

STAFF SUMMARY FOR JUNE 20-21, 2018

EXECUTIVE SESSION**Today's Item****Information** ☐**Action** ☒

Executive session will include four standing topics:

- (A) Pending litigation to which FGC is a party
- (B) Possible litigation involving FGC
- (C) Staffing
- (D) Deliberation and action on license and permit items

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

During the public portion of its meeting, FGC will call a recess and reconvene in a closed session pursuant to the authority of Government Code subsections 11126(a)(1), (c)(3), and (e)(1), and Section 309 of the Fish and Game Code. FGC will address the following items in closed session:

- (A) Pending litigation to which FGC is a party
See agenda for a complete list of pending civil litigation to which FGC is a party.
- (B) Possible litigation involving FGC
None to report at the time the meeting binder was prepared.
- (C) Staffing
The executive director recently hired a new staff member serving as wildlife advisor, who started on May 30, 2018. The executive director recently hired a new staff member for the seasonal clerk position, who started on Jun 7, 2018. Effective Jun 20, one of FGC's associate governmental program analyst positions will become vacant; the position will be advertised by the time of this meeting. The legal/regulatory clerk position is currently vacant.
- (D) Deliberation and action on license and permit items
DFW filed an accusation with FGC against Aaron Lance Newman regarding permanent revocation of Mr. Newman's hunting and sport fishing privileges. Mr. Newman filed a notice of defense. FGC staff referred the matter to the Office of Administrative Hearings (OAH); OAH conducted a hearing, and submitted a proposed decision for FGC consideration (Exhibit D1).

Mr. Newman requested that FGC delay this decision until its Aug 22-23, 2018 meeting; however, Government Code Section 11517, subdivision (c) requires FGC to reach a decision on the matter within 100 days of the receipt of the proposed decision; failure to do so within that time results in the proposed decision being deemed adopted by FGC. In this case, the 100 days expires on Aug 18, 2018.

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Recommendation

- (D) **FGC staff:** Adopt the proposed decision in the adjudicatory matter of the accusation against Aaron Lance Newman that provides for permanent revocation of hunting and sport fishing privileges.

Exhibits

- D1. [Proposed decision, filed May 9, 2018](#)

Motion/Direction

- (D) Moved by _____ and seconded by _____ that the Commission adopts the proposed decision in the matter of the accusation against Aaron Lance Newman.

BEFORE THE
FISH AND GAME COMMISSION
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

AARON LANCE NEWMAN,

Respondent.

Case No. 15ALJ07-FGC

OAH No. 2017100816

PROPOSED DECISION

Administrative Law Judge Ed Washington, Office of Administrative Hearings, State of California, heard this matter on March 27, 2018, in Sacramento, California.

Staff Counsel Stephanie Mello represented the Department of Fish and Wildlife (Department), State of California.

Attorney Paul Brisso represented respondent Aaron Lance Newman, who was present throughout the hearing.

Evidence was received, and the record was left open for the parties to submit written closing briefs. The parties' briefs were received and marked as Exhibits 14 (the Department's closing brief) and D (respondent's closing brief). The record was closed, and the matter was submitted for decision on April 9, 2018.

FACTUAL FINDINGS

1. Respondent held a sport fishing license issued by the Department. Those hunting and fishing privileges were suspended by the Superior Court of Humboldt County on October 29, 2014.
2. Complainant David Bess made the Accusation in his official capacity as Chief of the Law Enforcement Division of the Department. Through the Accusation, the Department seeks to permanently revoke respondent's sport fishing and hunting privileges in the State of California, based on his criminal convictions, described below.

Respondent's Conviction

3. On October 29, 2014, in the Superior Court of the State of California, County of Humboldt, Case No. CR 1302281, respondent was convicted, upon his plea of guilty, of three misdemeanor violations of the law, as follows:

- a. One count of violating Fish and Game Code section 1053.1, subdivision (a) (unlawfully obtaining more than one license, permit, reservation, or other entitlement of the same class or more than the number of tags authorized by statute or regulation for the same license year);
- b. One count of violating Fish and Game Code section 1054, subdivision (a) (unlawfully submitting, or conspiring to submit, false, inaccurate, or otherwise misleading information on an application or other document offered by the department for any purpose, including obtaining a license, tag, permit, or other privilege or entitlement pursuant to the Fish and Game Code or its regulations); and
- c. One count of violating Section 29.16, subdivision (b), of title 14 of the California Code of Regulations (unlawfully failing to tag any abalone taken and retained in the sport fishery).

4. As a result of these convictions, the court placed respondent on three years of informal probation, and ordered him to serve one day in jail, complete 250 hours of community service and to pay \$3,416.33 in related restitution, fines, and fees. The court also prohibited respondent from possessing or obtaining a recreational fishing or hunting license in any state during the term of his probation. Respondent has successfully completed his community service commitment. On November 29, 2017, respondent's conviction was dismissed pursuant to Penal Code section 1203.4.

5. The Department permits individuals who have lost their abalone permit report card or deer tag to apply for and receive a replacement. An abalone permit report card authorizes a person to take up to 24 abalone each season. The abalone permit report card includes 24 separate areas on which a fisherman may designate when and where each abalone was taken. It also includes 24 detachable tags that must be affixed to each abalone taken. A deer tag authorizes the recipient to take and harvest a single deer in the designated hunting zone each year. The B-zone is comprised of portions of more than a dozen different counties in northern California. The X3B deer hunting zone is in the most northeastern portion of California and is comprised of the portions of Modoc County and Lassen County which border the Oregon and Nevada border. A deer tag includes a section for specifying the harvest information and method of taking, in addition to a report card portion the hunter must complete specifying the same harvest information. The report card is maintained by the hunter and the tag is attached to the animal after it is taken.

6. The incident underlying respondent's conviction occurred between April and November 2012. On April 19, 2012, respondent obtained from the Department an original 2012 B-zone deer tag authorizing him to kill and harvest a single deer in the B-zone during the B-zone hunting season. September 2, 2012 respondent killed and harvested a four-point deer under this license. On September 10, 2012, respondent went to the Eureka Fish and Game office and reported that his original B-zone license had not been used and was lost. Respondent requested a second B-zone license, and signed an affidavit under penalty of perjury stating that he lost his original 2012 B-zone deer tag. On November 26, 2012, respondent unlawfully possessed untagged abalone.¹

The Department's Evidence

7. Kristin Hubbard, an Environmental Biologist in the Department's Fort Bragg office, compiled data reflecting the number of duplicate abalone report cards issued between 2002 and 2011, and the individuals who obtained them. According to the information available to the Department, respondent had requested and obtained 11 duplicate abalone report cards from 2003 through 2011. No one else in California had received more than two duplicate abalone report cards during that same period.

8. In fall 2011, Ms. Hubbard informed Game Warden Don Powers of her research results. Warden Powers noticed that respondent had obtained more duplicate abalone report cards than anyone else on the list, and suspected that respondent was illegally obtaining duplicate abalone report cards to take more than the legal limit of abalone during a season. Warden Powers shared this information with Game Warden Matthew Well, and other game wardens, and the Department initiated a formal investigation into duplicate license requests.

9. During the investigation, the game wardens determined that pursuant to a "big game drawing," respondent had obtained a 2012 X3B zone deer tag as his first deer tag application in 2012, and had also purchased a B-zone deer tag pursuant to his second deer tag application that year. They determined that respondent had obtained a duplicate 2012 B-zone deer tag on September 10, 2012. The wardens also discovered that respondent had completed and submitted an affidavit for a 2012 duplicate abalone permit in which he certified under penalty of perjury that that he had taken seven abalone that season utilizing his original report card.

10. On November 26, 2012, the wardens served a search warrant on respondent's residence. The wardens interviewed respondent regarding his abalone fishing and deer hunting activities. Respondent told them he only had "this year's ab card" in his possession and there were no old abalone permit report cards in his home. When asked to explain why

¹ The Accusation specifies that one basis for respondent's conviction was that on August 8, 2012, respondent requested and received a duplicate abalone report card. The court documents admitted at hearing did not support that any activity occurring on August 8, 2012, formed the basis for respondent's conviction.

he had obtained so many duplicate abalone permit report cards, respondent replied "I lost a bunch of stuff." During the search, the wardens secured respondent's cell phone, digital camera, and computer, which all contained photographs of respondent and others engaged in hunting and fishing activities. The wardens discovered a set of three point deer antlers with a completed 2012 X3B zone deer tag issued to respondent in his garage. They discovered a set of four point deer antlers in respondent's living room near the fireplace that appeared "fresh," as there was dried hair and flesh attached to the skull plate. They discovered an unfilled duplicate 2012 B-zone deer tag issued to respondent. They discovered the completed report card portion of an original 2012 B-zone deer tag issued to respondent, which specified that respondent killed a four-point buck on September 2, 2012.

11. The wardens also discovered several items related to respondent's abalone fishing activities. They discovered respondent's 2009 original abalone permit report card, which reflected that respondent had secured 21 abalone as of June 3, 2009. In respondent's 2009 affidavit for a duplicate abalone permit report card, signed under penalty of perjury by respondent on June 4, 2009, he certified that he had lost his original 2009 abalone permit report card and had only secured three abalone that season using the original card. The wardens also discovered respondent's 2012 duplicate abalone report card. The wardens noted that 23 of the 24 abalone tags on the 2012 duplicate report card had been used. The wardens also discovered three frozen abalone in respondent's freezer that were untagged and had each been removed from their shells.

12. The investigating wardens obtained a copy of respondent's affidavit to support his request for a duplicate 2012 second deer tag for the B-zone. Within that affidavit, respondent certified under penalty of perjury as follows:

[Respondent] applied for and received a [2012] second deer tag for B-zone. Said license, permit, or other entitlement, has been lost or destroyed and, after making a diligent search, I am unable to find the same . . . and I hereby apply for a license, permit, or other entitlement, using this affidavit as a replacement for said notice. If the original license, permit, or other entitlement, is recovered, I agree to return it immediately to the Department of Fish and Game where it was issued. I understand that falsely applying for a license, permit, or other entitlement, or failure to return the original license, permit, or other entitlement, if recovered, is a violation of the law, punishable by a fine of up to \$1,000 and/or imprisonment in the county jail for up to six months or both the fine and imprisonment.

13. Based on all the information obtained during its investigation, the Department reported respondent's activities to the Humboldt County District Attorney's Office and recommended that he be prosecuted for multiple violations of the law. This information and recommendation led to respondent's criminal conviction, specified in Finding 3.

Respondent's Evidence

14. Respondent is a self-employed commercial fisherman and has worked in this capacity for approximately 20 years. On or about June 9, 2013, respondent was arrested for suspicion of criminal fishing and hunting activity discovered during the Department's 2012 investigation.

15. Respondent acknowledged that on September 10, 2012, he went to the Fish and Game office and obtained a duplicate B-zone deer tag. He asserted that he did not intend to obtain a duplicate B-zone tag. Instead, he intended to obtain a duplicate X3B zone deer tag, as the X3B zone season was about to begin in October. Respondent's first deer tag acquired in 2012 was his X3B zone deer tag, and the second was his B-zone deer tag. According to respondent, since the X3B zone season is second, he inadvertently asked for a duplicate of his second deer tag, when he should have asked for a duplicate for his first deer tag, since the X3B zone tag was acquired first. Because he asked for a duplicate second deer tag, he was issued a duplicate B-zone deer tag. Respondent did not notice that he had received a B-zone duplicate tag prior to departing the Fish and Game office. By the time respondent realized he had inadvertently obtained a duplicate B-zone tag rather than a duplicate X3B zone deer tag, he found his original X3B zone tag in his pickup truck. Respondent never returned the duplicate B-zone deer tag to the Department because he "thought he would look foolish." He asserted that he did not use the duplicate B-zone tag for any purpose whatsoever. He had previously taken a deer in the B-zone and had no use for the duplicate B-zone tag.

16. Respondent explained that he obtained multiple duplicate abalone permit report cards between 2003 and 2011 for several legitimate reasons. On at least three occasions his original abalone permit report card was washed away or otherwise lost to the water. Respondent recalled that on another occasion he left his original abalone permit report card in a friend's pickup truck and was unable to recover it. On another occasion his fishing equipment was stolen along with his original abalone permit report card. And, on multiple other occasions he misplaced his original abalone permit report cards due to his travels. He asserted that he completed each affidavit for a duplicate card to the best of his recollection.

17. Respondent also acknowledged that, on November 26, 2012, he had three abalone in his freezer that were not in their shells and were not tagged. He stated that the abalone were legally taken and properly tagged. However, he was unaware that they had to remain tagged once they were removed from their shells and placed in his freezer. He emphasized that the tagged and empty shells were only a few feet away from the frozen abalone when they were discovered by the wardens.

18. Respondent contends the Department should not revoke or suspend his hunting and fishing privileges because the Superior Court has already suspended his fishing and hunting privileges for the duration of his probation, and he has already paid over \$3,000 and performed 250 hours of community service based on the same conduct. Respondent also

asserted that despite his guilty plea to each of the counts specified in Finding 3 above, his conviction was due to his inadvertence and his underlying conduct was neither intentional nor reckless.

Discussion

19. The Fish and Game Commission may suspend or revoke respondent's hunting or sport fishing license or permit privileges if he has been convicted of a violation of the Fish and Game Code, its supportive regulations or provisions, and if it is established that respondent's commission of the offense(s) was done intentionally, knowingly, or recklessly. (Cal. Code Regs., tit. 14, §745.5, subd. (a).) On October 29, 2014, respondent was convicted of three counts of violating the Fish and Game Code and its supportive regulations. He unlawfully obtained multiple 2012 B-zone deer hunting permits, and obtained them by providing false, inaccurate, or misleading information to the Department. Respondent also failed to properly tag abalone taken as a result of his sport fishing activities.

20. Respondent provided several explanations for his unlawful acts at hearing. He asserted he mistakenly requested a duplicate 2012 B-zone deer tag, when he intended to request a duplicate 2010 X3B zone deer tag, because he frequently confuses one season for the other. He testified that he realized that he had inadvertently obtained a duplicate 2012 B-zone deer tag shortly after he obtained it, but did not return it to the Department as required by law because he was embarrassed. Respondent also asserted that he was not fully aware of the abalone tagging requirements when he stored abalone he caught in his freezer.

21. Respondent is a commercial fisherman with approximately 20 years of experience. He has obtained multiple duplicate sport fishing and hunting licenses during that period and should be well aware of the requirements for sport fishing, hunting, and replacing lost fishing and hunting licenses and permits. Respondent's explanations for his criminal activities were neither credible nor persuasive when considered with all the evidence presented at hearing. The evidence established that his criminal offenses were committed intentionally, knowingly, or recklessly.

22. Respondent's contention that he has already been punished in the criminal proceeding is not convincing. The form of discipline (e.g., revocation of a license) in administrative proceedings is different from the sanctions imposed in criminal proceedings (e.g., monetary fines or incarceration). (See *In Re Brown* (1995) 12 Cal.4th 205.) The goal of discipline in this case is to protect the public and protect California's at-risk fish and wildlife, not to punish the licensee.

23. When all the evidence discussed above is considered, respondent did not demonstrate that he is capable of exercising the privileges granted pursuant to a hunting license in a manner consistent with the Department's mission to manage California's diverse wildlife for the use and enjoyment by the people of the State of California. Therefore, his hunting license privileges should be permanently revoked.

LEGAL CONCLUSIONS

1. The Department has the burden of proving the existence of legal cause to permanently revoke respondent's hunting and sport fishing privileges. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320 ["[T]he DMV's burden was to prove by a preponderance of the evidence that Mann exercised the privilege of his license in derogation of the public interest".]) And it must do so by a preponderance of the evidence. (*Imports Performance v. Department of Consumer Affairs, Bureau of Automotive Repair* (2011) 201 Cal.App.4th 911, 916-917 [proceedings to discipline a nonprofessional or occupational license "are governed by the preponderance of evidence standard of proof"].)

2. Once the Department has met its burden, the burden shifts to respondent to demonstrate, by a preponderance of the evidence, that his hunting privileges should not be permanently revoked, despite the existence of legal cause to do so. (*Martin v. Alcoholic Beverage Control Appeals Board of California* (1959) 52 Cal.2d 259; *Southern California Jockey Club v. California Horse Racing Board* (1950) 36 Cal.2d 167; *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205.)

Applicable Law

3. Fish and Game Code section 1053.1, subdivision (a), provides:

A person shall not obtain more than one license, permit, reservation, or other entitlement of the same class, or more than the number of tags authorized by statute or regulation for the same license year

4. Fish and Game Code section 1054, subdivision (a), provides:

It is unlawful to submit, or conspire to submit, any false, inaccurate, or otherwise misleading information on any application or other document offered or otherwise presented to the department for any purpose, including, but not limited to, obtaining a license, tag, permit, or other privilege or entitlement pursuant to this code or regulations adopted thereto.

5. California Code of Regulations, title 14, section 29.16, subdivision (b), provides:

Tagging Requirements. An Abalone Report Card includes detachable tags that shall be used to tag any abalone that is taken and retained in the sport fishery. Any red abalone possessed by any person shall be tagged.

(1) Cardholders shall tag any red abalone either immediately upon exiting the water or immediately upon boarding a vessel,

whichever occurs first. For the purposes of this section a vessel is defined as any watercraft used or capable of being used as a means of transportation on water (reference Section 9840(a) CVC). Cardholders shall not wait to return to their vehicle, beach site or other location to tag any abalone in possession.

Exception: Cardholders who dive from a non-motorized vessel such as a kayak that is in the water may wait until immediately after disembarking from the non-motorized vessel to tag and record any abalone in possession, but shall not transfer any abalone from his or her immediate possession unless they are first tagged and recorded on the report card.

(2) The cardholder shall fill in the month, day, time of catch, and fishing location on the abalone tag, remove and completely detach the tag from the card, and affix it to the shell of the abalone.

(3) The tag shall be securely fastened to the shell of the abalone. To affix the tag, a "zip tie", string, line or other suitable material shall be passed through a siphon hole on the abalone shell and through the tag at the location specified on the abalone tag.

(4) Tags shall be used in sequential order, and shall not be removed from the report card until immediately prior to affixing to an abalone. Any tags detached from the report card and not affixed to an abalone shall be considered used and therefore invalid.

(5) No person shall possess any used or otherwise invalid abalone tags not attached to an abalone shell.

6. California Code of Regulations, title 14, section 745.5, subdivision (a), provides that the commission may suspend or revoke a person's sport fishing license or permit privileges, provided that:

(1) In a court of law the person is convicted of a violation of any provision of the California Fish and Game Code; any provision of title 14, California Code of Regulations; or any other provision of law intended to protect fish and wildlife of the State of California; and,

(2) The commission complies with the procedures set forth in section 746, title 14, California Code of Regulations; and,

(3) The hearing officer determines that person committed the offense intentionally, knowingly, or recklessly.

7. Cause exists pursuant to California Code of Regulations, title 14, section 745.5, subdivision (a), to permanently revoke respondent's hunting and fishing privileges based on his conviction, as specified in Finding 3, and as discussed in Findings 19 through 23.

8. When all the evidence is considered, respondent did not demonstrate that he is capable of exercising the privileges granted pursuant to his hunting and sports fishing licenses in a manner consistent with the Department's mission to manage California's diverse wildlife for the use and enjoyment by the people of the State of California. Therefore, his hunting and sport fishing privileges should be permanently revoked.

ORDER

Respondent Aaron Newman's hunting and sport fishing privileges are PERMANENTLY REVOKED.

DATED: May 9, 2018

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Ed Washington
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ED WASHINGTON
Administrative Law Judge
Office of Administrative Hearings