
| 12 | Documentation including DEC Division of Law Enforcement Significant Incident Report, DEC tickets (EC2511644 and EC2322736), and certificates of conviction and disposition for Mr. Ash re: tiger escape on November 16, 2005 |
| 13 | DEC Division of Law Enforcement Significant Incident Report re: tiger scratch on July 18, 2006, at Saratoga County fairgrounds |
| 13A | DEC Environmental Conservation Police Narrative Report re: animal inventory at Ashville Game Farm (7/19/06) |
| 13B | DEC tickets (AC628213, AC628224, AC627325, AC627406, AC627281, AC627336, AC627362, AC627351, AC627340, AC627314, AC627303, AC627292, and AC627270) issued re: tiger scratch and inspection of Ashville Game Farm |

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| 14 | Notice of Intent to Revoke Endangered/Threatened Species: Education/Exhibition License Number 67, for Ashville Game Farm, with cover letter (9/26/07) |
| 15 | Memorandum of Plea Bargain of Mr. Ash, Ballston Spa Village Court (11/9/07) |
| 16 | DEC Order on Consent (CO5-20060809-1) for Ashville Game Farm and Mr. Ash (3/6/08), in settlement of tickets identified in Exhibit No. 13-B |
| 17 | DEC Endangered/Threatened Species License No. 37, issued to Mr. Ash for year 2010 |
| 18 | DEC License No. 57 to Collect, Possess or Sell Wildlife, issued to Mr. Ash for year 2010 |
| 19 | DEC Division of Law Enforcement Significant Incident Report re: lemur bite at Ashville Game Farm (8/10/10) |
| 19A | Letter of Bryan Cherry, NYSDOH, to Roger Wicks, Washington County Attorney (8/10/10) |
| 20 | Indictment (No. I-192-2010) of Mr. Ash by Grand Jury of Washington County (12/16/10) |
| 21 | Orders and Conditions of Adult Probation for Mr. Ash (4/29/11), with fax transmittal cover sheet |
| 21A | Uniform Sentence and Commitment Form for Mr. Ash (7/8/11) |
| 22 | Letter of Robert M. Winn to Mark Sanza (8/11/11), with attachments |
| 23 | USDA Order to Show Cause (8/31/11) re: termination of Mr. Ash's Animal Welfare Act license, with cover letter (9/1/11) |
| 24 | USDA Decision and Order terminating Mr. Ash's Animal Welfare Act license, by William G. Jenson, Judicial Officer (9/14/12), with cover letter (9/18/12) |
| 25 | DEC New York State Black Bear Response Manual (11/14/06) |