

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

In the Matter of	)	<b>AMENDED<sup>1</sup> PROPOSED</b>
	)	<b>ORDER</b>
	)	
	)	
	)	
<b>JOHN &amp; MARIAN FORD</b>	)	OAH Case No. 700114
	)	Agency Case No. 06-CN020

On June 26, 2007, the Oregon Department of Forestry (Department) served a Notice of Civil Penalty on John and Marian Ford (Ford).<sup>2</sup> Ford filed a request for hearing on the notice, and the matter was referred to the Office of Administrative Hearings (OAH) on July 11, 2007. The matter was set for hearing but the hearing was postponed because the Department issued an Amended Notice of Civil Penalty on September 26, 2007. The hearing was then rescheduled for December 11, 2007.

On October 31, 2007, the Department filed a Motion for Partial Summary Determination, seeking to bar Ford from relitigating issues decided in a previous case heard by ALJ Thomas Ewing. After presentation of written argument by the Department and Ford, the motion was granted in a written decision dated December 4, 2007.

Hearing was held on December 11, 2007, as scheduled, with Administrative Law Judge Rick Barber presiding. Ford was present, representing himself, and testified in the hearing. Lanny Quackenbush represented the Department. Shannon Loffelmacher and Sandy Middleton testified on behalf of the Department. The record closed at the end of the hearing.

**EVIDENTIARY RULINGS**

Exhibits A1 through A10 were admitted into evidence without objection. At Ford's request, the Motion for Partial Summary Determination (including its exhibits) and my Order Granting Partial Summary Determination are included as exhibits. They are received as Exhibits A11 and A12, respectively. In addition, although not specifically mentioned in the hearing, I am marking Ford's response to the motion as Exhibit A13, and admitting it as well to complete the record. If anyone objects to the inclusion of Exhibit A13 in the evidentiary record, that objection must be made in writing within 7 days of the date of this order.

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<sup>1</sup> The prior order has been amended to include the proper exceptions language. The prior order was incorrect and should be discarded.

<sup>2</sup> I use the name "Ford" (in the singular) to designate both respondents in this case because only John Ford appeared in the proceedings.

In addition to the exhibits, I have designated several documents as “record” documents. These documents, identified at the hearing, include procedural documents and several pieces of correspondence from Ford about matters that lack relevance to the civil penalty issue before me. The documents are not considered evidence, nor were they offered into evidence, but are included to explain the procedural context of the case if there was any appeal.

Finally, among the documents filed by Ford in this case was a “Request for Immediate Agency Review of ALJ Barber Granting Partial Summary Determination and Denial of Legal Right to Another ALJ.”<sup>3</sup> When the matter was brought up during the hearing, I ruled that the motion was not relevant to our proceeding because it did not address the issues contemplated in OAR 137-003-0640, the rule addressing immediate agency review. On December 14, 2007, after the record closed in this proceeding, the Department issued a “Ruling on Request for Immediate Agency Review,” denying the request. Although that matter is not relevant to the issues before me, I have included the Department’s ruling among the non-evidentiary “record” documents, again for completeness of the documentary record.

## ISSUE

Whether Ford must pay a \$500 civil penalty for failing to replant his forestland as required by law.

## FINDINGS OF FACT

1. Ford clear-cut timber from his land and did not replant the land within 24 months. Ford was cited for failing to replant the clear-cut forestland. (Ex. A1). A hearing was held before ALJ Tom Ewing on June 14, 2006. Judge Ewing determined that Ford failed to replant his forestland within 24 months of completion of harvesting, in violation of the Forest Practices Act. (Ex. A3). Ford did not appeal the Final Order to the Court of Appeals, or failed to perfect such an appeal.

2. ALJ Ewing’s decision required Ford to replant the forestland on or before May 1, 2007. After that date, Shannon Loffelmacher was assigned the task of determining whether replanting had taken place. She was given instructions not to enter Ford’s property. Loffelmacher telephoned Mrs. Ford, who told her that the land had not been replanted and that the property had been sold. Loffelmacher researched the sale of the land by going onto the Linn County website, and then provided her information to Sandy Middleton. (Test. of Loffelmacher).

3. Middleton reviewed the information received from Loffelmacher to determine if a civil penalty for failing to replant was appropriate. Middleton did not at

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<sup>3</sup> A Motion to change the ALJ assigned to the case was filed after the decision was reached on the summary determination motion, and was denied by the Chief ALJ’s designee, Presiding Judge William Halpert, on December 10, 2007. The ALJ decision is among the “record” documents previously mentioned.

that time believe that Ford's real property had been sold because there was no deed that she could find. The Department determined that a civil penalty of \$5,000 was appropriate, and issued a notice to that effect on June 26, 2007. (Ex. A4). Ford requested a hearing. (Ex. A5).

4. The Department later received a copy of the Warranty Deed showing there had been a transfer of the property. With the transfer verified, the Department recalculated the civil penalty. (Test. of Middleton).

5. By rule, the Department uses a formula for determining the amount of the civil penalty. The formula [ $\$B (C \times P) + (\$B \times D \times R) = \text{the civil penalty}$ ] contains variables including the base fine (B), the cooperation factor (C), the prior knowledge factor (P), the damage factor (D) and the reparability factor (R). The Department determined that the base fine in this case was \$250, the cooperation value was 1, the prior knowledge value was 2, the damage value was 10, and the reparability value was zero. The damage value was determined based upon an informal policy, different than the administrative rule, that set the damage at five (5) for parcels below five acres, and at ten (10) for parcels above five acres. The Fords' land was approximately 12 acres. (Test. of Middleton). An Amended Notice was served on Ford on September 26, 2007. (Ex. A9).

### CONCLUSION OF LAW

Ford must pay a \$500 civil penalty for failing to replant his forestland as required by law.

### OPINION

**Scope of Hearing Issues.** Although the sole issue in this case is the Department's assessment of a civil penalty against Ford, Ford has contended from the outset that there are other issues that must be addressed in this proceeding. He sought to relitigate the underlying issues from the previous hearing, but was not allowed to do so based upon the doctrine of issue preclusion, as addressed in the Order Granting Partial Summary Determination.<sup>4</sup> Ford also contends there are issues concerning the legitimacy of the Office of Administrative Hearings (OAH),<sup>5</sup> and sought to subpoena the Governor, the Attorney General, the Speaker of the House and the President of the Senate to the hearing, among others, to discuss his concerns. The subpoena requests were denied on the basis of relevance.

Ford also sought to present evidence about the original civil penalty notice, which initially assessed a penalty of \$5,000. That notice was superseded by the Amended Notice, and the penalty reduced to \$500, so I determined that matters concerning the basis and computation of the first notice were not relevant. Finally, Ford was concerned

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<sup>4</sup> The Motion, Order and arguments addressing the issue preclusion matter may be found in Exhibits A11, A12 and A13.

<sup>5</sup> Ford believes the OAH's orders are without legal effect because it allegedly acted without having an oversight committee at one point.

about matters of possible trespass and the stress he had been feeling because of the litigation process. Once again, I informed him that I could not address those issues, and that the only issues I could resolve concerned the propriety of a civil penalty and the amount of such a penalty.

**The Civil Penalty.** The issue to be resolved in this case is whether Ford must pay a civil penalty for his failure to replant the forestland that he clear-cut. OAR 629-610-0040 states in part:

- (1) The time period for compliance with the reforestation rules begins at the completion of the operation or 12 months after tree stocking has been reduced, whichever comes first.
- (2) The landowner shall begin reforestation, including any necessary site preparation, within 12 months when reforestation is required.
- (3) *The landowner shall complete planting or seeding within 24 months unless a plan for an alternate practice for natural reforestation has been approved by the State Forester.*

(Emphasis added). Ford's initial failure to replant the land, and the necessity for him to do so, were the issues decided by Judge Ewing in the first hearing. That decision is now final.

The civil penalty allegation arises from Ford's failure to meet the requirements of Ewing's decision on or before May 1, 2007. The Department presented evidence to show that the forestland had not been replanted before May 1, 2007, the deadline set in Judge Ewing's previous decision. There was no evidence to the contrary. I therefore conclude that Ford did not comply with the previous order to replant the land. I must now determine whether a civil penalty is appropriate and, if so, the amount of the penalty. As the proponent of the position that a penalty is owed, the Department has the burden of producing evidence in support of its position. ORS 183.450(2).

OAR 629-670-0210 is the rule that the Department must apply to determine if a civil penalty is appropriate, and to determine the amount of the penalty. The Department clearly set forth the formula in its Amended Notice, and I quote it at length here:

The formula is  $\$B (C \times P) + (\$B \times D \times R)$ , where:

1. The base fine ( $\$B$ ) is \$250.00 for violation of OAR 629-610-0040(3) [see OAR 629-670-0210(2)(b)(A)].
2. The cooperation factor ( $C$ ) is 1 because Mr. and Mrs. Ford no longer own the property in violation [see OAR 629-670-0210(3)(c)].
3. The prior knowledge or prior violation factor ( $P$ ) is 2 because Mr. and Mrs. Ford had correspondence or conversation with

Department of Forestry personnel previous to the violation regarding the required practices or actions involved in the violation [see OAR 629-670-0210(4)(c)].

4. The damage factor (D) is determined to be 10 because the State Forester has determined that damage to affected resources is major and extensive [see OAR 629-670-0210(5)(e)].
5. The reparability factor (R) (extent of damage that cannot be corrected or prevented in the future) is determined to be zero because Mr. And Ms. Ford no longer have control of property to effect repairs [see OAR 629-67—0210(6)].

(Ex. A9 at 2-3). I will address each factor of the penalty computation to determine what the appropriate civil penalty is in this case.

**Base Penalty.** Relying upon the rule, the Department determined that the base penalty<sup>6</sup> in this case should be \$250. The “base penalty” is established by reference to the type of violation involved. The rule states in part:

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

\* \* \* \* \*

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

(A) *Violations of any rule or statute which requires or sets standards for accomplishing reforestation.*

(B) *Violations involving a failure to comply with the terms or conditions of any order of the State Forester issued in accordance with ORS 527.680.*

OAR 629-670-0210 (emphasis added). Ford violated the Department’s order requiring reforestation, and the appropriate base penalty is \$250.

**Cooperation Factor.** Subsection (3) of 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

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<sup>6</sup> The Department uses the phrase “base fine” while the rule refers to “base penalty.” I consider both terms to refer to the variable, \$B, noted in the rule and in the Amended Notice of Civil Penalty, but I will use the language of the rule.

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.

The Department assigned a value of one (1) for the cooperation factor in this case, primarily because the Fords sold their land and no longer own the property. Given the time periods involved, as well as the difficulties dealing with Ford on this issue, the Department could well have assigned a value of two (2) on the cooperation factor. Nevertheless, I will affirm the value, as assigned.

**Prior Knowledge.** Subsection (4) addresses the prior knowledge factor, for which the Department in this case assigned a value of two (2). The subsection 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(4) (emphasis added).

The Department contends that two (2) is the appropriate value because of the previous communications between Ford and its personnel. Ford did not present any evidence on the issue. The Department has established that the appropriate P value is two (2).

**Damage Factor.** There was a dispute about the damage factor in this case, primarily because of a clerical error in the Department's worksheet, called a Civil Penalty Assessment Sheet, prepared by Middleton. Although the D factor was given a value of ten (10) by the Department, Middleton mistakenly typed a zero on her worksheet, then later handwrote a one in front of it, making it a ten (10). Updated copies were provided at hearing, so that all parties had the exact same document. (Ex. A8). Although Ford was suspicious about the changed document, the actual application of the D factor in this case is nullified because of the reparability factor, below.

Nevertheless, I will briefly address the rule's requirements for determining damage. Subsection (5) of 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 (emphasis added). Middleton testified that she applied an informal method for determining the damage value, rather than using the method found in the rule, when she gave the value of ten to the damage factor.

This damage factor is the only area in the computations used by the Department where a question arises, primarily because there is a specific rule that sets forth how the value is to be determined. That method, set forth in the rule above, must be followed. Listening to Middleton's testimony, the method actually used may in fact be more reasonable than the administrative rule. However, as long as the administrative rule remains, the Department must abide by it.

In this case, however, the damage value is a non-issue because, as will be seen, the mathematic calculations based upon the facts of this case effectively cancel out any value for damage. These calculations will be discussed at length after my review of the last factor.

**Reparability Factor.** The Department determined that the reparability factor in this case was a zero because of the subsequent transfer of the real property from Ford to the new owner. The rule states:

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.

OAR 629-670-0210(6) (emphasis added).

Once again, the record reflects that the Department was generous with Ford on this issue. The rule, as written, does not clearly provide for a zero value upon a conveyance of the property. Arguably, there could be a value attached based upon the time needed to repair the clear-cut land, without regard to whether such repair is currently possible. However, since the Department has assigned a zero (0) value to the factor, I will affirm that value.

**The Department's Calculations are Correct.** The Department described the factors in the Amended Notice, and then set forth the calculation in this particular case, as follows:

$$\mathbf{\$250.00(1 \times 2) + (\$250.00 \times 10 \times 0) = \$500.00}$$

(Ex. A9 at 3). In the first half of the addition equation, the base penalty of \$250 is multiplied by two, equaling \$500. In the second half of the equation, the product is zero because any number multiplied by zero equals zero.<sup>7</sup> Thus, the equation looks like this when the multiplication matters are completed:

$$\mathbf{\$500 + 0 = \$500}$$

Based upon the evidence presented in the hearing, I conclude that the civil penalty of \$500 is appropriate under the rule and should be assessed.

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<sup>7</sup> Therefore, as previously discussed, the actual damage factor—no matter what it might be under a correct interpretation of the rule—would be zeroed out by the zero value for reparability.

## ORDER

I propose that the Department issue the following order:

That the Amended Notice assessing a civil penalty of \$500 be AFFIRMED.

Rick Barber

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Administrative Law Judge  
Office of Administrative Hearings

ISSUANCE AND MAILING DATE: December 31, 2007

## EXCEPTIONS

The proposed order is the administrative law judge's recommendation to the Oregon Board of Forestry. If a party disagrees with this proposed order, the party may file exceptions within seven (7) days of the date of this proposed order. Exceptions must be filed with the Oregon Board of Forestry.

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.

## FINAL ORDER

After the board has received and reviewed the proposed order and the exceptions, if any, the board may 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. The board will issue the final order in this case. The final order may remand the matter to the Administrative Law Judge for further proceedings on any issues the board specifies; enter a final order adopting the recommendations of the Administrative Law Judge; or enter an

amended proposed order or final order that modifies or rejects the recommendations of the Administrative Law Judge. *See* OAR 137-003-0665.

**APPENDIX A  
LIST OF EXHIBITS CITED**

- Ex. A1            ODF Citation dated May 5, 2006
- Ex. A3            Final Order, OAH Case 128623
- Ex. A4            Notice of Civil Penalty dated June 26, 2007
- Ex. A5            Ford request for hearing
- Ex. A8            Civil Penalty Assessment Sheet
- Ex. A9            Amended Notice of Civil Penalty dated September 26, 2007
- Ex. A11          Motion for Partial Summary Determination (including exhibits)
- Ex. A12          Order Granting Partial Summary Determination
- Ex. A13          Ford Response to Motion

**CERTIFICATE OF MAILING**

On December 31, 2007, I mailed the foregoing Amended Proposed Order in OAH Case No. 700114.

By: First Class and Certified Mail

Certified Mail Receipt #7006 0100 0002 2811 1184

John & Marian Ford  
40360 S Cedar Mill Rd  
Lyons OR 97358

By: First Class Mail

Sandy Middleton  
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Lanny Quackenbush  
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Pam for Lucy Garcia  
Administrative Specialist  
Hearing Coordinator