

## STAFF SUMMARY FOR APRIL 18-19, 2018

**21. EXECUTIVE SESSION**

<b>Today's Item</b>	<b>Information</b> ☒	<b>Action</b> ☒
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Executive Session will include the following topics:

- (A) Pending litigation to which FGC is a party
- (B) Possible litigation involving FGC
- (C) Staffing
- (D) Deliberation on license and permit items (none scheduled)

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

Pursuant to the authority of Government Code Section 11126(a)(1), (c)(3), and (e)(1), and Section 309 of the Fish and Game Code, FGC meets in closed session at each meeting. The purpose of executive session is to consider topics A-D as reflected on the meeting agenda.

- (A) At any stage of pending litigation, FGC may choose to take action. See agenda for a complete list of pending civil litigation to which FGC is a party; recent highlights in two of those cases are:
  - I. The California Supreme Court denied a petition for review on Mar 28, 2018 in **Central Coast Forest Assn. v. Calif. Fish and Game Commission**. With the denial, the Jan 5, 2018 decision by the Third District Court of Appeal is final, which upholds the 2004 FGC decision rejecting a de-listing petition for certain Coho salmon.
  - II. The trial court in **Pacific Star Sportfishing, LLC; Pacific Star Sportfishing, Inc. v. FGC, et al.** entered a tentative order denying a request to delay Pacific Star's suspension (see exhibit 1). At the conclusion of the Mar 28, 2018 hearing, the order became final; as a result, FGC's five-year suspension of Pacific Star's commercial sportfishing vessel permit will continue while the court resolves the legal challenge. The court also made a preliminary assessment of the ultimate resolution of the case and stated that Pacific Star "is unlikely to prevail on its claim that the Commission's" decision was wrong.
- (B) None to report at the time the meeting binder was prepared.
- (C) Staffing
  - I. One position is currently open; the senior environmental scientist (wildlife advisor) position has been advertised and interviews have been conducted. Additionally, a seasonal clerk is next in the queue for hiring and a legal/regulatory clerk is still desired if funding will permit.

**Recommendation (N/A)**

STAFF SUMMARY FOR APRIL 18-19, 2018

**Exhibits**

1. [Los Angeles Superior Court \[Tentative\] Order Denying Petitioner's Request for a Stay](#)

**Motion/Direction (N/A)**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

PACIFIC STAR SPORTFISHING, LLC, et  
al.,  
  
Plaintiff/Petitioner,  
  
vs.  
  
CALIFORNIA FISH & GAME  
COMMISSION, et al.,  
  
Defendants/Respondents.

Case No.: BS172486

[TENTATIVE] ORDER DENYING  
PETITIONER'S REQUEST FOR A STAY

Hearing Date: March 28, 2018  
Dept.: 86

Petitioners Pacific Star Sportfishing, LLC and Pacific Star Sportfishing, Inc. ("Petitioner")  
move the Court for an order staying Respondent California Fish and Game Commission's  
("Respondent" or "Commission") decision to suspend Petitioner's commercial passenger fishing  
vessel license for a period of 5 years pending judgment on the merits of the Petition. For the  
following reasons, the Court DENIES Petitioner's request to stay.

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**I. Statement of the Case**

*A. Petitioner's Evidence*

Petitioner is a corporation in the business of organizing sportfishing trips. (Petition ¶ 4.) Petitioner's sole vessel, the Pacific Star, is licensed by the Department of Fish & Wildlife (the "Department") as a commercial passenger fishing vessel. (*Id.* ¶¶ 4, 5.) On November 30, 2015, the Department filed an Accusation against Petitioner requesting that the Fish and Game Commission (the "Commission") suspend Petitioner's commercial passenger fishing license ("license") for a period of 5 years. (Petition ¶ 14, Exh. 1 ("ALJ Decision") p. 2.) An administrative hearing was held on July 18 and 19, 2017. (Petition ¶ 14.) On September 26, 2017, ALJ Heller issued his Proposed Decision. (Petition ¶ 16, Exh. 1.) The ALJ's decision found that Petitioner was "subject to disciplinary action under all of the 18 causes for discipline alleged in the Accusation. (ALJ Decision p. 11 ¶ 17.) However, the ALJ held that a five-year suspension was "extraordinarily lengthy" and "tantamount to revocation." (*Id.* p. 12 ¶ 20.) As a result, the ALJ imposed a two-year suspension, with execution stayed, and a five-year period of probation with a 90-day actual suspension. (Petition ¶ 16; ALJ Decision p. 12 ¶ 21.)

On January 2, 2018, the Commission issued its Notice of Non-adoption of the ALJ's Proposed Decision. (Petition ¶ 18.) On February 7, 2018, the Commission heard oral arguments from both sides and, after deliberation, decided to impose a 5-year actual suspension. (Petition ¶ 19.) On March 2, 2018, the Commission issued its final decision, effective March 16, 2018. (Petition ¶ 20, Exh. 2; Dratz Decl. ¶ 5.)

On March 5, 2018, Petitioner filed this petition seeking a writ of mandate ordering the Commission to set aside its decision imposing a 5-year actual suspension. On March 7, 2018, Petitioner moved ex parte to stay the Commission's decision pending trial on the Petition. In support of the application, Petitioner submitted the Declaration of Christine Bullard, the President of Pacific Star Sportfishing. (Bullard Decl. ¶ 1.) She declares that the entire crew of the Pacific Star, including the former Captain, have been replaced and are completely different than the crew

1 in 2013 when the violations of the Fish and Game Code occurred. (*Id.* ¶¶ 8, 9.) Bullard declares  
2 that the Pacific Star has not been cited for any violations since 2013. (*Id.* ¶ 10.)

3 *B. Department's Evidence*

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5 In opposition, the Department submits evidence of fishing logs submitted by Mike Bullard  
6 showing that Pacific Star took fishing trips on December 2 and December 3, 2017 and took in over  
7 200 fish. (Eres Decl. ¶ 5, Exhs. 1, 2.) However, on January 15, 2018, Mike Bullard submitted a  
8 log for the month of December reporting "No fishing activities." (Eres Decl. ¶ 6, Exh. 3.)  
9 Petitioner failed to submit any fishing logs for the months of January or February 2018. (Eres  
10 Decl. ¶ 7.) The Department also submits evidence that one of Petitioner's current captains, Mark  
11 Matthew Stober, participated in the violations leading to its license suspension. (Santos Cabral  
12 Decl. ¶ 3; Potter Decl., Exh. 4, lines 647-684.)

13 **II. Standard of Review**

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15 Petitioner seeks to stay the Commission's decision pending the hearing on the writ of  
16 mandate under Code of Civil Procedure section 1094.5(h)(1), which authorizes a court to "stay the  
17 operation of the administrative order or decision of any licensed hospital or any state agency" if  
18 "the court is satisfied that the public interest will not suffer and that the licensed hospital or agency  
19 is unlikely to prevail ultimately on the merits." However, Section 1094.5(h)(2) specifies that with  
20 respect to state agencies other than healthcare providers (such as the Fish & Game Commission),  
21 "the standard in this subdivision shall apply only when the agency has adopted the proposed  
22 decision of the administrative law judge in its entirety or has adopted the proposed decision but  
23 reduced the proposed penalty . . . ; otherwise the standard in subdivision (g) shall apply." In this  
24 case, the Commission did not adopt the proposed decision of the ALJ in its entirety or with a  
25 reduced penalty. Instead, the Commission adopted the proposed decision in part and increased the  
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1 penalty. As a result, pursuant to Section 1094.5(h)(2), the standard for granting a stay is set forth  
2 in Code of Civil Procedure section 1094.5(g), which provides, in pertinent part:

3 “(g) Except as provided in subdivision (h), the court in which proceedings under this  
4 section are instituted may stay the operation of the administrative order or decision pending  
5 the judgment of the court, or until the filing of a notice of appeal from the judgment or until  
6 the expiration of the time for filing the notice, whichever occurs first. ***However, no such  
7 stay shall be imposed or continued if the court is satisfied that it is against the public  
8 interest.***”

9 (Emphasis added.) “By its clear language, the power to stay a decision pending review which  
10 subdivision (g) grants is not absolute; the provision mandates that no stay be imposed when a stay  
11 would be against the public interest. Hence, it unequivocally requires that the superior court weigh  
12 the public interest in each individual case. This comports fully with the ‘inherent power’ of each  
13 superior court ‘to exercise reasonable control over litigation before it ....’ [Citations.]” (*Sterling  
14 v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App.3d 176, 187.)

### 15 **III. Analysis**

#### 16 **A. Granting a Stay Would Be Against the Public Interest**

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18 Petitioner contends that the Court should stay the Commission’s decision because, absent  
19 a stay, Petitioner will suffer irreparable financial harm. Christine Bullard (“Bullard”), Petitioner’s  
20 President, submits evidence that further suspension of Petitioner’s license through the summer,  
21 Petitioner’s main fishing season, would be “ruinous” to Petitioner’s business. (Bullard Decl. ¶  
22 32.) However, Petitioner’s interest in maintaining its business is a *private* interest, not a *public*  
23 interest.

24 On the other hand, both the ALJ and the Commission found that Petitioner had committed  
25 18 violations of the Fish & Game Code. These violations included fishing in restricted areas, using  
26 illegal fishing methods, failing to keep accurate records of the fish taken, and attempting to conceal  
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1 the number and type of fish taken. In light of these violations, public interest weighs against  
2 granting a stay and permitting Petitioner to continue its improper fishing practices.

3 Bullard declares that the violations for which it was suspended were all committed in 2013  
4 and since that time, Petitioner has replaced the “entire crew” and is now using a “completely  
5 different” crew. (Bullard Decl. ¶ 8.) Pacific Star now employs three captains: Matt Stober, Tino  
6 Ortiz, and Dan Connley. (*Id.* ¶ 9.) Bullard declares that since 2013, Petitioner has not been cited  
7 for any additional violations. (*Id.* ¶ 10.)

8 In opposition, the Department submits evidence that in the past few months, Petitioner has  
9 committed some of the same types of violations for which its license was suspended. For example,  
10 fishing logs submitted by Mike Bullard show that Pacific Star took fishing trips on December 2  
11 and December 3, 2017 and took in over 200 fish. (Eres Decl. ¶ 5, Exhs. 1, 2.) Yet, on January 15,  
12 2018, Mike Bullard submitted a log for the month of December reporting “No fishing activities.”  
13 (Eres Decl. ¶ 6, Exh. 3.) Petitioner also failed to submit any fishing logs for the months of January  
14 or February 2018. (Eres Decl. ¶ 7.) In addition, the Department submits evidence that one of  
15 Petitioner’s current captains, Mark Matthew Stober, participated in the violations leading to its  
16 license suspension. (Santos Cabral Decl. ¶ 3; Potter Decl., Exh. 4, lines 647-684.)

17 In reply, Petitioner explains that the fishing trips it reported in December were not  
18 commercial fishing trips covered by the license at issue. Petitioner also contends that it was not  
19 required to file reports for January and February because it did not engage in any commercial  
20 activity during those months. Petitioner’s contention is undermined by the fact that it submitted a  
21 report for December reporting “no fishing activities.” (Eres Decl., Exh. 3.) Moreover, Petitioner  
22 fails to rebut the Department’s evidence that one of its current captains, Matt Stober, was a  
23 crewmember in 2013 and was mentioned in an Arrest/Investigation Report for lying to an  
24 investigator about storing fish in the ship’s bait tank. (Santos Cabral Decl. ¶ 3; Potter Decl., Exh.  
25 4, lines 647-684.)

26 Accordingly, based on the evidence submitted, the Court is satisfied that imposing a stay  
27 would be against the public interest.  
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B. Petitioner Fails to Demonstrate a Likelihood of Prevailing on the Merits

The Court also declines to grant Petitioner's request for a stay because Petitioner fails to demonstrate a likelihood of prevailing on his claims. While not formally a factor that the Court considers in deciding whether a stay should issue under Section 1094.5(g), Petitioner's ultimate likelihood of success is relevant because there would be little reason to delay a decision without some showing that it might eventually be overturned.

In this case, Petitioner does not challenge any of the ALJ's findings or the ALJ's conclusion that Petitioner committed 18 violations of the Fish & Game Code. Petitioner challenges only the Commission's decision to impose a 5-year suspension rather than the ALJ's recommended 90-day suspension.

"The propriety of a penalty imposed by an administrative agency is a matter vested in the discretion of the agency, and its decision may not be disturbed unless there has been a manifest abuse of discretion. [Citations.]" (*Williamson v. Board of Medical Quality Assurance*, (1990) 217 Cal.App.3d 1343, 1347.) "[I]n reviewing the penalty imposed by an administrative body which is duly constituted to announce and enforce such penalties, neither a trial court nor an appellate court is free to substitute its own discretion as to the matter; *nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh.* [Citation.] Such interference . . . will only be sanctioned when there is an arbitrary, capricious or patently abusive exercise of discretion.' [Citation.]" (*Ibid.* [emphasis original].) If reasonable minds can differ with regard to the propriety of the disciplinary action, there is no abuse of discretion. (See *County of Los Angeles v. Civil Service Commission*, (1995) 39 Cal.App.4th 620, 634.)

Petitioner points out that the ALJ specifically declined to impose a 5-year suspension finding that such a suspension would be "extraordinarily lengthy" and "tantamount to revocation, given its probable financial impact." (Petition, Exh. 1 p. 20 ¶ 20.) However, the Commission found that a 5-year suspension was warranted based on the ALJ's findings indicating "systematic, intentional violations and concerted effort to hide those violations." (Petition, Exh. 2 p. 2 ¶ 4.)



1 The fact that the ALJ and Commission disagreed on the penalty to be imposed suggests that this  
2 is a case in which "reasonable minds can differ." Even if the Court agreed that a 5-year suspension  
3 is too harsh, the Court is not "free to substitute its own discretion." Given that Petitioner is not  
4 challenging any of the findings underlying the Commission's decision, Petitioner is unlikely to  
5 prevail on its claim that the Commission's imposition of a 5-year suspension was a "manifest abuse  
6 of discretion."

7 **IV. Conclusion**

8 For the foregoing reasons, the Court DENIES Petitioner's request for a stay pending trial  
9 on the merits of the Petition.  
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12 Dated: \_\_\_\_\_

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14 AMY D. HOGUE  
15 JUDGE OF THE SUPERIOR COURT  
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