

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

In the Matter of the Denial of the
Application for a New York State Guide
License Issued Pursuant to
Environmental Conservation Law ("ECL")
11-0533 and Part 197 of Title 6 of the
Official Compilation of Codes, Rules
and Regulations of the State of New
York ("6 NYCRR"),

ORDER

DEC Case No.
CO 5-20150806-01

- by -

PATRICK CUNNINGHAM

Guide License Application

Respondent.

In March 2015, Patrick Cunningham filed a licensed guide application with the New York State Department of Environmental Conservation ("Department") for fishing, hiking and whitewater rafting activities. By letter dated May 20, 2015, Department staff denied his application. On June 8, 2015, Department staff received a letter in which Mr. Cunningham appealed from the denial (see Hearing Exhibit 2).

The matter was referred to the Department's Office of Hearings and Mediation Services. Chief Administrative Law Judge James T. McClymonds assigned Administrative Law Judge ("ALJ") Michael S. Caruso to the matter. Following an administrative hearing, ALJ Caruso prepared the attached hearing report in which he recommends that I affirm Department staff's denial of Mr. Cunningham's 2015 licensed guide application. I adopt the ALJ's hearing report as my decision in this matter, subject to my comments below.

Mr. Cunningham, who has operated a guided whitewater river rafting company known as the Hudson River Rafting Company, Inc., located in the hamlet of North Creek, Warren County, held Guide License #434 for a number of years. On April 14, 2013, Mr. Cunningham applied to renew his license. The Department denied his renewal application for Guide License #434 on the ground that he had violated ECL 11-0533 by repeatedly providing rafting guides for hire who were not licensed by the Department for

whitewater rafting excursions (see Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015; see also Hearing Report, at 5 [Finding of Fact 7], 10).

The ALJ summarizes the positions of Department staff and Mr. Cunningham with respect to the 2015 application denial. Staff denied the application, in part, citing Mr. Cunningham's history of noncompliance with the ECL and applicable regulations, and the Department's Record of Compliance Enforcement Policy (see Hearing Report at 3). Staff also noted Mr. Cunningham's poor performance on the guide examination, including his failure of the fishing guide examination (see id.). Mr. Cunningham, however, contended that he met all the requirements to receive a guide license and that he has no current violations (see id.).

I have reviewed the prior decision and order of Acting Commissioner Marc Gerstman, which documented Mr. Cunningham's liability with respect to violations of ECL 11-0533 (see Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015, at 7-9). In addition to those violations, the hearing record documents numerous other incidents where Mr. Cunningham's actions and business practices have placed his customers and others at risk. These include but are not limited to (a) leaving a young camp counselor in the river, (b) allowing rafts that were overcrowded on the river, (c) personally abandoning a raft thereby leaving the customers on the raft to complete the trip absent any guide, (d) placing inexperienced customers on unguided rafts or in unguided inflatable kayaks, (e) using unlicensed guides, and (f) allowing his buses that transport customers to be driven by individuals lacking the proper license (see e.g. Hearing Report at 6-9 [Findings of Fact 13-39], 16-17).

The hearing report evaluates applicant's fitness with respect to the application for this license (see Hearing Report at 14-16). The ALJ concludes that "[t]he guiding practices exhibited by Mr. Cunningham and [his company] go to the very core of his fitness as an applicant," and that "[these] practices and the history of noncompliance . . . are incompatible and inconsistent with the responsibilities assumed by a licensed guide" (Hearing Report at 16). I concur. Moreover, as noted by the ALJ, these issues are relevant to each of the guiding activities in Mr. Cunningham's application.

Based on the record before me, Department staff has proved by a preponderance of the evidence that denial of the license

application is warranted. Accordingly, I uphold the determination of Department staff to deny Mr. Cunningham's application for a license to guide fishing, hiking and whitewater rafting activities.

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

I. Department staff's determination, as set forth in its letter dated May 20, 2015, to deny Patrick Cunningham's 2015 application for a license to guide fishing, hiking and whitewater rafting activities, is affirmed.

II. All communications from Patrick Cunningham to the Department concerning this order shall be made to Kenson Jeffrey, Esq., at the following address:

Kenson Jeffrey, Esq.
Senior Attorney
New York State Department of Environmental
Conservation
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500.

III. The provisions, terms and conditions of this order shall bind Patrick Cunningham, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Basil Seggos
Commissioner

Dated: August 24, 2016
Albany, New York

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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Application for New York State Guide
License Issued Pursuant to Environmental
Conservation Law (ECL) 11-0533 and Part
197 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
(6 NYCRR),

HEARING REPORT

DEC Case No.
CO 5-20150806-01

- by -

PATRICK CUNNINGHAM
Guide License #434

Applicant.

Appearances of Counsel:

-- Thomas S. Berkman, Acting Deputy Commissioner and
General Counsel (Kenson Jeffrey, Senior Attorney and Scott
Crisafulli, Deputy General Counsel, of counsel), for staff
of the Department of Environmental Conservation

-- Patrick Cunningham, pro se

By letter dated May 20, 2015, Scott W. Crisafulli, New York
State Department of Environmental Conservation (DEC or
Department) Deputy General Counsel advised Patrick Cunningham,
that the Department was denying his 2015 application for Guide
License #434 (Hearing Exhibit 1 [see attached exhibit chart]).
Mr. Cunningham applied for a license to guide fishing, hiking
and whitewater rafting activities (Staff Exhibit 4). Mr.
Cunningham held Guide License #434 for many years, but
Department staff denied his April 2013 guide license renewal
application.¹

¹ The Department suspended Mr. Cunningham's license by letter dated October
29, 2012 pending the outcome of criminal charges brought against him by New
York State on various matters. On April 14, 2013, Mr. Cunningham applied to
renew his license set to expire April 24, 2013. Department staff denied Mr.

Deputy General Counsel Crisafulli based Department staff's denial on there being no final resolution of staff's 2013 denial of Mr. Cunningham's guide license application, Mr. Cunningham's history of non-compliance with the law and regulations, and his performance on the guide license exams (Hearing Exhibit 1).

In an undated letter received by the Department's Office of General Counsel on June 8, 2015, Mr. Cunningham requested a hearing and asserted that he successfully presented all the requirements to receive a guide license and that he has no current violations. He also asserted that previous violations were not proven or were dismissed (Hearing Exhibit 2).

The matter was assigned to me, and a hearing was held on August 7, 2015 in the Department's Region 5 Sub-Office, Golf Course Road, Warrensburg, New York.

At the hearing, the Department staff was represented by Kenson Jeffrey, Senior Attorney and Scott Crisafulli, Deputy General Counsel, DEC Office of General Counsel. Mr. Cunningham appeared pro se. The matter concluded in one day. Department staff's post-hearing brief was received on October 5, 2015. Mr. Cunningham's post-hearing brief was received on November 4, 2015.² The record closed on November 5, 2015.

Because this matter concerns the Department staff's determination to deny a license application based in part upon violations of the ECL and regulations, the proceedings are governed by 6 NYCRR Part 622 - Uniform Enforcement Hearing Procedures (see 6 NYCRR 622.1[a][6]). The Department staff's denial letter constitutes the complaint and the applicant's request for a hearing constitutes the answer (6 NYCRR 622.3[b][2]). Department staff must prove its allegations by a preponderance of the evidence to prevail (6 NYCRR 622.11[b]).

Cunningham's application, and he requested a hearing. The matter was assigned to Administrative Law Judge Edward Buhrmaster. The parties agreed to submit the matter on the papers. During the pendency of this current proceeding, but after hearing, Acting Commissioner Marc Gerstman issued a Decision and Order dated August 24, 2015 affirming Department Staff's denial of Mr. Cunningham's 2013 guide license application.

² Mr. Cunningham presents alleged facts in his brief that were not established or introduced during the adjudicatory hearing. To the extent that his brief is not based on the hearing record, it is disregarded.

I. Summary of the Parties' Positions

A. Department Staff

Mr. Crisafulli's May 20, 2015 denial letter advised Mr. Cunningham that the Department denied his application for a guide license based on the following. First, there was an outstanding matter from the Department's 2013 denial of Mr. Cunningham's guide license application. The Commissioner had not issued a decision in that matter at the time of staff's 2015 denial or by the August 7, 2015 hearing.

Secondly, staff cites Mr. Cunningham's history of noncompliance with the ECL and regulations and the Department's Record of Compliance Enforcement Policy as support for staff's decision to deny. Staff presents the history of unlicensed guides that have guided customers for Mr. Cunningham's company, Hudson River Rafting Company, Inc. (HRRC), as violations considered in denying Mr. Cunningham's license application.

Lastly, staff notes Mr. Cunningham's poor performance on the guide examinations as supporting staff's reason to deny the license application. Department staff noted that Mr. Cunningham failed the "fishing and whitewater guide examinations" twice in 2014. Mr. Cunningham passed the "hiking, and boats and canoes and whitewater" examinations on April 16, 2015, but again failed the fishing guide examination. (See Exhibit 1.)

B. Applicant

Mr. Cunningham argues that he meets all the requirements to receive his guide license and that he has no current violations. He notes that previous violations were dismissed or resulted in a not guilty verdict. Mr. Cunningham also argues that no evidence has been provided that he does not know how to paddle to the right and left and guide a raft down the river.

II. Hearing

Senior attorney Kenson Jeffrey and Deputy General Counsel Scott Crisafulli appeared on behalf of Department staff and presented five witnesses: Colleen Kayser, License Guide Program

Specialist; Bruce Lomnitzer, DEC Forest Ranger; Jason Scott, DEC Forest Ranger; Arthur Perryman, II, DEC Forest Ranger; and Peter Burns, Owner, BeaverBrook Outfitters.

Mr. Cunningham appeared pro se and testified on his own behalf as the sole witness for his case.

Department staff offered twenty-eight exhibits at the hearing, all of the exhibits were accepted into evidence. Mr. Cunningham offered eight exhibits into evidence; six of the exhibits were accepted into evidence.

In addition, I took official notice of DEE-16: Record of Compliance Enforcement Policy, (rev. March 5, 1993); State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, 40 Misc3d 1210(A), (Sup Ct Hamilton County 2013); and State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, Sup Ct, Hamilton County, December 3, 2013, Giardino J., index No. 2012-6972.³

The transcript of the hearing was received on August 24, 2015.

III. Findings of Fact

1. On July 9, 2014 Patrick Cunningham took the fishing and whitewater guide examinations twice and failed the examinations both times. (See Exhibit 1; Transcript at 20 [testimony of Colleen Kayser].)

2. In March 2015, Patrick Cunningham submitted a Licensed Guide Application for fishing, hiking and whitewater rafting guiding activities to the Department. (See Staff Exhibit 4; Transcript at 16 [testimony of Colleen Kayser].)

3. On April 16, 2015, Mr. Cunningham took the fishing, hiking, boats and canoes, and whitewater guide examinations and passed the "hiking, boats and canoes and whitewater exams, but failed the fishing guide examination." (See Exhibit 1; Transcript at 20 [testimony of Colleen Kayser].)

4. Applicants for guide licenses must also submit a completed Physician's Statement of Physical Ability to Guide, on

³ I also take official notice of Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015.

a form provided by the Department. The form submitted by Mr. Cunningham is lacking the first two pages and the third page is not complete as the physician's address and phone number are missing. (Compare Staff Exhibits 4 and 5; Transcript at 17-19 [testimony of Colleen Kayser].)

5. The Department denied Mr. Cunningham's March 2015 application by letter dated May 20, 2015. (See Exhibit 1.)

6. Mr. Cunningham requested a hearing by letter received in the Department's Office of General Counsel on June 8, 2015. (See Exhibit 2.)

7. Mr. Cunningham held Guide License No. 434 before the Department suspended his license in 2012 and denied his 2013 renewal application. (See Staff Exhibit 3; Transcript at 15 and 52 [testimony of Colleen Kayser].)

8. Department staff denied Mr. Cunningham's guide license application in 2013. Staff's denial was affirmed by the Acting Commissioner. (See Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015.)

9. Mr. Cunningham is the owner of Hudson River Rafting Company, Inc. (HRRC). (See Transcript at 55 [testimony of Colleen Kayser]; see also Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015 at 5-8.)

10. A guide license is required for guiding customers down the Indian River between Lake Abanakee and the confluence of the Hudson River and the Hudson River between its confluence with the Indian River and the confluence of Balm of Gilead Brook. (See 6 NYCRR 197.2[k][7] and [8]; Transcript at 139 [testimony of Jason Scott].) Unless otherwise indicated, reference to those rivers herein is meant to refer to those portions of the rivers defined in the regulations where a guide license is needed.

11. On August 10, 2010, Mr. Cunningham guided a raft of camp children down the Indian River and Hudson River. A second raft carried camp counselors (older children and young adults) from the camp and did not have a licensed guide. (See Exhibit 28 A, B, & C; Transcript at 63-68 [testimony of Bruce Lomnitzer].)

12. There were fourteen young children plus Mr. Cunningham in one raft and eleven older children or young adults in the second raft. (See Exhibit 28 A, B and C.)

13. At a point in the Hudson River, near Wrap Rapids, Mr. Cunningham's raft became stuck on a rock. Mr. Cunningham had a young man from the second raft enter the water to push Mr. Cunningham's raft off the rock. (See Exhibit 28; Transcript at 64 [testimony of Bruce Lomnitzer].)

14. Once the raft was off the rock, it floated away leaving the young man behind. (See Transcript at 64 [testimony of Bruce Lomnitzer].)

15. Off duty DEC Forest Ranger Bruce Lomnitzer witnessed this event from his kayak and seeing that the young man was about to step downstream with the current grabbing him, advised him not to stand up in the river or his feet may become entrapped. The young man followed Ranger Lomnitzer's advice and got his feet up and began floating downstream. (See Transcript at 64 and 68 [testimony of Bruce Lomnitzer].)

16. Ranger Lomnitzer called out to Mr. Cunningham to have his raft back paddle to pick up the young man floating down the river, but Cunningham's raft continued to float downstream away from the Ranger and the young man. Mr. Cunningham and his raft did not respond to the Ranger's request or the man overboard. (See Transcript at 64 [testimony of Bruce Lomnitzer].)

17. Ranger Lomnitzer instructed the young man to grab the back loop of his kayak while the Ranger paddled hard to catch the Cunningham raft and repeated his request for the raft to back paddle. (See Transcript at 64-65 [testimony of Bruce Lomnitzer].)

18. Again he was ignored by Cunningham's raft. (See Transcript at 65 [testimony of Bruce Lomnitzer].)

19. When Ranger Lomnitzer finally got the young man in Cunningham's raft, the raft now held a total of sixteen people - fifteen customers and their guide, Mr. Cunningham. (See Transcript at 67 [testimony of Bruce Lomnitzer].)

20. The two HRRC rafts were overcrowded. (See Exhibit 28; Transcript at 97, 119-121 [testimony of Peter Burns].)

21. On May 27, 2012, Mr. Cunningham guided a raft of customers down the Indian River and Hudson River. Mr. Cunningham exited the raft at the railroad trestle that crosses the Hudson River, leaving the customers, including a ten year old child, to work their way to the takeout some three miles downstream. The customers had not consented to finishing the trip without a guide and struggled to complete the trip. (See Staff Exhibit 8 and Applicant Exhibit 1; Transcript at 58-59 [testimony of Bruce Lomnitzer].)⁴

22. On August 26, 2012, HRRC placed two inexperienced paddlers in an inflatable kayak or "duckie" to be herded down the Indian River and Hudson River by two HRRC rafts with guides. (See Staff Exhibits 9 and 11.)

23. One of the rafts was overcrowded with twelve people. (See Staff Exhibit 9.)

24. Shortly after entering the Indian River, the two men in the duckie became separated from the rafts. (See Staff Exhibits 9 and 11.)

25. The two men in the duckie struggled trying to negotiate the rapids and capsized, while the two rafts that were supposed to be herding or guiding the duckie were far downstream. (See Staff Exhibits 9 and 11.)

26. After capsizing the duckie and finally climbing back in during a calmer stretch of river, the rafts were no longer in sight of the duckie. (See Staff Exhibits 9 and 11.)

27. The two men struggled to keep the duckie afloat and after several minutes capized again and became separated from the duckie and each other. (See Staff Exhibit 11.)

28. The men hit rock after rock in the rapids, lost sight of one another, and when they finally made it to shore, had no idea what had become of each other or the rafts that were supposed to be guiding them. (See Staff Exhibit 11.)

⁴ Exhibit 8 is an Affidavit of Tammy Rowe who together with Ross Goldstein sought charges against Mr. Cunningham for reckless endangerment. Those charges were dismissed by the Town Court Justice because neither information was subscribed and verified as required by law, and the prosecution had failed to indicate it was ready for trial within 90 days. (See Applicant Exhibit 4.)

29. The two men, one guide and eleven customers from one raft eventually walked back to the area where they had launched their boats. (See Staff Exhibits 9 and 11.)

30. On Labor Day weekend, 2012, Mr. Cunningham guided a raft of customers down the Indian River and Hudson River. Just before the Hudson River travels under a railroad overpass, Mr. Cunningham instructed his customers to paddle to the side of the river where he exited the raft and left his customers to finish the remaining three miles of river on their own. The customers had not consented to a guideless finish to the trip. The customers were afraid for their safety and struggled to complete the trip. At the time Mr. Cunningham exited the raft there were no other rafts in sight. (See Staff Exhibit 6.)

31. Mr. Cunningham occasionally exits the raft he is guiding at the railroad trestle because the "tail of the Hudson River Gorge is flat and boring, and at that point there's nothing to guide" even though a guide needs to be licensed on that part of the river as well. (See Transcript at 194 [testimony of Patrick Cunningham]; see also Transcript at 59 [testimony of Bruce Lomnitzer].)

32. Mr. Cunningham does not allow his other guides to exit their rafts during a trip, but does it himself because he is "tired of guiding or bored." (See Transcript at 195 [testimony of Patrick Cunningham].)

33. From the railroad trestle to the take-out, approximately three miles of the Hudson River, the rafts can get hung up on rocks and it takes some effort paddling and dislodging the raft, which is often strenuous activity, to get down the river. (See Staff Exhibit 6 and 8; Transcript at 59 and 65 [testimony of Bruce Lomnitzer].)

34. Mr. Cunningham or his employees have placed customers with no whitewater experience on unguided rafts or in inflatable kayaks called duckies. Rafts are sometimes overloaded and on occasion the guide provided is not licensed as required by law. (See Staff Exhibits 7, 9, 11, 26, 28; Transcript at 67, 79-80, 131-132, 157-160 [testimony of Bruce Lomnitzer, Jason Scott and Arthur Perryman, II].)

35. When DEC Rangers checked HRRC's rafts for unlicensed guides, the unlicensed guides, HRRC employees, told the Rangers that it was a self-guided raft; but when the Rangers asked the

customers who the guide was, the customers indicated they were guided by the HRRC employees. (See Staff Exhibit 26; Transcript at 157-160 [testimony of Arthur Perryman, II].)

36. On several occasions, Mr. Cunningham's guides have been ticketed and fined for guiding without a license. (See Exhibits 15, 16, 17, 18, 19 and 20.)⁵

37. On several other occasions, Mr. Cunningham's guides were ticketed for guiding without a license, but the cases were later dismissed. (See Staff Exhibits 21, 22, 23, 24 and 25 and Applicant Exhibits 5 and 6.)

38. Mr. Cunningham and Hudson River Rafting Company, Inc. were found guilty of criminal contempt of court for providing an unlicensed guide on five separate occasions to guide rafts from the railroad track take-out on the Hudson River downstream past Balm of Gilead Brook. (See Transcript at 131 [testimony of Jason Scott]; People v Hudson River Rafting Co., Inc. and Patrick Cunningham, Sup Ct, Hamilton County, December 3, 2013, Giardino J., index No. 2012-6972.)

39. Mr. Cunningham has allowed his buses to be driven by guides and others who do not have the appropriate commercial license. (See Staff Exhibits 7, 10, and 13; Transcript at 106 [testimony of Peter Burns] and 192-193 [testimony of Patrick Cunningham].)

IV. Discussion

The Department's denial of Patrick Cunningham's 2015 licensed guide application is at issue. As previously stated, it is the Department's burden to prove by a preponderance of the evidence that the denial is justified. Department staff argues three factors in support of staff's decision: the outstanding Commissioner's decision on Department staff's 2013 denial of Mr. Cunningham's renewal application; applicant's record of compliance; and applicant's performance on the guide examinations.

⁵ These six violations were also the basis for Mr. Cunningham's liability in State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, 40 Misc3d 1210(A), (Sup Ct Hamilton County 2013); and the basis for Department staff's denial of Mr. Cunningham's licensed guide application in Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015.

A. Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015.

As noted above, I take official notice of the August 24, 2015 Decision and Order. I also note that identical issues exist in the prior matter and this proceeding, namely the six convictions for guiding without a license were the basis for the Supreme Court decision holding Mr. Cunningham liable for violations of ECL 11-0533, and were the basis for the Acting Commissioner's affirmance of Department staff's 2013 denial of Mr. Cunningham's renewal application. In this proceeding, the same six convictions are part of Department staff's proof relating to Mr. Cunningham's record of compliance (see Staff Exhibits 15, 16, 17, 18, 19 and 20; fn 5 supra).

Mr. Cunningham's liability for those six convictions was determined in the Hamilton County Supreme Court matter (see State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, 40 Misc3d 1210[A], [Sup Ct Hamilton County 2013]. In Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015, Acting Commissioner Gerstman gave the Supreme Court's holding collateral estoppel treatment and found those violations constituted grounds for denying Mr. Cunningham's 2013 licensed guide application.⁶

For the reasons stated in State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, 40 Misc3d 1210[A], supra, and Matter of Cunningham, Decision and Order of the Acting Commissioner, August 24, 2015, I conclude that Mr. Cunningham violated ECL 11-0533.

B. Applicant's fitness.

It is well settled 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, 308-309 [1959] ["the power to withhold a license for good cause, as well as the standards defining good cause, need not be expressly delegated where, by fair implication, in light of statutory purpose, such power has been implicitly delegated"] id. at 307).

⁶ There is lengthy discussion in the Acting Commissioner's Decision and Order regarding Mr. Cunningham's liability for violations committed by his employees, collateral estoppel, and the responsible corporate officer doctrine. See Matter of Cunningham, Decision and Order of the Commissioner, August 24, 2105 at 7-8.

Record of Compliance

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 DEE-16: Record of Compliance Enforcement Policy (rev. March 5, 1993) (<http://www.dec.ny.gov/regulations/25244.html>). DEE-16 acknowledges that "[p]ersistent or significant violators of the Environmental Conservation Law should not have permits renewed or be allowed to obtain new permits after committing breaches of law directly relating to their ability to carry out the authorized activities in a lawful and environmentally responsible manner." (Id. at § II.)

DEE-16 also 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. (Id. at IV.) DEE-16 instructs staff to consider violations occurring over the past ten years.

DEE-16 also requires the reviewer to apply these guidelines to any other corporation, partnership, association or organization in which the applicant holds or has held a substantial interest or in which it has acted as a high managerial agent or director or any other individual, corporation, partnership or organization which holds a substantial interest or the position of high managerial agent or director in the applicant. (Id.)

In addition to the six violations of ECL 11-0533 already established, Department staff has demonstrated there are other violations not considered in the Acting Commissioner's Decision and Order. In State v Hudson Riv. Rafting Co., Inc. and Patrick Cunningham, 40 Misc3d 1210(A), supra, Justice Giardino enjoined the defendants from providing unlicensed guides on any river where a licensed guide was required. The court also required the defendants to post a \$50,000 performance bond before offering any guided rafting excursions on any river in the state where licensed guides are required.

On July 1, 2013, Mr. Cunningham and HRRC established a \$50,000 irrevocable letter of credit in place of the performance bond. On July 5, 12, 21, and 25 and August 1, 2013, Mr. Cunningham and HRRC provided customers with an unlicensed guide on a portion of the Hudson River where a licensed guide is required. (People v Hudson River Rafting Co., Inc. and Patrick Cunningham, Sup Ct, Hamilton County, December 3, 2013, Giardino J., index No. 2012-6972.)

The trips launched at the railroad track take-out on the Hudson River and continued downstream past Balm of Gilead Brook. The portion of the Hudson River from the railroad track take-out to Balm of Gilead Brook is a section where a licensed guide is required. The court noted five instances in which this occurred, and found the rafting company and Mr. Cunningham guilty of criminal contempt for violating the court's prior order and imposed a \$25,000 sanction against them. (People v Hudson River Rafting Co., Inc. and Patrick Cunningham, Sup Ct, Hamilton County, December 3, 2013, Giardino J., index No. 2012-6972.) These additional five violations of the ECL 11-0533 further support Department staff's denial of Mr. Cunningham's 2015 guide license application.

Mr. Cunningham argues that those five violations were later dismissed in Town Court, but did not provide any documentation demonstrating that was the outcome or the cause for dismissal. Even if criminal charges prosecuted in Town Court were later dismissed by that court, it did not negate the finding by Supreme Court Justice Giardino that the violations of the ECL 11-0533 occurred in violation of his prior order or overturn Mr. Cunningham's criminal contempt of a Supreme Court order.

Mr. Cunningham questioned whether it is practical to put in downstream of Balm of Gilead Brook because it would deprive the customers of a couple nice sets of rapids (see Transcript at 145 [testimony of Jason Scott]). He does not argue that a licensed

guide is not required, but he questions why this requirement is now being enforced when it was never enforced by any of the retired Forest Rangers (see e.g. Transcript at 144 [testimony of Jason Scott]).

As the issue and facts establishing Mr. Cunningham's personal liability for those violations of ECL 11-0533 and violation of the court's previous order were necessarily decided in the proceeding before Supreme Court in which Mr. Cunningham had full and fair opportunity to litigate the matter, he is estopped from relitigating that issue or the facts underlying the court's determination. I conclude that Department staff has established that Mr. Cunningham violated ECL 11-0533 by providing unlicensed guides on those five additional occasions. I also conclude that Department staff has demonstrated that Mr. Cunningham was held in criminal contempt of court, which is relevant to the considerations established in DEE-16.

Though many of the violations proven by staff are several years old, Mr. Cunningham has not demonstrated that rehabilitation has occurred. Nor does he provide any indication that his business practices have changed to assure that there will be no more violations of the ECL. He also admits that his guides sometimes drive the buses to and from the launch area on the Indian River and take-out area on the Hudson River, without the required commercial driver's license (see Transcript at 192-193 [testimony of Patrick Cunningham]). Again, Mr. Cunningham provides no indication that those practices will be prevented in the future.

Character and fitness.

It is well settled that the Department has the authority to consider the fitness of an applicant and an applicant's compliance history when determining whether to issue, renew, deny or revoke a permit or license. (See Matter of Cindy A. Bardin, Order of the Commissioner, March 5, 2014, at 4 citing 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]; 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 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].)

It is also within the Department's authority to consider an applicant's conduct and business practices when determining the

fitness of the applicant, where, as here the law requires the Department to determine whether the applicant is competent and skilled.⁷ Mr. Cunningham argues this would be limited to whether the applicant possesses the competence and skill to paddle a raft down the river (see e.g. Transcript at 177 [testimony of Patrick Cunningham]). I conclude, however, that competence and skill, as well as fitness, are also reflected by the conduct of the applicant in applying those skills and by the business practices of the applicant.

The hearing record demonstrates that, in addition to violating the law, Mr. Cunningham has conducted himself and his business in a manner unsafe to his customers. He and HRRC have sent out rafts without a guide in the raft, when the customers expected a guided raft trip. Mr. Cunningham has admitted that on occasion he will exit a raft that he is guiding because he is bored. In doing so, he leaves his customers on the Hudson River to finish the remainder of the trip without a guide, without someone trained in first aid and CPR, and without knowledge of where the take-out is located. He claims customers agree to this, but the evidence demonstrates otherwise (see Staff Exhibits 6 and 8; see also Transcript at 80 [testimony of Bruce Lomnitzer]).

Mr. Cunningham also claims that the customers are never alone as there are always other rafts nearby. Again, the evidence demonstrates otherwise (see Staff Exhibit 6). Even if other rafts are nearby, there is a very distinct and real difference between being in a raft that is "herded" by other rafts and being in a raft that is guided by a person sitting in the stern. As exhibited by the events of August 26, 2012 (Staff Exhibits 9 and 11), there is no herding or guiding when the guided rafts become separated from the unguided duckies or rafts.

⁷ See e.g. Midan Rest. Co. v Tarshis, 68 NY2d 800 (1986) (holding that denial of permit to operate a sidewalk café was properly based on an agency's determination that the applicant lacked good character and fitness for the permit). The agency considered the applicant's assault conviction together with testimony pointing to the conclusion that the applicant was seeking to force tenants out of apartments, some of which were located in buildings adjoining the restaurant. Id. at 801-802. See also CC Lumber Co. v Waterfront Comm'n of N.Y. Harbor, 31 NY2d 350 (1972) (holding that an administrative agency responsible for licensing waterfront businesses had discretion to deny license on the basis that the applicant lacked good character and integrity). The commission's findings of overbilling and fraud were sufficient to support the conclusion that applicant lacked the requisite good character and integrity. Id. at 359.

It is understood that when Mr. Cunningham exits the raft at the train trestle that crosses the Hudson River near the confluence of the Hudson and Boreas Rivers that the most difficult rapids have already been negotiated. The remaining three miles of the trip, however, still call for skills in paddling and negotiating hazards on the river as well as strenuous paddling as the river widens and slows.

In the event of an emergency such as a heart attack, it does little good for the Department regulations to require a licensed guide to have first aid and CPR training, when that guide has abandoned his charges and is walking down the railroad tracks out of sight of his customers. Mr. Cunningham either does not perceive the risks to the paying customers or perceives them and dismisses them out of hand.

Department staff demonstrated at the hearing that Mr. Cunningham placed one of his customers at risk when he had the customer, a young camp counselor, push Cunningham's raft off a rock. After Cunningham's raft was freed and floating downstream, the young man was left there and no attempt was made by Cunningham's raft or the unguided raft of camp counselors to back paddle to pick up the stranded counselor. Luckily, off-duty Forest Ranger Lomnitzer happened upon the scene and helped prevent a dangerous situation from developing further. (See Transcript at 63-65.)

Mr. Cunningham also admits to rafts being launched without a guide in the raft, and the record demonstrates that if HRRC did not have enough guides on a given day that he or his employees would place customers in a raft or a duckie to be herded by guided rafts (see Transcript at 193-194 [testimony of Patrick Cunningham]). As staff's expert testified, other rafting companies do not send customers out in a raft on the Indian River and Hudson River without a guide (see Transcript at 108-109 and 121 [testimony of Peter Burns]).

Hamilton County Supreme Court Justice Giardino was concerned enough about this practice that he permanently enjoined Hudson River Rafting Company, Inc. and Patrick Cunningham "from renting rafts, kayaks or any other similar type of water craft or floatation device for customers to captain their own boats on the subject rivers where a licensed guide is required by 6 NYCRR § 197.2(k)." (State v Hudson River Rafting Co., Inc., 40 Misc2d 1210[A][Sup Ct Hamilton County 2013]).

Mr. Cunningham argues that there is nothing presented in this proceeding that indicates he is not an excellent guide. I disagree. I find his decisions to send customers out in unguided rafts and duckies or in rafts with unlicensed guides and his willingness to abandon his clients before a guided whitewater trip is completed create an elevated safety concern that negates the precautions considered by the Department in drafting the regulatory requirements to become a licensed guide.

The guiding practices exhibited by Mr. Cunningham and HRRC go to the very core of his fitness as an applicant. I conclude that his guiding practices and the history of noncompliance of the business he operates are incompatible and inconsistent with the responsibilities assumed by a licensed guide under ECL 11-0533 and 6 NYCRR part 197.

C. Applicant's examination results.

Department staff also denied Mr. Cunningham's application because he still has not passed his fishing guide examination. The record does not address whether or not staff could issue a license for those examinations passed by Mr. Cunningham. Even if that is a possibility, I conclude that the issues related to Mr. Cunningham's character and fitness are relevant to each of the guiding activities included in Mr. Cunningham's application, not just whitewater guiding activities.

For the reasons stated above, the record supports Department staff's denial of Mr. Cunningham's application.

V. Conclusions of Law

1. By providing an unlicensed guide for raft trips down the Hudson River on five separate occasions during 2013, Mr. Cunningham violated ECL 11-0533;

2. By providing an unlicensed guide for raft trips down the Hudson River on five separate occasions during 2013, Mr. Cunningham violated the order of the Hamilton County Supreme Court and was found in criminal contempt of the court order;

3. By providing unlicensed guides for raft trips down the Indian River and Hudson River during 2007, 2008, 2009, and 2010, Mr. Cunningham violated ECL 11-0533;

4. Mr. Cunningham demonstrated he lacks the character and fitness expected of a licensed guide by:

A. Placing customers with no whitewater experience in rafts without guides and overcrowded rafts with and without guides;

B. Placing customers with no whitewater experience in unguided inflatable kayaks when there was not enough space in rafts;

C. Exiting the raft he is guiding and leaving the customers to complete the last three miles of the raft trip on their own;

D. Allowing employees without the appropriate driver's license to drive buses carrying customers; and

5. By failing the fishing guide examination, Mr. Cunningham did not meet all the criteria for his 2015 guide license application.

VI. Recommendation

Accordingly, I recommend that the Commissioner issue an order affirming Department staff's denial of Patrick Cunningham's March 6, 2015 licensed guide application.

/s/

Michael S. Caruso
Administrative Law Judge

Dated: November 10, 2015
Albany, New York

EXHIBIT CHART

Matter of Patrick Cunningham, DEC Case No. CO 5-20150806-01
August 7, 2015 – NYSDEC Region 5 Sub-Office, Warrensburg, NY

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	May 20, 2015 Correspondence from Scott W. Crisfulli, Esq. to Patrick Cunningham denying 2015 Guide License #434 Application	✓	✓	Hearings Record	
2	Undated Hearing Request from Patrick J. Cunningham to Scott Crisafulli, Esq., received on June 8, 2015	✓	✓	Hearings Record	
Staff 3	Guide License #434 Issued to Patrick J. Cunningham on April 24, 2003, expired April 24, 2008	✓	✓	Department Staff	
Staff 4	New York State Licensed Guide Application submitted by Patrick J. Cunningham, dated March 6, 2015	✓	✓	Department Staff	
Staff 5	Memorandum to Physician: Guide License Applicant's Physical Ability	✓	✓	Department Staff	
Staff 6	November 27, 2012 Correspondence from Gina Norton to Nick Garin, AAG, sworn to November 29, 2012	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff 7	Affidavit of Wayne Rader, sworn to December 4, 2012	✓	✓	Department Staff	
Staff 8	Affidavit of Tammy Rowe, sworn to October 5, 2012	✓	✓	Department Staff	
Staff 9	Affidavit of Heather Savage, sworn to October 5, 2012	✓	✓	Department Staff	
Staff 10	Affidavit of Michael Keniston, sworn to October 9, 2012	✓	✓	Department Staff	
Staff 11	Affidavit of Richard Belson, sworn to October 8, 2012	✓	✓	Department Staff	
Staff 12	People vs Rory K. Fay Felony Complaint against Rory K Fay, affirmed September 27, 2012	✓	✓	Department Staff	
Staff 13	New York State Police, Voluntary Statement of Rory K. Fay, sworn to February 14, 2013	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff 14	June 2, 2014 Correspondence from Champlain National Bank to G. Nicholas Garin, AAG regarding reduction of amount in letter of credit	✓	✓	Department Staff	
Staff 15	Certificate of Conviction regarding People vs Jeremy M. Bertsche, dated February 13, 2013 (Johnsburg Town Court)	✓	✓	Department Staff	
Staff 16	Certificate of Disposition regarding People vs Yobi E. Livingston, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 17	Certificate of Disposition regarding People vs Timothy M. Sullivan, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 18	Certificate of Disposition regarding People vs Brad A. Cormack, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 19	Certificate of Disposition regarding People vs Brad A. Cormack, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 20	Certificate of Disposition regarding People vs Walter Harris, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff 21	Certificate of Disposition regarding People vs Rebecca J. Jacques, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 22	Certificate of Disposition regarding People vs Eric C. Wolff, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 23	Certificate of Disposition regarding People vs Meredith Cunningham, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 24	Certificate of Disposition regarding People vs Frank D. McKeon, dated February 12, 2013 (Indian Lake Town Court)	✓	✓	Department Staff	
Staff 25	Certificate of Disposition regarding People vs Brian M. Conway, dated February 12, 2013	✓	✓	Department Staff	
Staff 26	Supporting Deposition of Frank D. McKeon, sworn to September 6, 2007	✓	✓	Department Staff	
Staff 27	Tickets (2) Issued to Patrick J. Cunningham, dated August 19, 2010	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Staff 28	Photographs (3 - labeled A, B and C) of Hudson River Rafting Company rafts with customers	✓	✓	Department Staff	
Staff 29	Schedule B Hudson River Professional Rafters' Outfitters' Association Guidelines	✓	✓	Department Staff	
Staff 30	People vs Rory K. Fay, Supporting Deposition of Steven J. Ladd, affirmed November 8, 2012	✓	✓	Department Staff	
Applicant 1	Map of the Hudson River Gorge	✓	✓	Applicant	
Applicant 2	Guide License Violations Spreadsheet created by Applicant	✓	No	Applicant	Lack of Foundation, Testimonial
Applicant 3	January 23, 2013 Correspondence from Joseph Brennan, Esq. to Patrick J. Cunningham	✓	✓	Applicant	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
Applicant 4	March 3, 2014 Correspondence from Hon. Brian C. Farr to Joseph R. Brennan, Esq. regarding disposition of various matters	✓	✓	Applicant	
Applicant 5	Supporting Deposition of Forest Ranger Bruce Lomnitzer, unsigned and undated	✓	✓	Applicant	
Applicant 6	Disposition regarding People vs Meredith Cunningham, dated January 16, 2011 (Indian Lake Town Court)	✓	✓	Applicant	
Applicant 7	American Whitewater Affiliation/American Canoe Association, The Six Difficulty Classes	✓	✓	Applicant	
Applicant 8	Tammy Blake Drowning, written by Applicant	✓	No	Applicant	Testimonial