On May 24, Robert Briscoe (Applicant), through his attorney Thane Tienson, filed Exceptions to the Administrative Law Judge’s Proposed Order, objecting to the issues that had been discussed, the findings of fact and the conclusions of law the ALJ proposed, as well as the basic conclusion that the permit should not be renewed. The Oregon Department of Fish and Wildlife (Department) files this Response to Exceptions, and also attaches a draft of the Final Order it will request the Fish and Wildlife Commission adopt to reflect its response to the Applicant’s Exceptions (Attachment 1).

A number of the Applicant’s points can be (and for purposes of this analysis, are) grouped together, because many are premised on the same misunderstanding of the law.

Issue 1. (Duty of Department to Ensure Application Filed) Many of the issues and proposed Findings of Fact and Conclusions of Law the Applicant proposes in his exceptions are based on the incorrect legal assumption that the Department has a legal obligation to notify applicants for renewal of a Sardine limited entry fishery permit of the time deadlines and provide all of the forms and information necessary for the applicant to complete and return the form by the application deadline. (See Applicant’s “Issues” 1,2,5,6 and most of issue 7, “Findings of Fact” 1,3,14,15,16,17,18,19,22,30,31 and 32 and “Conclusions of Law” 1,2,5 and7). Applicant is mistaken as a matter of law. When the Commission adopted its limited entry system rules, in anticipation of just this factual situation, the Commission specified:

It is the responsibility of the permittee to ensure that an application is complete and is filed in a timely manner. 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. OAR 635-006-1075(3).

Thus, while the Department does as a courtesy send out renewal applications to permittees, and did in this case, the Department bears no responsibility to ensure that the application is completed and returned on time. It would be particularly troublesome in a case like this, where the Applicant was aware that his mail service is unreliable, if it was Department’s obligation not only to send the Applicant the forms but to personally ensure that he got them and returned them on time.

Issue 2. (Different Fisheries’ Renewal Requirements) Applicant observes that different limited entry fisheries have different renewal requirements, and some have provisions to allow a waiver of some or all of the renewal requirements. From this observation, Applicant argues that the Department should treat his application as if it had been filed under different rules, for purposes of applying waiver authority created for a different fishery, to his situation. In this fishery, the Commission chose to allow for a waiver of the landing requirements otherwise required for permit renewal, but not the time to file an application to renew. OAR 635-006-1075(1)(l)(D) and (E). (The Commission did exercise its authority under the rule and made an industry-wide waiver of the landing requirements for this fishery in 2006.) In a similar vein, Applicant argues that Washington state is specifically required to notify its sardine fishers of their obligation to file their renewal documents, and that the federal government operates its fisheries differently than the Commission has chosen for the Sardine fishery. Applicant’s observation only shows he was on notice that different procedural systems apply to each of these fisheries. The Department is obligated to implement each limited entry system as it was adopted by the legislature or the Commission, and is not at liberty to apply a different state’s (or fishery’s) rules to fit the convenience of the permittee.

Issue 3. (Grace Period to Complete Incomplete Applications) Applicant attempts to take advantage of the rule that allows the Department to return an application that was filed by the deadline but is incomplete, so long as the completed application is filed within by January 31, within the “grace period.” But in this case, there was no document filed by the deadline; thus there can be no grace period to complete an “incomplete application” that was not filed at all. Applicant’s proposed interpretation would allow every permittee until January 31 to file any renewal application at all, and only set a deadline of January 31 for when the “completed” application must be filed. This interpretation would swallow the entire rule that applications must be filed by a certain date, since the December 31 filing date would be meaningless.
Issue 4. (Waiver of Log Book Rule) Applicant argues that the Department was without authority to waive the rule that an applicant submit his log book “required under OAR 635-006-1110” with a renewal application, when the fisherman did not fish that year. The Department took the view that to require submission of an empty logbook was a meaningless act that furthered no Departmental goal, and that it was not required to demand the log book in this situation. The Commission’s administrative rule OAR 635-006-1110(4) expressly allows the Department to not require (i.e., waive) the log book’s submission for renewal of a Sardine Permit, and these circumstances would seem to justify such a waiver. The referenced rule requires the fisherman to submit the logbook “upon request of an authorized representative of the Department”. In this case, no authorized Department representative required submission of the log book under OAR 635-006-1110(4), so none was required with a renewal application under OAR 635-006-1075, in accordance with the Commission’s rules. Even if the Applicant were correct that the Department could not waive the Applicant’s obligation to submit the logbook before December 31, 2006, that would only provide an additional reason the Commission would be required to reject the renewal application. Is it really the Applicant’s position that his renewal application was defective for an additional reason?

Finally, contrary to what Applicant asserts, waiving the submission of the logbook could 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. While a specific rule permits Department staff to not demand the log book in some circumstances, no similar rule permits or implies that staff can waive the filing deadline for the application itself. Instead, under the operation of the Administrative Procedures Act, absent some special provision, when a timely renewal application is not made for a yearly permit, the permit lapses and there is no permit to renew. ORS 183.430(1), Schurman v. Bureau of Labor, 36 Or App 841, 585 P2d 758 (1978).

Issue 5. (Arbitrary and Capricious Standard) Applicant argues that the system the Commission established is arbitrary and capricious. (Identified as Issue 7 in his Exceptions). While in one sense the system is somewhat arbitrary (in that the Commission could have chosen many different ways to restrict participation and establish renewal requirements in this fishery), the system is not arbitrary in the sense that it is equally applied to all permittees who are subject to these same objective rules, clearly identified well in advance of the application deadline. The system the Commission did adopt is reasonable and accomplishes the Commission’s statutory policy of managing harvest of fishery resources while allocating the opportunity in a way that leads to a sustainable industry. While the Applicant would understandably prefer the rules were different, under the circumstances, he cannot identify which of the Commission’s rules, or which of the Department’s application of those rules was unlawful.
Conclusion

For the reasons cited above, the Department believes that the Commission should reject Applicant’s Exceptions and adopt Attachment 1 as its Final Order in this case.

The Department also proposes changes to the draft of the Commission’s Final Order it will ask the Commission to adopt in this case, shown as Attachment 1. Some of these changes add subsequent procedural history to the case, some respond to the Applicant’s arguments, and some clarify the ALJ’s proposed order.

DATED this 6th day of June, 2007.

[Signature]
Stephen E.A. Sanders, #85321
Assistant Attorney General
CERTIFICATE OF FILING

I hereby certify that on June 6, 2007, I filed the original of DEPARTMENT’S RESPONSE TO APPLICANT’S EXCEPTIONS with the Oregon Fish and Wildlife Commission, 3406 Cherry Avenue N.E., Salem, OR 97303, by first-class mail.

Stephen E. A. Sanders, #85321
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on June 6, 2007, I served the foregoing DEPARTMENT’S RESPONSE TO APPLICANT’S EXCEPTIONS upon the party hereto by regular mail, postage prepaid, a true, exact and full copy thereof to:

Thane Tienson
Landye Bennett Blumstein LLP
1300 SW 5th Ave Ste 3500
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Dated this 6th day of June, 2007.

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