On December 2, 2005, the Oregon Fish and Wildlife Commission (OFWC), by rule, removed sardines from the developmental fisheries species list and established a limited entry commercial sardine fishery. As the OFWC established this fishery, it limited the number of permits available and established renewal requirements. To renew a sardine permit, the permittee must, by December 31 of the current year, submit an application to the Oregon Department of Fish and Wildlife (ODFW) (OAR 635-006-1075). If the ODFW denies issuance, renewal or transfer of a sardine fishery permit, the applicant may make a written request to the OFWC for a hearing for review of the denial. The Sardine Advisory Board is designated as a party to the contested case. The decision to refuse to issue a commercial fishery permit must be made by the OFWC, and cannot be delegated to anyone else (ORS 496.112(3)).

OAR 635-006-1065 outlines the process for the OFWC's review of sardine permit denials. The Administrative Procedures Act (APA), and the OFWC's rule, afford permittees the opportunity for a contested case to challenge ODFW's denial. Contested cases are conducted by an Administrative Law Judge (ALJ) assigned from the Office of Administrative Hearings. The Attorney General has authorized ODFW staff to appear on the Agency's behalf in these contested cases through a "lay representative". After a contested case hearing, the ALJ issues a Proposed Order making findings of fact, conclusions of law and proposing a disposition of the permit at issue. Parties have a right to file "Exceptions" to the Proposed Order but must rely on facts in the record to support those exceptions. (While the Proposed Order calls for exceptions to be submitted within 14 days of the Proposed Order, the OFWC's rule, which controls, specifies 30 days to file exceptions with the OFWC. Mr. Briscoe filed Exceptions (Attachment 2) and the Agency filed a Response to Exceptions (Attachment 3).

The OFWC is entitled to make its own determination based on the official record of the case. If the OFWC changes the ALJ's Proposed Order in any substantial way, it must explain why it has made those changes and provide an opportunity for the parties to object to the new determination (OAR 137-003-0655).

The case before the OFWC:
ODFW received a renewal application from Mr. Briscoe on January 8, 2007, in an envelope postmarked January 5, 2007. ODFW proposed to deny the renewal of Mr. Briscoe's permit because the application was untimely filed and did not meet the renewal requirements established in OAR 635-006-1075(1)(k)(A)(i). This rule requires a complete application be submitted to ODFW by December 31 of the current year. Mr. Briscoe argues that it was unfair to deny him a permit for the untimely application since he did not receive notice that renewal was required and did not receive the renewal application that was mailed to
him. Mr. Briscoe further argues that OAR 635-006-1075(2) allows "incomplete" applications to be completed and refilled by January 31. Mr. Briscoe suggests that his application could be considered "incomplete", thus allowing him until January 31 to file it. The ALJ concluded that Mr. Briscoe did not timely file his application for a 2007 Limited Entry Sardine Vessel Permit and that ODFW should not allow the renewal of the permit. Mr. Briscoe disagrees with the ALJ's determination and filed Exceptions to the Proposed Order on May 24, 2007 (Attachment 2). ODFW filed a Response to Mr. Briscoe's Exceptions on June 6, 2007 (Attachment 3). OAR 635-006-1075(1)(k)(B) dictates that the OFWC may waive the renewal landing requirements of section (A)(iii) if it finds that the failure to meet these requirements is due to the permit holder's illness or injury, or to circumstances beyond the control of the permit holder. There are no provisions that allow the OFWC to waive the provisions for filing late applications. Staff proposes that the OFWC uphold the ALJ's Proposed Order and deny the permit renewal. Staff has prepared a Draft Final Order reflecting this position (Attachment 4 - new language underlined; old language crossed out).

PUBLIC INVOLVEMENT

The public is not entitled to participate unless they are formally designated as a party to the hearing.

The Sardine Advisory Board participated in the Contested Case hearing and provided input. However, there was no quorum of the Board to take an official position in the case and the Board has not filed exceptions.

ISSUE 1

WHETHER APPLICANT TIMELY FILED HIS APPLICATION FOR A 2007 LIMITED ENTRY SARDINE VESSEL PERMIT AND IF ODFW SHOULD ALLOW RENEWAL OF THE PERMIT.

ANALYSIS

The ALJ's Proposed Order found that OAR 635-006-1075(3) provides that "It is the responsibility of the permittee to ensure that an application is complete and is filed in a timely manner". ODFW mailed a renewal application to Applicant in November 2006. Applicant testified that he was aware that mail was sometimes not delivered to this Post Office box. ODFW had no way of knowing this, and while not legally required to provide this notice, did so as a courtesy and relied on the Post Office to deliver the renewal application to the address Mr. Briscoe provided. Between Applicant and ODFW, it was Applicant's responsibility, knowing of difficulties with his mail, to assure that he knew when the application was due and to inquire of ODFW if he did not receive a renewal application well before that date. The ALJ found, contrary to the Applicant's argument, that ODFW may not consider a late-filed application as an "incomplete" application. The Applicant's argument that the requirement of the submission of a log-book being waived, can not be considered a waiver of the requirement that an application be timely filed, as the presence or absence of a log-book merely relates to the completeness of the application, not its existence.
The ALJ proposed, and staff also recommends, that the denial of the renewal of 2007 Limited Entry Vessel Permit for Sardine Fishery for Robert Briscoe, Permit 57021 F/V St. Teresa be AFFIRMED.

**OPTIONS**

1. Adopt the ALJ's Proposed Order with changes as shown in Attachment 4. Mr. Briscoe would not be entitled to renew his permit.

2. Modify the Proposed Order.

3. Adopt a revised Order that would entitle Mr. Briscoe to renew his permit.

**STAFF RECOMMENDATION**

Option 1.

**DRAFT MOTION**

I move to adopt staff’s draft Order as shown in Attachment 1, Option 1, as the Oregon Fish and Wildlife Commission's Final Order in this case which denies renewal of Mr. Briscoe's Limited Entry Sardine Permit and to authorize the Commission Chair to sign the Final Order on the Oregon Fish and Wildlife Commission's behalf.

**EFFECTIVE DATE**

Upon service of the Oregon Fish and Wildlife Commission's Order.