

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

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In the Matter of the Denial of Application for Renewals of New York State Fish and Wildlife Licenses Issued Pursuant to Article 11 of the Environmental Conservation Law and Parts 175 and 182 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

-by-

**CINDY A. BARDIN,**

Applicant.

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**ORDER**

DEC Case No.  
OHMS 2013-68159

Applicant Cindy A. Bardin (Ms. Bardin) seeks to renew two special licenses issued by the Division of Fish, Wildlife & Marine Resources (DFWMR) of the Department of Environmental Conservation (Department), relating to Ms. Bardin's business involving the possession, propagation, and exhibition of certain animal species subject to federal and state regulation.

By letter dated August 25, 2011, DFWMR Director Patricia Riexinger denied Ms. Bardin's renewal requests, citing (i) noncompliance with conditions of Ms. Bardin's 2010 special licenses; and (ii) the facility's history of noncompliance with previously issued license conditions, and violations of the Environmental Conservation Law (ECL) or other statutes and regulations related to the handling of animals or the licensing of the facility (see Hearing Exhibit [Ex.] 1).

Following the Director's denial of Ms. Bardin's request to renew her special licenses, Ms. Bardin's counsel, by letter dated August 31, 2011, requested a hearing pursuant to part 175 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) (see Ex. 2). By letter dated September 14, 2011, counsel for the Department informed Ms. Bardin that there was no statutory or regulatory basis for her request for a hearing, denied the hearing request, and stated that the Director's decision to deny the application to renew the special licenses was a final determination by the agency (see Ex. 3).

Ms. Bardin thereafter commenced a CPLR article 78 proceeding in New York State Supreme Court, Washington County, challenging the Department's denial of a hearing. In a decision and order dated March 8, 2013, Justice Stan L. Pritzker ordered the Department to hold a hearing (see Matter of Bardin, Sup Ct, Washington County, March 8, 2013, Pritzker, J., Index No. 19481, at 15). Although Justice Pritzker agreed with the Department's position that no statutory or regulatory provision requires a hearing to challenge a denial of an application to renew special licenses, he analogized the facts in this case to those involving revocation of a license, which requires a hearing (see id. at 12 ["the denial of the renewal is, practically

speaking, the same as a revocation” of a special license]; see also *id.* at 14 [“non-renewal is akin to a revocation”]). Justice Pritzker held that, in such circumstances, due process requires a hearing, and ordered DEC to hold a hearing “in accordance with 6 NYCRR 175.5(c), (d) [,] (e)” (*id.* at 14-15).<sup>1</sup> In accordance with the court’s decision and order, an adjudicatory hearing was held on June 20, 2013.

The attached hearing report (Hearing Report) of Administrative Law Judge (ALJ) Helene G. Goldberger contains: (i) proposed findings of fact relating to Ms. Bardin’s permit history, history of violations, activities and omissions, and other facts relating to her request to renew her permits, as well as additional facts occurring subsequent to the Director’s denial of the request for renewal (see Hearing Report at 7-14); (ii) proposed conclusions that Department staff met its burden of proof to establish that Ms. Bardin committed violations of a 2010 consent order, relevant regulations, and several conditions of her special licenses (*id.* at 20-21); and (iii) recommendations that I (a) reverse the Director’s denial of Ms. Bardin’s request to renew her two special licenses, (b) renew Ms. Bardin’s licenses for “the 2014 season” with “very stringent oversight by the DEC staff,” (c) direct Ms. Bardin to pay that portion of the civil penalty under the 2010 consent order that remains unpaid, and (d) direct Ms. Bardin to “immediately provide a complete and accurate list of the animals in her possession with the respective identification” (*id.*).

In this order, I adopt the ALJ’s: (i) findings of fact; (ii) proposed conclusion that Department staff met its burden of proof to establish that Ms. Bardin committed violations of a 2010 consent order, relevant regulations, and several conditions of her special licenses; (iii) recommendation to direct Ms. Bardin to pay two thousand dollars (\$2,000), representing the as-yet unpaid portion of the civil penalty of three thousand five hundred dollars (\$3,500) that Ms. Bardin agreed to pay under the 2010 consent order; and (iv) recommendation to direct Ms. Bardin to provide a complete and accurate list of animals in her possession, with appropriate identification.

Based upon my review of the record, however, I do not adopt the ALJ’s recommendation to reverse Director Riexinger’s denial of Ms. Bardin’s application to renew her special licenses, and instead affirm Director Riexinger’s denial of Ms. Bardin’s application, with one modification. I modify the Director’s denial of the application to renew to allow Ms. Bardin one hundred five (105) days from the date this order is served upon Ms. Bardin – rather than the sixty (60) days provided in Director Riexinger’s August 2011 denial letter – to transfer all animals and

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<sup>1</sup>The sections cited by Justice Pritzker set the time frames and procedural mechanisms for administrative hearings challenging the Departmental revocation of special licenses. Section 175.5(c) requires the licensee to submit a written statement setting forth the reasons the licenses should not be revoked, or a request for a hearing, or both. Section 175.5(d) requires the Department to respond to the licensee’s statement or request within 10 working days of receipt and, if a hearing is requested, notify the licensee of a date and place for a hearing, to be held no earlier than 30 days after the notification. Finally, section 175.5(e) states in relevant part that, where a hearing is held, the Director of Fish and Wildlife, or the director’s agent, shall issue a decision within 30 calendar days of receipt of the completed record of the hearing, and such decision will continue the license as originally issued, modify the license conditions or revoke the license. By letter dated February 25, 2014 (a copy of which is enclosed), Director Riexinger delegated to me her decision-making authority under 6 NYCRR part 175. The February 25, 2014 letter supercedes the prior delegation letter dated January 13, 2014 and this order replaces the prior order dated February 10, 2014. The February 10, 2014 order is hereby vacated.

species regulated by the Department to one or more individuals or entities authorized by law to possess them.<sup>2</sup>

## FACTUAL BACKGROUND

Over the course of several years beginning in June 2006 and ending in August 2010, Ms. Bardin applied for, and the Department's Special Licenses Unit of DFWMR issued and amended, special licenses permitting Ms. Bardin to possess, at various times during that period, wild animals including two bobcats, one male and two female cougars, two male and two female ring-tailed lemurs, six American alligators, a female Bengal tiger, a female black panther, one male and one female lynx, one male tiger, one male and one female black bear and one red fox (see Hearing Report, at 8-9, Findings of Fact Nos. 1-17; see also generally Ex. 15 [Affidavit of Joseph E. Therrien dated Dec. 20, 2011 (Therrien Aff.)], at ¶¶ 18-46).

The Department issued one of the licenses to Ms. Bardin – license to possess and sell (LPS) # 61 – pursuant to ECL 11-0515(2) and 6 NYCRR part 175. The Department granted Ms. Bardin renewal of this license in 2007 (see Therrien Aff. ¶ 26) and, in August 2009, issued to her a new LPS # 61, rather than renewing her prior LPS #61, because she had allowed the earlier license to expire (id. ¶ 40; see also Ex. 23 [LPS # 61 in effect from August 19, 2009 to August 31, 2010]).

The Department issued the other license – endangered/threatened species propagation (ETSP) # 52 – pursuant to ECL 11-0535(2) and 6 NYCRR parts 175 and 182 (Therrien Aff. ¶ 20). Although notified in 2007 of the requirement to apply to renew this license, Ms. Bardin failed to submit a renewal application for ETSP # 52 until May 2008, almost a year after the earlier license had expired (Hearing Report, Finding of Fact No. 11; see also Therrien Aff. ¶ 27). The Department thereafter issued Ms. Bardin a new license – endangered/threatened species propagation/exhibition/education (ETSPEE) # 33 – that included authority to exhibit wild animals (id.; see also Ex. 22 [ETSPEE #33 in effect from August 19, 2009 to August 31, 2010]).

Joseph E. Therrien, a biologist with the Department since 1999, who has been assigned to the DFWMR Special Licenses Unit in 2005 and has served as Unit Leader of that Unit since 2011, provided testimony at the hearing and through an affidavit admitted as an exhibit (see Hearing Transcript [Tr.] at 15:1-131:21; see also Ex. 15). Ms. Bardin also provided testimony at

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<sup>2</sup> In addition, I do not adopt or endorse the ALJ's "personal feelings" concerning the propriety of possessing wild animals (see Hearing Report, at 21 n 7). As the ALJ acknowledges, possession of wild animals is expressly allowed under both federal and State law, and this Department will continue to issue to qualified persons licenses authorizing such possession, and will regulate and monitor such licensure to protect the animals, the public and the environment. Indeed, the ALJ recommended that I permit Ms. Bardin to continue to possess the animals (see id. at 20-21). I do not adopt the ALJ's recommendation to renew Ms. Bardin's licenses because, as discussed herein, the record in this proceeding establishes that Ms. Bardin's history of noncompliance demonstrates her lack of fitness, and warrants denial of her application to renew her licenses. Renewal of Ms. Bardin's licenses would not ensure protection of the animals, the public or the environment.

The hearing report also cites a news article which is not part of this record (see Hearing Report, at 19 n 4). Accordingly, I have not considered it as part of my deliberations or determinations in this matter.

the hearing and through two affidavits submitted as exhibits (see Tr. at 132:7-192:13; see also Exs. 13, 14).

## DISCUSSION

Courts have long recognized that “a licensing official has implicit discretion to pass upon the fitness of an applicant” (see e.g. Barton Trucking Corp. v O’Connell, 7 NY2d 299, 307-309 [1959]; Matter of Olsen v Town of Saugerties, 161 AD2d 1077, 1078 [3d Dept 1990]), and that the compliance history of a permit applicant is a relevant consideration when determining whether to renew a permit (see e.g. Matter of Bio-Tech Mills Inc. v Williams, 105 AD2d 301 [3d Dept 1985], affd for reasons stated below, 65 NY2d 855 [1985]; Matter of Olsen, 161 AD2d at 1078 [prior or existing violations are “legitimate factors bearing on the suitability of an applicant”]; see also Matter of Karta Corp., Order of the Commissioner, Aug. 10, 2010, adopting Hearing Report, at 24-26 [extended discussion of record of compliance as a basis for permit denial]).

These considerations have been incorporated into the Department’s Record of Compliance Enforcement Policy (rev. March 5, 1993) (DEE-16) (see also <http://www.dec.ny.gov/regulations/25244.html>). DEE-16 acknowledges that “[p]ersistent violators of the [ECL] should not have permits renewed” (id. at § II), and identifies events which “should be considered a basis for exercising the Department’s discretion in denying, suspending, modifying or revoking a permit” including, for example, whether the permittee or applicant (i) has been convicted of a crime related to the permitted activity under any federal or State law; or (ii) has been determined in an administrative proceeding to have violated any provision of the ECL, a related order or determination of the Commissioner, any regulation of the Department, any condition or term of any permit issued by the Department, or any similar statute, regulation, order or permit condition of the federal or other state government, or agency, on one or more occasions.

As set forth above, Director Riexinger denied Ms. Bardin’s request to renew her special licenses for: (i) noncompliance with conditions of Ms. Bardin’s 2010 special licenses; and (ii) the facility’s history of noncompliance with previously issued permit conditions, and violations of the ECL or other statutes and regulations related to the handling of animals or the permitting of the facility (see Ex. 1, at 1). In this case, a preponderance of the credible evidence introduced at the hearing, including Mr. Therrien’s and Ms. Bardin’s live testimony and affidavits, as well as the many exhibits admitted at the hearing, demonstrates that the Director’s determination to deny Ms. Bardin’s request to renew her special licenses was authorized and appropriate.

The ALJ’s conclusion that “Ms. Bardin does not have a good compliance record” (Hearing Report, at 19) is amply supported by the record. Indeed, the evidence established that Ms. Bardin repeatedly failed to comply with license conditions, failed to renew her licenses in a timely manner, acquired and possessed wild animals – including raccoons, a known rabies vector species, see e.g. Matter of Doty, Order of the Commissioner (Aug. 12, 2009), and an African lion – without authorization, and failed to provide housing facilities designed and constructed to ensure that the wildlife could not escape or pose a threat to the public. In addition Ms. Bardin: (i) pleaded guilty in town court to violations of law (see Therrien Aff. ¶¶ 51-52; see also Exs. 19,

21; (ii) entered into a consent order with the Department admitting violations of ECL provisions and regulations relating to activities under her special licenses (see Ex. 16); and (iii) entered into a federal Consent Decision and Order reflecting many violations of federal regulations (see Ex. 8 [USDA Consent Decision and Order, In re Cindy Bardin, AWA Docket No. 12-0428]).

Specifically, the record reflects Ms. Bardin has committed the following violations of applicable statutes, regulations, orders or license conditions:

- Failure to pay two thousand dollars (\$2,000) of a three thousand five hundred dollar (\$3,500) civil penalty under Ms. Bardin’s 2010 consent order with the Department (see Ex. 16 [July 2010 Consent Order], at 3, Art. I; see also Ex. 15, Therrien Aff. ¶ 48; Ex. 14 [Reply Affidavit of Cindy Bardin dated Jan. 2, 2011 (Bardin Reply Aff.)] ¶ 22;
- Failure to submit an annual report, in violation of license condition (see Therrien Aff. ¶¶ 25, 32);
- Failure to submit bills of sale for each animal acquired under both licenses, in violation of license condition (see id. ¶ 25);
- Failure to submit notification of the type, location and identification number or mark used to identify animals held under licenses, in violation of license condition (see id. ¶¶ 25, 41);
- Unauthorized loan of alligator (see id. ¶ 37);
- Failure to provide housing facilities designed and constructed to ensure that the wildlife could not escape or pose a threat to the public (see id. ¶ 48; see also Ex. 16 [Order on Consent dated July 30, 2010] ¶¶ 9[A], [B]);
- Unauthorized possession of endangered or threatened species after license had expired (see Ex. 16 ¶ 9[C]);
- Unauthorized possession of protected wildlife after license had expired (see Ex. 16 ¶ 9[D]);
- Unauthorized acquisition and possession of an African lion (see Therrien Aff. ¶¶ 51-52; see also Ex. 19 [ticket issued by DEC enforcement officers]; Ex. 21 [Order and Conditions of Conditional Discharge of Granville Town Justice Court, dated May 9, 2011 (2011 Conditional Discharge), reflecting Ms. Bardin’s conviction]; Ex. 9 [USDA Consent Decision and Order, In re Cindy Bardin, AWA Docket No. 12-0445, regarding same violations]);
- Two violations relating to failure to mark or tag animals as required by license conditions (see Exs. 18 and 20 [tickets reflecting 13 alleged violations]; Ex. 21 [2011 Order and Conditional Discharge reflecting conviction with respect to two “microchip violations”]);
- Unauthorized possession of raccoons without proper authorization (see Therrien Aff. ¶ 54; see also Ex. 14, Bardin Reply Aff. ¶ 28 [admitting possession]; see also Tr. at 159:25-160:6 [admitting possession]; 179:15-23 [same]; 180:14-181:8 [admitting knowledge that one is not supposed to possess raccoons without a license]; 188:17-19 [admitting possession of two raccoons]);
- In August 2010, failure to have an accurate written program of veterinary care available for inspection, in violation of federal regulation 9 CFR 2.40(a) (see Ex. 8 [USDA Consent Decision and Order, In re Cindy Bardin, AWA Docket No. 12-0428], at 3, ¶ 2;
- In September 2007, failure to meet minimum federal standards, and violations of several federal regulations, relating to “excessively rusted” lemur enclosure, failure to have plan

for environmental enhancement for nonhuman primates, accumulation of building materials in animal area, pile of nails adjacent to the cougar cage and accessible to the cougar (*id.* at 3-4, ¶ 3[a]-[d]);

- In July 2009, failure to maintain accurate and complete records of acquisition and disposition of a coatimundi, in violation of 9 CFR 2.75(b) (*id.* at 4, ¶ 4);
- In June 2010, failing to meet minimum standards, and violations of several federal regulations, relating to water and water receptacles for bears, protruding wire into capuchin enclosure, and accumulation of clutter (*id.* ¶ 5[a]-[c]);
- In August 2010, at an exhibition in Rhinebeck, New York, failure to have a secondary barrier between the public and primates' primary enclosure, and failure to construct the enclosures in a manner that would prevent the public from having direct contact with the animals, in violation of 9 CFR 2.131(c)(1) and 3.78(e) (*id.* ¶ 6);
- In August 2010, at an exhibition in Rhinebeck, New York, failure to have a barrier fence between the public and coatimundi enclosure, and failure to construct the enclosure in a manner that would prevent the public from having direct contact with the animal, in violation of 9 CFR 2.131(c)(1) (*id.* ¶ 7);
- In August 2010, at an exhibition in Rhinebeck, New York, to meet minimum federal standards, and violations of several federal regulations, relating to feeding a five-month-old tiger a diet that had not been reviewed and/or approved by the attending veterinarian, in violation of 9 CFR 3.129 (*id.* ¶ 8);
- In December 2010, failure to have a barrier fence between the public and the enclosures housing serval, pig, lion, bear, fox and lynx so as to prevent the public from having direct contact with the animals, in violation of 9 CFR 2.131(c)(1) (*id.* at 5, ¶ 9);
- In December 2010, failure to meet minimum standards, and violations of several federal regulations, relating to food storage areas also being used for housing animals, open food bags, rooms cluttered with construction and cleaning materials, fruit and vegetables stored on the floor in open containers under a roof under construction, the lynx enclosure perimeter fence lacked sufficient strength, and accumulation of clutter around the premises (*id.* ¶ 10[a]-[c]); and
- In June 2011, failure to meet minimum standards, and violations of federal regulations, relating to perimeter fence lacking sufficient structural strength (*id.* ¶ 11[a]).<sup>3</sup>

Indeed, even at the hearing, it remained unclear as to the types and number of animals that Ms. Bardin has possessed and continues to possess, and she admitted failing to advise the Department of changes in the animals that she owned or possessed (*see e.g.* Tr. 174:4-176:25; 191:9-192:12).

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<sup>3</sup> The record also reflects Ms. Bardin's failure, in October 2011, to meet minimum standards, and violations of federal regulations, relating to protruding nails and a hammer in a pig enclosure, and a wire protruding into the lion enclosure (*id.* ¶ 12[a], [b]). Director Riexinger's August 2011 denial of Ms. Bardin's request to renew the special licenses was of course based only on events and violations that occurred prior to that time, and my review of the propriety of the Director's denial must be limited to consideration of evidence that pre-dates the denial. I have included reference to matters post-dating the Director's denial as part of my discretionary consideration of Ms. Bardin's general fitness as well as the appropriate remedial relief ordered herein.

For the foregoing reasons, I hold that Ms. Bardin is not fit to hold the special licenses for which she has applied. I hereby affirm Director Riexinger's denial of Ms. Bardin's applications to renew her special licenses, and direct Ms. Bardin to transfer, within one hundred five (105) days of service of this order upon her, all of the Department-regulated animals and species in her possession or on loan from her facility, in accordance with the terms of this order. I have increased the period by which the animals must be transferred from sixty (60) days, as set forth in Director Riexinger's August 2011 letter, to one hundred five (105) days, due to the number and variety of animals and species in Ms. Bardin's possession.

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

- I. The determination of Patricia Riexinger, Director, Division of Fish, Wildlife & Marine Resources of the Department, as set forth in her August 25, 2011 Notice of Denial of Applications for License Renewals, is hereby **AFFIRMED**.
- II. Cindy A. Bardin's application for renewals of special licenses, specifically: (A) license to possess and sell # 61, and (B) endangered/threatened species propagation/exhibition/education # 33 are hereby **DENIED**.
- III. Within thirty (30) days of service of this order on Cindy A. Bardin, Ms. Bardin shall submit payment of two thousand dollars (\$2,000), representing the as-yet unpaid portion of a civil penalty payable under Order On Consent # CO 5-20090713-145. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation." The payment shall be mailed or otherwise delivered to the Department at the following address:  
  
Mark D. Sanza, Esq.  
Assistant Counsel  
NYS Department of Environmental Conservation  
Office of General Counsel  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-1500
- IV. Within thirty (30) days of service of this order on Cindy A. Bardin, Ms. Bardin shall provide to the Department an accurate and complete list of all animals and species regulated by the Department that are in Ms. Bardin's possession or on loan from her facility.
- V. Within one hundred five (105) days of service of this order on Cindy A. Bardin, Ms. Bardin shall transfer all animals and species regulated by the Department that are in her possession or on loan from her facility, to individuals or entities that are authorized by law to possess them. Pursuant to 6 NYCRR 175.5(h), Ms. Bardin shall be responsible for all liabilities and expenses for the final disposition of the animals and species. The transfer ordered herein shall be subject to the following conditions:

- A. The Department must pre-approve any such transfers that take place within New York. No less than fourteen (14) days prior to such transfer within the State of New York, Ms. Bardin shall provide notice in writing to the Department identifying each proposed transferee.
  - B. For any transfer of Department-regulated animals or species to persons or entities outside of the State of New York, Ms. Bardin shall provide written notice to each such proposed transferee, with a copy to the Department, that it is illegal to possess, sell or exhibit such animals and species in the State of New York without first obtaining a license from the Department. The written notice identified in this paragraph shall include the name, address and telephone number of the proposed transferee.
  - C. Until such time as the Department-regulated animals and species in Ms. Bardin's possession are transferred, they shall remain at Ms. Bardin's facility. During the period of time prior to such transfer, Ms. Bardin shall:
    - 1. Maintain the cages for these animals and species so that they are secured at all times with a keyed or combination lock;
    - 2. Keep members of the public at a distance such that they cannot have any contact with the animals or species at any time prior to the transfer of the animals and species;
    - 3. At all times provide humane care for the animals and species, and bear all costs associated with their care; and
    - 4. Not exhibit or breed any of the animals and species.
  - D. In the event Ms. Bardin fails to transfer all Department-regulated animals and species within the time frame provided in this order, the Department shall take appropriate action with respect to such animals and species, which may include, without limitation, transferring or euthanizing such animals or species.
- VI. In the event Ms. Bardin violates this order, the period of one hundred five (105) days allowed under this order for transfer of the animals and species shall terminate immediately.
- VII. All communications from Ms. Bardin to the Department concerning this order shall be directed to Mark D. Sanza Esq., at the address referenced in paragraph III of this order.



VIII. The provisions, terms and conditions of this order shall bind Cindy A. Bardin, and her agents, successors and assigns, in any and all capacities.

For the New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Joseph J. Martens  
Commissioner

Dated: March 5, 2014  
Albany, New York

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

In the Matter

- of -

the Denial of Application for Renewals of New York State Fish and  
Wildlife Licenses Issued Pursuant to Article 11 of the Environmental  
Conservation Law and Parts 175 and 182 of  
Title 6 of the Official Compilation of Codes, Rules and Regulations  
of the State of New York

to:

**CINDY A. BARDIN,**

Licensee.

Amended Endangered/Threatened Species License #33  
Amended License to Possess and Sell #61

HEARING REPORT

\_\_\_\_\_/s/\_\_\_\_\_  
Helene G. Goldberger  
Administrative Law Judge

September 13, 2013

## Proceedings

By letter dated August 25, 2011, Patricia Riexinger, New York State Department of Environmental Conservation (DEC or Department) Director of Fish, Wildlife & Marine Resources (DFWMR) advised licensee, Cindy Bardin, that the Department was denying the renewal applications for her special licenses. Hearing Exhibit (Ex.) 1 (see exhibit chart annexed). These licenses, numbered #33 – Endangered/Threatened Species: Propagation/Education/Exhibition License (ETSPEE) and #61 – License to Possess and Sell (LPS), were reissued to Ms. Bardin in August 2009 for Ms. Bardin’s facility then located at 66 Quaker Street, Granville, New York. Exs. 22, 23. They were scheduled to expire on August 31, 2010. *Id.* By application dated August 20, 2010, Ms. Bardin applied to renew her licenses with two proposed changes. Ex. 37. These were to change the location of the facility to 6603 Route 149 in Granville and to add one male “baby” lion that she was acquiring. *Id.*; Therrien Aff., ¶ 46.

In the denial letter, Director Riexinger contended that Ms. Bardin had violated a number of conditions of her licenses as well as other provisions of the Environmental Conservation Law (ECL) and the applicable regulations during the period from June 2009 through May 2011, forming the bases for the Department’s determination. Ex. 1.

In response to the August 25, 2011 denial letter, by letter dated August 31, 2011, attorney Robert M. Winn wrote Director Riexinger on behalf of Ms. Bardin requesting a hearing pursuant to Part 175 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). Ex. 2. By letter dated September 14, 2011, DEC Assistant Counsel Mark Sanza advised Mr. Winn that his request did not provide any basis to challenge the denial and no hearing was required. Ex. 3. On or about December 6, 2011, Ms. Bardin commenced an Article 78 proceeding in State Supreme Court (Washington County) against Commissioner Joe Martens and Director Riexinger challenging the denial and failure to provide an opportunity for a hearing. Ex. 13. By Decision and Order dated March 8, 2013, the Honorable Stan L. Pritzker determined that the petitioner, Cindy Bardin, was entitled to a hearing based upon due process grounds. Ex. 4. Justice Pritzker ordered that DEC hold a hearing within 40 days of the date of his decision. *Id.* Ms. Bardin agreed not to exhibit the animals at her facility or anywhere in New York State until a decision in this matter is rendered and DEC issues her a license. *Id.*

Department staff issued a statement of readiness dated March 14, 2013. Ex. 5. On March 21, 2013, Chief Administrative Law Judge James T. McClymonds assigned the matter to me for hearing. Ex. 6. Because the United States Department of Agriculture (USDA) had commenced an enforcement proceeding against Ms. Bardin, the parties requested adjournment of the DEC licensing proceeding pending the outcome of that matter. Justice Pritzker so-ordered a stipulation by the parties that acknowledged this agreement. Ex. 7. By letter dated April 25, 2013, Mr. Winn provided me with a copy of the Consent Decision and Order dated April 15,

2013 in connection with the USDA proceedings. Ex. 8. This Consent Decision and Order provides that Ms. Bardin's Animal Welfare Act license number 21-C-0319 was suspended for one week. *Id.*

Based upon the schedules of the parties, the DEC matter was set for hearing on June 20, 2013. The hearing proceeded on that date and the hearing transcript was received by the OHMS on July 19, 2013. The Department staff sent proposed corrections to the transcript by electronic mail on July 24, 2013. On July 31, 2013, I sent the parties my corrections to the transcript and invited additional corrections and/or objections from the parties by August 16, 2013.

Because this matter concerns the Department staff's determination to deny a license renewal, the proceedings are governed by Part 622 of Title 6 of NYCRR - Uniform Enforcement Hearing Procedures. 6 NYCRR § 622.1(a)(16). The Department staff's denial letter constitutes the complaint and the licensee's request for a hearing constitutes the answer. 6 NYCRR § 622.3(b)(2). The Department staff must prove its allegations by a preponderance of the evidence to prevail. 6 NYCRR § 622.11(b).

At the hearing, the Department staff was represented by Mark D. Sanza, Assistant Counsel, DEC Office of General Counsel. Ms. Bardin was represented by Mr. Winn of Granville, New York. The matter concluded in one day and closing memoranda were received on August 30, 2013, with replies due on September 6, 2013. Because the parties elected not to submit replies, the record closed on August 30, 2013 with my receipt of the closing memoranda.

DEC staff presented one witness, Joseph E. Therrien, a Biologist 1 with DEC's DFWMR. Ms. Bardin testified on her own behalf as the sole witness for her case.

#### DEC's Bases for Decision Not to Renew Licenses

In her August 25, 2011 denial letter, Director Riexinger advised Ms. Bardin that "the Department has denied your 2011 renewal applications for: (i) noncompliance with conditions of your 2010 special licenses issued by the Department; and (ii) the facility's history of noncompliance with previously issued permit conditions, and violations of the ECL or other statutes and regulations related to your handling of animals or the permitting of the facility." Ex. 1.

Specifically, the Director referred to an event held on May 30, 2009 at Sprinkles Ice Cream Shop in the Town of Queensbury that resulted in the issuance of appearance tickets for illegal possession of Department-regulated species without a permit and improper caging which failed to ensure that there would be no contact between the animals and the public. Ms. Bardin signed a consent order on June 24, 2010 to resolve violations of: 1) ECL § 11-0305(2), 6 NYCRR § 182.4 and condition 2.K. of license # 33 for failing to provide appropriate housing so that the wildlife displayed - specifically a cougar and a tiger - would not be a danger to the public; 2) ECL § 11-0535(2) and 6 NYCRR § 182.3 by possessing endangered/threatened species on June 27, 2009 after ETSPEE # 33 had expired; and 3) ECL § 11-0107(2) by possessing protected wildlife on June 27, 2009 after LPS # 61 had expired. Ex. 16. This consent order required Ms. Bardin to pay a civil penalty of \$3,500. The consent order was executed by

the licensee in June 2010 and Ms. Bardin has paid \$1,500 of the penalty. Therrien Aff., ¶ 48; Bardin Aff., ¶ 22.

Director Riexinger noted in the denial letter that after these violations, the Department modified the applicable special licenses to prohibit the transportation and exhibition of American black bears one year of age or older (license # 61), cougars one year of age or older, and tigers nine months of age or older (license # 33) at any location other than the 66 Quaker Street, Granville, New York facility.

In the denial letter, Director Riexinger recounted the March 17, 2011 Department staff inspection of Ms. Bardin's new facility located at 6603 Route 149 for which Ms. Bardin had submitted a renewal application. As a result of this inspection, the Department staff issued a uniform appearance ticket for illegal possession of an African lion and 13 counts of violating license conditions. Ms. Riexinger specified that Ms. Bardin violated condition 2.E. of the LPS (# 61) and condition 2.F. of the ETSPEE license (# 33) for failure to notify the Department of the type, location and number used for the identification markers on all animals greater than six months old. The Director noted that DEC staff had requested this information in letters dated December 6, 2007 and August 19, 2009. Director Riexinger advised that on May 9, 2011, the licensee was convicted in Granville Town Court of possessing a lion without a permit from the Department and two counts of failure to mark/microchip.

Director Riexinger also stated that the Department staff learned of Ms. Bardin's illegal possession of raccoons in May 2011. Raccoons are regulated by the Department as a rabies vector species. Legal possession of raccoons requires a special license (which Ms. Bardin did not possess) demonstrating proper training in order to handle, transport, transfer or house such species.

While Director Riexinger detailed the above referenced violations, she added in the denial letter that the licensee has a history of complaints against her and violations of her DEC special licenses. The Director concluded that ". . . it is now well established and documented that you are not capable of adequately and appropriately ensuring that wildlife held by you pursuant to such special licenses can be held in accordance with license provisions, and cannot escape or pose a threat to the public."

The Department staff provided an affidavit submitted in the Article 78 proceeding, *Matter of the Application of Cindy Bardin v. Joe Martens, et al*, by DEC biologist Joseph Therrien, Unit Leader for DFWMR's Special Licenses Unit that recounts a further history of alleged noncompliance. Ex. 15.

Mr. Therrien addressed the license history for Ms. Bardin's facility noting a number of failures to renew in a timely fashion and to provide the appropriate information for renewal. Therrien Affidavit (Aff.) ¶¶ 25, 27, 32.

Mr. Therrien addressed the unlicensed acquisition of certain animals in 2009 and 2010. Therrien Aff., ¶ 35. Mr. Therrien also noted that Ms. Bardin had exhibited animals without authorization to possess or exhibit them. *Id.*

Mr. Therrien stated that in August 2009, the DEC Special Licenses Unit was advised by DEC Environmental Conservation Officers (ECOs) that a Time Warner Cable representative reported having been grabbed by an uncaged bear cub at Ms. Bardin's residence and that she had a mature African lion on her porch. Therrien Aff., ¶ 36. While these claims were not verified, staff found that Ms. Bardin was not adequately housing the animals in her care.

In this affidavit, Mr. Therrien mentioned the illegal loan of an animal by Ms. Bardin that resulted in the animal's death. Therrien Aff., ¶ 37. He also reported concerns regarding the care of the animals by Ms. Bardin based on complaints from employees of veterinary hospitals. Therrien Aff., ¶¶ 43, 45.

Mr. Therrien reported that the Special Licenses Unit received a complaint from the Town Clerk in Granville regarding the licensee's failure to file a list of animals possessed at her facility with the Town in compliance with General Municipal Law § 209-cc. Therrien Aff., ¶ 47. Mr. Therrien also stated that this failure was in violation of Ms. Bardin's special licenses. *Id.*

Mr. Therrien noted that in March and June 2011, the USDA inspected Ms. Bardin's facility and determined that the perimeter fence was incomplete. Therrien Aff., ¶¶ 50, 55.

At the hearing on June 20, 2013, Mr. Therrien testified regarding another incident at the Great Escape this past spring. Ex. 24, TR 57-69. Mr. Therrien stated that according to USDA staff, there was an animal exhibit at the Great Escape on May 31 and June 1, 2013. *Id.* Pursuant to reports by the management of the Great Escape, Ms. Bardin was involved in this exhibition that consisted of a cockatiel, two cockatoos, a parrot, two alligators, a turtle, goats, house cats, a fox, and an unidentified mammal. *Id.* According to a deposition provided to the New York State Police (who were called in to address an alleged assault) by Jeffery Ash on June 5, 2013, Ms. Bardin was the lessee for this exhibition. Ex. 25. Because Ms. Bardin was prohibited from exhibiting DEC-regulated animals (alligators are subject to DEC regulation), Department staff alleged that this incident is another example of Ms. Bardin's failure to adhere to her license conditions and regulations.

In addition to the allegations that the Department staff had documented and the complaints they had received, the USDA had documented a number of violations of federal regulations concerning the care and housing of the animals at Ms. Bardin's facility. Ex. 8.

Based upon the totality of these circumstances (not including the Great Escape incident that occurred subsequent to her determination), Director Riexinger determined not to renew Ms. Bardin's licenses. Ex. 1; TR 51. She directed the licensee to transfer all animals and species regulated by the Department pursuant to the two special licenses including but not limited to, African lion, cougar, tiger, lemur, American alligator, red fox, bobcat, black bear and Canada lynx to individuals licensed to possess these species within sixty days from the date of the letter. Ex. 1. The denial letter also directed that any transfers within New York State must be pre-approved by the Department. *Id.* The denial letter advised if any transfers are outside the state, the licensee must inform any persons taking possession of these species that it is illegal to possess, sell or exhibit in New York State these specific species without first obtaining a license

to do so. *Id.* In the event that Ms. Bardin did not comply with the transfer requirement, the denial letter explained that the Department would seize the animals to be transferred or euthanized. *Id.* The Department staff further directed Ms. Bardin not to exhibit the animals or to breed them, not to allow the public to have access to the animals, and to secure them, and to provide humane care. *Id.*

In its closing brief, Department staff reiterated the arguments set forth in the denial letter, Mr. Therrien's affidavit, and in the testimony and argument at the hearing. In addition, staff emphasized that the USDA made repeated inspections finding Ms. Bardin's perimeter fencing lacking up until June 2011. DEC Closing Brief (Br.), pp. 11, 14. In citing to the Department's regulations concerning the possible outcomes after a hearing in these matters, Mr. Sanza argued that based on the lack of compliance, Ms. Bardin's licenses cannot be continued or modified. Br., p. 18. Mr. Sanza stressed that the possession of wildlife in New York State is not a property right and instead is a regulated activity subject to ECL Articles 11 and 13. *Id.* Mr. Sanza concluded that Department staff had met its burden of proof in support of Director Riexinger's denial by a preponderance of the evidence and her 2011 directive to transfer or dispose of all animals regulated by DEC was appropriate and authorized. Staff Br., pp. 16-21.

#### Ms. Bardin's Position

In the licensee's opening statement, Mr. Winn stated that the facility has been federally licensed for six years. TR 12. He noted that Ms. Bardin had applied for the renewal of the state licenses in 2009 and that no action had been taken on them by DEC staff for approximately 1 year. *Id.* Mr. Winn stressed that shortly before the expiration date of the licenses, Ms. Bardin received the denial from Patricia Riexinger that was tantamount to a revocation. TR 13. Mr. Winn explained that Ms. Winn remained a federally licensed exhibitor (except for the one week USDA suspension) but since August 2011, Ms. Bardin has not had any ability to exhibit based on the Department's actions. TR 13-14. Mr. Winn stressed that the Department has alleged minor transgressions and that many were resolved prior to the Department's enforcement actions. Mr. Winn maintained that Ms. Bardin has been subject to a *de facto* two year suspension without a hearing and if any penalty is exacted, it should be a suspension based on the time already served. TR 13-14; Bardin Br., pp. 24. In the licensee's closing memorandum, Mr. Winn argued that the Department's revocation is "shocking to one's sense of fairness" as the failures in compliance were "technical violations of rules." Bardin Br., pp. 16-17. Mr. Winn stressed that permanent revocation is not called for in this matter and cites to a variety of cases where the courts affirmed or reversed such a punishment. Bardin Br., pp. 14-16. He emphasized that only in cases where the individuals involved committed the most heinous activities did the courts agree to the permanent revocation of a license. *Id.* In addition, he cites to 6 NYCRR § 17.5(a) that provides that licenses may be revoked by the Department "for a period of time it deems appropriate . . ." underscoring that permanent revocation is not the standard. Bardin Br., p. 22.

During the hearing, Ms. Bardin testified that when Mr. Therrien and the Department staff visited her facility, she was not open to the public and was in the midst of construction due to the move to a new facility. TR 134-136, 139, 142. She explained that is the reason why the final perimeter fence was not up yet (although she claimed that there was always one there further

back from the cages.) TR 141. She stressed that no member of the public had ever been attacked by one of her animals. TR 133. She stated that each animal that she possesses had to be transported individually to her new facility and that the USDA checked the caging prior to the arrival of each animal. TR 134-135. Ms. Bardin testified that she had complied with a DEC officer's request that she put up a stockade fence in front of her property so that the animals would not be a distraction to drivers. TR 154-155. Ms. Bardin presented a group of pictures that she maintained depicted the caging for the animals. Exs. 28a-h. With respect to the plastic ties that Mr. Therrien had described, Ms. Bardin claimed that she had placed tarps over the outdoor cages during springtime storms to keep the wind out. TR 153. Similarly, she maintained that she had the "babies" in the house to keep them safe from the weather conditions. TR 148. She described the black bear cage as having a door that is bolted on the inside and therefore the knife through the hasp that Mr. Therrien complained of was not being used to keep the door secure. TR 153.

Ms. Bardin testified that the USDA inspector Dr. Nusbaum had made regular visits to her facility and that whenever he found anything out of compliance she addressed it as soon as possible and often immediately. TR 142-143. She emphasized that she must meet USDA standards prior to exhibition of the animals. TR 142.

With respect to the African lion, Ms. Bardin explained that she had spoken to "Joe" (Mr. Therrien) when she left her former facility due to a divorce. TR148-150. She testified that Mr. Therrien had advised her to get everything she needed before getting the lion. TR 149. She said she kept calling Joe because she didn't understand what the issue was with getting the lion added because she was not open to the public. TR 150, 157. She alleged that while she made repeated calls to Mr. Therrien regarding the status of her permit, they went unanswered. *Id.* She does not deny asking him to add the lion to her license. TR 155. Ms. Bardin stated that Dr. Nusbaum had approved the caging for the lion (Exs. 28g, h). She explained that the lion she had arranged to procure had to be transported before it matured and that was the reason for the urgency. TR 149. She stated that when the Town complained about the lion because of its unlicensed status, she agreed not to exhibit it and covered its cage. TR 151-152. Because the lion did not respond well to that environment, she closed the facility. TR 152.

Regarding the raccoons, Ms. Bardin stated that a gentleman who had raised raccoons he could no longer keep contacted her. TR 157. She explained that she got in touch with the wildlife rehabilitator Linda Brown who asked her to take the animals and Ms. Brown would pick them up. TR 158. Ms. Bardin testified that subsequently others contacted her to take their "pet" raccoons. TR 158. Ms. Bardin stated that she declined to take these and did advise DEC about some of them. TR 159-160. An ECO did visit her regarding the raccoons but there were none there because she had given the ones she had to the rehabilitator. TR 158-159.

With respect to the Sprinkles Ice Cream Shop incident, Ms. Bardin stated that she was there for two hours with two hybrid foxes, one baby coatimundi, one baby monkey, a cougar, and a baby tiger. TR 162. She testified that all the animals were contained within "heavy dog kennels with 5 x 6 panels" and that there was no human contact between the animals and the public. TR 162. Ms. Bardin described having several family members there to ensure that there was no contact. TR 162.



Concerning the Great Escape allegations, Ms. Bardin maintained that she was not there with any DEC-regulated animals and has not removed any animals from her facility since the denial. TR 164-165. She said the alligator(s) belonged to Aaron Bloom – not her. *Id.*, TR 172-173.

Ms. Bardin disputed the description in the executed USDA Consent Order regarding the August 2010 exhibition at Rhinebeck. TR 166-169. She explained that a USDA inspector came to the fair prior to opening to verify that the caging was sufficient. TR 167. In this instance, Ms. Bardin stated that the inspector asked for another screen which was put up and then the inspector departed. *Id.*

Ms. Bardin testified that she had never received any recommendations for improvement of her facility from DEC. TR 169. She said the USDA was always helping her to improve the facility and she has travelled to different zoos and attended courses to improve her facility. TR 169-170. She stated that she spent \$100 a week for meat for the cats and that Hannaford donated vegetables for the other animals. TR 170. Ms. Bardin stated that all the animals were microchipped before she received the denial letter and any delay was attributable to financial circumstances. TR 171. She maintained that all the animals were secure. TR 170. She explained that a number of her animals including the tiger and bear were rescues that had come from abusive circumstances. TR 172.

Mr. Winn stresses that DEC's failure to maintain standards for caging contrasted with the USDA's greater experience and jurisdiction that should result in deference to the latter agency that only suspended Ms. Bardin's license for a week. Bardin Br., pp. 18-19, 21-23.

## FINDINGS OF FACT

### License History

1. In June 2006, Cindy Bardin submitted an application to the DEC Special Licenses Unit for a LPS to possess and breed bobcats, leopards and cougars at her facility located at 66 Quaker Street, Granville (Washington County), New York for release to the wild in New York State. Therrien Aff., ¶ 17.

2. By letter dated June 15, 2006, DEC staff denied Ms. Bardin's LPS application because her facility was inadequate for holding dangerous large cats, such as cougars and leopards; she had failed to demonstrate adequate training and experience to handle these animals; she had submitted an incomplete application with respect to the possession of the bobcat; she had submitted an incorrect application for possession of cougars and leopards; and DEC did not have a reintroduction program for these species. Therrien Aff., ¶ 18. Department staff advised Ms. Bardin to resubmit a complete LPS application for possession of the bobcats. *Id.*

3. On June 21, 2006, the licensee reapplied for a LPS for possession of bobcats. Therrien Aff., ¶ 19. The Department's Special Licenses Unit issued her an LPS to possess two bobcats for propagation purposes, effective June 30, 2006 to June 30, 2007. *Id.* This license was assigned a number of 61. *Id.*

4. On June 27, 2006, Ms. Bardin applied for a new endangered/threatened species special (ETS) license to possess one male and one female lynx. Therrien Aff., ¶ 20. As lynx are classified as endangered and/or threatened under Part 182 of Title 6 of NYCRR, they may be possessed only under the authority of a license. DEC approved the application and issued an endangered/threatened species propagation (ETSP) license effective June 30, 2006 to June 30, 2007. *Id.* The license was issued with the number 52. *Id.*

5. Pursuant to Ms. Bardin's request to amend her ETSP license to include possession of one male and one female cougar, on or about November 12, 2006, DEC granted her request and amended the license. Therrien Aff., ¶ 21.

6. On or about March 6, 2007, Ms. Bardin requested of Department staff that ETSP # 52 be amended to authorize possession of two male and two female ring-tailed lemurs. Therrien Aff., ¶ 22. In response, Department staff amended the license in March 2007. *Id.*

7. In that same month - March 2007 - the licensee requested DEC staff to amend ETSP # 52 so that it authorized the possession of six American alligators and staff did so. *Id.*

8. In May 2007, Ms. Bardin submitted a renewal application for LPS # 61. Therrien Aff., ¶ 23. In September 2007, the licensee submitted an application to DEC to add an arctic fox to this license; however, the Department does not license this species, only requiring that the individual possess a USDA Animal Welfare Act license. Therrien Aff., ¶ 24. About September 7, 2007, Ms. Bardin submitted another application to amend LPS # 61 to add bobcats and a red fox. *Id.*

9. In October 2007, Department staff alerted Ms. Bardin that her renewal application for LPS # 61 dated May 15, 2007 was incomplete as she did not include an annual report as required by the license. Therrien Aff., ¶ 25. Mistakenly, Ms. Bardin responded with a list of animals that came under ETSP # 52. *Id.* On December 6, 2007, Department staff followed up with the licensee by advising her that the LPS # 61 renewal application remained incomplete due to the omission. *Id.* In this letter, staff also advised her that she had not submitted bills of sale for each animal that she had acquired under both her licenses nor had she submitted the type, location and identification number or mark used to identify the animals as required by the license conditions. *Id.*

10. In March 2008, Ms. Bardin asked Department staff to amend LPS # 61 to include two black bears. Therrien Aff., ¶ 26. Around this same time, the licensee requested that the bobcats be removed from LPS # 61. *Id.* In response, DEC staff amended LPS # 61 by backdating it to June 30, 2007, adding the black bears and the red fox, and removing the bobcats. *Id.* The LPS license was scheduled to expire on May 31, 2009. *Id.*

11. Ms. Bardin's ETSP # 52 license was scheduled to expire on June 30, 2007. Therrien Aff., ¶ 27. The Department's Special License Unit mailed Ms. Therrien an application to renew the license prior to the expiration date. *Id.* In May 2008, Ms. Bardin submitted the renewal application almost a year after the expiration of the last license. *Id.* In this renewal application,

the licensee requested the authority to exhibit the animal previously held under her expired ETSP license in addition to the authority to propagate the animals. *Id.* DEC issued Ms. Bardin a new ETSPEE license, effective May 8, 2008 to May 31, 2009. *Id.* This license was assigned number 33. *Id.* The animals that Ms. Bardin was permitted to exhibit were: Canada lynx, cougar, ring-tailed lemur, and American alligator. *Id.* She was permitted to propagate the lynx, cougar and ring-tailed lemur. *Id.*

12. By application request dated August 22, 2008, Ms. Bardin requested that DEC amend ETSPEE # 33 to authorize possession and exhibition of Bengal tigers. Therrien Aff., ¶ 28. She included in this request that she would obtain the tigers from a local exhibitor and that she would hold them in temporary caging until she found permanent housing facilities for them. *Id.* Because the Department does not approve temporary caging for dangerous animals, the request was denied by letter dated September 4, 2008. *Id.* Later that year, based upon a second application to add a female Bengal tiger and when the licensee had completed the permanent caging for the animal, the Department staff amended ETSPEE # 33 to include the tiger. Therrien Aff., ¶ 29.

13. Later in 2008, Ms. Bardin asked the Department staff to amend ETSPEE # 33 to include possession and exhibition of a female black panther. Therrien Aff., ¶ 30. Staff granted this request. *Id.*

14. Both ETSPEE # 33 and LPS # 61 expired on May 31, 2009. Therrien Aff., ¶ 31. In June and July 2009, Ms. Bardin submitted applications to renew LPS # 61 and ETSPEE # 33, respectively. Therrien Aff., ¶ 32. By letter dated June 26, 2009, Department staff informed the licensee that the ETSPEE renewal application was incomplete because it did not contain an annual report as required by the license. *Id.* Subsequently, Ms. Bardin submitted an annual report for ETSPEE # 33. *Id.*

15. On August 18, 2009, Ms. Bardin called to ask that her ETSPEE # 33 license be amended so that it only reflected one alligator instead of the six animals she previously had and that the black panther be deleted as she never acquired this animal. Therrien Aff., ¶ 38.

16. On August 19, 2009, the DEC Special Licenses Unit issued Ms. Bardin a new ETSPEE # 33 license. Therrien Aff., ¶ 39. This new license entitled Ms. Bardin to possess and exhibit one male and one female lynx, one male and two female cougars, one male tiger, two male and two female ring-tailed lemurs, and one American alligator, from August 19, 2009 to August 31, 2010. *Id.* Because of its concerns regarding the licensee's handling and exhibiting practices (see ¶¶ 26-29, *infra*), the staff modified the terms of the license to prohibit Ms. Bardin from exhibiting cougars one year of age or older and tigers nine months of age or older except at her facility. *Id.*; TR 131.

17. On August 19, 2009, the Department staff also issued Ms. Bardin a new LPS # 61 that authorized Ms. Bardin to possess and exhibit one male and one female black bear and one red fox. Therrien Aff., ¶ 40; Exs. 22, 23. Because of the staff's concerns as noted in ¶ 16, the permit prohibited Ms. Bardin from exhibiting black bears one year of age or older except at her licensed facility. *Id.*

18. On August 24, 2010, Ms. Bardin submitted to the Department an application to renew ETSPEE # 33. Therrien Aff., ¶ 46; Ex. 37. At the same time, she applied to renew LPS # 61 and submitted an application for a new dangerous wildlife license (DWL) in order to possess an African lion for exhibition purposes. *Id.* In this renewal application, the licensee informed the Department staff that she was in the process of moving the animals to a new location – 6603 Route 149, Granville, NY. *Id.* She requested that ETSPEE # 33 be amended to add the African lion. *Id.* The Special Licenses Unit suspended its review of Ms. Bardin’s applications pending the completion of the new facility and inspection and approval by DEC and USDA staff and so informed the licensee. Therrien Aff., ¶ 46; TR 25, 27.

19. While the Department staff was considering whether to renew Ms. Bardin’s licenses, the licensee was awaiting renewal and attempted to contact Department staff on numerous occasions. TR 150, 157. As she was concerned that she would lose an opportunity to procure the lion she wanted added to her license due to its growth, she went ahead and got the animal. TR 149-150.

20. The July 2010 list of animals that Ms. Bardin submitted to DEC with her license renewal does not accurately reflect the animals she currently has in her possession. TR 174-176, 191.

#### Facility Move

21. In August 2010, Ms. Bardin began construction of a new facility at 6603 State Route 149 in Granville, New York. TR 134.

22. Because the facility was close to Route 149, an ECO requested that Ms. Bardin erect a closed fence to prevent drivers from viewing her facility. TR 134. Ms. Bardin complied with this request. *Id.*

23. A USDA inspector inspected each cage prior to the licensee’s transfer of the animals to the facility. TR 134-136; Exs. 28a-h. Inspections by the USDA in December 2010, March 2011, and early June of 2011 revealed that the perimeter fencing at the facility was inadequate. Exs. 8, 15, ¶ 50.

24. Because the facility was still under construction during the winter of 2011, the public was not invited to the facility and the close perimeter fence was not completed. TR 108, 134.

25. The facility opened to the public in June 2011 after inspection and approval by the USDA but closed in August 2011 after receipt of the denial letter from Director Riexinger. TR 142, 146-147; Bardin Aff., ¶ 30. The exhibition season for this type of facility is generally June through August. TR 147.

#### Sprinkles Ice Cream Shop Exhibition

26. By e-mail dated June 1, 2009, a New York State Department of Agriculture and Markets

Field Veterinarian - Dr. Ellis - reported to DEC staff that Ms. Bardin was exhibiting wild animals at Sprinkles Ice Cream Shop in Queensbury, New York and that the display raised safety concerns. Therrien Aff., ¶ 33. Dr. Ellis forwarded pictures his wife took of the display to DEC. *Id.* DEC staff registered a formal complaint with USDA over concerns with respect to this exhibit. Therrien Aff., ¶ 34.

27. Specifically, staff noted that the cages containing the tiger and the cougar did not have a base or floor and were held together with twist ties. *Id.* There was no solid barrier that kept the public from the animals. *Id.* Plastic tape had been strung between the cages. *Id.* In addition, Ms. Bardin had family and friends - none of whom had licenses to handle these animals - providing security. TR 162, 188-189.

28. On June 27, 2009, DEC and USDA personnel conducted an inspection of the licensee's facility. Therrien Aff., ¶ 35. On June 29, 2009, DEC staff performed another inspection at which time they alleged, *inter alia*, the unlicensed acquisition of a cougar and a red fox. *Id.* Ms. Bardin admitted possessing the fox but claims it was a hybrid animal and that the charge was dropped. Ex. 14, Bardin Aff., ¶ 4. Ms. Bardin also admitted possessing the cougar but with the consent of Mr. Therrien. Bardin Aff., ¶ 5. She claims that this charge was also dropped. Ms. Bardin's licenses had expired on May 31, 2009.

29. In October 2009, the Department staff sent a proposed consent order to Ms. Bardin to resolve the violations associated with the Sprinkles Ice Cream Shop exhibition. Therrien Aff., ¶ 42. Ms. Bardin executed the consent order on June 24, 2010. Therrien Aff., ¶ 44. Department staff mailed a copy of the fully executed consent order to Ms. Bardin on September 10, 2010. Therrien Aff., ¶ 48. The order required the payment of a civil penalty of \$3,500 but to date only \$1,500 has been paid. *Id.*; Bardin Aff., ¶ 22.

#### March 17, 2011 DEC Inspection

30. As part of its review of the licensee's renewal applications, Department staff conducted an inspection of her facility on March 17, 2011. Therrien Aff., ¶ 51. Staff observed a capuchin monkey, several snakes, an alligator, a fox and several ring-tailed lemurs in cages throughout Ms. Bardin's house. *Id.* A domestic cat was roaming freely among these cages. *Id.*

31. Outside in Ms. Bardin's yard, there were multiple cages containing fox, black bear, grizzly bear, cougar, tiger, lynx, and an African lion. *Id.* The cage holding one of the bears was not secured with a lock. *Id.* Fencing to keep visitors away from the animals (perimeter fencing) was not in place; however, the facility was not open for the public at this time as it was under construction *Id.*; TR 108, 134, 137-138, 141, 148; Ex. 28b. The weather had been stormy and Ms. Bardin had covered the outdoor cages with tarps to keep out the wind. TR 140, 148. She had young animals in the house due to the poor weather. TR 148.

32. The cougar cage was pulling away from a metal post and was not secure. Therrien Aff., ¶ 51. The perimeter fencing at the rear of the property was not secure. *Id.*

33. Based upon this inspection, Department staff issued three separate tickets to Ms. Bardin

for acquisition and possession of a DEC-regulated species without a license (the lion) and failure to mark/tag all DEC-regulated animals. TR 29, 31-33, 43-46; Therrien Aff., ¶ 52; Exs. 18, 19, 20. On or about July 11, 2011, Ms. Bardin faxed the bar code identification numbers for: a female cougar, a male lion, two male foxes, one female black bear, one Syrian brown bear, one female Bengal tiger, a male and a female African serval, a Canadian lynx, four lemurs, and one alligator. Exs. 26, 27.

34. On May 9, 2011, Ms. Bardin pled guilty to possession of the African lion without a license and two counts of microchip violations in Granville Town Court. Therrien Aff., ¶ 53; Ex. 21.

### Raccoons

35. In May 2011, Ms. Bardin was contacted by a gentleman who had raised raccoons that he could no longer keep. TR 157-158. Ms. Bardin contacted Linda Brown, a wildlife rehabilitator, who asked Ms. Bardin to take the raccoons so that Ms. Brown could come and get them. TR 158; Bardin Aff., ¶ 28. Ms. Bardin agreed and took possession of these animals; she was also contacted by others who had raccoons. Bardin Aff., ¶ 28; TR 158-160; 179-180, 188. Ms. Bardin declined to take these additional animals and reported some of these individuals to DEC. TR 159. When an ECO came to Ms. Bardin's facility to investigate, there were no raccoons. TR 77. Ms. Bardin did not possess a license to possess raccoons. TR 50.

### USDA Inspections

36. The USDA is charged with regulatory authority based on the Animal Welfare Act (AWA) 7 USCA §§ 2131-2150. Its personnel will inspect a facility to assess adequacy of caging and the experience of the applicant prior to issuing a permit. TR 26. It is DEC's Special Licenses Unit's practice to wait until USDA has issued a license to a facility prior to issuance of its license. TR 26-27. As the Department does not have regulations pertaining to caging requirements, diet and veterinary care, the Department staff relies upon the USDA Class C or D exhibitor's license. TR 86-88.

37. On or about September 6, 2007, a USDA inspector found that the licensee's lemur enclosure was excessively rusted so that it could not be sanitized; Ms. Bardin had no plan for environmental enhancement for the primates; there was an accumulation of building materials in the animal area that could harbor pests and there was a pile of nails adjacent to the cougar cage. Ex. 8, ¶ 3.

38. On or about July 6, 2009, a USDA inspector found that Ms. Bardin failed to maintain accurate and complete records of the acquisition and disposition of a coatimundi. *Id.*, ¶ 4.

39. On or about June 22, 2010, a USDA inspector found that water and water receptacles for the bears were dirty, there was a wire protruding into the capuchin enclosure, and there was an accumulation of clutter around the premises. *Id.*, ¶ 5.

40. On August 26, 2010, Ms. Bardin had an exhibit at the Rhinebeck fair. Ex. 8, ¶¶ 2, 6, 7.

The USDA inspector found that the licensee failed to have an accurate written program of veterinary care. She also did not have a secondary barrier between the public and the primary enclosures housing a coatimundi and primates and the enclosures were not sufficient to prevent contact between the public and the animals. *Id.*

41. On December 3, 2010, a USDA inspector found that there were no barrier fences between the public and the enclosures housing serval, pig, lion, bear, fox and lynx, to prevent the public from having direct contact with the animals. *Id.*, ¶ 8. In addition, the inspector found food storage areas that were used for housing animals, open food bags, rooms cluttered with construction and cleaning materials, and fruit and vegetables stored on the floor in open containers under a roof that was under construction. The licensee's perimeter fence behind the lynx enclosure lacked sufficient structural strength and there was clutter around the premises. *Id.*, ¶ 9.

42. In March 2011, a USDA inspector determined that Ms. Bardin's perimeter fence remained incomplete. Ex. 15, ¶ 50.

43. On or about June 3, 2011, a USDA inspector found that the licensee's perimeter fence lacked structural strength. *Id.*, ¶ 10. Later that month, the USDA inspected the facility and found the fencing complete and approved the facility's opening. Bardin Aff., ¶ 30.

44. On or about October 13, 2011, a USDA inspector found that there were protruding nails and a hammer in the pig enclosure, and there was a wire protruding into the lion enclosure. *Id.*, ¶ 11.

45. Ms. Bardin admitted to the above referenced violations dating from September 2007 to October 2011 in a Consent Decision and Order dated April 15, 2013 that included a one week suspension of license. Ex. 8; TR 143-144.

46. Ms. Bardin also signed a Consent Decision and Order that related to her May 2011 convictions for three counts of violations of the ECL and the NYCRR for the unlicensed possession of the lion and the failures to microchip. Exs. 9, 21.

47. Inspections by USDA personnel on June 5, 2012 and May 7, 2013 indicate that the facility met all standards and regulations on those dates. Exs. 35 and 36; TR 144-146.

#### Miscellaneous Violations and Concerns

48. In August 2009, Ms. Bardin informed DEC staff that she had loaned an alligator out to another exhibitor and it had died in that individual's care. Therrien Aff., ¶ 37.

49. In April 2010, DEC staff received a complaint from an employee of the Granville Animal Hospital regarding the health of the licensee's kangaroo and primates. Therrien Aff., ¶ 43. On or about August 11, 2010, DEC staff received a complaint from a veterinary hospital regarding the poor condition of the facility and lack of appropriate housing for the animals. Therrien Aff., ¶ 45. Based on this information, Mr. Therrien filed a complaint with USDA. *Id.*

50. On or about August 25, 2010, Department staff was informed by the Town of Granville Clerk that despite a previous written request, the licensee had not provided a list of animals at her facility to the Town. Therrien Aff., ¶ 47.

## DISCUSSION

In order to protect the public from attacks and diseases such as rabies, to protect wild animals including endangered and threatened species from harm, and to protect native wild animals from introduction of invasive non-native species, the Legislature has enacted laws that restrict the possession and transport of wild animals - native, non-native, threatened and endangered species.<sup>1</sup> ECL, Articles 11 and 12. The Department's regulatory framework contained in Parts 175 and 182 further detail such protections. The Department's licensing program is fundamental to the implementation of these protections by restricting the possession and handling of these potentially dangerous animals and attaching conditions to any issued licenses.

Pursuant to ECL § 11-0515(2), “[t]he department may also issue a license revocable at its pleasure to possess and sell protected fish, wildlife, shellfish, crustacea or aquatic insects for propagation, scientific or exhibition purposes. ... Such license shall be in force for one year only and shall not be transferable. Each licensee shall file with the department a report containing such information as the department may require. Fish, wildlife, shellfish, crustacean or aquatic insects lawfully possessed under this section may be sold at any time by the licensee for propagation, scientific or exhibition purposes only.”

ECL § 11-0515(4) provides: “The Department shall have power to make regulations governing the possession of such fish, wildlife, shellfish, crustacea and aquatic insects to protect them from cruelty, disease, or undue discomfort and to protect the public from attack or contamination.”

ECL § 11-0535(2) provides: “Notwithstanding any other provision of this chapter, the taking, importation, transportation, possession or sale of any endangered or threatened species of fish, shellfish, crustacean or wildlife, or hides or other parts thereof, or the sale of or possession with intent to sell any article made in whole or in part from the skin, hide or other parts of any endangered or threatened species of fish, shellfish, crustacea or wildlife is prohibited, except under license or permit from the department.”

ECL § 11-0535(3) provides: “Notwithstanding any other provision of this chapter, the department may promulgate regulations to the taking, importation, transportation, possession or sale of any species of special concern as the department deems necessary for the proper protection of such species.”

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<sup>1</sup> As staff advocates in its closing memorandum, the common law has established that the State has jurisdiction over the wild animals that dwell here for the benefit of the people. Staff Br., pp. 18-19. Staff includes a citation to *Matter of Landesman v. Board of Regents*, 94 AD2d 827 (3d Dep't 1983) in support of this proposition. However, this case relates exclusively to the issue of whether a hearing is required when the respondent revoked an accountant's license and is not relevant to this discussion.



Part 175 of Title 6 of NYCRR sets forth the Department's requirements for applications for licenses to possess wildlife as well as the procedures for revocation of such licenses. In 6 NYCRR § 175.1(c) there is a list of the types of special licenses and permits issued pursuant to the ECL. As noted by Department staff in its closing memorandum, § 175.5 provides that the Director of DFWMR or her agent shall, within 30 calendar days of receipt of the completed record of the hearing, issue a decision which: (1) continues the license or permit in effect as originally issued; (2) modifies the license or permit conditions; or (3) revokes the license or permit.

Part 180 contains miscellaneous regulations regarding wildlife including § 180.1 concerning wildlife deemed dangerous to health or welfare. Part 181 addresses prohibitions with respect to certain species including raccoons in order to control rabies. Part 182 sets forth the regulations for endangered and threatened wildlife and species of special concern. Section 182.7 provides that the Department may issue a license pursuant to Part 175 to transport, sell, import and/or possess any species listed as endangered, threatened or species of special concern "for purposes it deems legitimate." That section further provides as follows: "Such licenses shall state the species to which it applies and any other conditions the department may deem appropriate."

Some examples of the conditions that the Department staff imposes on licensees can be found in Ms. Bardin's LPS # 61 and ETSPEE # 33 that provide, *inter alia*, what specific animals the licensee can possess, requiring that all animals held under the license must be permanently marked, animals held under this license must not be propagated and returned to the wild, no additional or replacement animals may be obtained under the license without a prior written amendment, and the licensee must house the animals to ensure their physical and psychological well-being and so that the public will not have contact with them. Exs. 22, 23.

As noted in Mr. Therrien's detailed affidavit and in the staff's closing brief, the Department's Special Licenses Unit oversees the program that permits the possession, propagation, and sale/transfer of these animals. Therrien Aff., ¶ 7; Staff Br., pp. 3-7. At the hearing in this matter, Mr. Therrien also explained that the Department does not issue special licenses to individuals who do not possess a valid USDA-issued AWA permit. Therrien Aff., ¶ 9; TR 26-27. In his affidavit, Mr. Therrien spelled out the criteria that Department staff apply in making determinations on a license – whether the regulations permit possession of the species; whether the activities proposed are permissible; whether the applicant has demonstrated that possession of the species will solely be for the activities noted on the application; whether the applicant has demonstrated to DEC staff that housing will be adequate for the welfare of the animal, to protect the public and to prevent any threats to native wildlife; and whether all required documents and fees are included with the application. Therrien Aff., ¶ 11. The kind of animal and the nature of the proposed activity will dictate the kind of license that is applicable, according to Mr. Therrien. Therrien Aff., ¶ 16. Specifically, there is a license for endangered and threatened species (ETS) and one for dangerous wildlife (DWL). *Id.* Based upon the activity that the licensee applies for and which DEC approves, the license will indicate, e.g. PS for possess/sale; EE for exhibition/education; and P for propagation.

While Mr. Therrien's affidavit included the adequacy of housing as one of the criteria DEC staff evaluates to make its license determinations, it was stressed at the hearing and also in the staff's closing memorandum, that DEC staff does not have standards for housing and relies solely upon USDA's determinations in regard to this factor. Staff Br., pp. 6-7; TR 93.

The history of the Department staff's actions vis a vis Ms. Bardin's applications and licenses is inconsistent with its stated concerns. Mr. Therrien related that Ms. Bardin's initial application in 2006 was rejected by staff, *inter alia*, for her failure to demonstrate that "she had sufficient training and experience to handle large cats like cougars or leopards." Therrien Aff., ¶ 18. Later that year, the Department staff agreed to provide her with permits to possess and propagate bobcats, lynx and cougar. Therrien Aff., ¶¶ 19-21. Mr. Therrien did not report that Ms. Bardin had acquired the experience with wild animals or that staff had investigated the housing proposed for these species and found it to be satisfactory. In fact, at the hearing, Mr. Therrien revealed that the Department does not do any investigations in response to a license application such as Ms. Bardin's other than make inquiry of the USDA. TR 95-98; Exs. 29, 30.

Mr. Therrien detailed a pattern of Department staff approval of her acquisition of many more species of wild animals such as lemurs, alligators, fox and bear. Therrien Aff., ¶¶ 22-24, 26. Despite Ms. Bardin's failures to apply to renew her licenses in a complete and timely fashion, the Department staff continued to reissue them and went so far as to back-date a license in 2008. Therrien Aff., ¶ 26.

It is the exhibition of the animals at Sprinkles Ice Cream Shoppe in 2009 that focused the Department staff's attention on Ms. Bardin's operation due to the potential for contact between the animals displayed and the public. Therrien Aff., ¶¶ 33-34; TR 22. This incident also led to a joint inspection of the licensee's facility on June 27, 2009 by DEC and USDA staff resulting in follow-up DEC inspection and staff allegations that she possessed two unlicensed animals – specifically a cougar and a red fox. Therrien Aff., ¶ 35. Ms. Bardin's licenses had expired on May 31, 2009 and therefore, the day she exhibited the animals at the ice cream shop they were still effective. It appears that the specific cougar and red fox found during the June 2009 inspection were not licensed although there had been two cougars and a red fox included in ETSP # 52 and LPS # 61, respectively. Therrien Aff., ¶¶ 21, 26. These violations of Ms. Bardin's licenses resulted in the issuance of tickets that were settled via a consent order in 2010. Specifically, the consent order stated that Ms. Bardin was in violation of ECL §§ 11-0305(2), 11-0535(2) and 11-0107(2) and 6 NYCRR §§ 182.3 and 184.4 by failing to provide secure housing for the animals displayed at the Sprinkles Ice Cream Shoppe and by possessing endangered/threatened and protected wildlife on June 27, 2009 after the two licenses had expired. Ex.16, ¶ 9. The Department staff continued to permit the licensee to possess and to exhibit wild animals including cougars and tigers. Therrien Aff., ¶ 39. The Department staff did limit the age of some animals that could be exhibited off the licensee's premises. *Id.*; TR 24.

The Department received other complaints from individuals regarding the licensee's animals. A delivery man complained about contact with an animal but there has been no documentation of this incident produced even after Department staff conducted an inspection. Therrien Aff., ¶ 36. Two reports from veterinary offices to the Department staff indicated substandard care and feeding of the licensee's animals. Therrien Aff., ¶¶ 43, 45. The second

complaint in August 2010, triggered Mr. Therrien's request of USDA for an investigation; however there is no indication that USDA followed up on this request and if it did what the results of that investigation were. Therrien Aff., ¶ 45. With respect to the "borrowed alligator," Ms. Bardin claimed that she did nothing wrong, arguing that the law does not preclude one licensed exhibitor showing another licensed exhibitor's animals. However, Department staff contended that the license did not permit loaning of animals.<sup>2</sup> Therrien Aff., ¶ 37. The Department staff also discussed a motor vehicle accident in October 2010 that resulted in the death of a kangaroo; however, Ms. Bardin claimed that the animal was not hers. Ex. 17; TR 181-182.

Ms. Bardin's handling of the raccoons was illegal pursuant to 6 NYCRR § 181.3. TR 130. The State has very strict regulations on handling of rabies vector species such as raccoons due to the virulent nature of rabies and the almost always fatal central nervous system disease that can be transmitted by infected animals. See, *Matter of Doty* (Commissioner's Decision, August 12, 2009); TR 50. Unlike the licensee in *Doty*, Ms. Bardin is not even a wildlife rehabilitator, let alone an individual licensed to handle these species. While Ms. Bardin credibly testified that she was facilitating the safe transport of the animal into the hands of a licensed rehabilitator, it is not up to individuals to "unilaterally decide which regulations to comply with." Bardin Aff., ¶ 28; TR 179-180; *Matter of Doty*, (Chief Administrative Law Judge McClymonds' Hearing Report, July 30, 2009).

The Great Escape situation as described by Mr. Therrien does not prove that Ms. Bardin took any actions in violation of the court order as the only animal(s) that would be subject to DEC's jurisdiction were owned by another individual according to Ms. Bardin. TR 164-165, 185.

In recounting his inspection of Ms. Bardin's facility in March 2011, Mr. Therrien emphasized that there were a number of animals caged in the licensee's home. Therrien Aff., ¶ 51; TR 126. As Ms. Bardin notes in her affidavit, he did not explain how this was illegal nor does he acknowledge that she was in the midst of constructing her facility and the public did not have access to it. Bardin Aff., ¶ 25; TR 148. With respect to the tarps Mr. Therrien complained of, it appears that these were used to protect the animals from the weather and did not constitute the structure of the cages. TR 140, 148. On cross-examination, Mr. Therrien admitted that Ms. Bardin's housing did not violate any DEC standards because there are none. TR 89. He also agreed that her facility was under construction during his visit and that there was no indication that it was open to the public. TR 89, 108.

The Department staff denied the renewal of Ms. Bardin's licenses because, in part, she has failed to provide secure housing for the animals she was harboring. Ex. 1. The licenses specifically have conditions requiring adequate housing to prevent escape and danger to the public. Exs. 22, 23, condition L. Yet, in his testimony elicited on cross examination, Mr. Therrien refused to provide an assessment of the housing that Ms. Bardin had erected and repeated that the Department does not have caging standards. TR 93-94, 102, 123; Exs. 28a-h. If the Department cannot assess whether a licensee's caging is adequate, it is difficult to

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<sup>2</sup> Both licenses do permit the sale of animals to other licensed individuals in New York State. LPS # 61, condition I; EPTSEE # 33, condition I.

understand how it can enforce conditions concerning housing or determine that housing is inadequate.

Ms. Bardin minimized the importance of meeting deadlines for license renewals, providing the necessary information to the Department staff to complete applications and complying with the conditions of her licenses, the laws and regulations that govern her activities. These requirements are crucial to safeguard the welfare of the public and the animals with which she is involved. While she argued that microchipping of the animals is not required by law, Ms. Bardin did not dispute that the identification of the animals is required as a condition of her licenses. Bardin Aff. ¶ 14; Therrien Aff., 41, TR 83. Yet, it was not until July 2011 - almost 2 years after DEC staff requested that she send the identification information for her animals and after a court found her guilty of failing to provide such information - that Ms. Bardin provided the bar code numbers to DEC staff. Exs. 22, 26 and 27; TR 128. Similarly, Ms. Bardin disagreed that the General Municipal Law requires that she provide a list of her animals to the Town. Bardin Aff., ¶ 21. While Ms. Bardin is correct that General Municipal Law § 209-cc exempts exhibitors from this requirement, her permit conditions did require this action. EPTSEE # 33, condition 2.Q; LPS # 61, condition 2.P. Moreover, since her license had not been renewed by DEC during part of this period, it is certainly debatable whether she was legally entitled to the exemption.

Despite pleading guilty in Town Court to possessing a lion without the necessary license from DEC, in her reply affidavit submitted in the Article 78 proceeding, Ms. Bardin deemed this violation “minor” because she was “accepting possession of another large cat while the application was pending and the State failing to take prompt action on the application should not result in the confiscation of my animals by the DEC . . .” Ex. 21; Bardin Aff., ¶ 27. Ms. Bardin claims that she repeatedly called Mr. Therrien to determine the status of her application to add the lion to her license without response. Bardin Aff., ¶¶ 2, 20, 27; TR 148-150. Mr. Therrien admitted his failure to answer Ms. Bardin’s calls citing the “workload in the unit.” TR 103. Without defending any failures of staff to respond to a licensee’s phone calls (TR 103), there is absolutely no basis for Ms. Bardin to ignore the law and acquire a potentially dangerous animal without the Department’s approval.<sup>3</sup> TR 149-150. The Department staff does state that because the USDA had not approved the housing at the new facility until June 2011, there was no basis for Department staff to renew her permit including the lion. Therrien Aff., ¶¶ 46, 50, 55. And, Ms. Bardin had a remedy available to her if she thought her application and facility were complete – that of serving the Department staff with a notice that staff had failed to meet the deadlines set forth in 6 NYCRR § 175.4 (TR 98-99). If the Department failed to respond within 15 days of that notice, the application would have been deemed approved according to this regulation. 6 NYCRR §§ 175.4(c), (d).

In the memorandum dated November 9, 2010 from Lance Durfey to Joe Therrien that recommended denial of the renewal of Ms. Bardin’s licenses, Mr. Durfey cited the charges of inadequate caging for the tiger and cougar; her lack of recordkeeping; and the alleged death of a kangaroo that escaped her facility. Ex. 17. Ms. Bardin denied that the kangaroo belonged to her and Department staff did not present any evidence to demonstrate otherwise. TR 129, 181-182.

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<sup>3</sup> According to Mr. Therrien, it was the discovery of this unlicensed lion at Mr. Bardin’s facility that elicited the staff’s determination to deny the renewals. TR 109.

Mr. Durfey's conclusions that Ms. Bardin's "behavior and negligence have led to the mistreatment and death of animals in her care [and that], she has shown a disregard for public health and safety" are not supported with any specific facts set forth in this document. Ex. 17.

Ms. Bardin does not have a good compliance record. As noted, despite multiple failings to meet expiration deadlines, the staff continued to license her activities. As emphasized by the licensee, the Department staff has not demonstrated any event that resulted in harm to the public or the escape of any animal. TR 72-75, 122, 133; Bardin Closing Br., pp. 7, 10, 16, 19. But the purpose of the Department's regulatory system is to prevent such occurrences.<sup>4</sup> TR 129-130, 191.

One way that the Department ensures safety is to have an accurate record of the animals in a licensee's possession. Ms. Bardin has made this very difficult by her delays in microchipping and her failure to keep DEC informed of the animal inventory with an accurate and up to date list. TR 191-192. Mr. Winn's classification of the violations as "technical" does not show an appreciation for the importance of record keeping.

I find that the cases cited by Ms. Bardin's counsel for the proposition that permanent revocation is not appropriate in this matter because the actions by Ms. Bardin are not "heinous" to be inapposite. Each of the cited cases (Bardin Br., pp. 14-16) involves the specific laws and programs of agencies other than DEC. For example, in *Gomez v. New York City Board of Education*, 5 AD3d 583 (1st Dep't 2008), the Appellate Division granted the petition to reinstate the driving certification of a school bus driver who refused a drug test because there was no regulation providing for revocation as a consequence of such refusal. In *Bell v. Waterfront Com. of New York Harbor*, 20 NY2d 54 (1967), the Court found the Commission's revocation too severe in light of the fact that the information the person lied about was privileged and other mitigating circumstances. The licensee cites to cases of acknowledged reprehensible conduct (e.g., abuse of minors) as appropriate circumstances for revocation to contrast to the facts before this hearing. However, in each regulatory context there are standards that are applied and we must apply the laws and regulations that govern here. The licensee minimizes the harm that can result if one of these animals has contact with an individual. Her continuous compliance failures could be seen as "death by a thousand cuts" - individually, they may not seem important but in their totality provide little indication of ability to operate a compliant, safe and responsible facility. Section 175.5(a) specifically allows for revocation if, *inter alia*, there is noncompliance with any provisions of the ECL, State or Federal laws or regulations directly related to the licensed activity.<sup>5</sup>

During the hearing, Mr. Therrien emphasized DEC staff's reliance on USDA's inspections and standards and that the USDA had addressed violations at Ms. Bardin's operation with a week's suspension of her license. Exs. 8, 9, 35-37; TR 86-88. Mitigating factors in this matter are the relative lenience of the USDA penalty particularly in light of DEC staff's reliance on that agency's expertise. In addition, there can be little question that Ms. Bardin has expended

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<sup>4</sup> Unlike Russia, where parents so inclined can have their children photographed next to Siberian tigers. See, *Step Right Up, Kids, the Predator is Ready*, Andrew E. Kramer, New York Times, July 10, 2013.

<sup>5</sup> And, while the licensee emphasizes that permanent revocation is too severe a penalty, the Department seeks revocation without any statement regarding the future viability of an application by Ms. Bardin.

resources in constructing her facility including the fencing requirement in response to DEC enforcement personnel. Exs. 28a-h; Bardin Aff. ¶ 33; TR 134. The licensee has been subject to the facility's closure for two seasons since DEC staff denied her license renewal. And, in the event that the Commissioner decides not to renew Ms. Bardin's licenses, the fate of these animals is uncertain. Ex. 1.

Ms. Bardin's counsel objected to the introduction of evidence concerning violations that were previously addressed by consent order or court action (TR 18). I find however that the Department can consider the "fitness" of an applicant based upon her history of compliance. *See, e.g., Matter of the Application of American Transfer Company* (Interim Decision, February 4, 1991); *Matter of Seaboard Contracting & Material Inc.* (Interim Decision, June 5, 1990); *Matter of Bio-Tech Mills, Inc.*, 105 AD2d 305 (3d Dep't 1985), *aff'd for reasons stated below*, 65 NY2d 855 (1985); *DEC Record of Compliance, Enforcement Guidance Memorandum* (March 5, 1993). I find that the Commissioner also has discretion to address Ms. Bardin's poor compliance record with a determination that stops short of revocation. *See, e.g., Matter of William Robinson*, 72 AD2d 878 (3d Dep't 1979); 6 NYCRR § 175.5(a).

The status of Ms. Bardin's facility as completed and inspected by the USDA provides the Department with an opportunity to restrict Ms. Bardin's exhibition of the animals to these premises. I recommend that Ms. Bardin be given a renewal of her two licenses limited to the 2014 season with very stringent oversight by the DEC staff. Ms. Bardin should be directed to immediately pay the outstanding balance of the penalty that is owed pursuant to the 2010 consent order. Ms. Bardin should also be ordered to immediately provide a complete and accurate list of the animals in her possession with the respective identification.

Should the Department staff discover further violations of Ms. Bardin's permit conditions and the applicable laws and regulations during this time period, the Department staff should notify the licensee immediately that her licenses are suspended pending a hearing within 30 days. Based upon the outcome of that hearing, the licenses would be subject to revocation.

## CONCLUSION

I find that the Department staff had met its burden of proof that the licensee committed the following violations:

- Failure to pay the complete penalty of \$3500 in violation of the 2010 Consent Order;
- Violation of 6 NYCRR § 181.3 for possession of raccoons without a DEC permit;
- Violation of License # 33 condition 2.Q. and License # 61 2.P. for failure to provide the municipality with list of wild animals possessed at facility;
- Violation of ETSPEE # 33, condition 2.F; LPS # 61, Condition 2.E for failure to timely provide the Department with the type, location and identification number/mark used within 5 days of marking animals subject to the licenses<sup>6</sup>;

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<sup>6</sup> While these violations as well as the possession of a lion without a license were addressed in Town Justice Court in response to Uniform Appearance Tickets issued the licensee, the Department retains the ability to apply civil penalties as well. Exs. 18-21; *See, Matter of Kinsella*, (Hearing Report, ALJ Daniel O'Connell adopted by Commissioner Jorling, June 2, 1992), 1992 NY ENV LEXIS 28.

- Violation of 6 NYCRR § 180.1 and LPS # 61, Condition 2.H for possession of a lion without a license from the Department;
- Violation of ETSPEE # 33 by loaning an alligator covered by this license to an individual.

These violations combined with the prior violations addressed in the 2010 consent order, the repeated failures to make timely submissions and renewal applications to the Department, the violations of USDA requirements and reports of substandard care of the animals constitute a pattern of noncompliance and questionable fitness for possession and exhibition of these animals. However, based upon the mitigating circumstances comprised of the licensee's significant investment in the construction of the facilities, the staff's pattern of approval of the licensee's activities, the USDA's approval of Ms. Bardin's operations, the two year *de facto* suspension of the facility's operation, and the uncertain fate of the animals if the licenses are not renewed, there is a basis for giving the licensee one more opportunity for an abbreviated term to become a model of compliance. Under these circumstances, I do not find the August 25, 2011 directive appropriate.<sup>7</sup>

In the event that Ms. Bardin fails to adhere to the decision in this matter, staff should promptly undertake revocation proceedings. Also, Ms. Bardin should be directed to immediately pay the outstanding balance of the penalty due under the 2010 consent order and to provide a complete and accurate list of all the DEC-regulated animals in her possession.

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<sup>7</sup> While my personal feelings are consistent with Dr. Gretchen Horn who provided a statement with respect to the Great Escape incident (Ex. 25) - that is, wild animals do not belong in the hands of citizens - current laws and regulations allow these activities.

**HEARING EXHIBIT CHART**

Matter of Cindy A. Bardin

June 20, 2013

<i>Exhibit No.</i>	<i>Description</i>	<i>ID'd?</i>	<i>Rec'd?</i>	<i>Offered By</i>
1	Notice of Denial of Applications for License Renewals dated August 25, 2011 from Patricia Riexinger, Director Division of Fish, Wildlife & Marine Resources	√	√	HGG
2	Request for Hearing dated August 31, 2011 from Robert M. Winn, Attorney at Law to Director Riexinger	√	√	HGG
3	Letter dated September 14, 2011 from Mark D. Sanza, Assistant Counsel to Robert M. Winn, Esq. – Denial of Hearing Request	√	√	HGG
4	Decision and Order – Hon. Stan L. Pritzker dated March 8, 2013	√	√	HGG
5	Statement of Readiness dated March 14, 2013	√	√	HGG
6	Assignment letter dated March 21, 2013	√	√	HGG
7	Stipulation and Order dated April 18, 2013 re: hearing adjournment w/cover letter dated April 22, 2013 from Robert M. Winn, Esq. to Hon. Dona Crandall, Washington County Clerk	√	√	HGG
8	Consent Decision and Order dated April 15, 2013 – USDA ALJ Janice K. Bullard	√	√	HGG
9	Consent Decision and Order dated April 19, 2013 – USDA ALJ Janice K. Bullard	√	√	RMW
10	Notice of Enforcement Hearing dated May 9, 2013	√	√	HGG
11	Revised Notice of Enforcement Hearing dated May 10, 2013	√	√	HGG
12	USDA Federal License – Cindy Bardin – Certificate No. 21-C-0319	√	√	RMW
13	Affidavit of Cindy Bardin dated December 6, 2011 submitted in Bardin v. Martens, et al., Index No. 19481 (Washington Co. Sup. Ct.)	√	√	MDS
14	Reply Affidavit of Cindy Bardin dated January 2, 2011 submitted in Bardin v. Martens, et al., Index No. 19481 (Washington Co. Sup. Ct.)	√	√	MDS
15	Affidavit of Joseph E. Therrien dated December 20, 2011 submitted in Bardin v. Martens, et al., Index No. 19481 (Washington Co. Sup. Ct.)	√	√	MDS



<i>Exhibit No.</i>	<i>Description</i>	<i>ID'd?</i>	<i>Rec'd?</i>	<i>Offered By</i>
16	Consent Order dated July 30, 2010 w/cover letter dated September 10, 2010 from Anthony A. London, Esq. to Cindy A. Bardin	√	√	RMW
17	Memorandum dated November 9, 2010 from Lance Durfey to Joe Therrien	√	√	MDS
18	Ticket - BA8708184	√	√	MDS
19	Ticket - BB8978384	√	√	MDS
20	Ticket – BB8978406	√	√	MDS
21	Order and Conditions of Conditional Discharge dated May 9, 2011	√	√	MDS
22	Letter dated August 19, 2009 from Patrick P. Martin to Cindy Bardin w/Amended Endangered/Threatened Species (ETS) License (#33)	√	√	MDS
23	License to Possess and Sell (#61) – Cindy A. Bardin	√	√	MDS
24	Series of e-mails including e-mail from Michael J. Smith, APHIS to Joseph Therrien dated June 5, 2013	√	√	MDS
25	New York State Incident Report dated May 31, 2013, with Supporting Depositions	√	√	MDS
26	Handwritten list of animals and bar code numbers (undated)	√	√	RMW
27	Copy of fax transmission report of handwritten list of animals and bar code numbers dated July 13, 2011	√	√	RMW
28a	Copy of color photo of lemur cage	√	√	RMW
28b	Copy of color photo of Canadian lynx cage	√	√	RMW
28c	Copy of color photo of black bear cage	√	√	RMW
28d	Copy of color photo of tiger cage	√	√	RMW
28e	Copy of color photo of red fox cage	√	√	RMW
28f	Copy of color photo of cougar cage	√	√	RMW
28g	Copy of color photo of African lion cage	√	√	RMW

<i>Exhibit No.</i>	<i>Description</i>	<i>ID'd?</i>	<i>Rec'd?</i>	<i>Offered By</i>
28h	Copy of color photo of lion's steel lockout	√	√	RMW
29	E-mail series between Steven Nusbaum, VMO, APHIS and Joseph Therrien dated November 9, 2006, and November 12, 2006	√	√	RMW
30	E-mail series between Steven Nusbaum, VMO, APHIS and Joseph Therrien dated March 12, 2007	√	√	RMW
31	E-mail from Cindy Bardin to Joseph Therrien dated March 15, 2011	√	√	RMW
32	E-mail from Joseph Therrien to Michael Smith dated September 7, 2011 with denial letter dated August 25, 2011 and copies of licenses	√	√	RMW
33	E-mail series between J. Therrien and Kevin Bolin – November 23, 2011	√	√	RMW
34	E-mail series between J. Therrien and Michael Smith dated January 19, 2012	√	√	RMW
35	Inspection report – USDA – May 8, 2013	√	√	RMW
36	Inspection report – USDA – June 5, 2012	√	√	RMW
37	Notice of License Renewal dated July 27, 2010	√	√	RMW