

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON FISH AND WILDLIFE COMMISSION**

IN THE MATTER OF

PROPOSED ORDER

DENNIS LEE STURGELL

OAH Case No. 901273

HISTORY OF THE CASE

On May 18, 2009, the Oregon Fish and Wildlife Commission (Commission) issued to Respondent, Dennis Lee Sturgell, a Notice of Intent to Revoke Commercial Fishing Licenses. The Commission proposed to revoke Respondent's personal commercial fishing license and his Ocean Dungeness Crab permit for one year based on Respondent's record of four convictions for violations of the commercial fishing laws and rules within three years. Respondent did not timely file a hearing request and, on August 4, 2009, the Commission issued a Final Order to Revoke Commercial Fishing Licenses.

On August 13, 2009, Respondent, through his attorney, Thane W. Tienson, filed a petition challenging the period for requesting a hearing. Respondent filed an amended petition on August 21, 2009. The Commission reconsidered its Final Order at its meeting of September 4, 2009 and agreed to accept Respondent's late hearing request. On September 16, 2009, the Commission issued an Order Granting Hearing. The Commission ordered that, although Respondent was entitled to a contested case hearing, the August 4, 2009 Final Order revoking Respondent's fishing licenses remained in effect pending the hearing.

On September 18, 2009, the Commission referred the matter to the Office of Administrative Hearings. The matter was initially assigned to Administrative Law Judge (ALJ) Stephen H. Elmore, who conducted a prehearing conference on October 22, 2009. The Commission and Respondent filed motions for summary determination on November 10, 2009. On December 10, 2009, ALJ Elmore issued a Ruling on Motions for Summary Determination. ALJ Elmore granted the Commission's motion addressing three of Respondent's four affirmative defenses and denied Respondent's motion. The Ruling held that pursuant to ORS 508.485(1) and 508.490(1), the Commission has the statutory authority to revoke and refuse to issue Respondent's Dungeness Crab permit.

In mid-December 2009, the case was reassigned to ALJ Alison Greene Webster. A contested case hearing was held before ALJ Webster in Portland, Oregon on January 4, 2010. The Commission was represented by Assistant Attorney General William Cook. Gene Law and Doug Westerlund of the Commission's License Revocation Board participated in the hearing. Respondent testified at the hearing. The following witnesses testified on Respondent's behalf: Paul R. Toste and Mike Giles. The following witness testified on the Commission's behalf:

Steve Williams, Assistant Administrator, Fish Division, Oregon Department of Fish and Wildlife; Deanna Erickson, License Services Manager of the Oregon Department of Fish and Wildlife; Lt. Jeff Samuels, Oregon State Police, Fish and Wildlife Section; and Sgt. Jeff Scroup, Oregon State Police, Fish and Wildlife Section, Astoria and St. Helens. The record closed on January 19, 2010.

ISSUE

Whether, under ORS 508.485(1) and OAR 655-006-0235, the Commission, in its discretion, should revoke for the remainder of the license year and refuse to issue for one year Respondent's 2009 personal commercial fishing license (no. 20228) and his Ocean Dungeness Crab permit (no. 96314) based on Respondent's four convictions of the Oregon commercial fishing laws.

EVIDENTIARY RULINGS

Respondent's Exhibits R1 and R2 were offered and admitted without objection.

Following the hearing, the Commission requested that additional documents, namely court documents and criminal investigation reports regarding Respondent's Clatsop County and Tillamook County cases and a photocopy of an ODFW pot tag, be admitted as Exhibits S1 through S3. Respondent objected on relevancy grounds. The objection was overruled, and the proffered exhibits were admitted.

FACTS

1. Respondent, Dennis Lee Sturgell, has been a commercial fisherman for 45 years. Respondent has also fished for Ocean Dungeness crab for 45 years. Respondent currently owns two vessels in his own name, the *F/V Genesis A* and the *F/V Fierce Leader*. In his long commercial fishing career, Respondent has occasionally been convicted of violations of the commercial fishing laws in Oregon and Washington. In June 1972, the Commission denied Respondent a guide license following a violation. In the State of Washington, Respondent was convicted of driving through razor clam beds in 1994 and waste of fish and wildlife in the second degree in 2000. Respondent has also been fined by the National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement for black cod fishing violations. In 1994, 1996 and 2000, he paid fines for overages. In 2001, he was fined for landing slime eels and black cod in the same trip. In 2007, he paid a large settlement following a VMS equipment malfunction and a black cod overage. (Test. of Samuels; test. of Sturgell.)

2. In April 2008, following investigations by Special Agent Hillberg of NOAA and Trooper Klepp of the Oregon State Police, Fish and Wildlife Division, Respondent was charged in the Clatsop County Circuit Court with black cod fishing log book violations and fish overages. In January 2009, Respondent pled guilty, and was convicted of two general commercial fishing violations under ORS 509.006. The offenses, Class A misdemeanors by statute, were reduced to Class A violations. In a Judgment dated January 28, 2009, Respondent was assessed a total of \$10,926 in fines. (Ex. R1; Ex. S1; test. of Samuels.)

3. Along the Oregon coast, the Ocean Dungeness Crab season begins on December 1 and continues through August 14. The peak harvest occurs during the first six to eight weeks of the season. Oregon has a "limited entry" commercial crab program. The Commission grants only 430 crab permits each season. In 2006, to "level the playing field" among commercial fisherman, the Commission imposed a crab pot limitation. (Test. of Williams.) Commercial fisherman such as Respondent are currently limited to fishing no more than 500 crab pots at a time. The Commission also imposed a requirement that every commercial crab pot have an ODFW tag. The tag must be attached to the biggest buoy of every crab pot. (Test. of Williams; test. of Samuels; test. of Sturgell.)

4. At the beginning of the 2006-2007 crab season, Respondent set his 500 crab pots in Coos Bay. After a big swell, most of his pots (all but 29) went missing. Respondent spent several days searching for his lost pots, and eventually recovered about 449 of them. By the time Respondent got to Garibaldi in early January 2007, he had about 430 pots to set down. At some point, Respondent decided to move his pots closer to shore. In the process of moving the buoys and pots, Respondent's crew neglected to appropriately tag about 100 of them. When Respondent returned to dock, he saw a pile of pot tags and realized what had happened. (Test. of Sturgell.)

5. Meanwhile, Oregon State Police Fish and Wildlife officers received complaints from other fisherman that Respondent was setting more than 500 pots and that he was not in compliance with the crab pot tag requirements. Troopers investigated and determined that Respondent had set some pots without tags. On or about January 15, 2007, Respondent called Sgt. Scroup and acknowledged that, due to an oversight by his crew, he pots had out without tags on the buoys. Respondent advised that he would immediately remedy the situation. Due to the weather or the press of other matters, however, Respondent did not go back out and place tags on the untagged buoys. (Test. of Sturgell; test. of Scroup.)

6. On January 23, 2007, with the assistance of State of Washington Fish and Wildlife officers, Oregon State Police Fish and Wildlife troopers conducted a crab pot compliance check in the Garibaldi area. They pulled up 72 untagged buoys with pots, 63 of which belonged to Respondent's vessel, the *Genesis A*. On January 31, 2007, they went out again, and recovered 11 more crab pots, five of which belonged to the *Genesis A*. Four of those buoys had tags, but Respondent had listed those tag numbers as lost.¹ One did not have any tags. (Test. of Samuels; test. of Scroup.)

7. In April 2007, Respondent was charged in Tillamook, Oregon, with 66 counts of unlawful use of commercial crab pots (OAR 635-005-0055(7)), a Class A misdemeanor.² He

¹ After losing about 50 crab pots in Coos Bay, Respondent replaced them and obtained replacement tags from the Commission. Respondent did not, however, keep track of the specific pots/tag numbers that had been lost. He provided tag numbers to the Commission to obtain the replacement tags, but those reported lost tag numbers did not accurately reflect the actual pots and tag numbers that had been lost. (Test. of Sturgell.)

² OAR 655-005-0055(7) provides, in pertinent part:

was also charged with one count of exceeding the number of crab pots, and a count of unlawful possession of an undersized crab. In February 2009, Respondent pled guilty to two counts of unlawful use of commercial crab pots. The remaining criminal counts were dismissed. For the two crab pot tag violations, Respondent was sentenced to 30 days in jail, and ordered to pay restitution in the amount of \$41,200. (Ex. R2; Ex. S2; test. of Sturgell.)

8. At or before its May 2009 meeting, the Commission learned of Respondent's recent log book and crab pot violation convictions. The Commission also learned that another commercial fisherman, Perry Kanury, had recently been convicted of three or four commercial fishing violations in Oregon, including a conviction for theft of crab pots. Accordingly, at its May 2009 meeting, the Commission voted to revoke the commercial fishing licenses of Respondent and Kanury for one year pursuant to the authority granted by ORS 508.485(1) and the provisions of OAR 635-006-0235. This was the first time in nearly 30 years the Commission had exercised its authority to revoke a commercial fishing license. (Test. of Erickson; test. of Williams.)

9. On May 15, 2009, the Commission issued Respondent a Notice of Intent to Revoke Commercial Fishing Licenses. Citing to Respondent's four convictions (two log book violations in Clatsop County in January 2009 and two crab pot violations in Tillamook in February 2009), the Commission proposed to revoke Respondent's commercial fishing license and crab permit,

It is *unlawful* for commercial purposes to:

(7) Use commercial crab pots in the Columbia River or Pacific Ocean unless the pots are individually marked with a surface buoy bearing, in a visible, legible and permanent manner, the brand of the owner and the Department buoy tag, provided that:

(a) The brand is a number registered with and approved by the Department;

(b) Only one unique buoy brand shall be registered to any one permitted vessel;

(c) All crab pots fished by a permitted vessel must use only the Oregon buoy brand number registered to that vessel in the area off of Oregon;

(d) The Department shall issue crab buoy tags to the owner of each commercial crab permit in the amount determined by OAR 635-006-1015(1)(g)(E);

(e) All buoy tags eligible to a permit holder must be purchased from the Department at cost and attached to the gear prior to setting gear; and

(f) Buoys attached to a crab pot must have the buoy tag securely attached to the first buoy on the crab pot line (the buoy closest to the crab pot) at the end away from the crab pot line[.]

and bar Respondent from reapplying for the license and permit for one year pursuant to ORS 508.485(1) and OAR 635-006-0235. (Test. of Erickson; Notice of Intent to Revoke.)

10. Respondent did not file a timely hearing request and, on August 4, 2009, the Commission issued a Final Order revoking Respondent's commercial fishing license and crab permit. Respondent, through counsel, filed a just cause petition and amended petition requesting a hearing. At its September 4, 2009 meeting, the Commission voted to accept Respondent's late hearing request, but keep the Final Order in effect pending completion of the contested case proceeding. On September 16, 2009, the Commission issued Respondent an Order Granting Hearing, noting that the Final Order remained in effect pending the hearing. (Pleadings.)

CONCLUSION OF LAW

The Commission should revoke Respondent's 2009 personal commercial fishing license (no. 20228) and his Ocean Dungeness Crab permit (no. 96314) for a period of six months, and bar Respondent from renewing the license for the same six month period based on Respondent's four convictions of the Oregon commercial fishing laws.

OPINION

As set out above, pursuant to ORS 508.481(1)³ and OAR 635-006-0235,⁴ the Commission has revoked Respondent's commercial fishing license and Ocean Dungeness Crab permit for one year based on Respondent's four convictions for commercial fishing violations in Oregon. Although the Commission has the statutory authority to revoke and/or refuse to issue

³ ORS 508.485(1) provides, in pertinent part:

Except for vessel licenses prescribed in ORS 508.260 and vessel permits prescribed in ORS 508.285, 508.470, 508.755, 508.775 to 508.796, 508.801 to 508.825, 508.880, 508.883 and 508.889 to 508.910, the State Fish and Wildlife Commission may, in its discretion, refuse the issuance of any license issued under the authority of the commission or the State Fish and Wildlife Director during any period not to exceed two years from the date of the license revocation order:

(1) Upon conviction within this state of any person of violation of any of the commercial fishing laws or rules after such person has once been convicted and penalized under ORS 508.485;

⁴ OAR 635-006-0235(1) provides:

Except as provided in section (2) of this rule in accordance with ORS 508.485 and 508.490, upon the third conviction or third forfeiture of bail within three years for violation of any of the Commercial Fishing Laws of the State of Oregon or for conviction in the State of Washington of an offense which was a violation of Columbia River Commercial fishing rules adopted pursuant to the Columbia River Compact, by any person, the Commission shall initiate contested case proceedings in accordance with the Administrative Procedures Act (ORS Chapter 183) to revoke, or refuse to issue, licenses issued under the Commercial Fishing Laws (Chapters 506-513).

Respondent's license and permit for up to one year,⁵ the issue remains whether, in its discretion, the Commission should do so in this instance.

OAR 635-006-0235 sets out the procedure for revocation of and refusal to issue commercial fishing licenses. It requires the Commission to appoint a hearings officer to conduct the contested case hearing, and authorizes the appointment of a three-member License Revocation Board to be present at the hearing and to make recommendations to the Commission concerning the revocation or refusal to issue the license. Subparagraph (7) of the rule lists five factors the Commission is required to consider in deciding whether to revoke or refuse to issue a license:

- (a) The recommendation of the License Revocation Board;
- (b) The gravity of the most recent offense, including whether the offense was a felony and whether the offense involved a closed season, closed area, or *unlawful* gear;
- (c) The gravity of the other commercial fishing offenses of which the person has been convicted or forfeited bail;
- (d) The impact of the offense on the fisheries resources of the state or, where relevant, on the State of Washington, including consideration of the species involved;
- (e) Whether the person also has been convicted of or forfeited bail for violations of the Wildlife laws of the State of Oregon.

(Emphasis in original.)

In challenging the revocation of his commercial license and crab permit, Respondent argues that the Commission's action is unprecedented and not warranted by the facts of the case. Citing to the other penalties and sanctions to which he has already been subjected (namely, 30 days in jail and more than \$50,000 in fines), Respondent argues that he has been sufficiently penalized for the violations. He asserts that adding a one year revocation of his licenses would be unfair and unduly harsh.

In considering the factors set out in 635-006-0235(7)(b) through (e), I note that none of the four offenses involved a felony, a closed season or a closed area. The two crab pot violations did, however, involve "unlawful gear" because it is now unlawful to use commercial crab pots in the Pacific Ocean unless the pots are individually marked with a surface buoy bearing an appropriate buoy tag. OAR 655-005-0055(7)(f). Although the crab pot violations involved unlawful gear, the violations did not adversely impact the fishery resources under subparagraph

⁵ As noted above, in ruling on Respondent's motion for summary determination, ALJ Elmore determined that the term "license" as used in ORS 508.485(1) and 508.490(1) encompasses any "permit" the Commission may issue, and therefore the Commission has the statutory authority to revoke and refuse to issue a Dungeness Crab permit.

(d). Respondent was not convicted of waste, setting more than 500 pots, or overages in this instance, and there is no biological impact to the crab fishery from Respondent's lack of compliance with the buoy tag requirements. Both the crab pot and the black cod log book violations were, however, contrary to the orderly administration of their respective fisheries. Finally, as described in the findings of fact above, Respondent has, in his 45-year commercial fishing career, been convicted of a handful of other commercial fishing offenses, including overages in the black cod fishery.

While Respondent acknowledges that the Commission has the statutory authority to revoke or refuse to issue commercial fishing licenses and permits, he argues, in essence, it would be an abuse of the Commission's discretion to revoke his license and permit for one year in this situation. In addition to relying upon the punishment he has already suffered (jail time and more than \$50,000 in fines), Respondent asserts that there is little or no Commission precedent for the fishing license revocations. He also notes that the other commercial fishing license the Commission sought to revoke in May 2009 (Mr. Kanury's) was based on the more egregious offense of theft of crab pots.

After considering the factors set out in the rule and Respondent's contentions, I find that the Commission acted within its authority in revoking Respondent's commercial fishing license and Ocean Dungeness Crab permit. I propose, however, that the license and permit revocations and prohibition against reapplying for the license and permit last for a period six months rather than one year. ORS 508.485(1) authorizes the Commission to revoke and refuse to issue any license during any period "not to exceed one year." This gives the Commission the option to take action against a license for a period of less than one year as well.

In mitigating the maximum one-year sanction in this instance, I rely on the following considerations: (1) Although ORS 508.485(1) has been in effect since 1965, the Commission has a dearth of precedent in revoking licenses issued under the Commercial Fishing Laws of this state. This is the first time in nearly 30 years that the Commission has sought license revocation; (2) OAR 635-006-0237(7) lists factors that must be considered, but the rule offers little guidance on how those considerations should be weighted; (3) Respondent's four convictions within three years for violations of these laws, while serious matters, were not offenses of such gravity so as to cause harm to the fisheries resources or to disrupt the commercial activity of other licensees and permit holders; (4) a preponderance of the evidence demonstrates that Respondent's pot tag violations resulted from mistake or inadvertence, as opposed to a willful act by Respondent; and finally (5) the pot tag violations occurred during the first season such requirements were in effect. In light of these considerations, I propose that Respondent's license and crab permit be revoked for a period of six months from the date of the August 4, 2009 Final Order, and that the Commission refuse to issue renewals of the licenses for a period of six months from the date of the August 4, 2009 Final Order.

ORDER

I propose the Commission issue the following order:

Respondent Dennis Sturgell's 2009 personal commercial fishing license #20228 is revoked and Respondent is barred from reapplying for the license for a period of six months from the date of the August 4, 2009 Final Order.

Respondent Dennis Sturgell's Ocean Dungeness Crab permit #96314 is revoked and Respondent is barred from reapplying for the permit for a period of six months from the date of the August 4, 2009 Final Order.

Alison Greene Webster
Administrative Law Judge
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: January 20, 2010

APPEALS PROCEDURE

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 Oregon Fish and Wildlife Commission on or before the 10th day after the Proposed Order was served (postmarked). Written exception may be mailed, faxed, or hand-delivered to the Commission.

Mail Exceptions to: Oregon Fish and Wildlife Commission
3406 Cherry Avenue, NE
Salem, Oregon 97303

If Exceptions to the Proposed Order are timely received, the Commission will: consider the exceptions, provide the applicant with an opportunity for oral argument, review the record, and issue a Final Order.

If no Exceptions to the Proposed Order are received, the Commission 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.

CERTIFICATE OF MAILING

On January 20, 2010, I mailed the foregoing Proposed Order in OAH Case No. 901273.

By: First Class and Certified Mail

Certified Mail Receipt #7009 0820 0001 6776 7194

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