

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
For the  
OREGON DEPARTMENT OF FISH AND WILDLIFE**

**IN THE MATTER OF:** ) **APPLICANT'S EXCEPTIONS TO**  
 ) **PROPOSED ORDER**  
**2007 SARDINE VESSEL PERMIT FOR** )  
**ROBERT BRISCOE** ) *OAH Case No. 133911*  
**PERMIT #57021 F/V ST. TERESA** ) *Agency Case No. 0307BRISCOE*

Applicant Robert Briscoe excepts to the Proposed Order dated May 15, 2007 as follows:

**ISSUES**

Applicant excepts to the two issues identified in the Proposed Order and submits that the issues ought to include four additional issues:

- 1) Whether the Applicant was timely notified of his obligation to apply for a 2007 Limited Entry Vessel Permit for Sardine Fishery prior to the December 31, 2006 deadline for the submission of such application?
- 2) Whether Applicant was timely provided with an application for a 2007 Limited Entry Vessel Permit for Sardine Fishery?
- 3) Whether, under the factual circumstances of this case, the Applicant should fairly have been considered to have timely returned an incomplete application from the Department, and whether the Applicant's submission of a completed application before January 31, 2007 should have resulted in a determination that he applied for renewal in a timely manner pursuant to OAR 635-006-1075(2)?
- 4) Whether, under the factual circumstances of this case, the Department can be said to have waived any obligation by the Applicant to have submitted an application prior to December 31, 2006?
- 5) Whether the Department had an obligation to notify permit holders of their obligation to renew their limited entry vessel permits for the sardine fishery prior to the deadline for submission of such applications?
- 6) Whether the Department had an obligation to ensure that permit holders were provided with renewal applications for the limited entry permits in sufficient time to allow them to timely filed an application for renewal with the Department?

- 7) Whether the Department's establishment of a December 31 deadline for the renewal of applications for the subsequent year and/or the establishment of a 31-day grace period for the submission of complete applications and/or the establishment of forfeiture of the permit as a consequence of the failure to timely submit an application and/or the Department's waiver of the obligation to submit logbooks for those permit holders with no landings and/or the failure to notify permit holders of their obligation to renew their permits by a specific deadline and/or its failure to ensure that permit holders actually received application forms sufficiently in advance of the renewal deadline constituted arbitrary and/or capricious agency action

## **FINDINGS OF FACT**

The Findings of Fact failed to include the following additional material uncontroverted facts:

- 1) The Applicant was never notified by the Department of the obligation to renew his Limited Entry Vessel Permit for Sardine Fishery prior to January 5, 2007.
- 2) The Applicant holds a Sardine Fishery Permit from the State of Washington Department of Fish and Wildlife (WDFW), and Washington prohibits renewal of permits for the sardine fishery until after January 1 of any calendar year. Applicant received a renewal application for his Sardine Fishery Permit from the State of Washington prior to December 31, 2006, and promptly completed it and returned it to WDFW. WDFW the returned it and informed Applicant it could not accept his renewal application until after January 1, 2007. Applicant reasonably believed, in the absence of the receipt of any contrary information from the Oregon Department of Fish and Wildlife, that ODFW had adopted a similar rule or policy.
- 3) The Applicant was not provided with nor received an application form in order to renew his 2007 Limited Entry Vessel Permit for Sardine Fishery by the Department until after he was advised by telephone on January 5, 2007 by Brett Weidoff, an official in the Department responsible for the administration of the Limited Entry Sardine Fishery in the State of Oregon, that his renewal application had not been received.
- 4) When Mr. Weidoff telephoned the Applicant on January 5, 2007 and was informed by the Applicant that he definitely intended to renew his application for a Limited Entry Vessel Permit for Sardine Fishery for 2007, Mr. Weidoff recommended that the Applicant telephone DeAnna Erickson, another Department employee in charge of licensing and who represented the Department at the Hearing in this matter, to obtain an application form and submit it.

- 5) Ms. Erickson, at the Applicant's request, submitted an application form to the Applicant electronically on January 5, 2007, and it was completed on that date and placed in the mail by the Applicant and received by the Department on the following Monday, January 8, 2007, and was deemed complete on that date.
- 6) There is no application renewal fee for the Limited Entry Sardine Fishery, and therefore, no fee was required to be submitted in conjunction with the application form by the Applicant in order for his application to be deemed complete.
- 7) The Limited Entry Vessel Permit for Sardine Fishery in Oregon is a commercially valuable permit. Only 26 permits have been issued.
- 8) The Limited Entry Sardine Fishery in Oregon was commenced for the first time in January 2006.
- 9) Applicant purchased his Limited Entry Vessel Permit for Sardine Fishery in Oregon from Paul Evich, and it was transferred to him in September 2006.
- 10) Applicant expended many thousands of dollars in obtaining the permit.
- 11) Applicant was unable to fish for sardines in Oregon in 2006 because of poor market conditions and his late receipt of the permit, and therefore, had no landings of sardines in Oregon in 2006.
- 12) Seven of the 26 permit holders (or eight total including Applicant) had no landings in 2006, and the Department, by regulation, agreed to waive the mandatory landing requirements for all permittees in 2006.
- 13) Therefore, those permit holders who had no landings in 2006, the only act to accomplish renewal was submission of an application form by December 31, 2006.
- 14) By regulation, the submission of an incomplete application form by December 31, 2006 allows for an extension of 31 days or until January 31, 2007, in order to return a complete application form and still obtain renewal.
- 15) At no time did the Department inform the Applicant of his obligation to renew his permit by submitting an application prior to December 31, 2006. That information was not contained on his permit that he received or in the transfer documents or in any other information or mailings from the Department.
- 16) The Department takes the position that for any limited entry permit holder, it has no duty to inform the holder of renewal requirements or renewal guidelines or even provide them with renewal documents. The obligation for obtaining that information, according to the Department, is entirely up to the permit holder no

matter how recently the permit was acquired, no matter how recently the fishery was established, no matter how valuable the permit, and regardless of whether the failure to timely renew results in a permanent forfeiture of the permit.

- 17) The Department sent an application form to the Applicant by regular mail to his post office box in Mt. Vernon, Washington.
- 18) The Applicant did not receive the application form, and the Department does not dispute the fact that the Applicant did not receive the application form sent to him.
- 19) The letter notifying the Applicant of the hearing held in this matter was sent by certified mail to ensure that the Applicant had prior actual notice of the hearing.
- 20) The Pacific Fisheries Management Council which administers and regulates federally-mandated ocean fisheries off the coasts of Washington, Oregon and California, sends its renewal applications to permit holders by certified mail to ensure they are received.
- 21) The renewal process for the Limited Entry Sardine Fishery in Oregon in 2006 was the very first such renewal process because there was no limited entry sardine fishery until 2006.
- 22) When Mr. Weidoff telephoned the Applicant on January 5, 2007 to inquire as to the status of his application form and renewal of his Limited Entry Vessel Permit for the Sardine Fishery, he had no particular reason to call other than to try to determine the final status of all of the permits in the sardine fishery, which he administered.
- 23) The Department has no uniform policy regarding deadline dates for renewal of permits for its limited entry commercial fisheries. There are 11 such fisheries, and the renewal guidelines are set forth in OAR 635-006-1075 and the referenced statutes.
- 24) The limited entry permits for the sea urchin, brine shrimp, and bay clam dive fisheries all have a deadline of January 31 of the year for which renewal is sought, a deadline which Applicant satisfied had it been applicable to the sardine fishery.
- 25) The black and blue rock fish limited entry fishery establishes a December 31 deadline but requires the Department, by not later than February 1 of the permit year, to send by certified mail a notice to the permit holder of the failure to submit the renewal application if it has not yet been received by the Department. An owner may then renew a permit later than January 31 but not later than April 1 if he/she pays a \$150/late fee in addition to the establish renewal fee. *See*

ORS 508.947. Applicant would have qualified for renewal if this rule was applicable to the sardine fishery.

- 26) The limited entry fisheries for gillnet salmon, troll salmon, shrimp, and scallops all have renewal deadlines established by statute and provide for obtaining renewal of the permit upon application by December 31 of the permit year.
- 27) Only the ocean Dungeness crab permit requires renewal by December 31 of the prior year and for a lapse of that permit if the December 31 deadline is not observed.
- 28) Applicable regulations require the submission of a logbook to ODFW by the application deadline in order to obtain renewal of a permit. *See* OAR 635-006-1075(k)(1)(B). Nonetheless, the Department waived the mandatory logbook submission requirement for those permit holders who made no landings in 2006, even though it had no legal authority to do so.
- 29) Neither the Oregon Fish and Wildlife Commission nor the Oregon Department of Fish and Wildlife authorized the Department to not require submission of a logbook from applicants with no landings.
- 30) The Department is obligated to return incomplete applications and allow the permit holder until January 31 of the permit year to properly complete an application form.
- 31) OAR 635-006-1075(1)(k)(3) provides that the failure of the Department to return an application for incompleteness or of an individual to receive a returned application shall not be grounds for treating the application as having been filed in a timely and complete manner. This provision is unique to the Limited Entry Sardine Fishery, and no other limited entry fishery in the State of Oregon has a like requirement;
- 32) Nothing in the statutes or rules governing the Limited Entry Sardine Fishery allows the Department to provide no notice of the renewal deadline to permit holders or to not provide them a written application form for renewal.

## CONCLUSIONS OF LAW

The Conclusions of Law should be modified to provide as follows:

- 1) The Applicant was entitled to receive prior notice from the Department of the obligation to renew his 2007 Limited Entry Vessel Permit for Sardine Fishery, and the Department, in this case, failed to provide adequate notice to the Applicant of that obligation.

- 2) The Applicant's prompt filing of a completed application upon receipt of actual notice of the need to renew his permit prior to January 31, 2007 constitutes a timely filing of his application for a 2007 Limited Entry Vessel Permit for Sardine Fishery.
- 3) Under Oregon law, a completed application for a Limited Entry Vessel Permit for Sardine Fishery include submission of a logbook from applicants, submission of any required application or renewal fee, and submission of a completed application form. The Applicant satisfied the first two components of the application process because the Department did not require submission of a logbook from applicants with no landings and did not require the submission of a renewal fee. Therefore, under the circumstances of this case, the Applicant can be considered to have submitted an incomplete application by December 31, 2006, and the Department's subsequent transmission of an application form to the Applicant on January 5, 2007, followed by the return by mail of that completed application form by the Applicant to the Department on that same date and received by the Department on January 8, 2007, constitutes a timely submission of a complete application within the meaning of OAR 635-006-1075(2).
- 4) The Department's waiver of the logbook submission requirement for Limited Entry Vessel Permit for Sardine Fishery permit holders, its telephone call to the Applicant on January 5, 2007, and submission of an application form to the Applicant on that same date, and its subsequent acceptance of his completed application form constitutes a waiver of any obligation on the part of the Applicant to have submitted an application form prior to December 31, 2006, particularly where as here, it is uncontroverted that the Applicant had no knowledge of the December 31, 2006 deadline and had not been provided with an application or renewal form prior to January 5, 2007.
- 5) Alternatively, the failure of the Department to provide notice to the Applicant of the December 31, 2006 renewal deadline and/or an application form for renewal prior to December 31, 2006, constitutes a material representation by omission which was relied upon by the Applicant to his detriment, and it was reasonable, under the circumstances of this case, for the Applicant to reasonably rely upon the belief that he was not under an obligation to submit an application for renewal prior to December 31, 2006, particularly where the State of Washington rejected his renewal application for his Washington Sardine Fishery Permit because it was received prior to January 6, 2007 and informed Applicant that WDFW prohibits the submission of applications or renewal forms for its Limited Entry Sardine Fishery prior to the January 1 deadline.
- 6) Those provisions of the renewal requirement applicable to the Limited Entry Sardine Fishery that require submission of an application form by December 31 of the previous year; that require the Department to void permits if a complete application form is not received by December 31 of the previous year; that allow

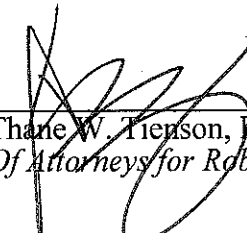
for a 31-day extension for permit holders who submit incomplete application forms by December 31 of the previous year, represent arbitrary and/or capricious agency action.

- 7) The Department was required to ensure that the Applicant actually received a renewal application form sufficiently in advance of the deadline in order to allow him to timely renew his permit.

DATED this 24<sup>th</sup> day of May, 2007.

LANDYE BENNETT BLUMSTEIN LLP

By: \_\_\_\_\_

  
Thane W. Tienson, P.C., OSB #77374  
*Of Attorneys for Robert Briscoe*

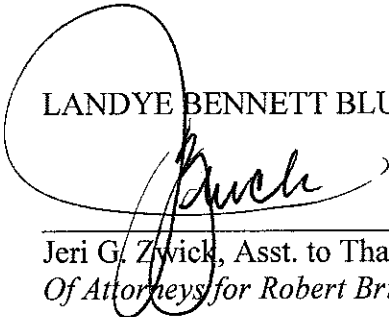
## CERTIFICATE OF SERVICE

I certify that on May 24, 2007, I served the foregoing Applicant's Exceptions to Proposed Order via certified mail, return receipt requested, to the following:

Commercial Fishery Permit Board  
Administrative Services Division – ODFW  
3406 Cherry Avenue NE  
Salem, OR 97303

DeAnna Erickson  
Oregon Department of Fish and Wildlife  
3406 Cherry Avenue NE  
Salem, OR 97303

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