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

IN THE MATTER OF:

2007 SARDINE VESSEL PERMIT FOR
ROBERT BRISCOE
PERMIT #57021 F/V ST. TERESA

[PROPOSED] FINAL ORDER

OAH Case No.: 133911
Agency Case No.: 0307BRISCOE

HISTORY OF THE CASE


On March 23, 2007, the Oregon Department of Fish and Wildlife referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Maurice L. Russell, II was assigned to preside at hearing.

A hearing was held on May 7, 2007, by telephone. Robert Briscoe appeared with counsel, Thane Tienson, and testified. The Oregon Department of Fish and Wildlife was represented by DeAnna Erickson, who testified. Testifying on behalf of the Department was Brett Weidoff. Stan Schones, Advisory Board Member, also attended. The record closed on May 7, 2007.

On May 15, 2007, the ALJ issued a Proposed Order upholding staff’s notice, and recommending that the permit renewal should be denied. On May 24th, Thane Tienson filed exceptions on the Applicant’s behalf to the Proposed Order, identifying various Issues, Findings of Fact and Conclusions of Law with which the Applicant disagreed. On June 6, the Department filed a Response to the Applicant’s Exceptions, addressing the Applicant’s objections, proposing changes to the Proposed Order to directly address those objections and the subsequent procedural history of the case, and defending the Proposed Order’s conclusions. On July 13, 2007 the Commission met to consider the case and issue this Final Order. After reviewing the case, and considering the Applicant’s arguments, the Commission authorized the Chair to sign this Final Order on its behalf.

ISSUES

1. Whether Applicant timely filed his application for a 2007 Limited Entry Sardine Vessel Permit.
2. Whether the Department owes the Applicant a legal duty to be certain the Applicant receives or files his permit renewal paperwork within the time specified by law.

3. If not, whether the Department Commission should allow renewal of the permit notwithstanding the application’s untimeliness.

EVIDENTIARY RULING

Exhibits A1 and A2, offered by the Oregon Department of Fish and Wildlife, were admitted into the record.

FINDINGS OF FACT

1. Applicant, Robert Briscoe, purchased the F/V St. Teresa in 2004. (Test. of Applicant.) He fished for sardines under the developmental fisheries permit held by the previous owner, Paul Evich, until the Department changed to a Limited Entry Permit process, beginning in 2006. (Test. of Applicant.) In August 2006, Applicant received a Limited Entry Sardine Fishery Permit for 2006. (Test. of Applicant.) Thereafter, the Department Commission waived the landings requirement for renewal of the Limited Entry Permit, because of adverse unusual market conditions as authorized by OAR 635-006-1075(1)(k)(C). (Test. of Applicant, Erickson.) Because the Department Commission waived the landings requirement, the Department did not require submission of a log book from applicants with no landings as it could have, but chose not to, under OAR 635-006-1110, as because the log would have had no entries of information to examine or transcribe. (Test. of Erickson.)

2. In November 2006, the Department mailed an application for renewal of Applicant’s Limited Entry Permit to Applicant’s address of record. (Test. of Erickson.) This mailing was as a courtesy to applicants. (Test. of Erickson.) Applicant has experienced difficulty in receiving his mail at his post office box, and has received mail addressed to others in that box. (Test. of Applicant.) Applicant did not receive the renewal application prior to December 31, 2006. (Test. of Applicant.)

3. On January 5, 2007, Brett Weidoff, an employee of the Department, was preparing a report for the Fish and Wildlife Commission concerning applications for Limited Entry Sardine Permits. (Test. of Weidoff.) He noticed that Applicant’s application had not been received, and telephoned Applicant to inquire, so he could include Applicant’s response in his report. (Test. of Weidoff.) Applicant then telephoned DeAnna Erickson, also a Department employee, to inquire. (Test. of Applicant.) DeAnna Erickson told Applicant that the applications were required to be postmarked by December 31, 2006 to be considered, but agreed to send an application form to Applicant so that he could file a completed application, with the understanding that it would be denied, allowing Applicant to obtain a hearing on the denial. (Test. Erickson, Applicant.) Applicant mailed the application on January 5, 2007. (Ex. 1 at 2; Test. of Applicant.) The Department received the application on January 8, 2007, and denied it as untimely filed by notice issued January 12, 2007 and initiated this case. (Ex. 1; Test. of Erickson.)

CONCLUSIONS OF LAW

1. Applicant did not timely file his application for a 2007 Limited Entry Sardine Vessel Permit.
2. The Department had no legal obligation to notify the Applicant of his obligation to renew by the deadline.

3. No legal reason excuses the Applicant’s failure to file his application on time, should not allow the permit notwithstanding the application’s untimeliness.

**OPINION**

Applicant argued 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. However, OAR 635-006-1075(3) provides in pertinent part: “It is the responsibility of the permittee to ensure that an application is complete and is filed in a timely manner.” The Department mailed a renewal application to Applicant in November 2006 even though it was not legally required to do so. Applicant was aware that mail was sometimes not delivered to his post office box. The Department had no way of knowing this, and was entitled to rely upon the post office to deliver the renewal application. Between Applicant and the Department, 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 the Department if he did not receive a renewal application well before that date. In Applicant’s exceptions, he argues that this Final Order should include facts and legal conclusions premised on the theory that the Department bears some legal responsibility for his failure to file his renewal on time. The Commission’s rule, cited above, rejects this theory.

Applicant also argued that OAR 635-006-1075(2) allows “incomplete” applications to be completed and refiled by January 31. Applicant suggested that his application could be considered “incomplete,” thus allowing him until January 31 to file it. OAR 635-006-1075(2) provides as follows:

- An application for renewal in any limited entry fishery shall be considered complete if it is legible, has all information requested in the form, and is accompanied by the required fee in full. Any application which is not complete shall be returned, and unless it is thereafter resubmitted and deemed complete by January 31, the individual shall not be considered to have applied for renewal in a timely manner.

In Oregon, statutes are construed using a methodology prescribed by the Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). The primary object of statutory construction is to discern the intention of the legislature. ORS 174.020; *PGE v. Bureau of Labor and Industries*. That inquiry begins with the text of the statute, and its statutory context, as "the best evidence of the legislature's intent." *Id.* Only if the text of the statute is not clear may the legislative history be considered, and only if the legislative history does not allow discernment of the legislative intent will maxims of statutory construction be applied. Consequently, if the statute is unambiguous, it must be read literally even if this reading would seemingly produce an absurd result. It is only when a statute has two or more plausible meanings that it may be construed to avoid absurdity. As the court noted in *Young v. State*, 161 Or App 32 (1999): "the legislative power includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly."
The foregoing principles apply to the interpretation of administrative rules as well. *Pilgrim v. Clatskanie P.U.D.* 149 Or App 234 (1997). In construing administrative rules that are ambiguous, the agency's interpretation of its own rule is entitled to some deference, when that interpretation is plausible and not inconsistent with the wording of the rule itself, the rule's context or any other source of law. *Don't Waste Oregon Comm. V. Energy Facility Siting*, 320 Or 132, 881 P2d 119 (1994). At the same time: "An agency must comply with the statutes that govern it and follow its own rules." *Smith v. Veterinary Medical Examining Board*, id. at 345.

Here, the argument turns on the meaning of “incomplete.” It is defined in *Webster’s Third New International Dictionary* (Merriam-Webster 2002) as: “incomplete: lacking a part or parts or not having all parts arranged in final or functional order: unfinished.” This definition assumes that some part of the item exists, but that other parts are lacking or disarranged. The definition cannot be read as treating a nonexistent item as “incomplete.” Moreover, the text and context of the rule requires that something be filed with the agency, as it authorizes the agency to “return” the incomplete application for completion. Thus, contrary to Applicant’s argument, the Department may not consider a late-filed application as an “incomplete” application.

Finally, Applicant argued that the Department waived the provisions for filing applications by not requiring log-books to be filed with applications during this year. This is not correct. First, Applicant did not rely upon any such waiver in filing his application after the date it was due. Second, it is not clear that the agency waived the log-book requirement. The Commission waived the landings requirement, as authorized by rule, but did not expressly waive the log-book requirement. Instead, where a vessel had no landings during 2006, staff did not require that a log-book be filed, as it would have had no entries in any event. The Commission’s administrative rule OAR 635-006-1110(4) allows the Department to not require (i.e., waive) the log book’s submission for renewal of a Sardine Permit if there would be no information in the log book, as was the case for those who made no landings in this fishery in 2006. There is no evidence that the Commission authorized this procedure. 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. Finally, even though the requirement for submission of a log-book was waived, this 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)

Applicant raised several other arguments that could change the outcome of the case, and so merit a response. For example, he argues that the renewal requirements for the Sardine fishery are unique among the Oregon limited entry fisheries, and also different from the way Washington and the federal government operate their limited entry fisheries. Of course, each of these fisheries has been established under specific statutes and rules which govern the Department’s ability to renew permits. While there may be much wisdom in having the same renewal requirements for each fishery, legally each system must be implemented as its technical rules require. Citing language from other fishery renewal rules under which the Applicant would have been allowed to renew his permit merely illustrates that the Sardine fishery is required to be
operated differently than for those fisheries, since the Commission adopted the specific, different, renewal requirements for this fishery.

Applicant also makes a catch-all argument that the way the Commission established the Sardine fishery was arbitrary and capricious agency action. As Applicant’s previous argument illustrates, there are many ways to establish a renewal system for a limited entry fishery. Each of the possible systems is necessarily “arbitrary” in the sense that any number of mechanisms might accomplish similar goals, but they are not “arbitrary” in a legal sense, since they apply equally and uniformly to all persons in the fishery, and thus lead to a uniform rather than arbitrary results. The system the Commission chose for the Sardine fishery accomplishes the Commission’s goal for this fishery of restricting participation for the protection of the fishery resource while establishing an orderly system for allocation of the economic benefits and renewal of these permits. This is not a feature that makes the Commission’s system unlawful, however, rather than merely inconvenient to the Applicant.

ORDER

I propose the Oregon Department of Fish and Wildlife issue the following order:

The Notice of Denial of Renewal of 2007 Limited Entry Vessel Permit for Sardine Fishery for Robert Briscoe, Permit 57021 F/V St. Teresa is AFFIRMED.

Maurice L. Russell II
Marla Rae
Administrative Law Judge
Office of Administrative Hearings
Chair, Oregon Fish and Wildlife Commission

ISSUANCE AND MAILING DATE: May 15, 2007

APPEALS PROCEDURE

Notice: You are entitled to judicial review of this order pursuant to the provisions of ORS 183.482.

Pursuant to ORS 183.460 and OAR 137-003-0650, the Department of Fish and Wildlife or any party to the hearing that disagrees with the recommended action of the Proposed Order may file Exceptions and provide argument. Exceptions must be in writing and must identify the Findings
of Fact or Conclusions of Law with which the party or agency takes exception. To be timely, Exceptions to the Proposed Order must be received by the Commercial Fishery Permit Board on or before the 14th day after the Proposed Order was served (postmarked). Written exception may be mailed, faxed, or hand-delivered to the Commercial Fishery Permit Board.

Mail Exceptions to: — Commercial Fishery Permit Board
_________________________ Administrative Services Division—ODFW
_________________________ 3406 Cherry Avenue, NE
_________________________ Salem, Oregon 97303

If Exceptions to the Proposed Order are timely received, the Commercial Fishery Permit Board will: consider the exceptions, provide the applicant with an opportunity for oral argument, review the record, and issue a Final Order. The Commercial Fishery Permit Board will not consider any evidence that was not a part of the original hearing record.

If no Exceptions to the Proposed Order are received, the Commercial Fishery Permit Board will review the Proposed Order as to Findings of Fact and Conclusions of Law and issue a Final Order either affirming the Proposed Order or modifying it.
APPENDIX A
LIST OF EXHIBITS CITED

Ex. 1: 2007 Sardine Permit Renewal Application, dated 1/5/07.
CERTIFICATE OF SERVICE

I certify that on May 15, 2007, I served the attached Final Proposed Order by mailing certified and/or first class mail, in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

THANE W TIENSON
ATTORNEY FOR ROBERT J BRISCOE
1300 SW 5TH AVE  STE 3500
PORTLAND OR  97201

BY FIRST CLASS AND CERTIFIED MAIL
CERTIFIED MAIL RECEIPT # 7005-1820-0005-2506-7165

DEANNA ERICKSON
DEPT OF FISH AND WILDLIFE
3406 CHERRY AVE NE
SALEM OR  97303

BY FIRST CLASS MAIL

_______________________________________
DeAnna Erickson  Lucy Garcia, Administrative Specialist
Office of Administrative Hearings