

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: BEATRICE, MICHAEL J.
PERMIT APPLICATION DENIAL

AAD NO. 14-001/AGA

DECISION AND ORDER

Jurisdiction

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 et. seq.); and the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* (“AAD Rules”). The parties agreed that the Administrative Adjudication Division has jurisdiction over the subject matter of Applicant’s appeal as well as personal jurisdiction over the Applicant pursuant to the Applicant’s request for an appeal filed October 12, 2014. (Division’s Exhibit F – Full).

Burden of Proof/ Standard of Review

The Applicant, Michael J. Beatrice (hereinafter “Applicant”) appealed the Decision dated October 5, 2014 from the Rhode Island Department of Environmental Management (“RIDEM”), Division of Agriculture (“Division”) denying him a permit to import and possess five (5) non-human primates. The parties agreed on the record that the Applicant has the burden of proving, by a preponderance of the evidence, that the Division’s denial of his permit application was incorrect.

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Facts and Travel

A Hearing was conducted on April 7, 2015. Prior to the Hearing, the Division and the Applicant submitted their Prehearing Memoranda. The Division and the Applicant filed Post Hearing Memoranda as well. The OC&I was represented by Gary Powers, Esquire and senior law student Elizabeth Hackley (per Article II, Rule 9 of the Supreme Court Rules). The Applicant represented himself. The proceedings were transcribed.

The following Exhibits were admitted by Stipulation after a Prehearing Conference prior to the Hearing:

Division's Exhibit A. The Applicant's Application for the issuance of an Importation and Possession Permit for five (5) non-human primates for Pet Ownership purposes dated September 29, 2014. 55 Pages (Copy).

Division's Exhibit B. The Applicant's Application for the issuance of an Importation and Possession Permit for (5) non-human primates for Exhibition purposes dated May 27, 2014. 61 Pages (Copy).

Division's Exhibit E. The Division's letter dated October 5, 2014 denying the Applicant's Applications dated September 29, 2014 for the issuance of an Importation and Possession Permit for five (5) non-human primates for Pet Ownership purposes pursuant to Rules 5 and 6 of the *Department of Environmental Management, Division of Agriculture.* 2 Pages (Copy).

Division's Exhibit F. The Applicant's letter dated October 12, 2014 appealing the denial of his September 29, 2014 Application for the issuance of an Importation and Possession Permit for five (5) non-human primates for Pet Ownership purposes to the Division. 4 Pages (Copy).

Division's Exhibit G. The Applicant's USDA Class C Exhibitor License. 1 Page (Copy).

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Applicant's Exhibit A. Applicable Rhode Island General Laws.

Applicant's Exhibit B. *Rhode Island Department of Environmental Management's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals.*

Applicant's Exhibit C. United States Department of Agriculture Class C Exhibitor's License and documents associated with its acquisition.

Applicant's Exhibit E. Letter from Michael Embury, Town Manager for the Town of North Kingstown.

Applicant's Exhibit K. Division's Letter of Denial.

Applicant's Exhibit L Applicant's appeal letter.

Applicant's Exhibit M. USDA Inspection Report.

Applicant's Exhibit N. Application Documents.

Applicant's Exhibit O. Photograph of Housing Enclosures.

The following exhibits were offered during the Hearing and admitted as Full Exhibits:

Division's Exhibit C. E-mail correspondence dated May 19, 2014 form Maura Harrington to Scott Marshall verifying the Town of North Kingstown's prohibition on the keeping of primates. 1 Page (Copy).

Division's Exhibit D. Letter dated June 11, 2014 to the Applicant from James H. Reilly, Town Solicitor of North Kingstown indicating the maintenance of wild animals in North Kingstown is prohibited.

Division's Exhibit H. United States Department of Agriculture Animal Welfare Act and Animal Welfare Regulations. November 2013. 143 Pages (Copy).

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Division's Exhibit I. North Kingstown, Rhode Island, Code of Ordinances, Part III, Chapter 9 – Animals. 10 Pages (Copy).

Division's Exhibit J. *Rhode Island Department of Environmental Management's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals.*

Applicant's Exhibit H. Applicant's Curricula Vitae

Applicant's Exhibit J. References and Letters of Recommendation.

Applicant's Exhibit P. Photographs of Lemurs being fed on Block Island.

Applicant's Exhibit Q. Additional Resources for Health and Safety.

The Applicant argued the Division improperly denied his right to import/ possess the five non-human primates as personal pets in violation of Rhode Island Law, exceeded its regulatory authority and misinterpreted the Ordinances of the Town of North Kingstown. He argued that he satisfied all Laws, Regulations and requirements governing the importation of wild animals. (TR. pg. 17). As evidence, he argued that he contacted Dr. Scott Marshall, the State Veterinarian, concerning the process of acquiring a permit to possess non-human primates as pets. He said that Dr. Marshall told him that he first needed to acquire a United States Department of Agriculture ("USDA") Class C Exhibitors License before his application for a permit to possess exotic wild animals would be considered/ approved. (TR. pg. 26).

The Applicant then filed for such a permit with the USDA and obtained it. (Division's Exhibit G – Full).

The Applicant also submitted a letter dated September 2, 2014 from the Town Manager of North Kingstown, Mr. Michael Embury, indicating he could possess the non-human primates.

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Dr. Marshall reviewed this letter (Applicant's Exhibit E – Full).

On October 5, 2014 the Division denied the Applicant's application for a permit to import the five non-human primates. (Applicant's Exhibit K – Full).

The Applicant was then allowed to introduce into evidence several other exhibits, over the objection of the Division, that were not submitted to the Division with his original application. For example, Applicant submitted letters, dated after the Division's denial of his application, that speak to the Applicant's ability to care for the non-human primates; the resources available to him if he were allowed the permit; his work history and experience working in Zoological settings, etc. (TR. pgs. 21-22). (Applicant's Exhibit H – Applicant's Curricula Vitae; Applicant's Exhibit J – Letters of Recommendation).

The Applicant argued that he has the requisite credentials and work experience to possess the non-human primates and that Dr. Marshall overlooked this. Furthermore, Applicant argued that Dr. Marshall ignored the Town Manager's letter stating he could possess the non-human primates (Applicant's Exhibit E – Full). He also argued that Dr. Marshall improperly concluded that the Applicant's intention was to exhibit the non-human primates, which directly contradicted the purpose stated in the Applicant's application, which stated "pet ownership". (Applicant's Exhibit N – Full) and (TR. pg. 80).

The Applicant further stated that Dr. Marshall also based his denial on health and safety as it related to rabies. The Applicant said that the basis for that denial was purely speculative. The Applicant testified that Dr. Leah Fischer would be employed by the Applicant to oversee all concerns regarding health and safety. Dr. Fischer was identified on the Applicant's application as required by the Division. As the Division did not cite insufficient or unqualified veterinarian qualifications as a basis for denial, the Applicant said the Division has conceded that veterinarian

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care he would render would meet and/ or exceed the expectations of the State.

The Applicant also argued that he is an expert on all matters related to primates. His qualifications are outlined but not be limited to his Curricula Vitae and Letters of Recommendation (Applicant's Exhibits H, J – Full). The Applicant's qualifications were identified on his application as required by the Division. As the Division did not cite Applicant's qualifications as a basis for denial, he alleges the Division has also conceded that his qualifications would meet and/ or exceed the expectations of the State.

The Applicant stated that he is eminently qualified to possess non-human primates. He has logged more than seven thousand (7,000) hours working in an operational zoo specializing in primates. He has experience in exotic animal management and care, building enclosures and houses for non-human primates and he has been a back-up Curator at the Zoo. He argued that the Division improperly denied his license request despite his qualifications (TR. pg. 27).

In response to the Applicant's arguments, the Division argued that it was required to deny the Applicant's application pursuant to Rule 6.1(d) and 5(1) of *The Department of Environmental Management's Division of Agriculture's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals* ("Rules and Regulations"). The Division argued the Applicant did not satisfy his burden of proof by a preponderance of the evidence that the Division improperly denied his application.

The Division presented four witnesses: Dr. Paula S. Gladue, Veterinary Medical Officer, United States Department of Agriculture ("USDA"); Jan Baltrush, Animal Care Inspector, USDA; Donald Maroney, Esquire, Assistant Town Solicitor, Town of North Kingstown; and Dr. Scott Marshall, D.V.M., Rhode Island State Veterinarian.

The first witness, Dr. Gladue, testified that as part of her duties as a USDA Veterinary

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Medical Officer she performs site inspections for premises that have applied to obtain a Class C Exhibitor's License. Dr. Gladue began her testimony by explaining that the USDA only gets involved in the issuance of Class C Exhibitor Licenses for individuals who desire to possess animals for exhibition purposes and not as pets. (TR. pg. 38). She further explained that persons desiring to possess animals for purposes of pet ownership are not required to obtain a Class C Exhibitor's License and in fact, the USDA has no jurisdiction over pet ownership. (TR. pg. 38). Dr. Gladue continued her testimony by verifying that she was one of the individuals who conducted the initial inspection of the Applicant's property on April 8, 2014. Dr. Gladue further stated that the Applicant's USDA Class C Exhibitor License application was for the exhibition of two **farm animals** (emphasis added), specifically, two (2) goats, not the five (5) non-human primates that are the subject of the instant proceeding. (TR. pg. 39). The USDA Exhibitor's License was issued based upon an inspection of an enclosure located on the Applicant's property and the determination that it was adequate pursuant to USDA *Animal Welfare Regulations* for the housing of **two goats** (emphasis added). Although there was construction of facilities for non-human primates in progress at the time of Dr. Gladue's inspection, these facilities were not officially inspected for the housing of non-human primates according to USDA's Animal Welfare Regulations. (TR. pg. 46). Dr. Gladue said she did a "courtesy walk-through of other enclosures - - not enclosures but housing areas" the Applicant was constructing for the non-human primates. (TR. pg. 48). Dr. Gladue further testified that the USDA Regulations governing the standards for enclosures for non-human primates differ than those governing goats and that the regulations governing non-human primates "are more stringent" than the regulations governing goats. (TR. pg. 45). Dr. Gladue was clear during her testimony that her inspection was for the two goats and

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that the issue of the non-human primates was a secondary idea that was being developed by the Applicant (TR. pg. 51).

The Division's second witness was Ms. Jan Baltrush, an Animal Care Inspector employed by the USDA. Ms. Baltrush attended the first inspection and conducted a second unannounced inspection of the Applicant's property. (TR. pg. 56). During the second inspection, Ms. Baltrush testified that there were two goats on the property and that the property satisfied the requirements of the USDA regulations governing the keeping and exhibition of goats. Ms. Baltrush reiterated that the subject property was only inspected and approved in response to the Applicant's application for goats during both inspections. The facility was not inspected and approved by the USDA for the housing of non-human primates during Ms. Baltrush's two inspections of the Applicant's property. (TR. pg. 57).

The testimony of these individuals directly contradicts the Applicant's statement that "My residential primate facility meets or exceeds the requirements of the USDA and have twice passed inspection by that organization" (TR. pg. 23). The Applicant failed to rebut the testimony of Dr. Gladue and Ms. Baltrush who inspected his facility for the keeping and exhibition of two goats.

The Division's third witness, Donald Maroney, Assistant Town Solicitor for the Town of North Kingstown, testified that the ordinances of North Kingstown do not allow for the keeping of non-human primates for either pet ownership or exhibition purposes. (TR. pg. 62). Attorney Maroney stated that North Kingstown Ordinance 3-8(g) (Division's Exhibit I - Full) clearly provides that "no wild animal may be kept within the Town limits except under such conditions as shall be fixed by the animal control officer, however, wild animals may be kept for exhibition purposes by circuses, zoos and educational institutions." *Id.* Attorney Maroney also confirmed the accuracy of the Division's Exhibit D – Full, a letter from the North Kingstown Town Solicitor

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addressed to the Applicant that the local ordinances of North Kingstown do not allow the keeping of non-human primates at the Applicant's residence. (TR. pg. 69). Attorney Maroney also reviewed Applicant's Exhibit E – Full, a letter from North Kingstown's Town Manager, Mr. Michael Embury, and testified that Mr. Embury never consulted with the Town Solicitor's office in preparing the letter, nor is Mr. Embury an attorney. (TR. pg. 61). Attorney Maroney said Mr. Embury's legal conclusion that the Applicant could keep non-human primates on his property was incorrect. (TR. pg. 62).

Dr. Scott Marshall testified as the Division's final witness. Dr. Marshall testified that he reviewed the subject Application in his capacity as the State Veterinarian for the importation and possession of exotic animals, drafted the denial letter to the Applicant and then submitted it to his Division Chief for approval. (TR. pg. 85). Dr. Marshall testified that he did consider correspondence from the North Kingstown Town Solicitor and the North Kingstown Town Planner in his decision to deny the Applicant's application for the possession of exotic animals, contrary to the Applicant's assertions. (TR. pgs. 86-88). Both letters indicated that the keeping of non-human primates is prohibited by North Kingstown Town Ordinances. (TR. pg. 88). Additionally, Dr. Marshall explained his reliance on Rule 6.1(d) of the Division's *Rules and Regulations Governing Importation and Possession of Exotic Wild Animals* in his decision to deny the permit application. (TR. pg. 89). Rule 6.1(d) states that "Issuance of exotic animal import permits may be made by the Department upon the following: ... (d) Determination that possession of the exotic species will not endanger the public health or the health of native wildlife or domestic animals to an extent greater than possession of domestic animals or exempt exotic animals would." Dr. Marshall testified that he determined that possession of five (5) non-human primates would endanger public health for a number of reasons. First, non-human primates are

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“by their very nature... more dangerous than other animals are.” (TR. pgs. 89-90). Additionally, Dr. Marshall testified regarding his concerns that there is no rabies vaccination approved for use in non-human primates. (TR. pg. 90). Dr. Marshall testified that the chain link fence that the Applicant proposed to use as part of the primary enclosure for the non-human primates would allow for small animals to enter the enclosure and thereby increase the risk of disease transmission, including rabies. (Applicant’s Exhibit O – Full) and (TR. pg. 93). Dr. Marshall said rabies is endemic in Rhode Island. (TR. pg. 90). Furthermore, Dr. Marshall noted that the Applicant is not permitted to possess the tranquilizing drugs that might be administered via darting equipment that is used in zoo settings to aid in the recapture of non-human primates should they escape. (TR. pg. 91). The tranquilizing drug used in the darting equipment is available by veterinary prescription only, and the Applicant would not be able to have these drugs on a shelf waiting to be used should one of the non-human primates escape. (TR. pg. 92).

The Applicant then cross-examined Dr. Marshall but failed to rebut the issues Dr. Marshall raised regarding the risk to the health of the animal and human residents of the State as required pursuant to Rule 6.1(d). The Applicant also failed to address his lack of ability to possess the tranquilizing drugs required to be used in darting equipment needed to capture the animals should they escape.

Both parties rested at the conclusion of Dr. Marshall’s testimony.

Discussion

The Division objected to the admission of certain evidence the Applicant introduced during the presentation of his case. For example, letters that were dated after the denial of his permit, that speak to his ability to care for the non-human primates; his work history and

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experience working in Zoological settings, etc. (TR. pgs. 21-22) and Applicant's Exhibits for ID only H and J). They were admitted into evidence subject to review and determination of the weight they should be given, if any.

After hearing all of the evidence in this matter, I do not assign any weight to these documents for two reasons. One is that the case of Edward A. Kent v. Rhode Island Department of Environmental Management C.A. No. PC 10-00026 (Rhode Island Superior Court July 20, 2011) limits my review of this matter to the record established by the Applicant and the Division, which led to this Appeal. In this instance, these documents were not submitted by the Applicant to the Division with his Application to house the non-human primates. (Division's Exhibit A – Full). Despite the fact they did shed light on the knowledge, the capabilities and the qualifications of the Applicant to house and care for non-human primates, they are not relevant to the main issue for denial of the Applicant's Application, namely, public health and safety. The Applicant argued that the Federal and State officials approved his facility for non-human primates. (TR. pgs. 23, 45, 46, 56, 57). This is not true. He also argues that it was approved by the Town Manager for the Town of North Kingstown. That statement is true, but the Division presented Mr. Maroney, who testified that the Town Manager's conclusions were legally incorrect (TR. pg. 62) and the Applicant was aware of this fact.

The most important testimony was given by Dr. Scott Marshall, the State Veterinarian, who testified about the health and safety reasons for denying the Applicant's request. Dr. Marshall, contrary to the Applicant's assertions, stated that he considered all of the evidence presented to the Division prior to issuing the denial letter. (TR. pgs. 86-88). Dr. Marshall said he believed the possession of five non-human primates would endanger public health for a variety of

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reasons. One reason is that they are “by their very nature ... more dangerous than other animals are.” (TR. pgs. 89-90). Secondly, there is no rabies vaccination for non-human primates. (TR. pg. 90). He was concerned that small animals could enter the chain link fence enclosure and thereby increase the risk of disease transmission, including rabies. (TR. pg. 93). Lastly, the Applicant would not be permitted to possess the necessary tranquilizing drugs to be used in case of escape. They are only available by prescription.

I found Dr. Marshall’s testimony sensible and credible. He addressed the central issues in this case, namely, the health and safety of the public. His testimony, combined with the credible testimony from Dr. Gladue and Ms. Jan Baltrush, was in stark contrast to the unsubstantiated statements of the Applicant concerning the purposes of the inspections of the Applicant’s facility (goats vs. non-human primates), and the testimony of Mr. Maroney, which explained why the non-human primates are not allowed on the Applicant’s property (contrary to Applicant’s assertions). All the evidence presented makes it clear that the Applicant did not prove, by a preponderance of the evidence, that the Division’s denial letter of October 5, 2014 was in error and inconsistent with Rule 6(1)(d) and Rule 5(1) of the *Rhode Island Department of Environmental Management’s Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals*.

Finally, the Applicant argued that the application process is very explicit and required that he provide seven key items to submit, which he did. He claimed the application did not request items pertaining to health and safety, which he argued, was the main reason for the Division denying his application. (TR. pg. 32). The application has the following acknowledgement on page 3... “Signature below indicates knowledge and understanding of the laws, regulations and requirements listed above”. (Applicant’s Exhibit N – Full). The regulations listed above this

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acknowledgment includes *Rules and Regulations Governing the Prevention, Control and Suppression of Rabies with the State of Rhode Island*. The Applicant signed his application. (Division's Exhibit A -- Full).

Findings of Fact

1. On September 29, 2014 the Applicant filed a permit application for the importation and possession of five (5) non-human primates for pet ownership with the Rhode Island Department of Environmental Management, Division of Agriculture ("the Division").
2. The Division issued a letter on October 5, 2014 denying the Applicant's application of September 29, 2014.
3. The Applicant then filed a timely Appeal of the Division's denial on October 12, 2014 with the Administrative Adjudication Division for Environmental Matters ("AAD").
4. A hearing was held at AAD on April 7, 2015 regarding the Applicant's Appeal.
5. The Applicant obtained a USDA Class C Exhibitors License from the USDA.
6. At the Applicant's request, officials from the USDA (Dr. Paula S. Gladue and Ms. Jan Baltrush) inspected his facilities for the keeping and exhibition of two goats.
7. Dr. Gladue provided the Applicant a "courtesy" walk-through of the facility for housing non-human primates.
8. Donald Maroney, Esquire, Assistant Town Solicitor for North Kingstown, testified that non-human primates are not allowed by Town Ordinance.
9. Mr. Maroney also said the opinion rendered by Mr. Embury, the Town Manager of North Kingstown that stated the Applicant could keep non-human primates on his property was incorrect.
10. Dr. Scott Marshall reviewed the Applicant's Application for possession of Five (5) non-human primates and drafted the denial letter after reviewing and considering all of the relevant correspondence and document submitted by the Applicant to the Division.
11. The Applicant signed the Application for the possession of non-human primates and acknowledged on page 3 "signature below indicates knowledge and understanding of the Laws, regulations and requirements listed above" which includes Rules and Regulations governing the Prevention, Control and Suppression of Rabies with the State of Rhode Island.

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Conclusions of Law

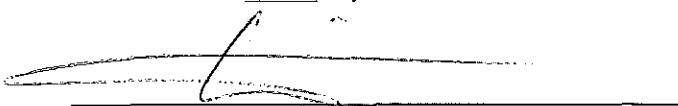
1. The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R. I. General Laws §42-17.7-1 et. seq.); the *Administrative Procedures Act* (R. I. General Laws §42-35-1 et. seq.); and the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter* ("AAD Rules").
2. The parties agreed that the Administrative Adjudication Division has jurisdiction over the subject matter of Applicant's appeal as well as personal jurisdiction over the Applicant pursuant to the Applicant's request for an appeal filed October 12, 2014.
3. The Applicant has the burden of proving, by a preponderance of the evidence, that the Division's denial of his permit application was incorrect.
4. The Applicant filed an Application for the issuance of an Importation and Possession Permit for Five (5) non-human primates on September 29, 2014 that forms the basis for this Appeal.
5. The Town of North Kingstown Ordinances 3 – 8 (g) does not allow the keeping of non-human primates for either pet ownership or exhibition purposes except that a circus, zoo or educational institution may keep such non-human primates.
6. The Applicant submitted the Documentation required and signed his Application for Possession Permit Application for an Exotic Wild Animal and acknowledged that he understood and had knowledge of all applicable requirements, regulations and laws regarding the possession and importation of exotic wild animals, including the *Rules and Regulations Governing the Prevention, Control and Suppression of Rabies within the State of Rhode Island*.
7. Dr. Scott Marshall's denial of the Applicant's Application to possess Five (5) non-human primates was properly based on all relevant North Kingstown Municipal Ordinances and Rules 5 and 6 of *Rhode Island Department of Environmental Management's Division of Agriculture's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals*.
8. On October 5, 2014, the Division properly denied the Applicant's Application for the issuance of an Importation and Possession Permit for Five (5) non-human primates for pet ownership purposes pursuant to Rule 5(1) and 6(1) of the *Rhode Island Department of Environmental Management's Division of Agriculture's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals*.

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Wherefore it is hereby **ORDERED** that:

1. The Applicant's Appeal dated October 12, 2014 is hereby **DENIED** and **DISMISSED**.
2. The Division's letter dated October 5, 2014 denying the Applicant's Application dated September 29, 2014 for the Importation and Possession Permit for Five (5) non-human primates pursuant to Rules 5 and 6 of the *Rhode Island Department of Environmental Management's Division of Agriculture's Rules and Regulations Governing the Importation and Possession of Exotic Wild Animals* is **SUSTAINED** and **UPHELD**.

Entered as an Administrative Order this 30th day of June, 2015.



David M. Spinella
Hearing Officer
Administrative Adjudication Division
One Capitol Hill, 2nd Floor
Providence, RI 02908
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Michael J. Beatrice, 50 Advent Street, North Kingstown, RI 02852 and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 30th day of June, 2015.

