

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

IN THE MATTER OF:) PROPOSED ORDER
)
ROSE LOGGING INC.) OAH Case No.: 1504353
) Agency Case No.: 14-CN021 and 14-CN022
)
ATR SERVICES INC.) OAH Case No. 1504354
) Agency Case No.: 14-CN019 and 14-CN020

HISTORY OF THE CASE

On September 15, 2015, the Oregon Department of Forestry, Private Forests (Department or ODF) issued a Notice of Civil Penalty; Findings of Fact; Proposed and Final Order in Case Nos 14-CN021 and 14-CN022 to Rose Logging, Inc. (Rose Logging). Also on September 15, 2015, ODF issued a Notice of Civil Penalty; Findings of Fact; Proposed and Final Order in Case Nos 14-CN021 and 14-CN022 to ATR Services Inc. (ATR). On October 1, 2015, Michael E. Hagland, Attorney at Law, requested a hearing on behalf of both Rose Logging and ATR (Respondents). On October 12, 2015, Mr. Hagland filed a Statement of Claims and Defenses on behalf of Respondents.

On October 15, 2015, ODF referred both hearing requests to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Bernadette H. Bignon was assigned to preside at hearing on both matters.

On January 21, 2016, ODF issued Amended Notices in both cases. ALJ Bignon held a telephone prehearing on January 22, 2016. Mr. Hagland appeared on behalf of Rose Logging and ATR. Angela Lane, authorized representative, appeared for ODF. At the prehearing, the parties' joint request to consolidate the matters for hearing was granted. The parties agreed to deadlines for exhibits and witness lists, and the matter was set for hearing to be held on April 13, 2016 at the Eugene offices of the OAH.

On April 12, 2016, Respondents ATR and Rose Logging each filed Amended Statements of Claims and Defenses, including additional claims and defenses not raised previously by Respondents.

A hearing was held on April 13, 2016, at the OAH offices in Eugene, Oregon. Ms. Lane, authorized representative of ODF, accompanied by Keith Baldwin, appeared on behalf of ODF. Mr. Hagland appeared on behalf of Respondents, accompanied by Greg Demers, for ATR Services, Inc., and Mel McDougal, for Rose Logging. The following testified at hearing: Keith

Baldwin, Department Field Coordinator; Bernard Bochsler, retired ODF Stewardship Forester; Scott West, ODF Stewardship Forester (at the time of the violations); Greg Demers, President, ATR Services, Inc.; and Angela Demers.

At the close of the evidentiary hearing on April 13, 2016, deadlines were set for filing final arguments. Following timely receipt of the parties' final arguments, the record closed on April 25, 2016 and ALJ Bignon took the matter under advisement.

ISSUES

1. Whether ATR Services, Inc. violated the Forest Practices Act, in Department Case Nos. 14-CN019 and 14-CN020, by:

- failing to submit to the State Forester a written plan prior to performing forest operations that required notification under OAR 629-605-0140, and within 100 feet of a Type F stream; in violation of OAR 629-605-0170(2), ORS 527.610; and
- failed to design and construct a stream crossing to pass a peak flow that at least corresponds to the 50-year return interval, in violation of OAR 629-605-0170(2); OAR 629-625-0320(2)(a); and ORS 527.610.

2. If so, whether ATR Services, Inc. is liable for a civil penalty of \$ 800.00 in Case No. 14-CN019 and \$2025.00 in Case No. CN020 for a total civil penalty amount of \$2,825.00 as proposed by ODF. ORS 527.683 through .687 and 527.992; OAR 629-670-0210.

3. Whether Rose Logging, Inc. violated the Forest Practices Act, in Department Case Nos. 14-CN021 and 14-CN022, by:

- failing to submit to the State Forester a written plan prior to performing forest operations that required notification under OAR 629-605-0140, and within 100 feet of a Type F stream, in violation of OAR 629-605-0170(2), ORS 527.610; and
- failed to design and construct a stream crossing to pass a peak flow that at least corresponds to the 50-year return interval, in violation of OAR 629-605-0170(2); OAR 629-625-0320(2)(a); and ORS 527.610.

4. If so, whether Rose Logging, Inc. is liable for a civil penalty of \$400.00 in Case No. 14-CN021 and \$1,025.00 in Case No. CN022, for a total civil penalty in the amount of \$1,425.00, as proposed by ODF. ORS 527.683 through .687 and 527.992; OAR 629-670-0210.

5. Whether ODF is estopped from assessing penalties against ATR, Logging, Inc., and/or Rose Logging, Inc. for failing to file a written plan based on an alleged waiver by ODF of the requirement for a written plan.

EVIDENTIARY RULINGS

Exhibits A1 through A24, offered by ODF, and R1 and R2, offered by Respondents, were admitted into the record without objection.

The Findings of Facts as stated in the Amended Notices for both Rose Logging and ATR Services, Inc. and as admitted in Respondents' Amended Statements of Claims and Defenses are included below with the corresponding citations to the Amended Notices.

Keith Baldwin, as offered by ODF, qualifies as an expert in the field of ODF's practice and procedure, and compliance with the Forest Practices Act. (Test. of Baldwin; Ex. A23.)

FINDINGS OF FACT

(1) On August 4, 2014 Angela Demers, of ATR Services, Inc. submitted a notification, NOPA #2014-582-00393, for a clear cut harvest, and associated road construction on 24 acres of farmland located in Sections 10 and 11, Township 9 South, Range 3 West, Willamette Meridian, in Marion County, Oregon. The operator listed on the notification that Ms. Demers filed was "ATR Services Inc./Rose Logging." (Amended Notice, Findings of Fact, paragraph 1.)

(2) Ms. Demers noted on the notification that the landowner and timber owner was Delbert Erb; however Mr. Erb noted "McDougal-Demers had the timber right * * *." She also noted on the notification that the operation would occur within 100 feet of a lake or a stream, as noted by checking the appropriate box in the *Site Codes - Water* section of the form. (Amended Notice, Findings of Fact, paragraph 2.)

(3) Greg Demers has worked over 25 years in the timber industry. He currently works in timber acquisitions, primarily for Oregon Land Company, LLC. (OLC). Demers is the president of, and has financial interests in, ATR Services, Inc. He also has interests in ATR Land, Frontier Resources, and Willamette Water Company. OLC solicits contacts from interested landowners through different means, including mailings to landowners at addresses acquired through a public records search. OLC receives contacts from landowners who are interested in timber harvesting and who have received the solicitations. (Test. of G. Demers.)

(4) Del Erb, landowner and timberowner, contacted OLC after one such mailing. (Test. of G. Demers.) After the initial contact, as is his practice and habit, Demers met with Erb and began to perform his due diligence. Due diligence includes research through multiple sources to find any issues, *i.e.* high landslide/high water level or protected species habitat, that might affect the ability to complete the timber harvest or the cost of the operation. (Test. of G. Demers.)

(5) Among other things, under Notice and Permit Type, Ms. Demers checked box 2A on the form which was next to the following text:

Notice to the State Forest that an operation will be conducted on lands described here (ORS 527.670). **15 day waiting period required, unless waived.**

Ms. Demers also checked box 2C on the form which was next to the following text:

Notice to the State Forester and the Dept. of Revenue of the **intent to harvest timber** (ORS 321.550).

(emphasis in original) (Ex. A1, at 1.)

(6) Ms. Demers completed the form for the operator. Where space was provided for “Operator Information (Person/and or company conducting the operation),” she named “ATR Services, Inc./Rose Logging” as the business name, with the mailing address of “PO Box 876, Veneta, OR, 97487, and provided the phone number. (Ex. A1 at 1.)

(7) Ms. Demers provided Delbert Erb’s name and address as the individual landowner and as the timber owner/taxpayer. (Ex. A1 at 2.) She indicated the activity would be clear-cut/overstory removal of 24 acres, from the ground and from “other” (no further explanation given). The estimated MBF (1000 board feet) to be removed was approximately 425. Ms. Demers the operator expected to reconstruct 1,000 feet of an existing road, using a backhoe and excavation. (Ex. A1 at 3.)

(8) Ms. Demers indicated the operation had an estimated start date of July 30, 2014 and an estimated end date of December 31, 2014. (Ex. A1 at 3.) Where the form required one box be completed in each of the following sections: for Waters, Ms. Demers indicated the site was “W100 Within 100’ of any lake or stream, (a channel that carries flowing surface water during some time of the year); for Topography (over the steepest third of the operation), Ms. Demers indicated the site was “T1 Slope of 0% to 35%; and for Soil, Ms. Demers indicated the site was “S1 No evidence of mass soil movement (slips, landslides, etc.) (*Id.*)

(9) During August of 2014, Bernard Bochsler, acting ODF Stewardship Forester, was working for Joe Arbow, who was on assignment to fire duties. (Test. of Bochsler.) Prior to his retirement in 2008, Bochsler worked over 29 years for ODF, including approximately 15-years as a forest steward supervisor. In his position as a stewardship forester, Bochsler’s primary duties included monitoring compliance with FPA and fire practices act. (Test. of Bochsler.) Bochsler had also held positions in state lands timber-sale layout, state lands timber sales contract administrator, forest practices/stewardship forester, private-forest training officer, and private-forest budget manager for ODF. He currently works as a forestry practices consultant and educator with the Oregon Forestry Institute, and Oregon Associated Loggers, teaching forestry practices, rules, and current updates. (Test. of Bochsler.) .

(10) On August 6, 2014, Bochsler received the notification for the Miller Creek project. (Test. of Bochsler; Ex. A1 at 1-6.) As is his practice, Bochsler reviewed the notification which had been completed by the operator or the operator’s representative. The operator had completed the notice for an operation that required a 15 day waiting period, unless waived; and notice to the State Forester and Department of Revenue that the operator intended to harvest timber. Mel McDougal was listed as the representative to be contacted in the event of a fire emergency. ATR Services and Rose Logging were listed (with address and telephone number) as the operator(s) for the notification/permit. (Test. of Bochsler; *Id.*)

(11) As indicated in the notice, the proposed operation was for clear-cut removal, it would require road reconstruction, and work within 100 feet of a stream. Bochsler reviewed the location

information for the site and confirmed that the work would impact Miller Creek, a medium fish stream (Type F). (Test. of Bochsler; Ex. A1.)

(12) Information on the topography of the proposed site is essential in determining what resources might be impacted by the work. Bochsler, as was his habit and practice, did not do a site visit. He reviewed the information submitted by the operator, including the project location indicated on the tax map and aerial photograph overlaid with tax plat information which were attached to the notification. The operator had added demarcations on both the map and the photograph to show the project location. (Test. of Bochsler; Ex. A1 at 5, 6.)

(13) After reviewing the notification, Bochsler circled "Stat. WP" on the form to indicate that the proposed work, by statute, required a written plan. Under "Regulated Use Area" Bochsler wrote: medium fish stream - Miller Creek. (Test. of Bochsler; Ex. A1 at 4.) He added two handwritten numbered notes on requirements for the project as follows:

1. prior to any activity within 100 ft of stream a written plan is required.
2. any activity with (*sic*) 300 ft of State Hwy (I-5) right-a-way (*sic*) - requires [compliance] with the Scenic Highway Rules.

Bochsler issued the Forest Activity Inspection report with his handwritten notes on August 6, 2014. (*Id.*)

(14) On August 7, 2014, after speaking to Greg Demers, who spoke for the operators, Bochsler gave approval to put rock on the areas of the road in the reconstruction project which were located outside of the protected zone. Bochsler gave permission to put rock on the road for a limited waiver after the operator clarified that a part of the project, outside of the protected stream area, required use of only spot rocking for maintenance purposes. He issued a second handwritten Forest Activity Inspection report documenting the waiver of the 15-day waiting period as follows:

Waiver to begin operations beyond 100 ft of Miller creek and beyond 300 ft of Scenic Hwy (I-5) right-of-way.

Ok to put additional rock on road without a written plan.

(Test. of Bochsler; Ex. A2 at 2.) Bochsler issued the second notice to the operator later that day, August 7, 2014, the day after he issued the original inspection report. (*Id.*)

(15) Rock placement for any reason, if there is a possibility that it will affect a fish passable regulated stream, requires a written plan. (Test. of Bochsler.)

(16) Per standard operating procedure, after receiving the change request form, ODF sent a copy of the SF Operation Report for Notification No. 201458200393 to Rose Logging as the operator, as well as to Erb as the land and timber owner. (Test. of Baldwin; Ex. A3 at 2.)

(17) Bochsler called the contact number on the notification plan to discuss the fish stream and potential for a written plan. He also discussed the fact that the harvest operation area was outside the scenic buffer. (Test. of Bochsler.)

(18) Per Department procedure, administrative staff reviewed the notification, including Bochsler's notes, and processed the information into ODF's data base. The staff then generated an SF operation report for the stewardship forester responsible for that area. (Test. of Bochsler; Ex. A1 at 7.) Between the two listed operators, ATR Services and Rose Logging, Bochsler used the first company, Rose Logging, in his handwritten reports. The report, dated August 7, 2014, was based on the information submitted by the operator and the comments by the forester. It is sent to the operator, the landowner, and the timber owner. The report included Bochsler's notes regarding a written plan requirement because of Miller Creek and compliance with the scenic highway designation of I-5. (*Id.*)

(19) As of August 6, 2014 Notification review, Demers had a signed contract with Erb. Demers signed the contract as a representative of OLC but not an operator for purposes of the timber work. Demers did not contract to repair the culvert. Demers contracted to perform for the work to be done within Department requirements. (Test. of G. Demers.)

(20) Demers does not have an ownership interest in Rose Logging or McDougal Brothers. When Demers directed his daughter to file the Notification, he did not know at that point which logging company would perform the contract work. (Test. of G. Demers.)

(21) At the time the contract closed on September 8, 2014, the timber deed was closed in the name of McDougal Brothers, Inc. Demers has an agreement to receive one-third of the profits if a contract that he negotiated closes. He acts on behalf of either Rose Logging or ATR Services, Inc., when negotiating contracts. During the conversations with Department personnel, Demers did not state which party, if either, he was acting on behalf of. (Test. of G. Demers.)

(22) On September 17, 2014, ODF received a *Request to Change or Transfer*, signed by Angela Demers, indicating that the operator for NOAP #,2014-582-00393 be changed from ATR Services, Inc. to Rose Logging. (Amended Notice, Findings of Fact, paragraph 4.) Bochsler was not working for ODF when the September 22, 2014 change form was received. (Test. of Bochsler.)

(23) On September 23, 2014, the change of operator was processed and a report showing the details submitted as part of the notification in August, including types of activities that would be conducted and the requirement for a written plan, was sent to Rose Logging. (Amended Notice, Findings of Fact, paragraph 5.)

(24) Rocking began around the end of September. Demers did not do the rocking and is not sure who did do the rocking. (Test. of G. Demers.)

(25) On October 25, 2014, Erb emailed a complaint with ODF. Erb wrote, among other things, that he had hired a logging company to log part of his timber, that the logger had a permit and was expected to put in 600 feet of base rock and replace the culvert that was washed out, and he did not believe the culvert work met ODF's specifications. (Ex. A5 at 1.) Erb attached pictures showing the affected culvert he had taken a few days before some recent rain. (*Id.*)

(26) On October 26, 2014, Joe Arbow, replied to Erb's email, and provided contact information for Scott West, ODF forest steward for the affected area at that time. (Test. of West; Ex. A5 at 1.)

(27) West holds a bachelors of science degree in forest management from Oregon State University. He has additional training in related areas, including but not limited to, Forest Law I, II, and III from ODF. West began work for ODF as a seasonal employee in 1990. Following 5 years of seasonal work in various areas, he was hired full-time as a state forester. He later made a lateral transfer to a state steward assigned to the Lyons unit from the beginning of 2014 until the end of 2014, when he moved to his current position in the Cascades Unit. West, in his current position as the Acting Mollala Unit Forester, North Cascade District, supervises 3 forest stewards, in addition to oversight of the fire and the grants programs. (Test. of West.)

(28) At the time of the citations at issue, West was assigned to the Lyons Unit. He had been out on a fire earlier in the summer of 2014, and was on another fire when Joe Arbow received the transfer notification. He was not involved with the proposed work or notification until he received the email from Arbow. After receiving Arbow's email, West took over the investigation. (Test. of West; Ex. A5.)

(29) After receiving the complaint, West spoke with Erb. He also discussed the complaint with his supervisor, Russ Lane, and Keith Baldwin, Forest Practices Field Coordinator for ODF. (Test. of West, Baldwin.)

(30) On October 29, 2014, West, accompanied by Lane, and Baldwin, went to the site to inspect the culvert on Miller Creek. The road leading into the site from Enchanted Way was marked with a sign for Rose Logging. (Test. of West; Ex. A6 at 3.) On the site map submitted with the Notification, the access road as marked is visible crossing Miller Creek to reach the logging site. (Test. of West; Ex. A1 at 6.)

(31) West and the others observed that the crossing over Miller Creek had been reconstructed. West also saw timber had been felled and observed logging equipment out on the operation from Rose Logging. (Test. of West.) The timber operation was in the area indicated on the notification maps, a part located across the haul road at approximately one-third down on the area marked on the map. Only a part of the proposed timbering had been done. (*Id.*; Ex. A1 at 6.) In West's opinion, without the reconstruction work, the culvert would have been impassable for the passage of the logging equipment to perform the work that he saw on the site. (*Id.*)

(32) West observed that the culvert was too small and was restricting the stream flow. He took measurements of the culvert and found that it did not meet the 50-year peak flow requirement. (Test. of West; Ex. A6 at 3.)

(33) West observed pooling on the inlet side of the Miller Creek culvert (Ex. A6 at 4) and the flow exiting the culvert on the outlet side (*Id.*, at 5). (Test. of West.) The flow exiting the outlet was a fraction of the water ponding on the inlet side due to the inadequate culvert size. (Test. of West.)

(34) West also saw cribbing of logs on the road surface where it crossed the culvert at Miller Creek. (Test. of West; Ex. A6 at 5.) Cribbing of logs is a common practice where logs along a road section are placed to prevent movement or to hold back material from moving down a slope. In West's experience, he has seen multiple logs placed, such as those on the culvert crossing, to hold back material. He has also seen logs placed during logging operations on road edges which are used as a visual guide to highlight the edge of the driving surface for log truck

drivers. When used as guide logs, West has seen mostly one log, maybe two. Based on his experience, West opined that the multiple logs placed on the edges of the Miller Creek culvert were placed as cribbing and not as guide logs. (Test. of West.)

(35) Several feet of new rock had been placed over the culvert. The new rock was a different color than the rest of the material underneath it, which was weathered and darker, indicating to West that the work had been reconstruction rather than new construction. The nature of the work was also not considered “maintenance;” work involving an inch up to possibly four inches of new gravel placement. (Test. of West and Baldwin; Ex. A6 at 5.)

(36) Over the culvert, material had “raveled” or moved down the slope from where rock had been placed above the culvert. The material had partially blocked the stream flow on the outlet side of the culvert. The material was the same as that placed on top of the culvert. (Test. of West and Baldwin; Ex. A6 at 5.)

(37) West returned to his office and examined the maps that had been submitted with the August 6, 2014 Notification. West found that there was no written plan on file for the Miller Creek crossing, and that the culvert did not meet the 50-year peak flow requirements. (Test. of West; Ex. A6 at 3-4.) West contacted Erb and his supervisor Russ Lane with his findings following his investigation. Erb told West that he had a contract with ATR and Greg Demers and his company, and that the contract required the contractors to ensure that work on the crossing over Miller Creek would be sufficient to comply with the FPA. (Test. of West.)

(38) On October 29, 2014, West issued citations to Rose Logging and to ATR Services for failing to submit a written plan before conducting an operation, as required for a stream that is within 100 feet of a Type F or Type D stream (Miller Creek being a medium Type F stream) (Ex. A7 at 3, A8 at 3) and for failing to design and construct stream crossing to pass the peak flow corresponding to the 50-year return interval. (Test. of West; Ex. A7 at 4; A8 at 7.)

(39) West also issued Orders to Cease Further Violation and to Repair Damage or Correct Unsatisfactory Condition Caused by Violation. (Test. of West; Exs. A7 at 4, 7, A8 at 4, 7.) The Orders to Repair issued to both ATR and to Rose Logging regarding failure to file a written plan directed the named parties to “Submit a written plan prior to any further operations within 100 feet of Miller Creek (Medium Type F stream)” to be completed on or before October 30, 2014. (Exs. A7 at 4, A8 at 4.)

(40) The Orders to Repair issued to both ATR and to Rose Logging regarding the insufficient stream crossing included the following requirements:

You are hereby directed to take the following action to repair damage or correct the unsatisfactory condition resulting from violation of OAR 629-625-0320(2)(a):

- Remove culvert and associated fill material from Miller Creek (Medium Type F stream).
- Shape stream crossing approaches to natural contour.
- Seed and mulch exposed soil on approaches.

- Place removed fill material in a stable location outside of the Riparian Management Area.
- Minimize sedimentation delivery into Miller Creek during repairs.

Such action is to be completed on or before November 3, 2014.

(Test. of West; Exs. A7 at 7, A8 at 7.)

(41) All Orders to Cease and to Repair issued in this matter included language informing “any operator, timber owner, or landowner affected by a finding or order of the State Forester” of the right to appeal and the deadline and requirements for doing so. The affected party is also informed that the notice becomes a final order unless the named party files a timely written request. (Test. of West; Exs. A7 at 4, 7, A8 at 4, 7.)

(42) On October 31, 2014, Demers confirmed with West that he had received the citations and intended to have the work done as soon as possible. Demers’s conversations with West and the email correspondence indicated that the McDougals were involved with the operation and the planned repairs. (Test. of West; Ex. A9.)

(43) Demers does not regularly submit written plans but he was the individual operating on behalf of the interests involved. Demers acted as a conduit for information between West and the operators. He did not inform West at the time the citations were issued that ATR Services, Inc., was not involved in the project. (Test. of G. Demers.) Neither Demers nor anyone representing Rose Logging or ATR Services requested a hearing on either of the Orders to Repair. (Test. of West.)

(44) On October 31, 2014, Greg Demers, of ATR Services, Inc. submitted a statutory written plan on behalf of Rose Logging. (Amended Notice Rose Logging, Findings of Fact, paragraph 10; Amended Notice ATR Services, Inc., Findings of Fact; paragraph 11.)

(45) Demers submitted a written plan by email to West on October 31, 2014 and wrote that they intended to have the work done by the date ordered. (Ex. A9 at 1-3.) The plan indicated Rose Logging was the operator and Del Erb was the landowner. (*Id.* at 2.)

(46) Demers contacted West shortly after submitting the first plan and informed him that they were having difficulties locating culvert pipe of the required dimensions. Demers proposed removing the old culvert and all fill as an alternative, then placing a 40 feet x 16 feet steel bridge on concrete blocks above the high water mark. Demers wrote that the bridge ends would then be approximately 15 feet back from the edge of the creek bed. (Ex. A9 at 7.)

(47) On October 31, 2014, after submitting the proposal for the bridge alternative, Demers arranged to have West meet with Mel and Doug McDougal, owners of Rose Logging, at the site but West was unable to make the meeting. (Test. of G. Demers and West.)

(48) After receiving both the first written plan and Demer’s description of the alternative bridge plan, West forwarded them to Lane. (Test. of West; Ex. A9 at 5.) After Lane reviewed the plan and proposed bridge option, Lane determined that the written plan for the culvert would have been sufficient during low flows and inside the ODFW in-water work period. However, the

planned installation of the very large culvert during winter conditions would be difficult without doing resource damage. Lane found that the bridge option was probably achievable with careful planning. Lane noted that the written plan would need to address design and installation to avoid resource-damage and to pass the 50-year peak flow. (Ex. A9 at 5.)

(49) Additionally, Lane noted that the written plan for a Type F stream has a 14-day public comment period “which [ODF] does not have the authority to waive.” (Ex. A9 at 5.) Lane wrote that he planned to consult further with the Enforcement/Penalties staff in Salem to see if it would be possible to make the bridge installation part of the repair order in order to help things move faster. (*Id.*)

(50) At 12:15 p.m. October 31, 2014, West forwarded Lane’s comments to Demers. West informed Demers that the email he was forwarding was from his supervisor Russ Lane. West wrote that ODF wanted to work with Demers as fast as they could but that there were statutory timelines, including the 14-day public comment period, which was not waivable. West confirmed that they were investigating the possibility of getting the bridge option added to the repair order to allow Demers to do the work sooner. West requested a written plan for the bridge option as soon as Demers could get it to him. (Ex. A9 at 5.)

(51) The work on the culvert was not completed by November 4, 2014, as originally ordered. Because West had spoken with, and exchanged email with Demers after issuing the citations, West accepted Demers assurances that he was getting the equipment necessary to complete the repairs as soon as possible. (Test. of West; Ex. A9.)

(52) On November 4, 2014, West received an email, from Nadine Waterman of McDougal Brothers, that read as follows:

From: Nadine Waterman [<mailto:Nadine@McDougalBros.com>]

Sent: Tuesday, November 4, 2014 8:55 AM

To: WEST, Scott A

Subject: FW: Del Erb Written Plan

Attached is the bridge diagram

If you have any questions, please call me at (541) 954-7203 or by return email to this address

Mel

The email also included two attachments - a modified version of the written plan dated November 3, 2014, and a diagram titled, “Bridge installation across Miller creek -- Del Erb.” The modified version of the plan indicated “the culvert would be replaced with a temporary bridge.”

(Amended Notice ATR Services, Inc., Findings of Fact, paragraph 12; Amended Notice Rose Logging, Findings of Face paragraph 11.)

(53) Following review of the November 4, 2014 plan, West completed an amendment on November 13, 2014 to the Forest Activity Inspection Report. On November 13, 2014, West issued the amended Inspection Report to both Rose Logging and to ATR Services as they had both received the original citations. (Test. of West; Ex. A10 at 5-8.) West provided additional details to the November 4, 2014 proposed plan that would increase the likelihood that the plan would achieve resource protections standards. (*Id.*)

(54) On November 26, 2014, West received an email, forwarded by Maggie Turner of McDougal Brothers. Turner wrote that Demers had requested that she send him the attached Written Plan for the property at T9S, R3W, Sec. 10, 11. (Test. of West; Ex. A11 at 1.) The attached document was a written plan for the replacement stream crossing at Miller Creek. Norman McDougal signed the plan which was dated November 26, 2014. The plan included proposed resource protection measures and plans for installing a bridge crossing across Miller Creek to meet 50-year peak flow capacity. (Ex. A11 at 2-5.)

(55) On November 26, 2014, Mr. West received an email sent by Maggie Turner at McDougalBros.com stating, “Scott, Greg Demers asked me to send you the attached Written Plan for the property at T9S, R3, Sec. 10, 11. Maggie [.]” It was determined that Mr. Demers, via Ms. Turner, was submitted (*sic*) a modified version of the written plan for Rose Logging. The modified date on the plan was November 24, 2014. The plan was signed by Norman McDougal. The modified version of the written plan stated “the culvert will be replaced with a bride consisting of two 8’ x 40’ prefabricated decks placed side-by-side to create a 16’ x 20’ bridge crossing.” A reset to the 14-Day comment period was calculated, as described in ORS 527.670(10). (Amended Notice ATR Services, Inc., Findings of Fact paragraph 14; Amended Notice Rose Logging, Findings of Fact, paragraph 13.)

(56) Following expiration of the 14-day public comment period, West issued a second amended Forest Activity Inspection Report on December 15, 2014. (Test. of West; Ex. A11 at 6.) On the report, West noted that the written plan submitted for the bridge would meet the FPA requirements to protect the “waters of the State and pass a 50 year event.” (Ex. A11 at 6.) West also noted the following:

This is not an approval of the plan but a review that if you follow your plan it should not result in a violation of the [FPA].

(*Id.*)

(57) West made additional recommendations and he requested notification of when the work was to be done so that he could make a site visit. (Ex. A11 at 6.)

(58) ODF publishes a Technical Note that provides guidance on when and if waivers of a written plan are granted for an operation near an RMA (Riparian Management Area). The guidance refers to the written plan rule but provides a flow chart to illustrate when a plan is required or if it may be waived. According to the Note, if a road reconstruction occurs near an RMA, if it will occur inside the RMA or has the potential to “directly effect” the RMA, a written plan is required. (Ex. A 24.)

(59) In West's application of the Note to the current project, the road reconstruction in the current matter was clearly within the RMA and had the potential to directly impact the RMA. Definitions for the relevant terms were included with the Note. (Test. of West; Ex. A24.)

(60) Keith Baldwin, as ODF Field Coordinator, provides technical assistance to forest stewards and supervisors in application and enforcement and civil penalty actions under the Forest Practices Act. (Test. of Baldwin; Ex. A23.) Forest stewards cannot waive the written plan requirement for work within 100 feet of a RMA. Baldwin consulted with West during the investigation. He reviewed the notification of operation, visited the site and agreed that it was reasonable to cite both Rose Logging and ATR Services because he concluded that they were collaborating to enable the operation on the ground. (Test. of Baldwin.)

(61) Baldwin was familiar with the Miller Creek crossing from a notification filed in 2011 by a different lumber operator. After Baldwin had inspected the site in 2011, and documented the conditions with photographs, he had informed the prior notifying party/operator that the culvert would not pass the 50-year peak flow requirement as it was at that time. The operator did not perform the work. (Test. of Baldwin.)

(62) Best Practices Standards under the FPA apply to all commercial forest activities, including timber harvesting. ODF's process for compliance and enforcement begins with recommendations to avoid an unsatisfactory condition. Prior to beginning any activity, timber owner or operator or representatives complete the notification form, like the one at issue in this case, that provided by ODF. The completion and submittal of a notification serves, in part, to provide a 15-day period for comments on the project by the individuals involved or those who have filed to be notified under the rule. The rules require a written plan in specified conditions. (Test of Baldwin.)

(63) The next step in compliance is to prepare recommendations on a written plan to avoid violations. The written plan under the notification must have enough information to evaluate whether the plan is likely to comply with the FPA or not. The current operation required a written plan for activity within 100 feet of a medium Type F stream, including anything that would affect the stream or the components of the riparian area. The plan allows the forester to assess the operation to ensure that the activity will not affect the stream or provides for protection. If the area has a resource that requires a plan, lack of a plan removes the opportunity for the forester to make comments to the plan, or to affirm that the plan meets the criteria, and the opportunity for the public to comment. (Test. of Baldwin.)

(64) If site conditions warrant it, a citation will be issued for violations that do occur during an operation. In Baldwin's opinion, after the October 29, 2014 site visit, it was clear that the conditions at Miller Creek were unsatisfactory. Rock had been added to bring the road up to be able to support trucks across the culvert but it was not surface rock. The additional rock was base rock, which had created damage. In addition, the post-September rain season resulted in the increased risk of higher flow impact because the culvert was undersized to meet the required stream flow. (Test. of Baldwin.)

(65) ODF publishes technical notes, available to the public, which provide guidance to parties, including landowners and operators, on best practices to comply with the FPA. Two of those notes include Technical Note Number 4, "Fish Passage Guidelines for New and Replacement

Stream Crossing Structures,” and Number 5, “Determining the 50-Year Peak Flow and Stream Crossing Structure Size for New and Replacement Crossings.” (Test. of Baldwin; Exs. A20 and 21.)

(66) Baldwin, in accord with ODF’s technical notes, provided information to West for input into determining what size culvert would be adequate to provide sufficient stream flow to comply with the fish passage. According to the calculations in the manual, the culvert would have been so large that the resulting impact to the riparian area that it would not meet the requirements of the FPA. The damage could not be corrected immediately because additional work would be required to correct the damage. (Test. of Baldwin.)

(67) Throughout the project compliance process, West continued to communicate with Demers as representatives for ATR and Rose Logging. Demers communicated in the same manner, from the beginning of his contact with West through the resolution of the project deficits, referring to “we” when indicating what action or response would be taken. Demers did not change his references or say anything to West before or after the Change Form was submitted to indicate if he was speaking on behalf of the same parties. West communicated with Demers on all aspects of the citations. (Test. of West.)

(68) Regardless of whether a part of the activity was re-rocking the existing road bed, the proposed activity came within 100 feet of Miller creek which was a medium Type F fish stream. The proposed activity required a written plan and that requirement could not be waived. The fact that the stated purpose of the work was road reconstruction did not change the requirement for a written plan prior to work being done within 100 feet of Miller Creek. (Test. of Baldwin.)

(69) In Baldwin’s opinion, the conditions on the ground supported the citations for failing to construct a crossing that passed a 50 year and the order to repair, remove the substandard work; in addition to the citations for failing to meet the written plan requirements. Baldwin opined that it was appropriate to cite both ATR and Rose Logging by virtue of the notification of application, the email and telephone contacts, and by observing who was active on the site. (Test. of Baldwin.)

(70) ATR Services, Inc. has received five other citations (Case Nos. 14-WL012, 13-WL009, 13-WL033, 13-WL034 and 13-WL035) for other forest practice rule or statute violations with the past three years. (Ex. A22.)

(71) On March 4, 2015, West determined that no other issues remained with the operation and recommended that the standard penalty be assessed. (Test. of West.)

(72) Greg Demers, as of 2015, remained registered with the Oregon Secretary of State’s office as president and secretary of ATR Services, Inc. (Ex. A19.) Demers is not listed with the Secretary of State as a principal with Rose Logging, Inc. (Ex. A18.)

(73) By letter of September 15, 2015, ATR Services, Inc., Attn: Gregory M. Demers, President, and ATR Services, Inc., Attn: Jeff Demers, Registered Agent, was served with the Notice of Civil Penalty for Forest Practices Violations, Case Nos. 14-CN019 and 14-CN0120. (Ex. A14.) On October 1, 2015, Michael E. Hagland, Attorneys for ATR Services, Inc., filed ATR Services, Inc., Requests for Hearing and Collaborative Dispute Resolution. (Ex. A15 at 1-2.) On October 12, 2015, Mr. Hagland filed ATR Services, Inc.’s Statement of Claims and Defenses. (Ex.

A15 at 4-6.) Under Claims and Defenses, counsel objected to ODF's "proposed civil penalties as inappropriate and/or excessive considering the inaccuracy of facts assumed by ODF as alleged above and the actual facts and circumstances that will be proven at hearing. (*Id.* at 5.)

(74) By letter of October 19, 2014, ODF acknowledged receipt of Mr. Hagland's request for a contested case hearing and a collaborative dispute resolution regarding the penalties assessed on September 15, 2015. ODF declined to participate in a Consolidated Disputed Resolution and referred the matter to the Office of Administrative hearings for a contested case hearing. (Ex. A15.)

(75) On January 21, 2016, ODF issued its Amended Notice of Civil Penalty to Respondent ATR, based upon the two violations issued on October 30, 2014. The Amended Notice stated in part:

ATR Services, Inc. is ordered to pay a civil penalty in the amount of \$2,825.00. This penalty is calculated using a formula set out in administrative rule 629-670-0210 (enclosed). The rule formula is $\$B(C \times P) + (\$B \times D \times R)$, where:

Case 14-CN020

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 2 because ATR Services, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition. [See OAR 629-670-0210(3)(c)]
3. The prior knowledge value (P) is 4 because ATR Services, Inc. has received five other citations (Case Nos. 14-WL012, 13-WL009, 13-WL033, 13-WL034, and 13-WL035) for other forest practice rule or statute violations within the past three years. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 0 because the violation did not result in resource damage. [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 factor is zero. [See OAR 629-670-0210(6)].

$$\mathbf{\$100.00 (2 \times 4) + (\$100.00 \times 0 \times 0) = \$800.00}$$

Case 14-CN020

1. The base fine (\$B) is \$250.00 for violation of OAR 629-625-0320(2)(a). [see OAR 629-670-0210(2)(b)(E)]
2. The cooperation value (C) is 2 because ATR Services, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition. [See OAR 629-670-0210(3)(c)]

3. The prior knowledge value (P) is 4 because ATR Services, Inc. has received five other citations (Case Nos. 14-WL012, 13-WL009, 13-WL033, 13-WL034, and 13-WL035) for other forest practice rule or statute violations within the past three years. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 1 because the violation resulted in resource damage that if uncorrected is minor and would naturally self-restore within one year. [See OAR 629-670-0210(5)(b)]
5. The repair value (R) (extent of damage that cannot be corrected or prevented in the future) is 0.10 as the repairs that were completed prevented ninety percent of potential damage expected over the next 4 years. [See OAR 629-670-0210(6)].

$$\mathbf{\$250.00 (2 \times 4) + (\$250.00 \times 1 \times 0.10) = \$2025.00}$$

$$\mathbf{\text{Total Penalty Assessment: } \$800.00 + \$2,025.00 = \$2,825.00}$$

(Ex. A17 at 5-6.)

(76) On January 21, 2016, ODF issued its Amended Notice of Civil Penalty to Respondent Rose Logging, based upon the two violations issued on October 30, 2014. The Amended Notice stated in part:

Rose Logging, Inc. is ordered to pay a civil penalty in the amount of **\$1,425.00**. This penalty is calculated using a formula set out in administrative rule 629-670-0210 (enclosed). The rule formula is $\$B(C \times P) + (\$B \times D \times R)$, where:

Case 14-CN021

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 2 because Rose Logging, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition. [See OAR 629-670-0210(3)(c)]
3. The prior knowledge value (P) is 2 because Rose Logging, Inc. 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. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 0 because the violation did not result in resource damage. [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 factor is zero. [See OAR 629-670-0210(6)].

$$\mathbf{\$100.00 (2 \times 2) + (\$100.00 \times 0 \times 0) = \$400.00}$$

Case 14-CN022

1. The base fine (\$B) is \$250.00 for violation of OAR 629-625-0320(2)(a). [see OAR 629-670-0210(2)(b)(E)]
2. The cooperation value (C) is 2 because Rose Logging, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition. [See OAR 629-670-0210(3)(c)]
3. The prior knowledge value (P) is 2 because Rose Logging, Inc. 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. [See OAR 629-670-0210(4)(c)]
4. The damage value (D) is 1 because the violation resulted in resource damage that if uncorrected is minor and would naturally self-restore within one year. [See OAR 629-670-0210(5)(b)]
5. The repair value (R) (extent of damage that cannot be corrected or prevented in the future) is 0.10 as the repairs that were completed prevented ninety percent of potential damage expected over the next 4 years. [See OAR 629-670-0210(6)].

$$\mathbf{\$250.00 (2 \times 2) + (\$250.00 \times 1 \times 0.10) = \$1,025.00}$$

$$\mathbf{\text{Total Penalty Assessment: } \$400.00 + \$1,025.00 = \$1,425.00}$$

(Ex. A16 at 5-6.)

CONCLUSIONS OF LAW

1. ATR Services, Inc. violated the Forest Practices Act, in Department Case Nos. 14-CN019 and 14-CN020, by:

- failing to submit to the State Forester a written plan prior to performing forest operations that required notification under OAR 629-605-0140, and within 100 feet of a Type F stream;
- failing to design and construct a stream crossing to pass a peak flow that at least corresponds to the 50-year return interval.

2. ATR Services, Inc. is liable for a civil penalty of \$ 800.00 in Case No. 14-CN019 and \$2025.00 in Case No. CN020, for a total civil penalty amount of \$2,825.00 as proposed by ODF.

3. Rose Logging, Inc. violated the Forest Practices Act, in Department Case Nos. 14-CN021 and 14-CN022, by:

- failing to submit to the State Forester a written plan prior to performing forest operations that required notification under OAR 629-605-0140, and within 100 feet of a Type F stream; and

- failing to design and construct a stream crossing to pass a peak flow that at least corresponds to the 50-year return interval.

4. Rose Logging, Inc. is liable for a civil penalty of \$400.00 in Case No. 14-CN021 and \$1,025.00 in Case No. CN022, for a total civil penalty in the amount of \$1,425.00, as proposed by ODF.

5. Respondents did not prove that ODF waived the requirement for a written plan and estoppel does not apply.

OPINION

Review of ruling made on the record

At the beginning of the hearing, ODF raised an objection to Respondents' Amended Statements as untimely under ODF's rules. After hearing from the parties on the matter, I permitted Respondents to file their Amended Statements of Claims and Defenses. To clarify the record, the ruling was based on the following: ODF had the right to request to leave the record open if needed to avoid unfair prejudice; and ODF had the right to file a supplemental written argument in response to Respondent's affirmative defenses.¹

ODF contends that Respondent violated the Forest Practices Act (FPA) and should be required to pay the civil penalties as assessed under the laws and rules. As the proponent of this position, ODF has the burden of proof. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). 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, 402 (1987). ODF has met its burden.

Authority of the Board

The legislature granted the Board of Forestry broad rulemaking authority to implement and enforce terms of the FPA. ORS 527.710 to 527.715, ORS 527.765. The Board of Forestry promulgated rules as directed to carry out its duties, including rules relevant to the requirements for notification and statutory written plans, and the requirements for design and construction of stream crossing structures in areas subject to the FPA. The State Forester has authority to issue citations for violation of the terms of the FPA (as well as any rules promulgated thereunder) and may order operators to make reasonable efforts to repair the damage. ORS 527.680(1), (2). The legislature defined "State Forester" to include duly authorized representatives of the State Forester.

¹ The administrative law judge may allow filing of an amended document in certain circumstances. (OAR 136-003-0530(5) and (6)(b)). In this case I considered the following: Respondents timely filed their requests for hearing and statements of claims and defenses, (OAR 629-670-0310), ODF issued Amended Notices (OAR 137-003-0530(5)) prior to the beginning of the hearing but after referral to the OAH, (OAR 137-003-0520(4)(a)(A), 137-003-0520(2)(b)).

ORS 527.620(15). The State Forester authorized Stewardship Foresters to issue citations and repair orders. The State Forestry Department (ODF) consists of the State Forester and the deputy, assistants and employees of the forester, acting under direction of the State Board of Forestry. ORS 526.008

Citations issued to proper parties

For purposes of the FPA, an “operator” is defined by the statute as “any person, including a landowner or timber owner, who conducts an operation.” ORS 527.620(13). The FPA defines an “operation” means “any commercial activity relating to the establishment, management or harvest of forest tree species [exceptions omitted].” ORS 527.620(12).

Regarding forest operations, OAR 629-605-0100 requires:

- (1) The operator, landowner, or timber owner shall comply with the practices described in the forest practice statutes and rules unless approval has been obtained from the State Forester for a plan for an alternate practice which is designed to result in the same effect or to meet the same purpose or provide equal or better results as those practices described in statute or administrative rule.

ODF alleged Respondent ATR Services and Rose Logging were both operators for purposes of the operation at issue and are both responsible for the alleged violations and proposed civil penalties. Respondent ATR Services argued it was not properly cited because it was not an operator after September 17, 2014, and was not responsible for any work, violations, or penalties. ATR based its contention on the *Request to Change or Transfer*, filed by Angela Demers requesting a transfer the operator for NOAP #2014-582-00393 from ATR Services to Rose Logging. The record supports ODF’s determination that ATR, through Greg Demers, as well as Rose Logging remained the operators throughout the period in question.

The Notification was filed in the name of both Respondents. Clearly as of the date of the Notification, August 4, 2014, Respondents both met the definition under the statute for “operators” who filed a notification of an “operation” for work under the FPA. At the time the Notification was filed, any work on the operation within the RMA required a written plan. Work was done within the RMA at some time in September 2014. Regardless of the September 17, 2014 request to transfer, as of October 31, 2014, there was evidence that Rose Logging was operating at the timber site, and was working with ATR, Services, and that ATR Services was overseeing the operation for Rose Logging. Based on the file evidence and the observations during the October 29, 2014 site visit, West and Baldwin determined that the Respondents were collaborating on the operation. West subsequently served both Respondents with Notices of Violation and Orders to Cease Further Violation and Repair Damage (the citations) on October 30, 2014.

ODF was authorized to apply the requirements of the FPA to ATR. The citations were received and signed for by representatives of both Respondents. There was no evidence that Respondent ATR alerted ODF that it believed it had been cited in error or appealed the citations within the 30 day period. Throughout the period ODF (through West) communicated with the operators to remedy the violations, Demers (president of ATR) continued to act as the representative in response to the citations issued to both ATR and Rose Logging.

As late as November 26, 2014, when the modified plan (calling for a bridge span rather than a replacement culvert) was submitted, Demers had directed an employee of McDougal Brothers to submit the modification. The record supports a determination that Demers's continued representation and involvement with the operation constituted the actions of an "operator." *see Gambee v. ODF*, 191 Or App 241, 251 (2003) (discussion of the definitions of operator and operations and authority of the Board of Forestry regarding FPA compliance.)²

There was insufficient evidence to establish a break in Demers' actions as an operator on behalf of ATR and Rose Logging to establish that Demers was acting solely on behalf of Rose Logging. Regardless of the Request to Transfer, the actual relationship of the parties remained factually the same. Greg Demers continued to act for both ATR and Rose Logging, as the agent for the operators in conducting the operation in question. ATR was properly issued the Notice of Civil Penalties in conjunction with Rose Logging.

Violations of OAR 629-670-0170 (requiring written plan):

ODF contends that Respondents violated the FPA, in part, by failing to submit to the State Forester a written plan prior to performing forest operations that required notification under OAR 629-605-0170(2) and 629-625-0320. I agree with ODF.

ORS 527.760, entitled "Commencement of operations; rules; written plan; effect of plan; notice of chemical application; fees," provides that:

- (1) The State Board of Forestry shall designate the types of operations for which notice shall be required under this section.
- (2) The board shall identify by rule the types of operations that require a written plan.
- (3) In addition to any other types of operations identified by the board, the board shall adopt rules to require a written plan for the following:
 - (a) An operation that occurs within 100 feet of a stream determined by the State Forester to be used by fish or for domestic use, unless [list of exceptions omitted].

ODF's rules reflect the statutory notification requirements. Under OAR 629-605-0140, notification to the State Forester is required in the following relevant operations:

Under the provisions of ORS 527.670:

- (1) Notification to the State Forester shall be given for the following types of operations:

² Respondents' arguments and authority to the contrary were considered but were not found to be persuasive.

(a) Harvesting of forest tree species including, but not limited to, felling, bucking, yarding, decking, loading or hauling.

(b) Construction, reconstruction and improvement of roads, including reconstruction or replacement of crossing structures on any streams[.]

By statute, and as mirrored in OAR 629-605-0170(2), “an operator must submit to the State Forester a written plan as required by ORS 527.670(3) before conducting an operation that requires notification under OAR 629-605-0140,³ and that is within 100 feet of a Type F or Type D stream.” Under the rules, the State Forester “may waive, in writing, the requirement for a written plan described in sections (2) and (3) if the operation activity will not directly affect⁴ the physical components of the riparian management area. Further direction of when a waiver will be granted is described in Technical Note FP10 dated September 1, 2013.” OAR 629-605-0170(4).

Equitable estoppel raised by Respondents

In each of the Amended Notices at issue, ODF alleged that Respondents had violated the FPA, including an alleged failure to file a written plan as required under OAR 629-605-0170(2) and therefore, were liable for civil penalties associated with those violations. In response, counsel filed Amended Statements of Claims and Defenses on behalf of both Respondent Rose Logging and ATR. Regarding the allegation that Respondents’ failed to file a written plan as required, counsel alleged that ODF acting Stewardship Forester Boschler had waived the requirement that Respondents file a written plan prior to putting additional rock on the road in question. Thus, counsel argued, ODF was prevented, under equitable estoppel, from issuing the Notices of Civil Penalty (as Amended) to either Respondent for actions taken in reliance upon the alleged authorization of a Department representative. Respondent ATR Services also claimed, based on the Request to Change or Transfer from ATR Services, Inc to Rose Logging, filed on September 17, 2014, that ODF had no basis to assess ATR civil penalties.

³ OAR 629-605-0140 provides in relevant part:

Under the provisions of ORS 527.670:

(1) Notification to the State Forester shall be given for the following types of operations:

(a) Harvesting of forest tree species including, but not limited to, felling, bucking, yarding, decking, loading or hauling.

(b) Construction, reconstruction and improvement of roads, including reconstruction or replacement of crossing structures on any streams.

(c) Site preparation for reforestation involving clearing or the use of heavy machinery[.].

⁴ OAR 629-605-0170(1) further defines “Directly Affect” and “Physical Components” for purposes of section (4) of the rule:

(a) “Physical components” means materials such as, but not limited to, vegetation, snags, rocks and soil; and

(b) “Directly affect” means that physical components will be moved, disturbed, or otherwise altered by the operation.

As the proponents of an affirmative defense, Respondents bear the burden of production and persuasion on those matters asserted in support of that defense and if not, the factfinder must resolve the matter against the party upon whom the burden of persuasion rests. ORS 183.450(2), *see also Riley Hill*, 303 Or 390, 394-5 (discussing principle) (cited with approval in *State v. James*, 123 P.3d 251, 258, 339 Or. 476 (Or, 2005)).

Respondents failed to meet their burden regarding equitable estoppel. As argued by ODF, equitable estoppel will be applied against an agency only if the party shows that the agency made a false representation, the party relied upon a false or misleading representation, and the party's reliance was reasonable. *Wilkinson v. PERB*, 188 Or App 97, 102 (2003), *see also Employment Div. v. Western Graphics Corp.*, 76 Or App 608, 612-614 (1985) (Court finding that equitable estoppel will be applied against an agency only if it is shown that the person asserting it was misled by the agency and justifiably and detrimentally relied on the misleading conduct).

Witness Reliability Determination

Witness testimony differed regarding the events surrounding Bochler's first Forest Activity Inspection Report issued on August 6, 2014 and the second Report issued on August 7, 2014 differed. To reconcile any conflicts in the record and determine which evidence is more likely than not correct, it is necessary in this case to assess the credibility and reliability of the witnesses offering conflicting testimony. A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of witness credibility can be based on a number of factors, other than the manner of testifying. These factors include the inherent probability of the evidence, whether the evidence is corroborated, whether the evidence is contradicted by other testimony or evidence, whether there are internal inconsistencies, and "whether human experience demonstrates that the evidence is logically incredible." *Tew v. DMV*, 179 Or App 443, 449 (2002), *citing Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part).

I will review the evidence presented by both parties.

Bochsler retired from ODF with 15 years of experience supervising forest stewards. Greg Demers and Angela Demers testified to first-hand recollection of a telephone conversation during which Bochsler waived the written plan and waiting period required under the terms of the operation as applied for on the Notification. Bochsler admitted he had no direct recollection of the alleged conversation. Bochsler reviewed the two inspection reports and verified that he had completed both. In Bochsler's opinion, the August 6, 2014 report was properly checked and completed to indicate that, based on the Notification filed, the operation would require a written plan prior to any activity within 100 feet of Miller Creek, a medium fish stream, in addition to compliance with scenic highway requirements where relevant.

Bochsler also testified that he did not recall details of the conversation between himself and Demers that occurred on or about August 7, 2014. However, he testified that, looking at the August 7, 2014 Report, he opined that he had granted a waiver to begin operations *beyond* the restricted areas, *including operation beyond 100 feet of Miller Creek*. Bochsler credibly testified that, based on his experience and training, and his habit and practice, that the August 7, 2014 inspection report was not a waiver for the written plan and waiting period that was required by the work set out in the Notification. He testified that the August 7, 2014 report was consistent with what had been his understanding of the operators' request to begin putting additional spot rock, not to begin reconstruction, on the road outside of the restricted areas as requested. Bochsler testified that he would not have granted a waiver of the written plan regarding work within 100 feet of the Miller Creek crossing as it was not consistent with Department laws and rules.

In contradiction of Bochsler's testimony, Greg Demers testified that he had called Bochsler on August 7, 2014, to request a waiver of the written plan so that he could begin work on the project, including work necessary to cross Miller Creek. Demers first testified that he spoke with Bochsler for approximately 15-minutes on the telephone on August 7, 2014, a fact he alleged to be supported by telephone records. Demers said that, during a detailed conversation, he made it clear to Bochsler that he was requesting waiver of the written plan and waiver of the waiting period requirements to begin work on the entire project. Demers also testified that his daughter, Angela Demers, was training with him at the time and was on a speaker phone during the conversation. Demers testified that he had asked for Bochsler to provide him with a written verification of the waiver at the end of the conversation, and that the Report of August 7, 2014 was that verification. However, on cross-examination, Demers was unable to document any call to ODF's phone on August 7, 2014 that was longer than one and half minutes (there were two calls placed from different phones on Demer's telephone accounts at exactly the same time for 30 seconds each to the Lyon's Department office).

Angela Demers testified that she recalled being present when Greg Demers called Bochsler on August 7, 2014. She said that the conversation was noteworthy, that she heard Mr. Demers ask for a waiver to the written plan requirement for the operation, that Bochsler said the plan would be waived to allow placement of rock on the existing road, specifically including that part of the road crossing the culvert on Miller Creek, that Demers asked if he could have that in writing, that Bochsler agreed and that the report received on August 7, 2014 was assumed to be verification of the waiver.

In evaluating the evidence presented, I find as follows:

Bochsler's testimony was consistent with his extensive experience and training as a forest steward supervisor. The facts as he recounted them were consistent with the documents in evidence and in accord with the testimony of Baldwin and West, additional witnesses I find to be credible. Bochsler's admission that he had no direct recall of what was shown to be a conversation of less than two minutes, bolstered his credibility. He drew inferences from what he had written and those inferences were logical. His testimony of what the documents demonstrated was logical and consistent with the practices of ODF. Bochsler testified that, when an operation involves an RMA, a written plan is required, and he testified that he would not have waived that requirement.

There was no logical reason given that supported a finding that Bochsler waived the written plan requirement. Accordingly, I give great weight to Bochsler's testimony.

Greg Demers testimony regarding the telephone call was not reliable. Records he produced did not support his version of the facts. The telephone call, at most less than two minutes, was highly unlikely to contain the detailed conversation Demers described having with Bochsler. The initial Notification filed for Demers by his daughter indicated that Demers knew that Miller Creek was within an RMA and required a written plan. Demers also testified that he had had issues with rocking across culverts and notification requirements previously. Demers is experienced in multiple areas of timber operations. His testimony was internally and externally inconsistent and he had a financial interest in the operation that resulted in the current contested case. To the extent that Demers's version of the events differed from the account of ODF's witnesses, I find Demers the less reliable witness.

Ms. Demers works on a contract basis for timber operators, including her father. She contracts to complete, among other things, required notifications for timber operations filed with ODF. In consideration of the record as a whole and those factors listed in *Tew*, including her familial relationship with Mr. Demers and her financial interest as a contractor for the parties, I find Ms. Demers's testimony regarding the disputed events less reliable than ODF's witness.

In summary, where Bochsler's testimony on behalf of ODF differs from the testimony of Greg Demers and Angela Demers, I find Bochsler the more credible witness. The findings of fact on the disputed matters reflect Bochsler's testimony. Based on that finding, Respondents failed to meet the burden to show that Bochsler waived the written plan and waiting period requirements for the work involving Miller Creek and equitable estoppel does not apply.

ODF met its burden to prove (regarding Case No. 14-CN019) that Respondent ATR and Respondent Rose Logging (regarding Case No. 14-CN021) violated OAR 629-670-0170(2) by failing to file a written plan as required by ORS 527.670(3) before conducting an operation that requires notification under OAR 629-605-0140, and that was within 100 feet of Miller Creek, a Type F medium fish stream. The facts proved at hearing showed Respondent ATR as an operator, collaborated with Respondent ATR to conduct an operation within 100 feet of a protected RMA, without having first filed a written plan.

Violations of OAR 629-625-0320:

ODF's administrative rules set forth requirements for road construction and maintenance within all forest practices regions. Regarding stream crossing structures, OAR 629-625-0320 provides in relevant part:

(2) Operators shall design and construct stream crossings (culverts, bridges, and fords) to:

(a) Pass a peak flow that at least corresponds to the 50-year return interval. When determining the size of culvert needed to pass a peak flow corresponding to the 50-year return interval, operators shall select a size that is adequate to preclude ponding of water higher than the top of the culvert[.]

ODF met its burden to prove (regarding Case No. 14-CN020) that Respondents ATR and Respondent Rose Logging (regarding Case No. 14-CN022) violated the rule. The record showed that, after notification was filed for work in the area, specifically including the crossing at Miller Creek, before October 29, 2014 which clearly violated the rule. Respondents were cited on October 30, 2014, and ordered to correct the violation by November 4, 2014. Despite assurances that they would meet the deadline, Respondents were unable to do so. Not until the December 15, 2014 inspection report did West find that Respondents' *plan* for the work appear to meet FPA requirements if followed. The work to complete the crossing in compliance with the rule's requirement was not completed until sometime after that December 15, 2014 inspection report.

ODF proved the violations as alleged and is entitled to assess civil penalties against Respondents, as set out below.

Assessment of Civil Penalties – ATR Services, Inc.

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 ATR Services should be penalized in the amount of \$800 for the failure to file a written plan, and \$2,025.00 for the violation of the FPA road and construction maintenance rule⁵ (failure to design and construct a stream crossing sufficient to pass a peak flow that at least corresponds to the 50-year return limit).

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:

⁵ "OAR 629-625-0000 through 629-625-0700 shall be known as the road construction and maintenance rules." OAR 629-625-0000(2)

(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 violation of the FPA has a base penalty of \$250. There was no evidence that contradicted the base penalty assessments in either violation, and ODF correctly applied the rule to determine the base penalties in each assessment.

Cooperation Value. ODF determined that the cooperation value on the written plan violation and for the FPA violation was 2 because ATR Services, Inc., did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition for either violation. 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.

OAR 629-670-0210. ATR Services, Inc. did not contest the value assessed by ODF for cooperation in an alternative should ATR be determined liable as an operator. Assuming any evidence presented on behalf of Rose Logging would apply to ATR, the record supports ODF's determination of 2 for the cooperation value. ATR did not immediately cease the violation or take necessary and timely action as required by ODF for either the written plan violation or the FPA violation. ODF correctly determined the cooperation value (and the other values to be addressed below).

Prior Knowledge. ODF assigned a value of 4 for prior knowledge on both of the violations for ATR because ATR had received five other citations for other forest practice rule or statute violations within the past three years. The record supports ODF's determination. 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 ATR was cited for five violations for other forest practice rule or statute violations within the past three years. ODF's assignment of a value of 4 is appropriate.

Damage Value. The administrative rule states, in relevant part:

(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[.]

OAR 629-670-0210.

The damage value for the written plan violation was assessed at 0 because the violation did not result in resource damage. ODF's assessment is supported by the record.

The damage value for violating the 50-year peak-flow requirement was assessed at 1 because ODF found that the violation resulted in resource damage that if uncorrected is minor and would naturally self-restore within one year. The record supports ODF's determination.

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 written plan violation, the repair value is zero because the violation did not result in resource damage, thus the repair value is not applicable.

For the violation of the 50-year peak-flow requirement, ODF assigned a value of 0.10 as the repairs that were completed prevented ninety percent of the potential damage expected over the next four years. ODF's determination is supported by the evidence and was appropriately assigned.

Calculation. ODF assessed an \$800 penalty for the violation of OAR 629-605-0170(2) and, using the factors noted above, concluded that the penalty for violating OAR 629-625-0320(2)(a) was \$2025.00. The penalty calculations are correct and need not be repeated here. ATR must pay the total amount of \$2,825.00 (the sum of the two penalties assessed against ATR) in civil penalties assessed, as set forth in ODF's notice.

Assessment of Civil Penalties – Rose Logging, Inc.

ODF calculated the penalty in its Notice of Civil Penalty; Order issued to Rose Logging under OAR 629-670-0210, as detailed in the assessment portion of the opinion for ATR above.

Using the formula, ODF determined that Rose Logging Inc., should be penalized in the amount of \$400 for the failure to file a written plan, and \$1,025.00 for the violation of the FPA road and construction maintenance rule.

The rules for calculating specific values for the penalty calculations are set out in detail above. Utilizing the same administrative rule, ODF determined the values as follows:

As was the case for ATR, the base fine (\$B) is \$100.00 for violation of OAR 629-605-0170(2). The cooperation value (C) is 2 because Rose Logging, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition.

ODF determined that the prior knowledge value (P) was 2 because Rose Logging, Inc. 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. The record supports ODF's determination and the value of 2 for P.

Again, based on the same facts as were used in ATR's penalty calculation, ODF determined that the damage value (D) is 0 because the violation did not result in resource damage. And, ODF's determination that the repair value (R) is not applicable because the damage factor is zero is appropriate. ODF's determination that Rose Loggings is subject to a civil penalty of \$400.00 for violating the written plan requirement is correct.

ODF applied the same formula to assess the appropriate penalty for Rose Logging for violating the FPA road and construction maintenance rule (failure to design and construct a stream crossing sufficient to pass a peak flow that at least corresponds to the 50-year return limit). The base value is \$250.00 for the violation of OAR 629-625-0320(2)(a). The cooperation value is 2 because Rose Logging, Inc. did not immediately cease further violation or did not take necessary and timely action to repair damage or correct any unsatisfactory condition. The record supports that determination.

ODF assessed the prior knowledge value at 2 because Rose Logging, Inc. 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. Again the record supports ODF's determination.

ODF assessed the damage value as 1 because the violation resulted in resource damage that if uncorrected is minor and would naturally self-restore within one year. The evidence supported ODF's assessment. ODF assessed the repair value at 0.10 as the repairs that were completed prevented ninety percent of potential damage expected over the next 4 years. The record supported ODF's value. ODF's calculations resulted in the determination that Rose Logging should be assessed a civil penalty of \$1,025.00 for violating OAR 629-625-0320. The penalty is supported by the record.

Rose Logging must pay the total penalty \$1,425.00 as set forth in ODF's Amended Notice.

ORDER

I propose the Department issue the following orders:

(1) The Amended Notice of Civil Penalty and Proposed/Final Order, issued January 21, 2016, to ATR Services, Inc. (ODF Case Nos. 14-CN019 and 14-CN020) be affirmed; and ATR Services be ordered to pay the total civil penalty in the amount of \$2,825.00 as set forth in the Amended Notice.

(2) The Amended Notice of Civil Penalty and Proposed/Final Order, issued January 21, 2016, to Rose Logging, Inc. (ODF Case Nos. 14-CN021 and 14-CN022) be affirmed; and Rose Logging be ordered to pay the total civil penalty in the amount of \$1,425.00 as set forth in the Amended Notice.

Bernadette H. Bignon

Senior 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 July 1, 2016, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 1504353 & 1504354.

By: First Class and Certified Mail

Certified Mail Receipt #7015 0640 0001 7130 3033

Michael Haglund
Attorney at Law
200 SW Market St Ste. 1777
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By: First Class Mail

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Alesia Vella for Ryan Clark
Administrative Specialist
Hearing Coordinator