

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Department-Initiated
Revocation and Notice of Intent to Deny
Renewal of Wildlife Rehabilitator Class I
License No. 896, Based Upon Alleged
Violations,

ORDER

DEC Case No.
OHMS 2009-64295

- by -

MARIAN D. DOTY,

Respondent.

Respondent Marian D. Doty operates a wildlife rehabilitation facility in the Town of Chester, Orange County, New York. Pursuant to section 175.5 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") seeks to revoke and deny renewal of respondent's Wildlife Rehabilitator Class I License No. 896 based upon alleged violations of the conditions of the license, as well as violations of State and federal regulations.

Department staff commenced this administrative enforcement proceeding against respondent Doty by service of a notice of intent to revoke license and notice of intent to deny application for renewal of license dated March 16, 2009 ("notice of intent to revoke"). In its notice of intent to revoke, which serves as the complaint in this matter, Department staff alleges that respondent Doty:

(1) violated 6 NYCRR 175.5(a)(2) and Condition 2(C) of her license by possessing raccoons, a rabies vector species, in July 2008;

(2) violated 6 NYCRR 175.5(a)(1) and Conditions 2(I) and (R) of her license by failing to list raccoons possessed in July 2008 on her wildlife rehabilitation log tally and her four rehabilitation log forms submitted to the Department for 2008;

(3) violated 6 NYCRR 175.5(a)(4) when, in 2007, she fed deer not confined in a deer rehabilitation enclosure, in violation of 6 NYCRR 189.3(b); and

(4) violated 6 NYCRR 175.5(a)(4) when, in 2007, she possessed a red-tailed hawk without a federal migratory bird rehabilitation permit, in violation of section 21.31 of title 50 of the Code of Federal Regulations.

Pursuant to 6 NYCRR 175.5(c), respondent Doty filed a letter dated March 26, 2009, and received March 30, 2009, explaining why her license should not be revoked, and requesting a hearing. Respondent's March 26, 2009, letter serves as the answer in this matter.

The Director of the Division of Fish, Wildlife and Marine Resources subsequently delegated her decision making authority under 6 NYCRR part 175 in this matter to Commissioner Alexander B. Grannis. Accordingly, the matter was referred to the Department's Office of Hearings and Mediation Services for administrative adjudicatory proceedings before Chief Administrative Law Judge ("ALJ") James T. McClymonds.

An adjudicatory hearing was held on May 28, 2009, in the Department's Region 3 office. The Chief ALJ prepared the attached Hearing Report, which I adopt as my decision in this matter, except as to the relief recommended.

Based upon my review of the record, I conclude that Department staff proved by a preponderance of the record evidence that respondent Doty committed two of the violations charged by staff with respect to possession of raccoons and recordkeeping relating to that species.

I am, however, modifying the relief recommended in the Hearing Report. I conclude that the relief requested by Department staff, that is, revoking respondent's Wildlife Rehabilitator Class I License No. 896, denying respondent's application for the renewal of this license for calendar year 2009, and not entertaining an application from respondent for a Wildlife Rehabilitator License until January 2011, is appropriate in the circumstances presented here.

Because of the virulent nature of rabies, a fatal central nervous system disease, strict compliance with the rabies vector species rehabilitation requirements is essential before a wildlife rehabilitator may safely handle that species (see, e.g., Hearing Report, at 15-16; see also Hearing Transcript, at 68-74; Hearing Exhibit 23 [New York State Wildlife Rehabilitation Syllabus for Rabies Vector Species]). Department staff contended that respondent's failure to comply with the applicable requirements governing rabies vector species sufficiently justified the requested relief (see Hearing Transcript, at 239-40), and I agree. These requirements are intended to protect not only wildlife rehabilitators but other people and animals that might encounter rabies vector species, and respondent's failure to meet all the requirements constitutes a serious offense.

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

I. Respondent Marian D. Doty is adjudged to have violated 6 NYCRR 175.5(a)(2) and Condition 2(C) of her wildlife rehabilitation license by possessing twelve raccoons, a rabies vector species, in July 2008.

II. Respondent is adjudged to have violated 6 NYCRR 175.5(a)(1) and Conditions 2(I) and (R) of her license by failing to list twelve raccoons possessed in July 2008 on her wildlife rehabilitation log tally and her four rehabilitation log forms submitted to the Department for 2008.

III. The remaining violations charged in Department staff's March 16, 2009, notice of intent to revoke are dismissed.

IV. As a result of the violations established, respondent Marian D. Doty's Wildlife Rehabilitator Class I License No. 896 is hereby revoked, and respondent's application for renewal of this license for 2009 is denied. The Department shall not entertain any application for a wildlife rehabilitator license from respondent prior to January 2011.

V. All communications from respondent to the Department concerning this order shall be made to Mark D. Sanza, Esq., Assistant Counsel, New York State Department of Environmental Conservation, Office of General Counsel, 625 Broadway, 14th Floor, Albany, New York 12233-1500.

VI. The provisions, terms and conditions of this order shall bind respondent Marian D. Doty, and her agents, successors, and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: August 12, 2009
Albany, New York

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

In the Matter of the Department-
Initiated Revocation and Notice of
Intent to Deny Renewal of Wildlife
Rehabilitator Class I License No. 896,
Based Upon Alleged Violations

HEARING REPORT

DEC Case No.
OHMS 2009-64295

- by -

MARIAN D. DOTY,

Respondent.

Appearances of Counsel:

- Alison H. Croker, Deputy Commissioner and General Counsel (Mark D. Sanza of counsel), for the Department of Environmental Conservation
- Beattie Padovan, LLC (Vanessa R. Elliott of counsel), for respondent Marian D. Doty

PROCEEDINGS

Pursuant to section 175.5 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by service of a March 16, 2009, notice of intent to revoke and notice of intent to deny application for renewal of respondent Marian D. Doty's 2008 wildlife rehabilitator license (Class I License No. 896). Respondent Doty operates a wildlife rehabilitation facility in the Town of Chester, Orange County.

Department staff seeks revocation of respondent's license and intends to deny renewal of the license for calendar years 2009 and 2010, based upon alleged violations of the conditions of the license, as well as violations of State and federal regulations (see DEC Exhibit ["DEC Exh"] 1). Pursuant to 6 NYCRR 175.5(c), respondent Doty filed a letter received March 30, 2009, explaining why the license

should not be revoked, and requesting a hearing (see DEC Exh 2).

By letter dated April 8, 2009, Patricia Riexinger, Director of the Division of Fish, Wildlife and Marine Resources, delegated her decision making authority under 6 NYCRR part 175 to Commissioner Alexander B. Grannis (see DEC Exh 3). Accordingly, the matter was referred to the Department's Office of Hearings and Mediation Services for administrative adjudicatory proceedings before Chief Administrative Law Judge ("ALJ") James T. McClymonds.

Because the Department-initiated license revocation proceeding is based upon alleged violations of the license and the Department's regulations, the proceeding is governed by the Department's Uniform Enforcement Hearing Procedures at 6 NYCRR part 622 ("Part 622") (see 6 NYCRR 622.1[a][6]). Accordingly, Department staff's notice of intent to revoke constitutes the complaint in this matter, and respondent Doty's request for a hearing constitutes the answer (see 6 NYCRR 622.3[b][2]).

Notice of the enforcement hearing was issued on April 21, 2009, by email and regular mail to counsel for the Department and counsel for respondent Doty, and by regular mail to respondent Doty. The hearing was held on Thursday, May 28, 2009, in the Department's Region 3 office. No post-hearing briefing was sought by the parties or authorized by the ALJ.

FINDINGS OF FACT

The following facts were established by a preponderance of the credible evidence at hearing:

1. Respondent Doty has held a Wildlife Rehabilitator License (Class I) since May 9, 2006 (see DEC Exhs 12-14). Pursuant to her annually-renewed licenses, respondent receives injured and debilitated wild animals for rehabilitation and, ultimately, release into the wild (see 6 NYCRR 184.1). Respondent operates a wildlife rehabilitation facility at 421 Bull Mill Road, Chester, New York.
2. Respondent's licenses expressly provide that "[u]nless otherwise authorized, this license DOES NOT authorize the licensee to rehabilitate, capture, possess,

transport, house, feed or release to the wild any . . . RACCOON (*Procyon lotor*)" (e.g. Exh 14, condition 2[C] [emphasis in original]). Respondent Doty's licenses also provide that "[t]he licensee must submit, to the Special Licenses Unit, all required records and reports properly executed" (e.g. Exh 14, condition 2[I]). The licenses further provide that "[t]he licensee must keep and maintain a record known as the Wildlife Rehabilitation Log. The completed Log and Wildlife Rehabilitation Log Tally must be submitted to the Special Licenses Unit on or before February 1st following the expiration date of this license" (e.g. id., condition 2[R]).

3. In 2007, responding to a call from the Town of Tuxedo Police Department, respondent Doty transported a badly injured and debilitated red-tailed hawk from outside the Police Department's waiting room to the Newburgh Veterinary Hospital (see DEC Exh 20; Transcript ["Tr"] at 209). At the time respondent transported the hawk, the hawk had a badly broken wing and a serious infection (see Tr at 209). Respondent Doty had no further contact with the bird after she delivered it to the veterinarian (see id.).

4. In 2007, respondent Doty began to rehabilitate white-tailed deer, which she confined to a pen on her property (see Tr at 22-23, 244). Several neighbors filed complaints, dated June 2, 2007, and July 6, 2007, respectively, claiming that respondent Doty was feeding deer and confining them to a pen (see DEC Exhs 4, 5). In both cases, the investigating Environmental Conservation Officer ("ECO") confirmed that respondent Doty was a licensed rehabilitator, and closed the cases without noting any violations (see id.).

5. Mr. Joseph T. Vitanza, a neighbor of respondent Doty, sent a letter to Commissioner Grannis, dated September 15, 2007, claiming that, "About a year and a half ago, . . . [respondent] Doty was routinely putting out food to feed the deer that populated our area," among other complaints (DEC Exh 17).

6. On September 27, 2007, ECO Mead responded to a complaint by respondent Doty that Mr. Vitanza was shooting deer on her property with a BB gun. Upon investigating respondent Doty's property, Officer Mead instructed respondent Doty to raise her bird feeders, which deer were

able to reach (Tr at 208). ECO Mead issued a verbal warning to respondent Doty not to feed wild deer outside the rehabilitation enclosure, and closed the case without noting any violations (see DEC Exh 6).

7. In late 2007, respondent Doty undertook to become a licensed rabies vector species ("RVS") rehabilitator, and completed such requirements for licensure as rabies pre-exposure vaccinations and RVS training (Respondent's Exhibits ["Resp Exhs"] A, B, E, and F). She also began construction of an RVS caging facility (Tr at 200), which ultimately passed inspection on October 30, 2008 (Resp Exh D).

8. In 2008, respondent Doty twice took possession of raccoons, an RVS: four raccoons in April 2008, and four more in May 2008 (Resp Exh C; Tr at 216 [the date on this wildlife admittance form was incorrect -- should be 4/14/08, not 4/14/07 (see Tr 215-220)]; DEC Exh 9). An additional four raccoons were born in her care (DEC Exh 10, at 17). At the time respondent Doty had possession of the raccoons, she lacked a license to rehabilitate raccoons.

9. On both occasions that respondent received the raccoons, she was contacted by two separate individuals who indicated that they were referred to respondent by the Department. Respondent directed the individuals to call Gary Bell, the only licensed RVS Rehabilitator in Orange County. Respondent also tried calling Mr. Bell herself. However, Mr. Bell failed to return phone calls. Accordingly, respondent Doty told the individuals to bring her the raccoons.

10. After taking possession of the raccoons, respondent Doty made several more attempts to call Mr. Bell, but Mr. Bell continued to fail to return calls. When respondent finally contacted Mr. Bell, he informed her that he was unable to accept the raccoons because he was already over-burdened with forty-five baby raccoons and an injured adult raccoon (Tr at 222). While respondent had possession of the raccoons, she kept them in cages locked in a workshop marked with no trespassing signs. At the time, her RVS caging facility was not constructed or inspected.

11. On July 16, 2008, ECO Bello discovered the twelve raccoons when he investigated respondent Doty's property in response to a complaint by the Warwick Humane Society

concerning respondent Doty's possession of raccoons (see DEC Exh 7; Tr at 35). Officer Bello issued respondent Doty a ticket for 12 counts of possessing raccoons without the appropriate permit (see Exh 8). Officer Bello then contacted Mr. Bell, who took possession of the raccoons later that day (Tr at 35-36). Officer Bello also took respondent Doty's wildlife admittance forms detailing the circumstances under which the raccoons arrived in Doty's care (Tr at 227; Resp Exh C; DEC Exh 9).

12. Respondent Doty pleaded guilty to the violation in the Town of Chester Justice Court in December 2008, and paid a fine of \$100 in January 2009 (DEC Exh 8; Tr at 36-37).

13. In December 2008, respondent Doty submitted her 2008 wildlife rehabilitator log tally and wildlife rehabilitation logs to the Department. Respondent Doty did not report the raccoons on her tally, or on any of her log forms for 2008 (DEC Exh 22).

DISCUSSION

Standards of Review

In an administrative enforcement proceeding conducted pursuant to 6 NYCRR part 622, Department staff bears the ultimate burden of proof on all charges and matters affirmatively asserted in the instrument that initiated the proceeding, in this case, the 2009 notice of intent to revoke respondent's license (see 6 NYCRR 622.11[b][1]). The party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a statute or regulation has established a higher standard (see 6 NYCRR 622.11[c]). Here, no statute or regulation establishes a higher standard.

Liability

Applicable Statutes and Regulations

ECL 11-0515(3) authorizes the Department to issue a revocable license to any person to possess distressed wildlife for rehabilitation purposes. The ECL further authorizes the Department to "adopt regulations concerning the qualifications, appointment and duties of wildlife

rehabilitators and the procedures for license issuance and revocation" (ECL 11-0515[3]).

Part 175 of 6 NYCRR sets forth the general requirements for the issuance and revocation of special licenses and permits issued pursuant to ECL article 11, among other statutes. Section 175.5(a) provides that the Department may revoke licenses or permits for a period of time it deems appropriate, after taking into consideration all relevant circumstances.

Part 184 of 6 NYCRR provides Department regulations specifically governing wildlife rehabilitators. Wildlife rehabilitation is "the practice of providing care for injured or debilitated wildlife, including their capture, housing, feeding, emergency treatment and release to the wild" (6 NYCRR 184.2[f]). A wildlife rehabilitator must "comply with applicable provisions of the Environmental Conservation Law and rules and regulations adopted pursuant thereto and with the department's instructions concerning methods of wildlife rehabilitation, reporting requirements and any conditions contained in his/her license" (6 NYCRR 184.6[4]). If a wildlife rehabilitator fails to perform the duties provided in 6 NYCRR 184.6, the Department may revoke a wildlife rehabilitator license (see 6 NYCRR 184.7[a][1]).

Charge #1: Alleged Violation of 6 NYCRR 175.5(a)(2)

Department Staff alleges that respondent Doty violated 6 NYCRR 175.5(a)(2) and Condition 2(C) of her wildlife rehabilitator license by possessing raccoons in July 2008. Section 175.5(a)(2) provides that a special license may be revoked if the licensee fails to comply with any terms or conditions of the license. Condition 2(C) of respondent 2008 wildlife rehabilitator license provides: "Unless otherwise authorized, this license does not authorize the licensee to rehabilitate, capture, possess, transport, house, feed or release to the wild any . . . raccoon" (DEC Exh 14 [emphasis omitted]). Raccoons are a rabies vector species, the handling of which requires a multi-agency RVS license (see DEC Exh 23).

Respondent Doty admitted to possessing raccoons without the required RVS license. Indeed, in December 2008, she pleaded guilty in Town of Chester Justice Court to possessing twelve raccoons in July 2008. Therefore,

Department staff has met its burden of proof by a preponderance of the evidence that respondent Doty violated Condition 2(C) of her license, and thus 6 NYCRR 175.5(a)(2).

Charge #2: Alleged Violation of 6 NYCRR 175.5(a)(1)

Department staff alleges that respondent Doty violated 6 NYCRR 175.5(a)(1) and Conditions 2(I) and (R) of her license by providing materially false or inaccurate statements when she failed to list raccoons possessed in July 2008 on her 2008 wildlife rehabilitation log tally or her four log forms for 2008.

Section 175.5(a)(1) provides that the Department may revoke a special license if the licensee provides materially false or inaccurate statements in the application, supporting papers or required reports. Condition 2(I) of respondent Doty's 2008 Wildlife Rehabilitator License states that a licensee must submit all required records and reports properly executed to the Special Licenses Unit (DEC Exh 14). Condition 2(R) provides: "The licensee must keep and maintain a record known as the Wildlife Rehabilitation Log. The completed Log and Wildlife Rehabilitation Log Tally must be submitted to the Special Licenses Unit on or before February 1st following the expiration date of this license" (id.).

The instructions provided to wildlife rehabilitators for the log forms include guidelines for completion (see DEC Exh 15). Guideline 3 states that a rehabilitator must "[c]omplete ALL sections of the log. If something is Unknown, write UNK" (id.). Guideline 6 states: "Logs which are INCOMPLETE, ILLEGIBLE, or MUTILATED will be returned to the licensee to be rewritten" (id.).

The wildlife rehabilitation logs, in turn, include a section B, which provide a space for identifying each of the species received (see DEC Exh 22). The instructions indicate that accepted common names of species are to be listed in section B (see DEC Exh 15).

The facts here are not seriously in dispute. Respondent Doty possessed twelve raccoons in July 2008. Conditions 2(I) and (R) of her license required her to report these raccoons on her 2008 log tally and logs, which she failed to do.

Respondent Doty contends that she was unable to include the raccoons on the 2008 log forms or tally because on July 16, 2008, ECO Bello took her wildlife admittance forms for the raccoons and did not return them (Tr at 195, 227). Respondent Doty completes a wildlife admittance form for each animal she receives, and maintains the forms in chronological order. Respondent Doty then transfers information from the wildlife admittance forms onto the log forms and tally at the end of each year – either in November or December – for submission to the Department (Tr at 195-196, 227).

Respondent Doty testified that: "I don't have that greater [sic] memory for a couple of papers that are missing. So I was unable to put them in the log, other than maybe eight raccoons. I don't know where they came from or anything else. So they were left out of the log" (Tr at 195). Respondent Doty further argues that including raccoons in the log forms and tally was unnecessary because the Department was already aware that she possessed twelve raccoons in July, as evidenced by Officer Bello's ticket (id.).

Department staff argues that respondent Doty had sufficient information to include the raccoons in her log forms and tally, as established by Officer Bello's ticket, and the circumstance that the ticket was being adjudicated in Justice Court at the same time respondent was preparing her 2008 tally and logs for submission to the Department. Furthermore, Department staff claims whether or not the Department was already aware that respondent had raccoons in her possession is irrelevant to respondent's obligation to accurately report those animals in her logs and tally.

I agree with Department staff. The Department requires self-monitoring and reporting to ensure compliance with the regulations governing wildlife rehabilitators. The regulatory scheme requires, at a minimum, that log forms provide an accurate count of each animal species in a rehabilitator's possession. Further, Guideline 3 for the log form provides that rehabilitators must "[c]omplete ALL sections of the log. If something is Unknown, write UNK" (DEC Exh 15). Respondent Doty's argument that it was impossible for her to include the raccoons in her log forms and tally lacks credibility. When respondent Doty completed the log forms and tally, she knew, or reasonably

should have known, how many raccoons she possessed. Officer Bello provided that number in the ticket he issued on July 16, 2008 (Exh 8). Therefore, respondent Doty could have accounted for each raccoon, and recorded "UNK" for information she could not remember. While the admittance forms may have facilitated completion of the log forms and tally, they were not necessary for her to provide the key information.

Furthermore, I disagree with respondent Doty that completing the log form and tally was unnecessary in this instance. Respondent's obligation to provide to the Department as complete and accurate a record of animals in her possession as possible is independent of whether the Department was aware that she possessed some animals. The log and tally instructions make no exception to the listing requirement for animals that are the subject of an ECO's ticket. Accordingly, respondent Doty is liable for failing to list the twelve raccoons in her possession on her 2008 logs and tally, in violation of Conditions 2(I) and (R) of her license and, thus, in violation of 6 NYCRR 175.5(a)(1).

Charge #3: Alleged Violation of 6 NYCRR 175.5(a)(4) and 6 NYCRR 189.3(b)

Department Staff alleges that respondent Doty violated 6 NYCRR 175.5(a)(4) by feeding deer not confined in her deer rehabilitation enclosure in violation of 6 NYCRR 189.3(b). Section 175.5(a)(4) provides that a special license may be revoked for "noncompliance with any provision of the Environmental Conservation Law, [and] any other State or Federal laws or regulations of the department directly related to the licensed or permitted activity[.]"

Part 189 sets forth the Department's regulations regarding chronic wasting disease, a fatal transmissible neurodegenerative disease that affects deer, among other species (see 6 NYCRR 189.1). Section 189.3(b) provides: "No person shall feed wild white-tailed deer at any time in New York State." Under section 189.2(f), "feeding" means "the act of using, placing, giving, exposing, depositing, distributing or scattering any material, or any act to maintain the availability of such material, that attracts wild white-tailed deer to feed on such material." However, a person may feed white-tailed deer in that person's legal possession so long as the deer are in captivity, that is,

within a perimeter fence or other confined space (see 6 NYCRR 189.3[b][4]; 6 NYCRR 189.2[h]).

Department staff bases its charge on complaints from neighbors filed in 2007, and on a report in which ECO Mead issued a verbal warning to respondent not to feed deer not confined in her deer rehabilitation enclosure (see DEC Exh 1). In the first complaint, dated June 2, 2007, the complainant claimed that respondent Doty had four fawns in a fence (see DEC Exh 4). After an investigation, ECO Galvin issued no violation because respondent Doty's license allowed rehabilitation of white-tailed deer and the five fawns in her legal possession were confined in a pen (see id.).

In the next complaint, dated July 6, 2007, the complainant alleged that respondent Doty fed deer on her property (see DEC Exh 5). After an investigation, ECO Bello noted respondent Doty possessed seven fawns in a pen pursuant to her valid wildlife rehabilitators license (see id.). Again, the responding officer issued no violation (see id.). Because Doty was licensed to legally possess white-tail deer pursuant to her license, and those deer were in captivity, these complaints do not support the charged violation.

Department staff also relies on a letter that respondent's neighbor, Mr. Vitanza, addressed to Commissioner Grannis on September 15, 2007 (see DEC Exh 17). Mr. Vitanza alleged that about a year and a half prior, "Ms. Doty was routinely putting out food to feed the deer that populated our area" (id.). He also wrote, "At one point, I counted over thirty-two deer in my yard, which was not normal, which led me to assume that it was the result of Ms. Doty's putting out food" (id.). In short, Mr. Vitanza complained that a growing number of deer in his neighborhood resulted from Ms. Doty's rehabilitation practices, and possibly from feeding wild deer (id.).

Respondent Doty disputes Mr. Vitanza's credibility. Respondent Doty's complaint, dated September 27, 2007, alleged that Mr. Vitanza shot deer in her yard with a BB gun (see DEC Exh 6). Respondent Doty also testified that Mr. Vitanza told her "he would kill all the animals on my property, and he would kill me" (Tr at 212).

Mr. Vitanza did not appear as a witness at the hearing. Moreover, Mr. Vitanza's hearsay statement about events occurring "about a year and a half ago" is equivocal, at best, concerning respondent's alleged feeding of deer outside a containment area. Thus, I conclude that Mr. Vitanza's hearsay statement lacks sufficient weight to support finding a violation.

Finally, Department staff also relies on a report dated September 27, 2007, by ECO Mead (see DEC Exh 6). ECO Mead arrived at Doty's residence to investigate respondent Doty's complaint against Mr. Vitanza (id.). Respondent Doty asserted that Mr. Vitanza was shooting "her deer" with a BB gun (id.). When asked whether the deer were under her care for injuries, she stated that they were not (see id.) ECO Mead replied that "the deer were not pets and she could not feed the deer unless they were under her medical care" (see id.). ECO Mead further instructed that "any more feeding of the deer would be a violation and she would receive a summons." Id. Thus, ECO Mead issued a verbal warning to respondent Doty not to feed deer outside of her medical care (id.).

The next day, ECO Mead interviewed Mr. Vitanza, who stated that he had "attempted to asked [sic] Doty to stop feeding the deer once the [sic] get out of her custody with failed success" (id.). ECO Mead issued a verbal warning to Mr. Vitanza not to shoot deer with a BB gun (id.).

Respondent Doty's testimony clarified the incident described in ECO Mead's report. Respondent Doty testified that she had placed bird feeders on her property (see Tr at 208). ECO Mead suggested that she raise them, as "the deer were able to rear up and eat [sic] on their hind legs and eat out of the bird feeders" (id.).

The statements in ECO Mead's report do not support finding a violation, and the Department did not call ECO Mead to testify to provide any further elaboration of the incident. ECO Mead never determined that Doty had fed deer, nor did he issue a violation. ECO Mead did not report seeing wild deer eating on respondent's property, nor did he report seeing food placed for deer, other than the bird feeders. Thus, ECO Mead's verbal warning to respondent Doty "not [to] feed the deer unless they were under her medical care" was not based upon a determination

that respondent Doty had in fact fed deer or otherwise placed deer food outside the confinement area (see DEC Exh 6).

At most the record suggests the possibility that wild deer might have been feeding incidental to respondent Doty's placement of bird feeders within their reach. However, on this record, the evidence that deer were feeding from respondent Doty's bird feeders is speculative, and lacks sufficient weight to establish a violation of section 189.3(b) by a preponderance of the evidence. Consequently, Department staff has not met its burden of proof on this charge.

Charge #4: Alleged Violation of 6 NYCRR 175.5(a)(4) and 50 CFR 21.31

Department Staff alleges that respondent Doty violated 6 NYCRR 175.5(a)(4) by possessing a red-tailed hawk without a Federal Migratory Bird Rehabilitation Permit in violation of section 21.31 of title 50 of the Code of Federal Regulations ("50 CFR"). Part 175.5(a)(4) provides that the Department may revoke a special license for "noncompliance with . . . any other State or Federal laws or regulations of the department directly related to the licensed or permitted activity."

Section 21.31 of 50 CFR requires a federal rehabilitation permit to possess or transport any migratory birds for rehabilitation purposes. Specifically, section 21.31(a) states: "Except as provided in section 21.12, a rehabilitation permit is required to take, temporarily possess, or transport any migratory bird for rehabilitation purposes. However, any person who finds a sick, injured, or orphaned migratory bird may, without a permit, take possession of the bird in order to immediately transport it to a permitted rehabilitator [emphasis added]." Migratory bird means "any bird, whatever in its origin and whether or not raised in captivity, which belongs to a species listed in section 10.13" (50 CFR 10.12). Red-tailed hawks are listed as migratory birds in section 10.13.

Section 21.12(c) provides an exception to the permit requirement for licensed veterinarians: "Licensed veterinarians are not required to obtain a Federal migratory bird permit to temporarily possess, stabilize, or euthanize sick and injured migratory birds. However, a

veterinarian without a migratory bird rehabilitation permit must transfer any such bird to a federally permitted migratory bird rehabilitator within 24 hours after the bird's condition is stabilized, unless the bird is euthanized."

The question here is whether a unlicensed person may take possession of an injured migratory bird to immediately transport it to a licensed veterinarian, irrespective of whether the veterinarian holds a federal migratory bird rehabilitation permit. I conclude that this is permissible.

Section 21.12(c) expressly states that licensed veterinarians may temporarily possess and stabilize injured migratory birds, even without a federal migratory bird permit. Thus, licensed veterinarians are "permitted rehabilitators" under section 21.12(c). Accordingly, 50 CFR 21.31 allows an unlicensed individual to transport an injured migratory bird to a licensed veterinarian.

In the instant case, the Town of Tuxedo Police Department asked respondent Doty in 2007 to held with a badly injured red-tailed hawk in their possession (see Tr at 209). Respondent Doty retrieved the hawk from outside the Police Department's waiting room, and drove it immediately to the Newburgh Veterinary Hospital (see DEC Exh 20; Tr at 209). Respondent Doty is not a federally permitted migratory bird rehabilitator. It is fairly inferable, however, that the Newburgh Veterinary Hospital employs licensed veterinarians, and nothing in the record suggests otherwise.

Consequently, respondent Doty did not violate any State or federal laws or regulations by transporting the injured hawk to the Newburgh Veterinary Hospital, which was allowed to accept injured migratory birds. Therefore, Department has failed to meet its burden of proof on this charge.

Penalty

In sum, Department staff established two of the four violations charged: (1) respondent Doty violated the terms of her wildlife rehabilitator license when she took possession of twelve raccoons in 2008, and (2) respondent Doty violated the terms of her license when she failed to

accurately report the raccoons on her 2008 wildlife rehabilitation logs and tally. Accordingly, the appropriate penalty must be considered.

Department Staff seeks to revoke respondent Doty's 2008 Wildlife Rehabilitator License, and bar her from reapplying until January 2011 (see DEC Exh 1; Tr at 8, 239-240). Department staff presents two justifications for the requested penalty. First, staff contends that the seriousness of the violations concerning raccoons, an RVS, warrants a severe penalty (Tr at 239-240). Second, staff argues that a pattern of problems concerning the operation of respondent Doty's rehabilitation facility also justifies the rarely imposed sanction of wildlife rehabilitator license revocation (see Tr at 81).

In response, respondent Doty argues several factors in mitigation of the penalty. First, respondent Doty argues that at least two of the four violations charged were not established on this record. With respect to the reporting violation, respondent Doty contends that the Department was well aware that raccoons were in her possession in 2008, and that no evidence exists that she tried to hide anything.

With respect to the raccoon possession charge, respondent Doty argues several mitigating factors. First, although she had not obtained a RVS rehabilitation license, she had satisfied many of the licensing requirements, including the training course and vaccination requirement. Respondent Doty argues that the ECL only requires that a wildlife rehabilitator complete a training course before handling RVS (see ECL 11-0919). Second, although her RVS cage was not completed or inspected at the time she had the raccoons in her possession, she nevertheless kept the raccoons caged and safely away from the public. Third, respondent Doty justified her actions on the ground that the only RVS licensed rehabilitator in the area was overwhelmed at the time. Respondent Doty argues that her actions were more consistent with the statutory goal of protecting public health than leaving the raccoons with untrained and unvaccinated members of the public.

Respondent Doty is correct that to the extent the sanction sought by Department staff is premised on four violations, the circumstance that only two violations were established warrants a reduction in the penalty. However,

the seriousness of the violations established -- respondent Doty's violations arising from her unpermitted handling of raccoons, an RVS -- nevertheless require imposition of a significant penalty.

Department staff stressed the importance of strict compliance with RVS rehabilitation regulations before a wildlife rehabilitator may safely handle an RVS, such as raccoons. Staff's witness, Mr. Martin, described rabies as a "virulent, always fatal, central nervous system disease virus that affects all mammals" (Tr at 69). Rabies poses a serious threat not only to wildlife, but to the health of humans and domesticated animals (see id.). The State's response to this serious health threat is a coordinated multi-agency effort involving the Department, the State Department of Health, and the State Department of Agriculture and Markets (see id. at 69-75). Ultimately, each county Health Department retains final authority concerning how RVS will be rehabilitated, or if it will be allowed at all, within their respective jurisdictions (see Tr at 72).

The State's Wildlife Rehabilitation Syllabus for RVS (see DEC Exh 23) was developed by the Department, pursuant to its express statutory authority (see ECL 11-0919[2]), in conjunction with the Departments of Health, and Agriculture and Markets, and reviewed by the New York State Veterinarian Medical Association, and the Humane Society of the United States (see Tr at 70-71). The purpose of the program is "to ensure minimal risk to not only the wildlife rehabilitators, but the people who encounter rabies vector species and livestock" (see id. at 69).

Wildlife rehabilitators must have their rehabilitator's license amended to allow rehabilitation of RVS before they may handle an RVS (see DEC Exh 23, at 15). To obtain a rehabilitator license with RVS authority, the applicant must (1) possess a valid Wildlife Rehabilitator License -- Class I, Class II, or Assistant; (2) complete the form "Application to Rehabilitate Rabies Vector Species"; (3) provide evidence of rabies pre-exposure or post-exposure vaccination; and (4) attend an RVS Training Course provided by or approved by the Department (see DEC Exh 23, at 12-13). In addition, applicants must provide an RVS caging facility, which must pass inspection by the Department of Agriculture and Markets before becoming

operational (see id. at 13; Tr at 73). Finally, before a wildlife rehabilitator with RVS authority may accept or respond to any calls involving RVS, the rehabilitator must register with the local county Health Department office (see id. at 17).

While respondent Doty had satisfied several of the requirements for obtaining RVS authority, she had not completed all the requirements at the time she accepted the raccoons. Most significantly, she had not obtained RVS authority for her wildlife rehabilitator's license. Respondent Doty's concern for the well-being of wildlife is notable, and her desire to protect the public from exposure to RVS is certainly laudable. However, as a licensed wildlife rehabilitator who has received RVS training, respondent Doty must appreciate that she may not unilaterally decide for herself which regulations she will comply with and which she will ignore.

In sum, respondent Doty's knowing disregard for the regulations governing RVS, and her failure to comply with the conditions of her wildlife rehabilitation license warrants a significant penalty. Accordingly, I recommend that the Commissioner revoke respondent's wildlife rehabilitator's license and deny renewal of that license for one year after issuance of the Commissioner's order in this matter.

CONCLUSIONS OF LAW

1. Respondent Marian D. Doty violated 6 NYCRR 175.5(a)(2) and Condition 2(c) of her license by possessing twelve raccoons in July 2008.
2. Respondent Doty violated 6 NYCRR 175.5(a)(1) and Conditions 2(I) and (R) of her license by providing materially false or inaccurate statements when she failed to list raccoons possessed in July 2008 on her wildlife rehabilitation log tally sheet or her four wildlife rehabilitation log forms for 2008.
3. Department staff failed to prove by a preponderance of the evidence that respondent Doty violated 6 NYCRR 175.5(a)(4) by feeding deer not confined in a deer rehabilitation enclosure in violation of 6 NYCRR 189.3(b). Staff also failed to prove by a preponderance of the evidence that respondent Doty violated 6 NYCRR 175.5(a)(4)

by possessing a red-tailed hawk without a federal migratory bird rehabilitation permit in violation of 50 CFR 21.31.

RECOMMENDATION

I recommend that the Commissioner determine that respondent Doty is liable for the two violations established by Department staff, and that the Commissioner dismiss the remaining charges. I also recommend that the Commissioner revoke respondent Doty's wildlife rehabilitator license, and deny renewal of that license until twelve months after the Commissioner's order in this matter is served upon respondent.

/s/

James T. McClymonds
Chief Administrative Law Judge

Dated: July 30, 2009
Albany, New York