



LICENSE REVOCATION ORDER

NAME AND ADDRESS OF RESPONDENT

David C. Lounsbury
[REDACTED]
[REDACTED]
[REDACTED]

Revocation Period Begins: 6/6/2014
Revocation Period Ends: 6/6/2019

Licenses Revoked: Hunting

HEARING DATA

Name of Hearing Officer:
Michael S. Caruso
Environmental Impact Examiner
(Administrative Law Judge)

Date and Time of Hearing:
Wednesday, April 16, 2014, at 10:45 A.M.

INCIDENT DATA

Victims:

[REDACTED]
(Property Owners)

Call For Service #: 13-003714 & 13-003762

Date of Incident: March 25, 2013

In the matter of the revocation of the **hunting** licenses, and all of the rights and privileges associated therewith of the individual identified above and hereinafter known as the Respondent;

On the date, time and location indicated, the entitled matter was decided by the above named Hearing Officer, duly designated by the Commissioner of the Department of Environmental Conservation pursuant to Section 11-0719 of the New York State Environmental Conservation Law.

Further, having been established that a Notice of Hearing and Complaint was served upon the Respondent, with the Respondent having **not appeared** at the hearing, all other persons having had the opportunity to testify and present evidence and upon submission of the Hearing Record, Report and Recommendation establishing that the Respondent did on the date of incident stated above while engaged in **hunting, so negligently and wantonly discharge a firearm as to destroy or damage private property in violation of ECL § 11-0719(2)(a)(1)(iii)**, specifically, on March 25, 2013, while hunting opossum, Respondent did negligently and wantonly discharge a firearm and struck two residences located at [REDACTED], respectively, in the Town of Machias, Cattaraugus County, it is, upon the record of these proceedings:

ORDERED AND DIRECTED, that any **hunting** licenses, carcass tags, stamps and permits currently held by the Respondent are hereby revoked and now void, and the Respondent is ordered and declared to be ineligible to hold such licenses, carcass tags, stamps and permits and is ineligible to **hunt** without a license until the revocation period in this Order ends and Respondent has fully satisfied all of the provisions of this Order and all other licensing requirements, and it is further,

ORDERED AND DIRECTED, that the revocation and ineligibility herein above set forth, shall be entered in the minutes of the New York State Department of Environmental Conservation, and that a written notice thereof be forthwith served upon the Respondent by certified mail, return receipt requested, or by personal service by a representative of the New York State Department of Environmental Conservation, and it is further,

ORDERED AND DIRECTED, as provided in said Section that within five days after the service of the order and notice upon the Respondent, that the Respondent deliver to the Department of Environmental Conservation, Albany, New York, any and all **hunting** licenses, carcass tags and permits issued to the Respondent for the current license year, together with any button or stamp associated with **hunting**, and it is further,

ORDERED AND DIRECTED, that in addition to completing the entire revocation time period the Respondent must successfully complete a Department-sponsored course and obtain a certificate of qualification in responsible **hunting** practices **before** being issued another **hunting** license. Therefore, the Respondent should successfully complete a Department-sponsored course and submit a certificate of qualification in responsible **hunting** practices to the Department **during** the revocation period. The certificate of qualification should be sent to the following address within 10 days from the date the certificate was issued: New York State Department of Environmental Conservation, Division of Law Enforcement, License Revocation Section, 625 Broadway, 3rd Floor, Albany, N.Y. 12233. It is further,

ORDERED AND DIRECTED, that if the Respondent fails to comply with any provision of this Revocation Order, the Respondent will become subject to the penalties prescribed by law in such cases.

June 6, 2014

Date

/s/

**Timothy A. Duffy, Director
Commissioner's Designee for
Sportsman License Revocation
Hearings**

Revocation or Suspension of Licenses pursuant to Interstate Wildlife Violator Compact

Effective March 1, 2006, New York State joined the Interstate Wildlife Violator Compact (IWVC). The IWVC is a compact under which member states reciprocate regarding the suspension or revocation of licenses and permits resulting from violations concerning the pursuit, possession or taking of mammals, birds, fish, reptiles, amphibians, mollusks, shellfish and crustaceans.

If a person's license or permit privileges which come under the scope of the IWVC are suspended or revoked in one member state, they are subject to suspension or revocation in all member states. In addition to license and permit suspensions and revocations which result from a conviction for the illegal pursuit, possession or taking of mammals, birds, fish, reptiles, amphibians, mollusks, shellfish and crustaceans, failing to appear in court or to otherwise answer a ticket or summons issued for such violations will also result in license or permit suspension. IWVC member states also agree to recognize convictions and/or civil and administrative settlements for violations within the scope of the IWVC which occur in all other member states and to apply them toward license and permit suspension and revocations in the state in which the person resides. For a complete list of IWVC member states, please call DEC's Division of Law Enforcement at **518-402-8816**.

**New York State Department of Environmental Conservation
Hunting Related Shooting Incident (HRSI) License Revocation Hearing
Hearing Report, Findings & Recommendations, and Final Decision**

**In the Matter of the Alleged Violation of Article 11
of the New York State Environmental Law (ECL) by:**

Name	David C. Lounsbury	Address	[REDACTED]
D.O.B.	[REDACTED]	Sporting License #	[REDACTED]

HRSI General Information

Case Name:	Matter of David C. Lounsbury	Call for Service #	13-003714 & 13-003762
Case No.:	13-003714 & 13-003762		
On (Date):	March 25, 2013	Victim (Name):	[REDACTED]
Was (check one):	Injured <input type="checkbox"/> ; Killed <input type="checkbox"/> ; or had Property Damaged <input checked="" type="checkbox"/>		
Description of Nature of Injury or Property Damaged:	While respondent was hunting, he discharged four shots at an opossum and struck two houses - one at [REDACTED] and the other at [REDACTED] in the town of Machias, Cattaraugus County.		
By (Name of Responsible Party):	David C. Lounsbury		
Location:	Town of	Machias	County of Cattaraugus

This incident occurred while the Respondent and/or Victim were engaged in the following hunting activity (specify):

Attempting to take an opossum.

This hearing was held at the Office of the New York State Department of Environmental Conservation located at (address):

270 Michigan Avenue, Buffalo, New York

at (time): 10:45 A.M. **on (date):** April 16, 2014

Designated Hearing Officer Name and Title:	Michael S. Caruso Environmental Impact Examiner (Administrative Law Judge)
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Petitioning Officer Rank, Name, & Shield	Lt. Donald J. Pleakis
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Respondent did not waive his right to this hearing.

APPEARANCES:

Respondent did not appear for this hearing.

Victim(s)

Victims did not appear for this hearing. List name(s) and address(es) of victim:

[REDACTED]
[REDACTED]

Witness(es)

List name(s) and address(es) of witness(es) present at this hearing:

ECO Robert J. Nosal

Others Present At Hearing

List name(s) and address(es) of others present at this hearing:

Mary Schulze - Court Reporter, Jack W. Hunt & Associates, Inc.

Firearm/Weapon Pertaining To The Hunting Related Shooting Incident

Make	Savage	Gauge/Caliber	12 Gauge
Model	944	Owned by:	David C. Lounsbury
Serial #	P788125	Possessed by	David C. Lounsbury

Exhibit List

1. DEC Hunting Related Shooting Investigation File - Case # 13-003714 ██████████ House Shooting (containing a table of contents and contents labeled S-1 through S-11).
2. DEC Hunting Related Shooting Investigation File - Case #13-003762 ██████████ House Shooting (containing a table of contents and contents labeled S-1 through S-12).
3. Cover Letter with Notice of Hearing and Complaint dated March 3, 2014 with proof of service on March 5, 2014.
4. New York Hunting & Trapping, 2013-14 Official Guide to Laws & Regulations, Volume 6, Issue No. 1, October 2013
 - The 10 Commandments of Firearm Safety pages 20-21 (with #3 underlined by staff).
 - Opossum Hunting Season page 55 (outlined by staff).
5. Six 12 gauge shell casings and one 12 gauge slug - Case # 13-003714 ██████████ House Shooting.
6. One 12 gauge slug - Case #13-003762 ██████████ House Shooting.

Office of Hearings Records:

- A. Copy of Hunting Related Shooting Incident Notice of Hearing and Complaint dated December 31, 2013 addressed to respondent with proof of service.
- B. Copy of letter from OHMS to the parties dated February 6, 2014 with a copy of OHMS webpage, "Guide to Enforcement Hearings".
- C. February 28, 2014 Hearing Transcript.

Transcript

The hearing was stenographically recorded.

Synopsis of Incident from Testimony, Documents, and Evidence

The synopsis rendered by me in this matter is based upon my review of the documents and evidence referenced above and the testimony of those present during the hearing held on the above date and time:

At approximately 6:00 pm on March 25, 2013, respondent discharged his Savage single-shot 12 gauge shotgun at least four times while attempting to take an opossum that was crossing a frozen snow covered field. The opossum was approximately 365 feet from respondent with two houses directly behind the opossum approximately 647 and

880 feet from respondent's position, respectively. One shotgun slug hit a house owned by [REDACTED], and one slug hit a house owned by [REDACTED]. The opossum was unharmed by respondent's attempts.

Findings, Conclusions of Law, and Recommendations of the Hearing Officer

FINDINGS: The findings, including any findings of negligence or negligence and wantonness or lack thereof (as the case may be), on the part of the Respondent, by this Hearing Officer, are based upon the preponderance of the testimony, documents, and evidence presented during the hearing and held on the above date and time (see 6 NYCRR 622.11[c]), unless this report notes a Default Judgment without hearing in which case the findings are based solely on the documents and evidence listed in this Report.

1. Respondent resides at [REDACTED] (Hearing Exhibits 1 [S-3] and 2 [S-3]).
2. Respondent owns a Savage Model 944 12 Gauge single-shot shotgun bearing Serial Number P788125. (Hearing Exhibits 1 [S-3] and 2 [S-3]).
3. On March 25, 2013, at approximately 6:00 pm respondent spotted an opossum as it exited respondent's property and ventured across an open field. (Hearing Exhibits 1 [S-4, S-6] and 2 [S-4, S-7]).
4. Respondent retrieved his shotgun and, in an attempt to take the opossum, shot in a northerly direction at the opossum as it crossed the field. (Hearing Exhibits 1 [S-3, S-4, S-6, S-11] and 2 [S-3, S-4, S-7, S-12]).
5. Respondent was firing 12 gauge Foster-type slugs. (Hearing Exhibits 5 and 6; Hearing Transcript at 42).
6. A couple of inches of snow covered the field, the ground was frozen and there was a layer of ice beneath the snow where the opossum was situated while respondent was shooting. (Hearing Exhibits 1 [S-11] and 2 [S-12]); Hearing Transcript at 24, 30, 31, 37 and 38).
7. Respondent was aware that there were houses in the direction he was firing even though a line of trees partially obstructed his view of the houses. (Hearing Exhibits 1 [S-3, S-4, S-6] and 2 [S-3, S-4, S-7]); Hearing Transcript at 50, 51, 52, 54 and 55).
8. When respondent discharged his shotgun, the houses were in the direct line of respondent's fire. (Hearing Exhibits 1[S-11] and 2 [S-12]; Hearing Transcript at 26).
9. Respondent shot at least four times at the opossum but failed to hit his target each time. (Hearing Exhibits 1 [S-3] and 2 [S-3]).
10. The opossum left tracks in the snow as it traveled across the field perpendicular to the road and was approximately 365 feet from respondent as respondent shot. (Hearing Exhibits 1 [S-3 and S-11] and 2 [S-3 and S-12]; Hearing Transcript at 24 and 51).
11. The slugs deflected off the frozen field in the vicinity of the opossum and continued in a northerly direction toward the houses. (Hearing Exhibits 1 [S-11] and 2 [S-12]; Hearing Transcript at 24, 30, 31, 37 and 38).
12. There were six empty shell casings found at the scene and several slug deflection marks found in the snow. (Hearing Exhibits 1 [S-3, S-9, S-11] and 2 [S-3]; Hearing Transcript at 24, 31, 34 and 42).
13. One slug entered the siding of the [REDACTED], some 647 feet from respondent's position, traveled a short distance, exited the siding and fell to the ground. (Hearing Exhibit 1 [S-1, S-2, S-3, S-4, S-5, S-6, S-7, S-9, and S-11]; Hearing Transcript at 24, 26, 28 and 34).
14. Another slug struck the [REDACTED] some 880 feet from respondent's position, pierced the siding and lodged in the attic. (Hearing Exhibit 2 [S-1, S-2, S-3, S-4, S-5, S-6, S-7, S-8, S-10, and S-12]; Hearing Transcript at 36, 39, 40 and 42).
15. In Cattaraugus County, the open season for opossum closed on February 15, 2013. (Hearing Exhibit 3, page 55).
16. The topography between respondent's location and the [REDACTED] houses is relatively flat with the open cornfield slightly lower than the houses and respondent's position while firing. (Hearing Exhibits 1 [S-3, S-11] and 2 [S-3, S-12]; Hearing Transcript at 54).
17. On January 2, 2014, Respondent was served with a Notice of Hearing and Complaint dated December 31, 2013.
18. Respondent did not answer the December 31, 2013 Notice of Hearing and Complaint and did not appear at the hearing held on February 28, 2014 at the New York State Department of Environmental Conservation Region 9 offices at 10:35 am. (Hearing Transcript from February 28, 2014 at 3).
19. On March 5, 2014, Respondent was served with a Notice of Hearing and Complaint dated March 3, 2014. (Hearing Exhibit 3)
20. Respondent did not answer the March 3, 2014 Notice of Hearing and Complaint and did not appear at the hearing held on April 16, 2014 at the New York State Department of Environmental Conservation Region 9 offices at 10:45 am. (Hearing Transcript at 11).

DISCUSSION: Including a discussion of the standards of negligence, or negligence and wantonness (as the case may be).

This matter was originally noticed for a hearing on February 28, 2014. The hearing was convened at 10:35 a.m. on that date. Respondent did not answer the complaint and did not appear at the hearing. Department staff orally moved to withdraw its Notice of Hearing and Complaint and to re-file and serve a new Notice of Hearing and Complaint. I granted the motion from the bench.

In this hunting related shooting case, where private property has been damaged, Department staff must prove by a preponderance of the evidence that respondent David C. Lounsbury (i) while hunting (ii) caused damage to private property (iii) by negligently and wantonly discharging a firearm (ECL 11-0719[2][a][1][iii]).

The Department applies the “reckless disregard for the safety of others” standard of care (see e.g. Marra v New York Cent. & Hudson R.R. Co., 139 AD 707, 710 [2d Dept 1910]) to determine whether a hunter negligently and wantonly discharged a firearm. In short, the evidence must show that the hunter “‘has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow’ and has done so with conscious indifference to the outcome” (Saarinen v Kerr, 84 NY2d 494, 501 [1994] [quoting Prosser & Keeton, Torts § 34 at 213 (5th ed 1984)]; see also Restatement [Second] of Torts § 500).

Department staff’s proof presents a prima facie case demonstrating that respondent while hunting did knowingly discharge his firearm in the direction of his neighbors’ houses without regard to the consequences and thereby caused damage to the houses. The record shows that Department staff duly served the notice of hearing and complaint upon respondent; and that respondent failed to file an answer to the complaint; and failed to appear for the adjudicatory hearing scheduled in the matter on April 16, 2014, as directed in the notice of hearing. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Moreover, the proof adduced at the hearing, conducted in respondent’s absence, demonstrates by a preponderance of the evidence that respondent while hunting did negligently and wantonly discharge his firearm and caused damage to his neighbors’ houses. The Department is entitled to judgment upon the facts proven.

The preponderance of the record evidence establishes that respondent discharged his 12 gauge single-shot shotgun at least 4 times. Each time the firearm was discharged the opossum was directly in line with the houses that were 647 and 880 feet away from respondent’s position. The record demonstrates that the shotgun slugs deflected off the hard frozen surface of the cornfield near the opossum. One of the slugs struck the [REDACTED] house and another slug struck and entered the attic of the [REDACTED] house. Respondent’s own statement demonstrates that he was aware that the [REDACTED] house was in the direction he was firing, but he nonetheless fired in that direction not once but at least four times. The evidence demonstrated that six shell casings were retrieved from the vicinity where respondent was shooting from, and that several deflection marks were made in the snow about 365 feet from the point of respondent’s shooting location. The houses were in the direct line of respondent’s fire.

In this case, respondent was aware of the proximity of the neighboring houses and proceeded in disregard of the fact that the houses were the backdrop for his intended target, the opossum. Respondent acted wantonly by taking these shots knowing the backdrop for the target included neighboring houses. Here, respondent violated The 10 Commandments of Firearm Safety. First, he knew that the neighbors’ houses were behind the intended target. Second, respondent shot at a hard flat surface, the frozen field, where the chances of a ricochet or deflected shot stood a high chance of hitting the houses beyond the targeted opossum. As staff also pointed out, it is highly unlikely that a target the size of an opossum can be hit from 365 feet away with a smooth bore shotgun, with only a bead sight, shooting a slug. (See Hearing Transcript at 52). The chances of a slug deflecting off a hard frozen surface, however, were high. Respondent ignored the known and apparent risks and proceeded in disregard of the high and excessive degree of danger. The fact that two of respondent’s four admitted shots hit neighboring houses further demonstrates the high and excessive degree of danger involved.

Department staff’s requested revocation of respondent’s hunting and trapping licenses for a period of five years is consistent with previous decisions and supported by the facts in this case.

CONCLUSIONS OF LAW: The following are the Hearing Officer's conclusions of law concerning the violations established on the record of the hearing.

Respondent David C. Lounsbury negligently and wantonly discharged his firearm while hunting and caused damage to two private residences in violation of ECL 11-0719(2)(a)(1)(iii).

RECOMMENDATIONS: The following are this Hearing Officer's recommendations concerning the revocation of the respondent's sporting license and are subject to review by the Commissioner or the Commissioner's Designee for Sporting License Revocations.

- 1. That respondent David C. Lounsbury's hunting and trapping licenses be revoked and that he be denied the privilege of obtaining such licenses and denied the privileges of hunting and trapping with or without a license for a period of five years from the date of a Commissioner's Order; and**
- 2. That the Commissioner order respondent David C. Lounsbury to successfully complete a Department-sponsored sportsman education course and obtain the associated certificate of qualification before being issued another license.**

Hearing Officer's Name:	Michael S. Caruso	Title:	Environmental Impact Examiner (Administrative Law Judge)
Signature:	<i>/s/</i>	Date:	May 19, 2014

Central Office Review and Decision Regarding Sporting License Revocation

I have reviewed the hearing record regarding this matter and adopt the hearing report of the Administrative Law Judge (ALJ) in its entirety.

I agree that Department staff proved by a preponderance of the record evidence that respondent David C. Lounsbury negligently and wantonly discharged his firearm while hunting and caused damage to two private residences in violation of ECL 11-0719(2)(a)(1)(iii). The record demonstrates that on March 25, 2013, while hunting opossum, respondent discharged his Savage Model 944 12-gauge single-shot shotgun at least four times in the direction of two private residences. The residences were directly in respondent's line of fire, and no adequate back stop protected the residences. In addition, respondent shot at a flat, hard surface, namely, a frozen field. Each of these actions constituted a violation of basic hunter safety rules (see Exhibit 4, at 21). Moreover, the record demonstrates that respondent knew that the residences were in the direction that he was firing (see Finding of Fact No. 7). Thus, the evidence demonstrates that respondent intentionally discharged his firearm in conscious disregard of a known or obvious risk of harm to life or property, therefore, acted negligently and wantonly (see Matter of Drilling, License Revocation Decision, Sept. 23, 2013, at 6-7; Saarinen v Kerr, 84 NY2d 494, 501 [1994] [quoting Prosser & Keeton, Torts § 34 at 213 (5th ed 1984)], see also Restatement [Second] of Torts § 500).

Finally, the five year suspension of respondent's hunting and trapping privileges is authorized and supported by the record. Respondent shall also be required to successfully complete a Department-sponsored sportsman education course and obtain the associated certificate of qualification before being issued another license.

The sporting license privileges of the responsible party should be revoked: Yes No

Sporting licenses subject to revocation: Hunting Trapping

Length and Terms of Revocation:

Five (5) years. Respondent David C. Lounsbury to successfully complete a Department-sponsored sportsman education course and obtain the associated certificate of qualification before being issued another license.

Commissioner or Commissioner's Designee:

Timothy A. Duffy, Director

Signature:

/s/

Shield #

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Date:

6-05-14