

BEFORE THE OREGON FISH AND WILDLIFE COMMISSION

**IN THE MATTER OF DENNIS LEE
STURGELL**
Hammond, Oregon

) **AMENDED PETITION FOR HEARING**
) **AND FOR DETERMINATION OF**
) **APPLICABILITY OF THE 60-DAY**
) **PERIOD TO REQUEST A HEARING OF**
) **THE DEPARTMENT'S NOTICE OF**
) **INTENT TO REVOKE COMMERCIAL**
) **FISHING LICENSES**

Pursuant to ORS 183.410, OAR 137-003-003(1)(a), and OAR 635-001-005, petitioner Dennis Lee Sturgell respectfully requests that a hearing be provided him to contest the Department's Notice of Intent to Revoke certain of his commercial fishing licenses under the particular facts of this contested case, and in the alternative, petitioner requests a declaratory ruling from the Commission to determine the applicability of the 60-day period to request a hearing of the Department's Notice of Intent to Revoke..

FACTUAL BACKGROUND

Petitioner Dennis Lee Sturgell entered pleas of "guilty" to two violations of the general commercial fishing violations regarding the taking, possessing, buying, selling, or handling of food fish (ORS 509.006) on January 28, 2009 in Clatsop County Circuit Court, Oregon.

Thereafter, on February 6, 2009, the petitioner entered pleas of "guilty" to two violations regarding the unlawful use of a commercial crab pot (OAR 635-005-055(7)) in Tillamook County Circuit Court, Oregon.

Thereafter, on May 15, 2009, the Oregon Fish and Wildlife Commission moved to initiate contested case proceedings to revoke the commercial fishing license and a permit of the petitioner and appoint a License Revocation Board consisting of three commercial crabbers on the Commercial Fishery Permit Board to advise the Commission on this case. On May 18, 2009, the Department of Fish and Wildlife ("Department"/"Agency") mailed a Notice of Intent to Revoke Commercial Fishing Licenses via certified mail, return receipt requested, to the petitioner informing him, in pertinent part:

"To challenge this proposed action, you must submit a written request for hearing to the Department of Fish and Wildlife, 3406 Chery [sic] Avenue NE, Salem, Oregon 97303-4924, which must be received by the Department within 60 days after the date that this Notice was mailed to you Upon receipt of a timely request for hearing, a case will be referred to the Office of Administrative Hearings which would assign an Administrative Law Judge to hear the case....

“If you fail to file a timely request for hearing or if you fail to appear at a scheduled hearing, this Notice will automatically become an enforceable Final Order against you. The Department’s file would serve as the record upon default.”

While Mr. Sturgell’s bookkeeper received the Notice several days after it was mailed, Mr. Sturgell did not personally receive the Notice until Saturday, May 30, 2009, and delivered it to his primary legal counsel, Harold “Hal” Snow on Monday, June 1, 2009, and Mr. Snow immediately associated the undersigned Thane W. Tienson to assist him in representing the petitioner.

Thereafter, beginning on June 11, 2009 and continuing through July 10, 2009, the petitioner, acting by and through his counsel, Thane W. Tienson and Harold “Hal” Snow engaged in several telephone negotiations with counsel for the Commission and Department, Stephen Sanders, in an effort to avoid going through the hearings process. On each occasion, Mr. Sanders promised that he would speak with Roy Elicker, Director of the Department, and Marla Rae, Chair of the Commission, regarding our discussion and promptly report back as to whether there was interest in pursuing settlement negotiations and entering into a settlement agreement along the lines suggested in our discussion, and on each occasion in which he spoke, he stated that based upon those discussions, he believed a settlement was desired. In the June 24 and July 10, 2009 conversations, Mr. Sanders stated that he would contact Fronda Woods or Michael Grossman, counsel for the Washington Department of Fish and Wildlife, and the Washington Fish and Wildlife Commission to determine their interest in being part of any settlement because of concerns about the impact of the Wildlife Violator Compact to which both Oregon and Washington are signatories and promptly report back. Mr. Sanders continually stated that he believed there was likely to be a positive reception on the part of the Department and Commission to a settlement proposal, in part because the Department had never revoked any commercial fishing licenses before, and, in part, because of the significant economic impact that revocation of the petitioner’s fishing license and permit may have, not just on him but on others in the Oregon commercial fishing industry who depend upon the petitioner’s business for their livelihoods. The petitioner participated in two of the telephone discussion with Mr. Sanders – on June 11 and June 24, 2009.

ORS 183.417(3)(a) expressly provides for informal disposition of contested cases by stipulation, agreed settlement, or Consent Order, and that such informal settlement may be made in license revocation proceedings.

The petitioner and his counsel understood that while there was no guarantee that a settlement could be reached, it was likely that one could be reached, and that there was no need to request a hearing pending conclusion of such settlement negotiations. However, inexplicably, repeated telephone calls to Mr. Sanders over the next two weeks following the July 10, 2009 telephone conversation were not responded to, and, consequently, Mr. Tienson was unable to speak with him until July 29, 2009. On that date, Mr. Sanders stated that the Department was now taking the position that the 60-day request for hearing deadline had passed and that a Final Order would now take effect and settlement negotiations would not continue.

Stunned by this development, the petitioner's counsel immediately filed a Request for Hearing on July 29, 2009, 11 days after the expiration of the 60-day period following the date of mailing but within 60 days of the petitioner's actual *receipt* of the Notice.

ARGUMENT

A. **The Failure to Timely Request A Hearing was Beyond Mr. Sturgell's Reasonable Control.**

The failure to timely request a hearing within the 60 days from the date of mailing as set by the Commission, under the unique circumstances of this case, constitutes circumstances beyond the reasonable control of the parties. Specifically, as both Mr. Sturgell and his attorney, Thane Tienson, will attest, they both understood that this matter would be settled without the necessity of a hearing or even the necessity of requesting a hearing. Had there been any good faith belief that the matter could not be settled, the hearing would have been formally and timely requested.

As Mr. Tienson's Declaration demonstrates, he spoke with Mr. Sanders on June 11, June 12, June 24, June 26, July 2, and July 10, 2009 (all well within the 60-day period concerning this matter), and on each occasion it was to further the settlement discussions. Specifically, as Mr. Tienson's Declaration further demonstrates, in none of those conversations was there any discussion or mention of the necessity of following through with the request for a hearing. In fact, Mr. Sanders was always positive about settlement prospects and the discussions included detailed discussions about the form in which the settlement would take, including potential ways in which to characterize the license revocation so as to not trigger the effect of the Wildlife Violator Compact.

Had there been any indication from Mr. Sanders that the matter could not be settled without the necessity of a hearing, a timely formal request for a hearing would have been made. At no point did Mr. Sanders suggest that such a request, even as a precautionary measure, should nonetheless be made. In fact, as Mr. Tienson's Declaration reflects, he specifically stated during the discussions that took place between himself, Mr. Sturgell, Mr. Sanders, and Mr. Snow in Mr. Snow's office on June 12, 2009 that he would hold off requesting a hearing. Mr. Sanders agreed. Following the July 10 conversation, Mr. Sanders repeatedly failed to return telephone message from Mr. Tienson as to the status. Mr. Tienson even called Mr. Sanders on July 20, 2009 to find out what the status of the settlement was and again requested that Mr. Sanders return his call, still laboring under the impression that settlement was still likely as he had heard nothing to change his mind. Again, he received no response until Mr. Sturgell himself called Mr. Tienson on July 29, 2009 and stated that he had been informed that the time for requesting a hearing had passed and that a Final Order would be issued. Mr. Tienson immediately filed a Request for Hearing. That Request for Hearing was filed with the Commission before entry of the Final Order by default.

OAR 137-003-003(1)(a) adopted by the Commission in OAR 635-001-005 as part of the Model Rules of Procedure expressly provides that an Agency may grant a request for a hearing that is received after the time specified by the Agency but before entry of the Final Order by

default if the cause for failure to timely request a hearing is beyond the reasonable control of the party.

Under the circumstances set forth above, petition Sturgell submits that under the circumstances presented here that such circumstances exist, and that, regardless, the Commission, through Mr. Sanders, had timely actual notice of Mr. Sturgell's intent to request a hearing if settlement could not be reached. Petitioner therefore respectfully requests that the Commission allow him a hearing before taking the unprecedented action of revoking a commercial fishing license and permit.

B. Petitioner Timely Requested A Hearing Within 60 Days of his Actual Receipt of the Notice of Intent to Revoke.

In its Notice of Intent to Revoke Commercial Fishing Licenses, the Department identified no statutory or regulatory authority for the 60-day period it established for requesting a hearing or for its decision to commence the 60-day period from the date of mailing, not its actual receipt by the petitioner. ORS 183.435 requires that an agency grant a person requesting a license 60 days from notification of the refusal to request a hearing. Significantly, however, that statutory provision applies, by its very terms, only to refusal to issue a license required to pursue a commercial activity if the refusal is based on grounds other than the results of a test or inspection. Therefore, it does not apply to revocations. Second, even if it were held to apply, the 60-day period is from "notification of the refusal," which the petitioner submits should be calculated only from the date that he personally received such notification and not from the date of mailing by the Department.

Even Petitions for Judicial Review of Agency Orders to which a 60-day appeal period applies, are calculated from the date "following the date the Order upon which the Petition is based is served unless otherwise provided by statute." See ORS 183.482(1). Again, in this case, the Order was not received by the petitioner until May 30, 2009, and therefore, his Request for Hearing was timely.

Additionally, the Commission should be deemed to have received actual notice of the petitioner's intent to request a hearing if no satisfactory settlement could be reached and to have received that actual notice well within the established 60-day period.

C. A 90-Day Notice Period Should Apply to this License Revocation Proceeding; Petitioner's Request for a Hearing was Timely.

ORS 183.430(2) obligates the Agency to provide a hearing if a demand for one is made within 90 days in the context of the suspension, revocation, or refusal to renew a license on an emergency basis. If 90 days' written notice is allowed for such revocations in that circumstance, it is anomalous and inconsistent to not allow the petitioner 90 days notice here.

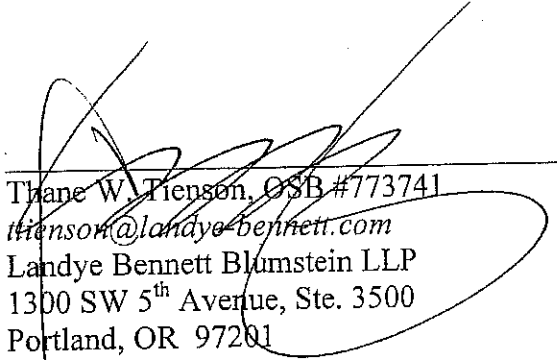
CONCLUSION

Particularly because of the importance of the issue to the petitioner's economic livelihood and the unprecedented nature of the action by the Agency, petitioner respectfully requests that he

be given an opportunity to be heard in opposition in this matter and an opportunity to present his argument and concerns.

For all of the above reasons, the petitioner requests that the Department issue a declaratory ruling with respect to the applicability of the particular 60-day period given to the petitioner within which to request a hearing under the particular facts presented here, and that the petitioner be granted a hearing as requested, and that the sanction of revocation of the petitioner's 2009 commercial license 20228 and his Dungeness crab permit 96314 and the imposition of a bar from reapplying for that license and permit for a period of one year from August 4, 2009 be rescinded.

DATED this 21st day of August, 2009.



Thane W. Tienson, OSB #773741
ttienson@landye-bennett.com
Landye Bennett Blumstein LLP
1300 SW 5th Avenue, Ste. 3500
Portland, OR 97201
503.224.4100
503.224.4133 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2009, I served the foregoing **AMENDED PETITION FOR HEARING AND FOR DETERMINATION OF APPLICABILITY OF 60-DAY RULE** on the following individual(s):

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

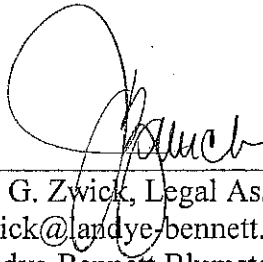
Marla Rae, Chair
Oregon Dept. of Fish and Wildlife
3406 Cherry Avenue NE
Salem, OR 97303

Roy Elicker, Director
Oregon Dept. of Fish and Wildlife
3406 Cherry Avenue NE
Salem, OR 97303

Stephen Sanders
Oregon Department of Justice
1515 SW 5th Avenue, Ste. 410
Portland, OR 97201

via first class mail.

DATED this 21st day of August, 2009.



Jeri G. Zwick, Legal Asst. to Thane W. Tienson
jzwick@landye-bennett.com
Landye Bennett Blumstein LLP
1300 SW 5th Avenue, Ste. 3500
Portland, OR 97201
503.224.4100 (telephone)
503.224.4133 (facsimile)