

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF FORESTRY, PRIVATE FORESTRY DIVISION**

IN THE MATTER OF:) **PROPOSED ORDER**
)
BRIMSTONE NATURAL) OAH Case No.: 1403854
RESOURCES COMPANY) Agency Case Nos.: 13-SW022, 13-SW023 &
) 13-SW024

HISTORY OF THE CASE

On July 29, 2014, the Oregon Department of Forestry, Private Forestry Division (ODF) issued a Notice of Civil Penalty to Brimstone Natural Resources Company (Brimstone). On August 13, 2014, Attorney James Dole filed a Request for Hearing on Brimstone's behalf. On August 25, 2014, Mr. Dole filed Brimstone's Answer (Denials and Statement of Claims and Defenses).

On September 8, 2014, ODF referred the hearing request to the Office of Administrative Hearings (OAH). The OAH initially assigned the matter to Senior Administrative Law Judge (ALJ) Dove Gutman, but later reassigned the case to ALJ Rick Barber. During a prehearing conference held on November 5, 2014,¹ the parties scheduled the hearing for January 8, 2015, and set up a schedule for filing a Motion for Summary Determination.

Motion for Summary Determination. Assistant Attorney General Matt DeVore filed ODF's Motion for Summary Determination on November 17, 2014, and Mr. Dole filed Brimstone's Response on December 12, 2014. Thereafter, the matter was taken under advisement. On December 31, 2014, ALJ Barber issued a Ruling on Motion for Summary Determination, which is incorporated herein by this reference.

Pursuant to the Ruling, the violations previously established and affirmed in the Final Order in OAH Case 1303445 (having to do with wrongfully cutting down trees within the Riparian Management Area (RMA)), are established in this case by application of the doctrine of issue preclusion. Although the ultimate issue in this case is the penalty assessment, the sub-issues remaining to be tried are: the finality of Case 13-SW022 and the appropriate value of the various factors that the administrative rules require ODF to consider when determining the amounts of penalties.

Hearing. Hearing was held as scheduled on January 8, 2015, in Salem, Oregon. Mr. DeVore represented ODF, and Mr. Dole represented Brimstone. ODF Policy Analyst Angie Lane was ODF's authorized representative, and John West was Brimstone's authorized representative. ODF called the following witnesses: Stewardship Foresters Stephen Wetmore

¹ ALJ Monica Whitaker convened the prehearing conference in ALJ Barber's absence.

and Tyson Schultz; ODF Forest Practices Field Coordinator Brad Knotts; and Ms. Lane. Brimstone presented the testimony of Mr. West. The hearing record closed on January 8, 2015.

ISSUE

Whether, given Brimstone's three violations of the Forest Practices Act in cases 13-SW022, 13-SW023 and 13-SW024, it should be assessed a civil penalty in the amount of \$4,950.

EVIDENTIARY RULING

Exhibits A1 through A32, offered by ODF, and Exhibit R1, offered by Brimstone, were admitted into evidence without objection.

FINDINGS OF FACT

The Previous Hearing

1. On September 25, 2013, ODF issued three citations to Brimstone. Citation 13-SW022 charged Brimstone with failing to file a written plan for the operation at Brimstone Gulch. (Ex. A6). Citation 13-SW023 charged Brimstone with removing four trees within 20 feet of the high water level of Brimstone Gulch, a Medium Fish stream. (Ex. A7). Citation 13-SW024 charged Brimstone with removing 45 trees, ranging in age from 75 to 135 years, from the RMA, and failing to retain 30 live conifer trees in the RMA. (Ex. A8). On October 17, 2013, Brimstone requested hearings on all three citations, but did not pursue the hearing request on 13-SW022.² (Ex. A10).

2. In the Proposed Order written after the hearing held on November 21, 2013, ALJ Dove Gutman concluded that Brimstone committed the violations in 13-SW023 and 13-SW024. On January 15, 2014, ODF issued a Final Order which incorporated ALJ Gutman's decision. (Ex. A27).

The Penalty Notice

3. On July 29, 2014, ODF issued its Notice of Civil Penalty to Brimstone, based upon the three violations issued on September 25, 2013. The Notice stated in part:

A civil penalty is assessed against Brimstone Natural Resources Co. in the amount of **\$4,950.00**. This penalty is calculated using a formula set out in administrative rule (OAR 629-670-0210). The rule describing how the formula is applied is in Attachment 1. The formula is $\$B(CxP) + (\$B \times D \times R)$, where:

Case No. 13-SW022

² The evidentiary record in this case does not reflect an actual withdrawal of the hearing request in 13-SW022, but it is inferred in ALJ Gutman's Proposed Order, which only addressed the other two cases. At hearing on January 8, 2015, Mr. Dole confirmed that Brimstone did not pursue its hearing request in 13-SW022.

1. The base fine (\$B) is \$100.00 for violation of OAR 629-605-0170(2). [see OAR 629-670-0210(2)(a)]
2. The cooperation value (C) is 1 because Mr. West followed the direction of ODF and there was no unsatisfactory condition to correct for this administrative violation. [See OAR 629-670-0210(3)(b)]
3. The prior knowledge value (P) is 2 because Mr. West had specific correspondence from ODF about the required practice involved before the violation. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 0 because there is no resource damage from an administrative violation. [See OAR 629-670-0210(5)(a)]
5. The repair value (R) (extent of damage that cannot be corrected or prevented in the future) is not applicable because the damage value is 0. [See OAR 629-670-0210(6)].

$$\$100.00 (1 \times 2) + (\$100 \times 0 \times 0) = \$200.00^3$$

Case No. 13-SW023

1. The base fine (\$B) is \$250.00 for violation of OAR 629-640-0100(2)(b). [see OAR 629-670-0210(2)(E)]
2. The cooperation value (C) is 2 because Mr. West [neglected] to take necessary and timely action to repair damage or correct an unsatisfactory condition. [See OAR 629-670-0210(3)(c)]
3. The prior knowledge value (P) is 2 because Mr. West has had significant past experience with the practice involved in the violation. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 15 because the damage is the result of harvest or destruction of all the trees or snags required to be maintained; and is major in relative effect, with self restoration taking much more than 10 years. [See OAR 629-670-0210(5)(e)]
6. The repair value (R) (extent of damage that cannot be corrected or prevented in the future) is 1 because repairs have not been completed (a due date of February 28, 2014, was set for repairs. [See OAR 629-670-0210(6)].

$$\$250.00 (2 \times 2) + (\$250 \times 15 \times 1) = \$4,750.00$$

Case No. 13-SW024

1. The base fine (\$B) is \$250.00 for violation of OAR 629-640-0100(2)(b). [see OAR 629-670-0210(2)(E)]
2. The cooperation value (C) is 2 because Mr. West [neglected] to take necessary and timely action to repair damage or correct an unsatisfactory

³ At hearing, I told Ms. Lane that ODF had miscalculated the penalty on 13-SW022. It was the ALJ who was incorrect.

- condition. [See OAR 629-670-0210(3)(c)]
3. The prior knowledge value (P) is 2 because Mr. West has had significant past experience with the practice involved in the violation. [See OAR 629-670-0210(4)(c)]
 4. The damage value (D) is 15 because the damage is the result of harvest or destruction of all the trees or snags required to be maintained; and is major in relative effect, with self restoration taking much more than 10 years. [See OAR 629-670-0210(5)(e)]
 7. The repair value (R) (extent of damage that cannot be corrected or prevented in the future) is 1 because repairs have not been completed (a due date of February 28, 2014, was set for repairs. [See OAR 629-670-0210(6)].

$$\$250.00 (2 \times 2) + (\$250 \times 15 \times 1) = \$4,750.00$$

$$\text{Total Penalty Assessment: } \$200.00 + \$4,750.00 + \$4,750.00 = \$9,700.00$$

The Civil Penalty Administrator has the discretion to combine violations for the sake of assessing reasonable penalties as stated in OAR 629-670-0214. Because the violations resulted from the same practice and the same damage, and it is in the best interest of the public, the violation for Case No. 13-SW023 and the violation for Case No. 13-SW024 will be combined into one penalty of \$4,750.00.

$$\text{Revised Total Penalty Assessment: } \$200.00 + \$4,750.00 = \$4,950.00$$

(Ex. A28; italics and nonsequential numbering in original).

4. On August 13, 2014, Brimstone filed a request for hearing on the Notice of Civil Penalty. (Ex. A30). On August 25, 2014, Brimstone denied that it committed the three violations and claimed that Brimstone Gulch was not a Medium Type F (fish-bearing) Stream. (Ex. A31).

Other Factors

5. The designation of a stream's fish-bearing status is made by the Oregon Department of Fish and Wildlife (ODFW), and ODF is bound by that designation in determining whether a stream is a fish-bearing stream. (Test. of Schultz). Because the ODFW information about the types of stream is somewhat complex, ODF office staff members are not allowed to give out information about the type of stream to people at the front desk. (Test. of Wetmore).

6. On November 25, 2014, Brimstone prepared and submitted a Plan for Alternate Practice to ODF. (Ex. R1, Attachment 4). ODF staff working on the case had often times worked with alternate practice plans for matters such as clear cuts or zoning changes, but had never seen an alternate practice plan requested for mining. As a result, ODF staff did not discuss the possibility of an alternate plan with Brimstone until the matter came up at the hearing in November 2013. (Test. of Schultz, Wetmore). West first heard about the ability to file for an

alternate plan at the November 21, 2013 hearing. (Test. of West). Wetmore asked West to put his plan in writing in May 2014 so it could be considered by ODF. (Test. of Wetmore).

7. The FPA requires a plan for alternate practice to be filed within 12 months of the alleged violations. Although the alternate practice need not be completed within 12 months, ODF will look to see if there has been reasonable progress in its development. In this case, Wetmore spoke with West in May 2014 and asked for something in writing about his alternate plan. If he had received the writing within the 12 month period (from the date of the violations), he would have considered the plan as reasonable progress. Having received the plan after the 12 month period, ODF is currently processing it but does not consider Brimstone to have established reasonable progress in the interim. As a result, ODF has included costs of repair in its penalty calculations. (Test. of Wetmore).

8. Wetmore first came to know West in approximately 2003, when West's company, Silver Creek Timber, was cited for failure to file a written plan and for harvesting trees within the RMA. West did not appeal the citation in 2003. (Test. of Wetmore).

9. Wetmore met with West on May 21, 2013 to correct an error in a previous notification, which had listed Brimstone Gulch as a Class D (Small) Fish-Bearing stream. Wetmore told West it was a Type F (Medium) Fish-Bearing stream, and provided written notice as well. (Ex. A24 at 7; Test. of Wetmore). Wetmore never told West that the stream was other than a fish-bearing stream. (Test. of Wetmore).

CONCLUSIONS OF LAW

Brimstone should be assessed a civil penalty in the amount of \$4,950.

OPINION

As the proponent of the position that Brimstone must pay civil penalties for the three violations, ODF has the burden of proof. ORS 183.450(2). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *reversed* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987). The burden of proof encompasses two burdens, the burden of production of evidence in support of an assertion, and the burden to persuade the fact-finder that the facts asserted are true. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000).

ODF has already established that Brimstone committed the three violations. Because 13-SW022 (the failure to file a plan) became final by operation of law, and because the other two violations are established by issue preclusion, ODF need not present further evidence on those matters. The Motion for Summary Determination found that Brimstone was precluded from contesting the violations in this second proceeding.

Although Brimstone was allowed some latitude in presenting its evidence and arguing its

case, certain of its claims at hearing were equally precluded by the previous hearing. A notable example is Brimstone's insistence that Brimstone Gulch is not a Type F Medium Fish-Bearing stream. Judge Gutman's order, as affirmed by the Board, clearly found that Brimstone Gulch is a Type F stream, and that matter will not be relitigated here.

Brimstone contends that what West was told about the type of the stream is important in determining Brimstone's (that is, West's), mental state at the time of the violations. Because "prior knowledge" is one of the criteria for setting a penalty amount, there is some relevance to the distinction drawn, and Brimstone was allowed to present its evidence. However, the preponderance of the evidence shows that West knew it was a Type F stream at the time he committed the violations.

The violations occurred in September 2013. Wetmore testified that he told West in May 2013 that Brimstone Gulch was a Type F stream, correcting a previous notification that it was a Type D stream—also fish-bearing. Exhibit A24 documents the information given to West in May 2013.

West testified that he was unaware of the Type F designation, that Wetmore had not told him it was a Type F stream, and that he had been told by ODF office staff members that the fish habitation stopped at a railroad bridge downstream. However, there is no corroborating evidence to support his testimony.

West testified that "Val" and "Jake" at the front desk told him Brimstone Gulch was not fish-bearing, but he did not bring either person to testify on his behalf. Wetmore testified that ODF personnel were not authorized to give out the designation of a stream at the front desk at ODF.

Given the affirmative evidence presented by Wetmore, and the lack of corroborative evidence by West, I conclude that West's testimony on this point is not accurate. He could not have been under the misapprehension that Brimstone Gulch was anything other than a Type F stream. Even if the two staff members had violated ODF policy and given West incorrect information, the alleged conversation would have been before Wetmore gave him the correct information, both written and orally, on May 21, 2013.

Calculating the Penalty

OAR 629-670-0210 sets forth the formula for calculating penalties in ODF cases. It states in part:

Amount of Civil Penalties

- (1) The amount of civil penalty per violation shall be the lesser of \$5000 or the amount determined by the formula $\$B(C \times P) + (\$B \times D \times R)$ where:
 - (a) \$B is a base fine established by type of violation in section (2) of this rule;
 - (b) C is cooperation;
 - (c) P is prior knowledge or prior violations;

(d) D is damage to protected resources; and

(e) R is the extent of damage that cannot be corrected, or prevented in the future, even though repairs are made.

Using this formula, ODF determined that Brimstone should be penalized in the amount of \$200 for the failure to file a written plan, and \$4,750 for each of the more serious violations. ODF then exercised its discretion to combine the serious violations, assessing only one penalty for both of the serious violations.

Base Penalty. Utilizing the same administrative rule, ODF determined the base penalty as follows:

(2) The base penalty value (\$B) shall be established as follows:

(a) A base penalty of \$100 shall be applied to violations of a type where the operator fails to notify the State Forester of intent to operate or fails to submit a required written plan or obtain written approval of a plan for an alternate practice.

(b) A base penalty of \$250 shall be applied to:

* * * * *

(E) All other violations of forest practice rules or statutes not specifically described in section (2) of this rule.

Under this rule, the failure to submit a written plan has a \$100 base penalty and the two violations of the FPA have a base penalty of \$250. Brimstone does not contest the base penalty, and ODF correctly applied the rule to determine the base penalty.

Cooperation Value. ODF determined that the cooperation value on the written plan violation was 1 because West followed ODF's instructions and there was no unsatisfactory condition to correct. It determined West's cooperation value on the more serious violations to be 2 because he failed to take necessary and timely action to correct the unsatisfactory condition. The rule states:

(3) The cooperation value (C) shall be determined by the State Forester after reviewing whether the operator is taking all feasible steps or procedures necessary or appropriate to correct the violation for which the penalty is being assessed. The value shall be assigned as follows:

(a) A value of 0.5 shall be assigned when, in the judgment of the State Forester, the operator takes substantial initiative to correct the damage or problem that led to the violation. Substantial initiative may include, but is not limited to, reporting the violation before it is discovered, initiating effective repairs without having to be directed, or making substantive changes in operating procedures designed to identify and avoid potential recurrences.

(b) A value of 1 shall be assigned when the operator cooperates in following the direction of the State Forester by immediately ceasing further violation and taking

prompt action to repair damage or correct any unsatisfactory condition where deemed feasible by the State Forester.

(c) A value of 2 shall be assigned when the State Forester determines that the operator does not immediately cease further violation, is evasive upon attempts to make necessary communications, or neglects to take necessary and timely action to repair damage or correct any unsatisfactory condition.

Determining this value gets at the crux of Brimstone's case in this second proceeding. While there is no dispute that Brimstone did not take "timely action to repair damage," Brimstone contends that there is nothing to repair because, once the alternate plan is approved the area will be exempt from the FPA and subject instead to mining regulations.

The question, however, is whether the timing of the alternate plan—that is, the lateness of its filing—precludes its consideration in the penalty calculation. Relying on OAR 629-610-0090(3), ODF contends that Brimstone needed to make "reasonable progress" in making repairs. The rule states:

Exemption from Reforestation for Land Uses Not Compatible with Forest Tree Cover

(1) A landowner, through a plan for an alternate practice, may request all, or portions of, an operation area be exempted from the reforestation requirements for the purpose of developing forestland for a use that is not compatible with the maintenance of forest tree cover. Approval of a plan for an alternate practice shall be obtained for such an exemption from the State Forester and shall only be granted for the smallest land area necessary to carry out the intended change in land use. Reforestation shall be required on the portions of operation areas not directly involved in the land use change.

(2) In seeking approval of the plan for an alternate practice, the landowner shall provide written documentation to the State Forester which establishes:

(a) The specific portion of the operation area necessary for the proposed change in land use;

(b) The intended change in land use and the incompatibility of the land use with forest tree cover;

(c) The intended change in land use is authorized under local land use and zoning ordinances, and all necessary permits and approvals have been obtained, or will be obtained within 12 months following the reduction in tree stocking; and

(d) The county assessor and local planning department have been notified in writing of the proposed change in land use.

(3) Reasonable progress towards the change in land use, as determined by the State Forester, shall be made within 12 months of the completion of the operation. Evidence of reasonable progress towards a change to an agricultural use may

include activities such as stump removal, cultivation, fencing, and planting or seeding of crops or pasture. Evidence of reasonable progress towards a change to a use involving building a structure may include activities such as stump removal, excavation, and construction.

Under this rule, if Brimstone had filed a plan for alternate practice with ODF, it would have considered that filing to be "reasonable progress." A timely filing would have affected both the cooperation and the repair values in this calculation. However, ODF contends that Brimstone's alternate practice plan was filed too late to be considered reasonable progress in the repair orders.

Brimstone contends that it could not file its alternate practice plan within a year of the violations because ODF never told Brimstone about plans for alternate practice. ODF agrees that it did not mention such plans because none of the foresters had ever dealt with a plan to convert forest land to mining. However, that does not answer the timeliness question in this case.

West testified that he did not know about plans for alternate practice until the hearing before ALJ Gutman on November 21, 2013. Using the violation dates as the start of the 12-month period noted in the rule, West would still have had ten months to file the plan. With that knowledge, and with Wetmore's coaching to West to give him something in writing in May 2014, West still waited and did not file within 12 months. Even if the first knowledge at the hearing is used as the starting date, it was more than a year after the hearing before Brimstone actually filed its plan for alternate practice.

I conclude that Brimstone's delay in filing the plan was not reasonable progress under the rule, and that ODF correctly determined the cooperation value (and the other values to be addressed below).

Prior Knowledge. ODF assigned a value of 2 for prior knowledge on all of the violations. On the administrative violation, ODF had given Brimstone notice that he needed to file a written plan. On the other two violations, ODF noted West's "significant prior experience" with the practices involved in the violation. The rule states:

(4) The prior knowledge value (P) shall be determined by the State Forester after reviewing department records of citations, operation notification or operation inspections. A value from 0.5 through 10 shall be assigned as follows:

(a) A value of 0.5 is appropriate when the operator has little or no prior knowledge of the Oregon Forest Practices Act but has cooperated in ceasing violation and correcting unsatisfactory conditions.

(b) A value of 1 is appropriate when the operator has general knowledge of the Oregon Forest Practices Act and rules, but has not had significant past experience with the practice in question, or has significant past experience with the practice, but the violation is determined by the State Forester to be inadvertent or accidental.

(c) A value of 2 is appropriate when the operator has had significant past experience with a practice or condition, or has had specific correspondence or conversation with department personnel about the required practices or actions

involved in the violation, before the violation.

(d) A value of 4 is appropriate when the State Forester has issued a written statement of unsatisfactory condition to the operator for the violation and timely corrective action was not taken.

(e) A value from 3 through 5 is appropriate when the operator has received citations for any other forest practice rule or statute within the past three years.

(f) A value from 5 to 10 shall be assigned when the operator has been cited within the past three years for a violation of the same forest practice rule, statute, or condition; or in a case of failure to comply with an order to cease further violation, or order to repair damage, or order to correct an unsatisfactory condition (ORS 527.680(2)).

OAR 629-670-0210. The evidence at hearing shows that West was cited for similar violations in approximately 2003, and that he was made aware of the fish-bearing status of the stream. ODF's assignment of a value of 2 is appropriate.

Damage Value. The administrative rule states:

(5) The damage value (D) shall be determined by the State Forester as a measure of extent or relative adverse effect of damage. The specific value applied shall be based on the pre-operation condition of the site, if known, the severity and extent of damage associated with the violation, and any potential economic gain to any involved operators. The damage value should be consistent with the policy of deterring future violations. A value from 0 through 20 shall be assigned. The following shall guide the State Forester's determination:

(a) A value of zero shall be assigned when the violation has not resulted and will not result in resource damage.

(b) A value of 1 shall be assigned when the adverse effects of the violation left uncorrected are minor and the affected resources will naturally self-restore within one year. Example: Siltation from exposed soil flows into the upper reaches of a stream, but the site will naturally revegetate within the next growing season, preventing further siltation.

(c) A value from 2 to 5 shall be assigned when the damage from the violations left uncorrected is more serious than described in subsection (b) of this section, but the affected resources will self-restore naturally within five years. Examples: A small volume debris avalanche is caused by road construction material placed in an unstable location and the debris comes to rest in a fish-bearing or domestic use water; or logs are skidded across a stream without an adequate temporary crossing leaving ruts and disturbed soil areas that will flow muddy water directly into the stream.

(d) A value from 5 through 10 shall be assigned when the damage from the violation left uncorrected is major in relative effect, with natural self-restoration

taking up to 10 years. A consideration in selecting a value from 5 to 10 may include, but is not limited to the size of the area affected. Examples: Failure to reforest five acres may be assigned no less than a 5, while failure to reforest 50 acres may be assigned a 10. Removal of understory vegetation along 500 feet of a small stream may be assigned a 10.

(e) A value from 5 through 20 shall be assigned when damage is the result of harvest or destruction of trees or snags required to be maintained; or when the damage from the violation left uncorrected is major in relative effect, with self-restoration taking more than 10 years. Example: Severe riparian management area soil disturbance, combined with the total harvest or destruction of what had been a fully stocked stand of trees required to be maintained, along more than 500 feet of a small stream may be assigned a factor of 20.

OAR 629-670-0210.

The damage value is determined by comparing the way the property was before the violation and the changes caused by the violation. Here, Brimstone removed several trees that were between 75 and 135 years old. Subsection (e) applies, because self-restoration of those trees would clearly take more than ten years. ODF selected a value of 15 based upon its analysis of the loss. I conclude that 15 is a reasonable damage value; the restorative time would be far more than the ten years, but was not as egregious as the example cited in the subsection for a value of 20. The value of 15 is appropriate and is supported by the evidence.

Repair Value. The same administrative rule states:

(6) The repair value (R) shall be assigned by the State Forester as a measure of the relative extent of the damage that is corrected or prevented through timely corrective action. The value shall be set by the State Forester between 0 and 1, inclusive and expressed as a decimal. The decimal indicates the degree of damage that already occurred and future damage that cannot be prevented, even after the repairs are completed as directed in the repair order. Example: A tractor crossed a stream with no temporary structure, breaking the stream banks down, leaving exposed skid trails which eroded, creating turbidity, and leaving visible sediment in the stream. With no repairs, the stream bank and skid trails would revegetate in 4 years. The landowner performed all repairs as ordered, including mulching, placing rip-rap, and building waterbars. In the State Forester's judgement, compliance with the repair order will prevent all but 20% of the potential damage expected over the next 4 years. Therefore R equals 0.20. If repairs are not feasible or are not completed, R equals 1.0.

In the administrative violation, the repair value is zero because there is nothing to repair. ODF has assigned a full value of 1 for the serious violations because the repairs had not been undertaken or completed.

As with the previous discussion of cooperation, Brimstone contends that its plan for alternate practice, once approved, would obviate any need for repair. However, that is not the issue here. The repair order is already final. The repair value under the rule addresses the

penalty, not the repair itself. Because no repairs had been undertaken, and because no "reasonable progress" was shown under OAR 629-610-0090, ODF appropriately set the repair value at 1.

Calculation. ODF assessed a \$200 penalty for the administrative violation and, using the factors noted above, concluded that the penalty for one of the serious violations would be \$4,750. The calculations of that penalty are correct and need not be repeated here.

ODF decided to combine the penalty for the two more serious violations, and to assess just one penalty of \$4,750. Adding that penalty to the administrative penalty, the total penalty Brimstone must pay is \$4,950, as set forth in ODF's Notice.

ORDER

I propose that the Department issue the following order:

That the Notice of Civil Penalty issued on July 29, 2014 be AFFIRMED.

Rick Barber

Administrative Law Judge
Office of Administrative Hearings

EXCEPTIONS TO PROPOSED ORDER

If this proposed order is adverse to you or to the agency, you or the agency may file exceptions within seven days after the date of the filing of the proposed order with the board if no other time is specified. Exceptions must be filed with the agency. Please send any exceptions to:

Angie Johnson, Civil Penalties Administrator
Department of Forestry, Private Forest Division
2600 State Street, Bldg D
Salem, OR 97310

The exceptions shall be confined to factual and legal issues that are essential to the ultimate and just determination of the proceeding, and shall be based only on grounds that:

1. A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record;
2. A necessary legal conclusion is omitted or is contrary to law or the board's policy; or
3. Prejudicial procedural error occurred.

The exceptions shall be numbered and shall specify the disputed finding, opinions or

conclusions. The nature of the suggested error shall be specified and the alternative or corrective language provided.

After the board has received and reviewed the proposed order and the exceptions, if any, the board may:

1. Entertain written and/or oral argument if the board determines it is necessary or appropriate to assist the board in the proper disposition of the case. If allowed, oral argument will be limited to matters raised in written exceptions and shall be presented under time limits determined by the board chair;

2. Remand the matter to the ALJ for further proceedings on any issues the board specifies, and to prepare a revised proposed order as appropriate, under OAR 137-003-0655(2);

3. Enter a final order adopting the recommendations of the ALJ; or

4. Enter an amended proposed order or final order that modifies or rejects the recommendations of the ALJ. If the board decides to modify or reject the proposed order, the board must comply with OAR 137-003-0655 and 137-003-0665.

RECONSIDERATION AND REHEARING

Under the provisions of OAR 137-003-0675, you may file a petition for reconsideration or rehearing of the final order with the board within 60 calendar days after this order is served. Any such petition shall set forth the specific grounds for reconsideration or rehearing and the remedy sought. The petition may be supported by a written argument. Under OAR 629-001-0050, you must file a petition for reconsideration as a condition for further appeal.

APPEAL

You may appeal by filing a petition for judicial review with the Oregon Court of Appeals within 60 days following the date the final order on reconsideration or rehearing is issued, or within 60 days following denial of the request for reconsideration or rehearing. See Oregon Revised Statutes 183.480 *et seq.*

CERTIFICATE OF MAILING

On February 3, 2015, I mailed the foregoing Proposed Order issued on this date in OAH Case No. 1403854.

By: First Class Mail

James Dole
Attorney at Law
Watkinson Laird Rubenstein
1246 NE 7th Street Ste B
Grants Pass OR 97526

Angie Lane
Department of Forestry, Private Forests
2600 State Street, Bldg D
Salem OR 97310

Matthew DeVore
Assistant Attorney General
Department Of Justice
1162 Court Street NE
Salem OR 97301-4096

Lucy Garcia
Administrative Specialist
Hearing Coordinator