

<b>Agenda Item No.:</b>	D
<b>Work Plan:</b>	Administrative Work Plan
<b>Topic:</b>	Final Orders
<b>Presentation Title:</b>	Final Order – Brimstone Natural Resources Company
<b>Date of Presentation:</b>	March 4, 2015
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### SUMMARY

The purpose of this agenda item is to consider the hearing record for the notice of civil penalty involving several forest practices violations by Brimstone Natural Resources Company, and to make a decision on the proposed final order regarding the matter.

### CONTEXT

The *Forestry Program for Oregon's Strategy A* recognizes the importance of promoting a sound and effective legal system as well as ensuring that Oregon's forests continue to provide a diverse suite of social and economic outputs and benefits (Strategy B). Citations and repair orders for violations of forest regulations are part of an effective enforcement program that meets these objectives by changing behaviors to comply with best management practices designed to promote a multitude of forest outputs and benefits.

### BACKGROUND

In September of 2013, an Oregon Department of Forestry Department stewardship forester discovered that Brimstone Natural Resources Co. or its agents had installed a stream crossing through Brimstone Gulch without a written plan, removed four trees from within twenty feet of Brimstone Gulch and removed 45 trees from the riparian management area of the same creek. Citations and repair orders were issued on September 25, 2013 for the following violations:

- Violation of ORS 527.630(3) and 629-605-0170(2), no repair order issued (Administrative violation).
  - *Written plan requirements in general and written plan requirements for operations near Type F and Type D streams.*
- Violation of OAR 629-640-0100(2)(b), repair order issued.
  - *General vegetation retention prescription for Type F streams; specifically all trees shall be retained within 20 feet of the high water level. Repairs include minimum number of trees to be planted and seed and spacing recommendations. Trees must be planted by February 28, 2014.*

- Violation of OAR 629-640-0100(5), repair order issued.
  - *General vegetation retention prescription for Type F streams; specifically retention of at least 30 live conifer trees per 1000 feet along medium streams. Repairs include minimum number of trees to be planted and seed and spacing recommendations. Trees must be planted by February 28, 2014.*

John West of Brimstone Natural Resources Company appealed the repair orders on October 17, 2013. A hearing was conducted by an administrative law judge (ALJ Dove Gutman) on November 21, 2013; Matt Devore, Assistant Attorney General for Department of Justice, represented ODF because legal argument surrounding mining laws, specifically jurisdiction of Oregon Forest Practices Act over mining activities, was claimed by the respondent. ALJ Gutman issued the proposed final order on December 19, 2013, and the Board issued a final order on January 15, 2014 supporting ALJ Gutman's conclusion that the Orders to repair be affirmed.

On July 29, 2014, the Oregon Department of Forestry issued a Notice of Civil Penalty for the violations referenced above. Repairs were not completed as ordered, hence, the Repair Value in the civil penalty calculation was the highest value that could be assigned. The District recommended combining penalties for two of the violations. A total penalty amount of \$4,950.00 was issued.

On August 13, 2014, Attorney James Dole filed a Request for Hearing on Brimstone's behalf.

On September 8, 2014, ODF referred the hearing request to the Office of Administrative Hearings (OAH). The OAH initially assigned the matter to Senior ALJ Dove Gutman, but later reassigned the case to ALJ Rick Barber per a request from the respondent's attorney to change ALJs.

The hearing was held on January 8, 2015, in Salem, Oregon. Mr. DeVore represented ODF, and Mr. Dole represented Brimstone. ODF Policy Analyst/Civil Penalty Administrator Angie Lane was ODF's authorized representative, and Mr. West was Brimstone's authorized representative.

On February 3, 2015, ALJ Barber issued a Proposed Final Order for the Board's consideration. In the Order, ALJ Barber concluded that Brimstone should be assessed a civil penalty in the amount of \$4,950.00 and ordered the Notice of Civil Penalty issued on July 29, 2014 be affirmed.

The Board may schedule oral or written argument if it is determined to be necessary or appropriate to assist in making a decision. According to OAR 629-001-0045(3)(a), the Board may only take argument from the State Forester and any party that filed exceptions to the proposed order, with such argument being limited to matters raised in those written exceptions. The deadline for written exceptions was February 11, 2014. Neither party submitted exceptions.

### **ALTERNATIVES CONSIDERED**

Upon review of the amended proposed order and record presented in this case, the Board can:

1. Remand the matter to the hearing officer for further hearing on such issues as the Board specifies and to prepare a revised proposed order as appropriate under OAR 137-003-0655(2); or
2. Reject the hearing officer's proposed order and adopt a different final order that contains the necessary findings of fact and conclusions of law based on the record; or
3. Adopt the proposed order as the Board's final order.

The Department supports alternative 3.

### **RECOMMENDATION**

Adopt the proposed order in Attachment 1 as the Board's final order (alternative 3).

### **ATTACHMENTS**

- (1) Proposed Final Order
- (2) Respondent Exhibit (R1) 14 pp. *Available upon request.*
- (3) Agency Exhibits (Exhibits A1 and A32) 145 pp. *Available upon request.*