

STAFF SUMMARY FOR AUGUST 24-25, 2016

12. EXECUTIVE SESSION**Today's Item**Information Action

- (A) Pending litigation to which FGC is a party: See agenda for complete list of litigation.
- (B) Possible litigation involving FGC: None to report at the time the binder was prepared.
- (C) Staffing
- (D) Deliberation on license and permit items: Review and take action on Kramer appeal and Exotic Feline Breeding Compound, Inc. appeal

Summary of Previous/Future Actions (N/A)**Background**

- (A) The agenda lists pending civil litigation to which FGC is a party.
- (B) N/A
- (C) N/A
- (D) Mr. Steven Kramer applied to DFW to renew an expired license. DFW denied the request and Mr. Kramer appealed to FGC. DFW and Mr. Kramer subsequently entered into an agreement to attempt to resolve the appeal (Exhibit 1), but FGC has sole authority to decide whether to grant Mr. Kramer's renewal request. Exhibit 2 is a FGC decision document that would be consistent with the Fish and Game Code and the agreed position of Mr. Kramer and DFW.

Exotic Feline Breeding Compound, Inc. (EFBC) requested a fee waiver from DFW. DFW denied the request and EFBC appealed to FGC. The appeal was referred to the Office of Administrative Hearings, who conducted a hearing and ultimately filed a Proposed Decision (Exhibit 3) that found EFBC did not justify the requested fee waiver. Exhibit 4 is an unsigned FGC decision document that would adopt adopting the proposed decision.

Recommendation

- (D) **FGC staff:** Formally adopt a decision in the appeal of Mr. Steven Kramer; and formally adopt the proposed decision in the EFBC appeal consistent with the recommendation of the OAH administrative law judge.

Exhibits

1. [Settlement Agreement between the Department and Steven Kramer](#)
2. [\[Unsigned\] FGC Decision In the Matter of Steven Kramer](#)
3. [Proposed Decision In the Matter of Exotic Feline Breeding Compound, Inc., from the Office of Administrative Hearings](#)
4. [\[Unsigned\] FGC Decision In the Matter of Exotic Feline Breeding Compound, Inc.](#)

Motion/Direction

STAFF SUMMARY FOR AUGUST 24-25, 2016

Moved by _____ and seconded by _____ that the Commission adopts the drafted decisions In the Matter of Steven Kramer and In the Matter of Exotic Feline Breeding Compound, Inc.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made between the Department of Fish and Wildlife ("DFW") and Steven Kramer (individually, a "Party," and collectively, "Parties").

I. Recitals

The Parties execute this Agreement with reference to and in contemplation of the following facts:

- a. Mr. Kramer possessed a Pacific Herring Gillnet Permit (Permit), Permit Number (H-003-E).
- b. DFW license records indicate that the Permit was last valid during the 2013-14 permit year, making it eligible for renewal in 2014-2015, but not 2015-2016.
- c. On October 5, 2015, Mr. Kramer submitted to DFW a request to renew the Permit. ("Renewal Request;" Exhibit A.) In the Renewal Request, Mr. Kramer explained he did not submit the Renewal Request by the March 31, 2015 deadline because he does not recall if he received a renewal notice and this oversight prevented him from receiving a worksheet for the 2015-16 permit year. The Department's license records show that the renewal worksheet for the 2014-2015 permit year was mailed to Mr. Kramer's current address.
- d. On December 9, 2015, DFW denied the Renewal Request pursuant to Fish and Game Code Section 7852.2 (Section 7852.2), subdivision (c). (Exhibit B.) Section 7852.2, subdivision (c) states "The department shall deny any application for renewal received after March 31 of the permit year following the year in which the applicant last held a valid permit for that fishery." For DFW to grant the Renewal Request, Mr. Kramer would have had to submit the Renewal Request along with applicable fees by March 31, 2015.
- e. Section 7852.2, subdivision (d), states "An applicant who is denied renewal of a late application may submit a written appeal for renewal to the commission within 60 days of the date of the department's denial. The commission, upon consideration of the appeal, may grant renewal. If the commission grants renewal, it shall assess the applicable late fee pursuant to subdivision (a)." On December 22, 2015, Mr. Kramer submitted to the California Fish and Game Commission ("Commission") a request for an appeal of DFW's denial of his Renewal Request. (Exhibit C.)
- f. Section 7852.2, subdivisions (a) and (b) state:
 - (a) In addition to the base fee for the license, stamp, permit, or other entitlement, the department shall assess a late fee for any renewal the application for which is received after the deadline, according to the following schedule:
 - (1) One to 30 days after the deadline, a fee of one hundred twenty-five dollars (\$125).
 - (2) Thirty-one to 60 days after the deadline, a fee of two hundred fifty dollars (\$250).

- (3) Sixty-one days or more after the deadline, a fee of five hundred dollars (\$500).
- (b) The department shall not waive the applicable late fee. The late fees specified in this section are applicable beginning in the 2008 license year, and shall be adjusted annually thereafter pursuant to Section 713.”
- g. Pursuant to Section 7852.2, subdivisions (a) and (b), Mr. Kramer would owe \$1,478.50 in fees if the Commission reinstates the PERMIT. (Exhibit D.)
- h. The Parties understand that this Agreement is solely between DFW and Mr. Kramer and that the Commission is neither a signatory to it nor bound by it in any way. Furthermore, the Parties understand that pursuant to Section 7852.2, subdivision (d), the Commission, and not DFW, has the sole discretion to approve or deny the Renewal Request.
- i. For the purpose of saving time and costs associated with an appeal hearing, the Parties agree to compromise and settle these issues. In light of recent discussions between DFW and Mr. Kramer, the Parties have come to an agreement on terms upon which they can resolve this matter.

II. Terms

The Parties hereby agree to the following:

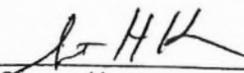
- a. DFW agrees to not oppose the Renewal Request.
- b. If the Commission reinstates the PERMIT, Mr. Kramer agrees to fully pay all fees owed pursuant Section 7852.2, subdivisions (a) and (b), within 60 days of the Commission’s decision. DFW shall not issue the PERMIT until all fees are paid.
- c. The Parties agree that this Agreement, all documents attached to this Agreement, and documents previously submitted to the Commission related to the Renewal Request constitute Mr. Kramer’s written appeal pursuant to Section 7852.2, subdivision (d), provided that the Commission considers the Renewal Request at an upcoming Commission meeting. Each Party may, at its discretion, address the Commission at a Commission meeting regarding the Renewal Request, so long as the address is consistent with the terms of this Agreement. In addition, DFW or Mr. Kramer may submit a memorandum or other documents to the Commission requesting that it take action on the Renewal Request, so long as these documents are consistent with the terms of this Agreement.
- d. This Agreement is intended to be a full and complete settlement of all disputes between the Parties pertaining to the Renewal Request. Provided that the Commission considers the Renewal Request at an upcoming Commission meeting, Mr. Kramer agrees to waive any present and future administrative appeal related to this renewal of the PERMIT, the December 9, 2015 denial of the Renewal Request, and all future claims and/or causes of action against DFW related to renewing the PERMIT.

- e. This Agreement may be pleaded as a full and complete defense and may be used as the basis for an injunction against any action, suit or proceeding which may be prosecuted, instituted or attempted by any Party in breach thereof.
- f. This Agreement is only applicable to Mr. Kramer's Renewal Request. This Agreement does not relate in any way to Mr. Kramer's general Commercial Fishing License or any other DFW-issued entitlement held by Mr. Kramer.
- g. Each party shall bear its own costs and attorneys' fees, and any other expenses, related to the Renewal Request subject to resolution by this Agreement.
- h. The obligations of this Agreement apply to and are binding on DFW or any successor agency or department and Mr. Kramer and his respective heirs, executors, administrators, and permitted assigns.
- i. The Parties represent and warrant to each other that the execution of this Agreement and the performance of such Party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on each Party and is enforceable in accordance with its terms.
- j. If any provision of this Agreement is found to be illegal or unenforceable, then any such provision shall be deemed stricken and the remaining provisions hereof shall remain in full force and effect.
- k. This Agreement constitutes the entire understanding between the Parties as to the Renewal Request and can only be amended or modified in writing, signed by duly authorized representatives of the Parties. This Agreement supersedes all prior representations and agreements, if any, between the Parties regarding the Renewal Request.
- l. This Agreement, when signed by all of the signatories, shall become effective as of the last signature date.
- m. This Agreement may be signed in counterparts, which together shall constitute one and the same Agreement. A facsimile or scanned signature shall be the same an original.

IN WITNESS THEREOF, the Parties have executed this Agreement as of the date of the last signature below:

By: 

Gabriel Tiffany
Deputy Director, Administration Division
Department of Fish and Wildlife



Steven Kramer

Date: 7/26/16

July 21, 2016

Department Exhibit A

Attachment #1

Steven H. Kramer

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

October 5, 2015

Ms. Debbie Noriega

CDFW, License and Revenue Branch

1740 N. Market Blvd.

Sacramento, CA 95834

Subject: Restoration of Humboldt Bay Herring Permit (H-003-E)

Dear Ms. Noriega,

I spoke with you on the phone today, regarding my Humboldt Bay Herring Permit (H-003-E). I am writing this letter to try and recover the permit. Apparently it was not renewed for the 2014/15 season and it is now late for the 2015/16 season.

If you will please recall, in 2014 the Fish and Game Commission (Commission) was considering closing the Humboldt Bay Herring Fishery due to little or no landings. I wrote a June 7, 2014 letter (attached) to the Commission that supported maintaining the status quo, since no fishing was occurring for herring in Humboldt Bay anyway. Later in 2014, the Commission eventually decided to maintain the status quo and kept the fishery open.

The best that I can recollect, is that I either did not receive a 2014/15 Permit Renewal Notice and work sheet, or I held off renewing it until the Commission decided, and then forgot to renew. Since I did comment on maintaining the fishery open, I demonstrated that my intent was to maintain my Herring Permit and not give it up. And since I did not fish that year, I did not realize I did not have a 2014/15 Permit.

This year, I did not recall receiving the June 2015 Permit Notice and worksheet from CDFW. I realized that the overdue day was Oct 2nd, so I called Mr. Lee Thao, (today) at CDFW to make sure I had paid, and was on the list to receive the permit in November. Mr. Thao informed me that I did not pay for 2014/15, so I did not get the 2015 Notice. He suggested I contact you to try and recover the permit.

I have paid for my Herring permit, on time, for more than a dozen years. In addition, I have paid on time, for my commercial fishing license and commercial boat license, for more than 15 years including 2014, and 2015. It was an oversight on my part, that I forgot to pay for the 2014 Herring permit, and because of that I did not receive the 2015 Herring permit Notice and worksheet.

I am asking to have my Humboldt Herring (H-003-E) permit restored to me. Please advise me on how best to proceed.

Thank you for your assistance.

Sincerely,

Steven H. Kramer

Attachment # 2

June 7, 2014

Steven H. Kramer



California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

RE: REQUEST FOR AUTHORIZATION TO PUBLISH NOTICE OF COMMISSION
INTENT TO AMEND COMMERCIAL HERRING REGULATIONS (SECTIONS 163
AND 164, TITLE 14, CCR)

Dear Commissioners,

I wish to comment on the proposal to lower the Pacific Herring quotas in Humboldt Bay to zero. Doing so would close the fishery in the near future and possibly for good.

I am a part-time commercial fisherman. When I fish, it is for roe herring in Humboldt Bay under my CA Herring Permit (H3). I have been fishing for herring in the bay since 1998. I have a considerable amount of time and money invested in the fishery (boat, equipment, license fees over the years, etc.) To my knowledge, only one other boat, also fishes the bay.

For full time work, I am a fisheries biologist for a federal agency. I possess a Masters degree in fisheries biology from Humboldt State University.

In approximately 2004 I ceased fishing for herring because of several reasons. First, the herring population seemed to crash and there were too few fish around to make it worthwhile. Second, the Eureka cold storage facility closed, which would make it impossible to land, store, sell, and ship tons of frozen herring to buyers in various locations that are out of this area.

To my knowledge, no one has commercially fished for herring in Humboldt Bay for approximately 10 years, which effectively was a self-imposed closure of the fishery by the fisherman. In addition, I am not aware of any spawning/population surveys by CA Fish and Wildlife (CDFW) since approximately 2007. I believe that the last surveys were by Mr. John Mello who managed the herring fisheries for CDFW until his recent retirement.

In conclusion, the Humboldt Bay roe herring the fishery is already closed. CDFW has not done any surveys in years, and therefore has no current information on what the status of the herring population is in Humboldt Bay. It seems that imposing a zero quota is unnecessary, and is in effect, a management solution looking for a problem, where there is no management problem. The fishermen in Humboldt Bay have a self-imposed closure in place. Setting the quota at zero would be the equivalent of not letting a good deed go unpunished.

Rather than close the fishery, I would like to suggest that annual spawning/population surveys should be continued and conducted to gather information on what the actual current status of the Humboldt Bay herring population is. If CDFW is unable to conduct the surveys, then perhaps the Fish and Game Commission, CDFW, or other entity, could issue a request for proposals, for independent surveys by consultants or others.

Thank you for the opportunity to comment on this proposed regulation change.

Sincerely,

Steven H. Kramer

Department Exhibit B



Attachment # 3
State of California - The Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
License and Revenue Branch
1740 N. Market Blvd
Sacramento, CA 95834
<http://www.wildlife.ca.gov>

EDMUND G. BROWN JR, Governor
CHARLTON H. BONHAM, Director



Certified Mail

*Letter delivered
12/18/15*

December 9, 2015

Mr. Steven H. Kramer
[REDACTED]

SUBJECT: NOTICE OF DENIAL FOR RENEWAL OF A PACIFIC HERRING GILL NET PERMIT

Dear Mr. Kramer:

This letter is in response to your request to reinstate your Pacific Herring Gill Net Permit (PHGNP), Permit Number H003-E (L82700).

Authority-Pacific Herring Gill Net Permit

Section 163(b)(3), Title 14, of the California Code of Regulations (CCR), states applications for renewal of all herring permits shall be received by the Department of Fish and Wildlife (Department), or if mailed, postmarked, on or before the first Friday of October each year.

Authority-Late Fee

Effective April 1, 2008, pursuant to Section 7852.2, of the Fish and Game Code (FGC), a graduated late fee was established for any renewal application that is received after the deadline. Section 7852.2(a), of the FGC, states in addition to the base fee for the license, stamp, permit, or other entitlement, the Department shall assess a late fee for any renewal the application for which is received after the deadline. Section 7852(b), of the FGC, states the Department shall not waive the applicable late fee. The late fees beginning in the 2008 license year shall be adjusted annually thereafter pursuant to Section 713, of the FGC.

Section 7852.2 (c), of the FGC, states the Department shall deny any application for renewal received after March 31 of the permit year following the year in which the applicant last held a valid permit in the fishery.

Reason for Appeal to the Department

In your letter, dated October 5, 2015, you stated you either did not receive a 2014-2015 Commercial Herring Permit Renewal Worksheet or you held off renewing your Herring Permit due to the Fish and Game Commission (Commission) considering closing the Humboldt Bay Herring Fishery due to little or no landings. You also stated that you wrote a letter to the Commission on June 7, 2014, that supported maintaining the status quo. You stated your intent was to maintain your herring permit and not give up on the fishery. You further stated that you have always paid for your commercial permits on time and it was an oversight on your part.

Conserving California's Wildlife Since 1870

Mr. Steven H. Kramer
December 9, 2015
Page Two

Documentation Submitted

Copy of letter submitted to the Commission dated, June 7, 2014, concerning the Pacific Herring quotas in Humboldt Bay.

Department Findings

Department license records show that you last held a valid 2013-2014 PRHGNP, which made you eligible to renew your permit for the 2014-2015 permit year.

Permits Held by Applicant

Resident Commercial Fishing License

Department Determination

Based on previously stated information, your request for renewal of your PRHGNP is denied, because you last held a valid PRHGNP in 2013-2014. As previously stated, FGC Section 7852.2(c), requires the Department to deny any application for renewal received after March 31 of the permit year following the year in which the applicant last held a valid permit for the fishery.

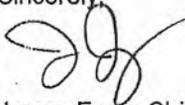
Deadline to File an Appeal to the Fish and Game Commission

If you wish to appeal the Department decision, you must submit a written appeal to the Commission at 1416 Ninth Street, Sacramento, California 95814. Pursuant to FGC Section 7852.2(d), your appeal must be received within 60 days of the date of this letter.

The Commission, upon consideration of the appeal, may grant renewal. If the Commission grants renewal, it shall assess the applicable license, permit and late fees of \$1,478.50 which would be due after receipt of the Commission's approval letter. A fee schedule is enclosed.

If you have any questions or require further assistance, please contact Ms. Debbie Noriega, of my staff, at the letterhead address, by telephone at (916) 928-58174, or e-mail Debbie.Noriega@wildlife.ca.gov.

Sincerely,



James Forng, Chief
License and Revenue Branch

Enclosure

cc: Mr. Sonke Mastrup
Fish and Game Commission
Sacramento, California

Ms. Debbie Noriega
Department of Fish and Wildlife
Sacramento, California



State of California - The Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
 License and Revenue Branch
 1740 N. Market Blvd
 Sacramento, CA 95834
<http://www.wildlife.ca.gov>

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



December 9, 2015

**Mr. Steven H. Kramer (L82700)
 Fees Required for Reinstatement for a
 Pacific Herring Gill Net Permit (PHGNP)**

Year		Permit Fees
2014-2015	PHGNP	\$372.50
	Late Fee (61 days to March 31, 2015)	<u>\$581.25</u>
		\$953.75
Prior Year Fees Due		\$953.75
Prior Year permit fees must be paid before 2015-2016 PRHGNP can be issued.		
2015-2016	PHGNP	\$377.25
	Late Fee (one to 30 days)	<u>\$147.50</u>
		\$524.75
Total Current Fees		\$524.75
Total Fees Due		\$1,478.50

If the Fish and Game Commission (Commission) should recommend approval, payment of \$1,478.50 would be due within 30 days after receipt of the Commission's approval letter.

Department Exhibit C

RECEIVED
CALIFORNIA
FISH AND GAME
COMMISSION

December 22, 2015

Steven H. Kramer

2015 DEC 28 PM 2: 32

MLS

California Fish and Game Commission

Attn: Mr. Sonke Mastrup

1416 Ninth Street

Sacramento, CA 95814

Subject: Renewal of Humboldt Bay Herring Gillnet Permit (H-003-E). Appeal of the CDFW Decision of Denial for Renewal

Dear Commissioners:

I am requesting reinstatement of my Pacific Herring Gillnet Permit (PHGNP), Permit Number (H-003-E) (L82700). I previously wrote to Ms. Debbie Noriega, at the California Department of Fish and Wildlife (CDFW), License and Revenue Branch on October 5, 2015 (see attachment #1.). In that letter I explained that I had inadvertently overlooked renewing the permit for the 2014/15 season. This year, I did not recall receiving the June 2015 Permit Notice and worksheet from CDFW. I realized that the overdue day was Oct 2nd, so I called Mr. Lee Thao (Oct. 5, 2015) at CDFW to make sure I had paid, and that I was on the list to receive the permit in November. Mr. Thao informed me that I did not pay for 2014/15, so I did not get the 2015 Notice. He suggested I contact Ms. Noriega and I did so by phone and through my Oct 5, 2015 letter.

If you will please recall, in 2014 the Fish and Game Commission (Commission) was considering closing the Humboldt Bay Herring Fishery due to little or no landings. I wrote a June 7, 2014 letter (attachment #2) to the Commission that supported maintaining the status quo, since no fishing was occurring for herring in Humboldt Bay anyway. Later in 2014, the Commission eventually decided to maintain the status quo and kept the fishery open. I was holding off renewing my permit until the Commission made a decision. Apparently, I just forgot to renew my permit later in 2014.

On December 18, 2015 I received a certified letter (attachment #3) dated December 9, 2015 from Mr. James Fong, Chief, License and Revenue Branch, CDFW in reply to my October 5, 2015 letter. In that letter, my request for renewal of my Pacific Herring Gillnet Permit was denied. Mr. Fong's letter outlines the nature of my request to have my herring permit reinstated. His letter also recommended that if I wanted to appeal the Department decision, I must submit a written appeal to the Commission at 1416 Ninth Street, Sacramento, CA 95814. Pursuant to

FGC Section 7852.2(d), my appeal must be received within 60 days of the date of Mr. Fong's letter, dated December 9, 2015.

This letter serves as my written appeal.

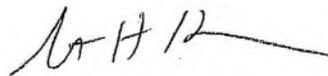
Mr. Fong's letter also stated that The Commission, upon consideration of the appeal, may grant renewal. If the Commission grants renewal, it shall assess the applicable license, permit, and late fees of \$1,478.50 which would be due within 30 days after receipt of the Commission's approval letter.

I am willing to pay that fee.

Over the years, I have made a considerable investment, in time and money, in order to remain eligible to participate in the Humboldt Bay Herring Gillnet fishery. I have paid for my Herring permit, on time, for more than a dozen years. In addition, I have paid on time, for my commercial fishing license, and commercial boat license, for over 15 years, including for the 2014, and 2015 seasons, even though I did not fish for herring. It was an oversight on my part, that I forgot to pay for the 2014 Herring permit, and because of that, I did not receive the 2015 Herring permit Notice and worksheet. My June 7, 2014 letter to the Commission, encouraging them to keep the fishery open, indicates that my intent has always been to renew my Herring permit.

Please accept this letter as my written appeal. Thank you for your time and consideration.

Respectfully yours

A handwritten signature in black ink, appearing to read 'S. H. Kramer', with a long horizontal flourish extending to the right.

Steven H. Kramer

Cc:

Mr James Fong, CDFW, Sacramento

Ms. Debbie Noriega, CDFW, Sacramento

Department Exhibit D



State of California - The Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
 License and Revenue Branch
 1740 N. Market Blvd
 Sacramento, CA 95834
<http://www.wildlife.ca.gov>

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



December 9, 2015

**Mr. Steven H. Kramer (L82700)
 Fees Required for Reinstatement for a
 Pacific Resident Herring Gill Net Permit (PHGNP)**

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Prior Year Fees Due		\$953.75
Prior Year permit fees must be paid before 2015-2016 PRHGNP can be issued.		
2015-2016	PHGNP	\$377.25
	Late Fee (one to 30 days)	<u>\$147.50</u>
		\$524.75
Total Current Fees		\$524.75
Total Fees Due		\$1,478.50

If the Fish and Game Commission (Commission) should recommend approval, payment of \$1,478.50 would be due within 30 days after receipt of the Commission's approval letter.

BEFORE THE FISH AND GAME COMMISSION
STATE OF CALIFORNIA

In the Matter of:) Case No. 15ALJ09-FGC
Steven Kramer,)
Appellant.)
_____)

DECISION

Consistent with the terms of the attached Settlement Agreement between Seven H. Kramer (“Appellant”) and the Department of Fish and Wildlife (“Department”), fully executed July 26, 2016, and the authority provided in Fish and Game Code Section 7852.2, subdivision (d), and Government Code section 11415.60, the Fish and Game Commission hereby orders that:

1. The Commission hereby grants renewal of the Pacific Herring Gillnet Permit (Permit), Permit Number (FI-003-E) previously issued to Appellant by the Department.
2. The Appellant must pay the Department all license, permit, and late fees owed pursuant to Section 7852.2, subdivisions (a) and (b), within 60 days of this Decision, which total \$1,478.50.
3. The Department shall renew the permit if the fees are paid consistent with this Decision.

IT IS SO ORDERED this _____ day of August 2016.

Eric Sklar, President

BEFORE THE
FISH AND GAME COMMISSION
STATE OF CALIFORNIA

In the Matter of:

EXOTIC FELINE BREEDING
COMPOUND, INC.,

Appellant,

Case No. 15ALJ03-FGC

OAH No. 2015061034

PROPOSED DECISION

This written review appeal is before Administrative Law Judge (ALJ) Timothy J. Aspinwall, Office of Administrative Hearings (OAH), State of California.

Scott M. Pearson represents appellant Exotic Feline Breeding Compound, Inc., (appellant).

David Kiene, Staff Counsel, represents the Department of Fish and Wildlife (Department).

The parties submitted initial and supplemental written arguments pursuant to briefing schedules. The parties delivered oral arguments on May 24, 2016, whereupon the matter was submitted for decision.

ISSUE PRESENTED

1. Should appellant be granted an exemption from permitting requirements pursuant to Fish and Game Code section 2150, subdivision (c)?

ADMINISTRATIVE RECORD ON REVIEW

The record on review consists of the following:

Exhibit 1: Order Setting Briefing Schedule, signed July 13, 2015.

- Exhibit 2: Written Statement of Appellant In Support of Its Appeal of The Department of Fish and Wildlife's Denial of Waiver Application, signed July 13, 2015.
- Exhibit 3: Declaration of Joseph Maynard In Support of Appellant, signed July 10, 2015, with attached exhibits 1 through 14.
- Exhibit 4: Appendix of the Record In Support of Written Statement of Appellant, Volume 1 of 3, pages 1 through 434.
- Exhibit 5: Appendix of the Record In Support of Written Statement of Appellant, Volume 2 of 3, pages 435 through 829.
- Exhibit 6: Appendix of the Record In Support of Written Statement of Appellant, Volume 3 of 3, pages 830 through 1338.
- Exhibit 7: Supplemental Appendix of the Record In Support of Written Statement of Appellant, Volume 4, pages 1339 through 1344.
- Exhibit 8: Department's Response to Appellant's Written Statement, signed August 12, 2015, with attachments 1 and 2.
- Exhibit 9: Appellant's Reply Brief In Support of Its Appeal of The Department of Fish and Wildlife's Denial of Waiver Application, signed September 4, 2015.
- Exhibit 10: Supplemental Declaration of Joseph Maynard In Support of Appellant, signed September 4, 2015.
- Exhibit 11: Order Setting Briefing Schedule, signed October 28, 2015.
- Exhibit 12: Stipulation to extend briefing deadlines, dated December 11, 2015.
- Exhibit 13: Appellant's Supplemental Brief In Support of Its Appeal of The Department of Fish and Wildlife's Denial of Waiver Application, signed December 21, 2015.
- Exhibit 14: Department's Brief In Response to Issues Raised In October 28, 2015 Order, signed December 21, 2015, with attached exhibit A, Declaration of William Caputo, signed December 18, 2015.
- Exhibit 15: Stipulation to extend briefing deadlines, dated January 22, 2016.
- Exhibit 16: Department's Response to Appellant's December 21, 2015 Brief, signed February 9, 2016.

Exhibit 17: Appellant's Supplemental Brief In Support of Its Appeal of The Department of Fish and Wildlife's Denial of Waiver Application, signed February 9, 2016.

Exhibit 18: Order Setting Oral Argument, signed April 6, 2016.

FACTUAL FINDINGS

Background and Procedural History

1. Appellant houses, breeds, and displays wild felines for public viewing. Until October 19, 2011, appellant held two permits issued by the Department – a breeding permit which allowed appellant to breed animals, and a resident exhibiting permit which allowed appellant to exhibit animals at least half-time for commercial and/or educational purposes. The permits expired and have not been renewed.

2. On October 24, 2011, the Department received appellant's initial application for a waiver of all permitting requirements associated with its breeding and exhibiting permits previously issued by the Department.

Fish and Game Code¹ section 2150, subdivision (c), allows organizations such as appellant to apply for a waiver of permit requirements, providing as follows:

A zoo is exempt from any permit requirement pursuant to this chapter For purposes of this section, **“zoo” means any organization which is accredited as meeting the standards and requirements of the American Zoo and Aquarium Association (AZA).** Any California organization which is not accredited by the AZA may apply to the [D]epartment for a waiver of specified permit requirements of this chapter. The [D]epartment may grant or deny the request for a waiver for **justified reasons.** . . . Any organization may appeal the determination of the [D]epartment to the [C]ommission. (Emphasis added.)

Appellant is not accredited by the American Zoo and Aquarium Association (AZA). Appellant is instead accredited by another accrediting organization – the Zoological Association of America (ZAA).

3. On April 24, 2012, the Department denied appellant's initial application for waiver based on the Department's position at that time that there were no standards in law to

¹ Subsequent statutory references are to the Fish and Game Code, unless otherwise specified.

guide the Department in determining whether “justified reasons” exist. Appellant timely filed an appeal.

4. On January 30, 2013, the Department sent a letter notifying appellant to complete the permit renewal process, or the Department would seek law enforcement action. On July 24, 2013, appellant met with representatives of the Department and the Fish and Game Commission (Commission) in an unsuccessful attempt to reach a resolution. On September 17, 2013, the Department again sent a letter notifying appellant to complete the permit renewal process no later than October 4, 2013, or face possible law enforcement action.

5. On October 7, 2013, appellant filed two legal actions in Kern County Superior Court – a Complaint for Declaratory and Injunctive Relief challenging the constitutionality of section 2150, subdivision (c), and a Verified Petition for Writ of Mandate seeking an order compelling the Department to consider appellant’s waiver application.

6. On March 10, 2014, the Kern County Superior Court issued a Peremptory Writ of Mandate ordering the Department to: (1) vacate the Department’s previous denial of appellants waiver application, (2) reconsider appellant’s waiver application and determine whether appellant meets the waiver criteria set forth in section 2150, subdivision (c), and (3) refrain from taking any action against appellant until the Department’s decision to grant or deny appellant’s waiver application becomes final. Appellant dismissed without prejudice its complaint for declaratory relief challenging the constitutionality of section 2150, subdivision (c).

7. On April 21, 2014, appellant re-submitted an application for waiver of permit requirements. On May 14, 2014, Department counsel sent appellant a letter stating that the Department was then in the process of reconsidering whether appellant met the waiver criteria set forth in section 2150, subdivision (c). The letter also informed appellant that it must meet, at minimum, the same standards required for AZA accreditation. The Department offered appellant an opportunity to supplement its application for waiver to demonstrate that it meets the AZA accreditation criteria.

8. During the subsequent months, appellant submitted additional materials on July 18, August 8, and October 3, 2014. On November 20, 2014, the Department sent a response to appellant, allowing appellant to submit additional materials by December 22, 2014. On December 22, 2014, appellant sent the Department a letter requesting that it make a final decision based on the materials previously submitted.

9. On April 14, 2015, the Department sent a letter to appellant denying its request for a waiver of permit requirements. The Department asserted that appellant did not meet 25 of the standards in the AZA accreditation criteria. On May 14, 2015, appellant sent a letter to the Commission requesting an appeal of the Department’s denial of its waiver request.

Appellant's Contentions

Underground Regulation

10. Appellant contends that the Department impermissibly utilized the AZA accreditation criteria referenced in section 2150, subdivision (c), in determining whether there were justified reasons to grant or deny appellant's waiver application. Specifically, appellant contends that the AZA accreditation standards as utilized by the Department constitute an impermissible "underground regulation."

Government Code section 11340.5, subdivision (a), states:

No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, **standard of general application**, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (Emphasis added.)

Government Code section 11342.600 defines a "regulation" states:

"Regulation" means every rule, regulation, order, or **standard of general application** or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency **to implement, interpret, or make specific the law** enforced or administered by it, or to govern its procedure. (Emphasis added.)

11. The AZA accreditation standards have not been adopted pursuant to the Administrative Procedure Act (APA) rulemaking process. Rather, they are referenced in section 2150, subdivision (c), to allow entities accredited by the AZA to seek exemption from permit requirements. As to entities not accredited by the AZA, such as appellant, the AZA accreditation criteria have not been formally adopted for determining whether "justified reasons" exist to grant an exemption from permit requirements.

12. There are two identifying characteristics of a regulation subject to the regulatory rulemaking requirements under the Administrative Procedure Act. "First, the agency must intend its rule to apply generally, rather than in a specific case. . . . Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or ... govern [the agency's] procedure.'" (*Tidewater Marine W., Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571, (quoting Gov. Code, § 11342, subd. (g).)

13. The evidence is clear that the Department utilized the AZA criteria to implement, interpret, and make specific section 2150, subdivision (c), in determining whether “justified reasons” existed to grant appellant’s application for permit waivers. The evidence is not clear, however, whether the Department used the AZA accreditation criteria as a “standard of general application” subject to the rulemaking requirements under the Government Code.

14. The fact that the Department utilized the AZA accreditation criteria to determine whether there were “justified reasons” to grant appellant’s application for waiver does not in itself demonstrate that the Department intended that the AZA accreditation criteria be used as a standard of general application. The Department’s counsel at the hearing on the petition for writ of mandate understood that it would violate the prohibition against underground regulations to use the AZA accreditation criteria as a standard of general application. The Department’s counsel stated to the judge that “... in order to consider what justified reasons are for the [D]epartment to consider these waiver requests it would have to develop standards that would apply to every waiver request, which would be the underground regulation.” (Administrative Record (AR), Exhibit 5, page 734, lines 11-15.)

15. The Superior Court judge on petition for writ of mandate responded during hearing to the concerns articulated by the Department’s counsel, as follows:

I don’t think that the[C]ommission is wholly without guidance here. I mean, you have a specific exception for a specific group, the AZA. . . . And so I’m not saying that it [the exemption criteria] would have to be identical [to the AZA exemption criteria]. I’m not even saying it would have to be substantially similar.

There is some guidance. Justified reasons and the fact that there is a specific exception, those two things together in my mind help give us some guidance.

(AR, Exhibit 5, page 738, lines 7-20.)

16. Following the Superior Court judge’s order mandating that the Department take action on appellant’s waiver application, the Department sent a letter to appellant stating that to qualify for an exemption, appellant would be required at a minimum to meet the AZA exemption criteria. The evidence is not clear whether the Department intended this as a standard of general application, or whether this standard was individually tailored to the situation with appellant.

Arbitrary Standard

17. Appellant contends that the AZA criteria as applied by the Department is either an underground regulation, or it is arbitrary if not applied equally to all waiver applicants. The record establishes that appellant's waiver application is the only instance in which the Department has applied the AZA accreditation criteria to determine whether an entity not accredited by the AZA qualifies for a waiver pursuant to section 2150, subdivision (c). The record also establishes that the Department has both granted and denied previous waiver requests by other parties. Specifically, the Department granted waiver requests to Orange County Zoo in 1993, and Micke Grove Zoo in 1992, neither of which is accredited by the AZA. The Department denied waiver requests to Moon Ridge Animal Park in 2007, California Living Museum in 2011, and Animal Educators in 2012. (AR, Exhibit 5, page 493.) The record does not establish what reasons were given, if any, to grant or deny the waiver applications. Nor does the record establish that the various applicants were similarly situated beyond the fact that they had all submitted waiver applications, and that the two entities granted waivers in 1992 and 1993 were not AZA accredited.

18. Appellant cites three cases as authority that an agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently. (*Mercy Catholic Med. Ctr. v. Thompson* (3d Cir. 2014) 380 F.3d 142, 158; *Yetman v. Garvey* (7th Cir. 2001) 261 F.3d 664, 669; *Transactive Corp. v. United States* (D.C. Cir. 1996) 232, 237.) The record in the current case, however, does not establish what standard the Department used to grant or deny waiver applications submitted by other parties. This absence of a clear factual record contrasts with the authorities cited by appellant. For example, in *Yetman v. Garvey*, a group of commercial pilots challenged the Federal Aviation Administration (FAA) rule prohibiting persons over the age of 60 from serving as commercial pilots. Though the court affirmed the FAA's rule, it was significant in court's analysis that the pilots challenging the rule were able to show that the FAA had not uniformly applied the age 60 rule. Specifically, the FAA allowed pilots over the age of 60 to fly for foreign airlines operating in United States airspace, and for commuter airlines. (*Yetman, supra*, 261 F.3d at pages 669-670.)

This factual record in this matter is insufficiently analogous to the authorities cited by appellant to establish that the Department gave disparate treatment to similarly situated parties, or that it acted arbitrarily when it used the AZA accreditation criteria to evaluate appellant's waiver application.

The Legislature's Intent

19. Appellant contends that the Department's use of the AZA accreditation criteria to evaluate appellant's waiver application contradicts the Legislature's intent, and renders meaningless the provision in section 2150, subdivision (c), permitting the Department to grant or deny a waiver request for "justified reasons."

Section 2116.5 articulates the Legislature's intent, as follows:

The Legislature finds and declares that wild animals are being captured for importation and resale in California; that some populations of wild animals are being depleted; that many animals die in captivity or transit; that some keepers of wild animals lack sufficient knowledge or facilities for the proper care of wild animals; that some wild animals are a threat to the native wildlife or agricultural interests of this state; and that some wild animals are a threat to public health and safety. It is the intention of the Legislature that the importation, transportation, and possession of wild animals shall be regulated to protect the health and welfare of wild animals captured, imported, transported, or possessed, to reduce the depletion of wildlife populations, to protect the native wildlife and agricultural interests of this state against damage from the existence at large of certain wild animals, and to protect the public health and safety in this state.

20. The Legislature's intent is essentially to protect the public health and safety, and the welfare of wild animals. The Department must implement section 2150, subdivision (c), consistent with the Legislature's intent. Entities accredited by the AZA are exempt from permit requirements, as provided by section 2150, subdivision (c). It is not inconsistent with the Legislature's intent to require entities not accredited by the AZA to meet substantially the same criteria that are required for AZA accreditation. In that way, similarly situated entities are treated similarly, and the Legislature's intent to protect the public safety and wild animal welfare is effectuated. This is a "justified reason" consistent with section 2150, subdivision (c).

Constitutional Claims

21. Appellant contends that the AZA accreditation standard results in an unconstitutional delegation of police power to a private party (the AZA), and that implementation of the AZA standard ensures that section 2150, subdivision (c), violates the Equal Protection Clauses of the United States and California Constitutions. Neither the Commission nor the Department has authority to rule on these constitutional claims. California Constitution, Article III, Section 3.5, states in part as follows:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce the statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

Based on the California Constitution, appellant's constitutional arguments are not considered in this Decision.

Bona Fide Zoo

22. Appellant contends that it is a bona fide zoo which is regulated by the United States Fish & Wildlife Service and the United States Department of Agriculture (USDA), and that state supervision of its operations is not needed to protect animal welfare or public safety. Appellant argues "justified reasons" exist to grant its waiver application because: (1) the Department recognized appellant as a "bona fide zoo" under a prior version of section 2150, subdivision (c); (2) appellant is accredited by the ZAA; (3) three professional zookeepers confirm that ZAA-accredited facilities are professionally managed zoos that can be trusted to protect animal welfare and public safety (AR Exhibit 4, pp. 300-305.); (4) five states have found the ZAA accreditation to be equivalent to AZA accreditation for permitting purposes; (5) appellant has been operating for 38 years without a single escape or injury; (6) appellant is licensed by the United States Fish and Wildlife Service and the USDA; and (7) appellant is a recognized expert in its field.

23. To support its claim that the Department previously recognized it as a zoo, appellant cites to a letter from the Department dated December 19, 1984, stating that the Department recognized appellant as a bona fide zoo. This recognition was pursuant to an earlier version of section 2150, subdivision (c), which last existed in 1985. The fact that the Department recognized appellant as a bona fide zoo under an earlier version of section 2150, subdivision (c), does not define whether appellant is a zoo under current law. Similarly, ZAA and AZA accreditation requirements are not identical and do not provide all the same safeguards. The fact that five other states have accepted ZAA accreditation for permitting purposes reflects the priorities of those states, which do not necessarily reflect the California legislature's intent. The fact that appellant is regulated by federal agencies does not make it unnecessary or undesirable for the Department to exercise its responsibilities to protect the public safety and animal welfare. Finally, assuming that appellant runs a safe and reputable facility, it does not necessarily follow that appellant should be exempt from specific requirements that the Department deems appropriate to protect the public safety and animal welfare.

Independent Basis for Waiver

24. Appellant contends that its participation in AZA sponsored Species Survival Plans (SSP) provides an independent basis to grant appellant's waiver application, because SSP participants not accredited by the AZA are expected to abide by AZA accreditation standards.

25. SSP participants not accredited by the AZA are not, by virtue of their participation in the SSP, considered accredited or certified by the SSP. They are referred to as approved non-member participants. (AR, Exhibit 6, p. 847.) Notwithstanding its participation in AZA SSPs as an approved non-member participant, appellant does not meet

a number of substantive AZA accreditation standards. Examples provided by the Department are discussed below, under Substantial Compliance.

Substantial Compliance

26. Appellant contends that it has substantially complied with the AZA accreditation standards sufficiently to serve the legislature's intent to protect animal welfare and public safety. Appellant did not meet 25 of the AZA accreditation standards. The Department discussed these accreditation criteria in a letter dated April 14, 2015, to appellant's counsel (AR, Exhibit 6, pp. 1318-1330), quoted in part as follows:

1.3.1. The institution must have an Institutional Collection Plan (ICP).

Explanation: The purpose of an ICP is to thoroughly assess, on a regular basis, the reason for having each taxon in the collection. The ICP should include a statement of justification for all species and individuals in the institution's planned collection. . . .

Department Finding: [Appellant] has not submitted materials demonstrating it complies with this AZA standard. Although the department recognizes [appellant] maintains a single taxon (Felidae), and ICP is nevertheless required for that single taxon. . . .

[¶] . . . [¶]

1.4.3. Animals must be identifiable, whenever practical, and have corresponding ID numbers. . . .

Department Finding: [Appellant] has not submitted materials demonstrating that it complies with this AZA standard. . . . All animals of the family Felidae held by [appellant] must either be micro-chipped, tattooed or have Department approval for an alternative method of identification prior to a permit being issued, or this waiver request approved. Based on [appellant's] documentation, the Department identifies the following animals as either not being micro-chipped, tattooed or having an approved alternative identification method. [List of 24 animals]

[¶] . . . [¶]

2.1.1. A full-time staff veterinarian is recommended. In cases where such is not practical, a consulting/part-time veterinarian

must be under written contract to make at least twice monthly inspections of the animals and to respond as soon as possible to any emergencies.

Department Finding: [Appellant] has not submitted materials demonstrating it complies with this AZA standard. The Department recognizes [appellant] has completed a United States Department of Agriculture Program of Veterinary Care (PVC) with [a Dr. of veterinary medicine] The PVC states [the Dr. of veterinary medicine] will make a minimum of three scheduled annual visits. . . .

[¶] . . . [¶]

2.7.2. Written, formal procedures for quarantine must be available and familiar to all staff working with quarantined animals.

Department Finding: [Appellant] has not submitted written procedures that comply with this AZA standard. This written procedure may include but is not limited to: quarantine length, personnel, protocols, and veterinary procedures to be performed. The [appellant] has not submitted sufficient material or documentation to satisfy this standard.

2.8.1. Pest control management programs must be administered in such a manner that the animals, staff, and public are not threatened by the pests, contamination from pests, or the control methods used.

Department Finding: [Appellant] has not submitted materials demonstrating it complies with this AZA standard.

[¶] . . . [¶]

7.3. There must be an adequate number of trained staff to care for the animals and to conduct the institution's programs.

Explanation: Although there is no set formula for prescribing the size of the staff, the number and type of species within the institution, the general condition of the animals and exhibits, and past staff practices may be used to define what is considered "adequate."

Department Finding: [Appellant] has not submitted documentation that demonstrates [appellant] maintains an adequate number of trained staff to care for the animals and conduct its programs.

[¶] . . . [¶]

11.2.5. Live-action emergency drills must be conducted at least once annually for each of the four basic types of emergency (fire; weather/environment appropriate to the region; injury to staff or a visitor; animal escape). Four separate drills are required. These drills must be recorded and evaluated to determine that procedures are being followed, that staff training is effective, and is that what is learned is used to correct and/or improve the emergency procedures. Records of these drills must be maintained in improvements in the procedures documented whenever such are identified.

Explanation: Emergency drills determine if institution staff are aware of emergency procedures, and understand their respective duties and responsibilities. Emergency drills enable the institution to identify potential areas that could cause problems in case of an actual emergency. . . .

Department Finding: [Appellant] has not submitted materials demonstrating it complies with this AZA standard. . . .

27. The AZA accreditation standards discussed above relate directly to the Legislature's intent to protect the public safety, and the health and welfare of animals. Appellant responded substantively to some but not all of the areas of concern expressed in the Department's letter discussed above. For example, with respect to standard 1.3.1, appellant contends that it makes no sense for it to have an ICP because it is focused on a single taxon, felidae, so there is no reason to have such a plan. The Department is not unreasonable in requiring an applicant for a permit waiver (such as appellant) to have an ICP, even though appellant keeps animals of only a single taxon. With respect to standard 2.1.1, appellant asserts that it substantially complies with the veterinary staff requirements by having two part-time veterinarians who are always on-call and a third consulting veterinarian, who on average inspect the animals more than twice-monthly as required by the AZA standard. The Department is not unreasonable in requiring appellant to have a contractual agreement requiring the veterinarians to be on site at least twice a month.

28. With respect to other areas, appellant may have more substantially addressed the Department's concerns. For example, with respect to the animal identification standard 1.4.3, appellant utilizes photographic identification of unique markings in lieu of a tattoo or microchip until the animal must be anesthetized for some other purpose. Appellant asserts

that this avoids unnecessary anesthesia, without compromising their ability to identify the animals. Appellant's assertion is supported by an affidavit from James G. Sanderson, who has studied many different species of wild cats and worked with many zoos, and is familiar with the nature of felid markings. Mr. Sanderson attests: "I can confirm that it is a scientific fact that photographs of wildcats with markings such as spots or stripes can be used to uniquely identify individual animals." (AR, Exhibit 4, p. 364.) This does not establish that appellant has satisfied standard 1.4.3; it does suggest, however, that the Department may evaluate reasonable alternatives the tattooing or microchip requirement.

Discussion

29. Appellant did not establish that its practices would protect animals and the public safety as effectively as the standards required for AZA accreditation. Nor did appellant establish that the standards the Department required are either unnecessary or unreasonable in light of the legislature's intent to protect the public safety and animal welfare. Appellant thus failed to demonstrate "justified reasons" why the Department should be required grant appellant a waiver of permit requirements.

LEGAL CONCLUSIONS

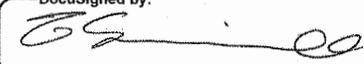
1. Appellant bears the burden of proving by a preponderance of evidence that justified reasons exist to grant a waiver of permit requirements pursuant to section 2150, subdivision (c). Unless otherwise provided by law, the standard of proof is by a preponderance of the evidence. (Evid. Code, § 115.) There is no statute, regulation, or case authority that requires a standard of proof other than a preponderance of evidence in an appeal from a denial of an application for waiver pursuant to section 2150, subdivision (c).

2. The administrative record as a whole has been considered. Taking into account the administrative record, and as set forth in the Factual Findings and Legal Conclusions as a whole, appellant has not met its burden. Appellant's request for an exemption from permitting requirements pursuant to Fish and Game Code section 2150, subdivision (c), should therefore be denied.

ORDER

The appeal of appellant Exotic Feline Breeding Compound, Inc., is DENIED.

DATED: July 22, 2016

DocuSigned by:

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TIMOTHY J. ASPINWALL
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
FISH AND GAME COMMISSION
STATE OF CALIFORNIA

In the Matter of the Appeal of:

EXOTIC FELINE BREEDING
COMPOUND, INC.,

Appellant.

Case No. 15ALJ03-FGC

OAH No. 2015061034

ORDER OF DECISION

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Fish & Game Commission (Licensing and Permits) as its Decision in the above-entitled matter.

This Decision shall become effective on _____.

IT IS SO ORDERED this _____ day of _____.

By: _____

