

Agenda Item No.:	4
Work Plan:	Administrative Work Plan
Topic:	Final Orders
Presentation Title:	Final Order – John West
Date of Presentation:	July 25, 2017
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SUMMARY

The purpose of this agenda item is to consider the hearing record for the contested order of the state forester (repair orders) involving several forest practices violations by John West, and to make a decision on the proposed final order regarding the matter.

CONTEXT

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

BACKGROUND

On June 18, 2013, an investigation found an operation (2013-712-00154) was crossing the bed of Brimstone Gulch, a medium sized Type F stream, without a written plan, a violation of the Forest Practices Act (FPA) and resulted in citations for the operator, BS Roads, Inc. and Brimstone Natural Resources Co., of which, John West is the president. John West responded that the existing bridge was too narrow for logging equipment and that a 6' diameter culvert would replace the existing bridge. A Forest Activity Inspection Report completed by the department and dated July 19, 2013, informed Mr. West that "The 6' pipe has been planned and will not meet the FPA"(emphasis added). The inspection report went on to inform Mr. West that based on department calculations a minimum 8' diameter culvert was required to meet the FPA and before replacing the existing bridge a written plan must be submitted and further noted the instream period for installation of the culvert is June 15 through September 15.

In early July 2014, Mr. West had a 6' diameter culvert installed at the location of an existing bridge. Sometime between July and December 2014, Mr. West had the existing bridge removed and placed, relatively intact, near the stream on the property. On April 7, 2015, Mr. West told the department that he had installed a 6' diameter culvert during the instream work period of 2014 for the purpose of crossing Brimstone Gulch for mining. Mr. West questioned the jurisdiction of the department and the need of a notification or written plan because the

crossing would be used for mining and not forest operations. On November 17, 2014, John West filed notification 2014-712-07131. On April 7, 2015, a contract forestry crew that conducted the logging operation under this notification was contacted. A representative of the contract crew said the crew drove over a culvert not a bridge at the crossing in question when it conducted the forestry operations.

On August 9, 2016, the department contacted Mr. West by phone, requesting permission for Oregon Department of Forestry (ODF) and Oregon Department of Fish and Wildlife (ODFW) personnel to access the property to inspect the Brimstone Gulch crossing. Mr. West told the department that ODF was not allowed on his property until he consulted his attorney. On August 29, 2016, the department contacted Mr. West, again by phone, requesting permission to inspect the crossing. Mr. West said that department staff were not allowed on his property and the department would need to obtain a warrant to enter his property. On September 26, 2016 the department obtained an Inspection Warrant signed by Circuit Court Judge Michael Newman.

On September 30, 2016, ODF, ODFW, and county law enforcement executed the Inspection Warrant. The inspection confirmed that John West had installed a 6' diameter by 30' long culvert on Brimstone Gulch. Based on ODF staff review, the culvert does not meet the ODF criteria/rules for fish passage.

John West is the president for Brimstone Natural Resources Co. and Westlands Contracting Inc. The two entities have been listed as the landowner of this parcel in recent years. Mr. West told the department he removed the bridge and installed the culvert. Mr. West has been "intimately involved with the property and the operation" to replace the crossing at Brimstone Gulch. No other operators were mentioned and without a notification, no other operators can be assumed.

Brimstone Natural Resources Co. was issued three citations in September, 2013 for operations adjacent to Brimstone Gulch. The citations were for (1) failure to submit to the State Forester a written plan before conducting operations that requires a notification and that is within 100 feet of a Type F or Type D stream, (2) removing four trees within 20 feet of the high water level of Brimstone Gulch, a Medium Type F stream, and (3) failure to retain 30 live conifer trees 8 inches dbh or larger per 1000 feet along medium fish streams. With these three citations, Mr. West has been informed of the responsibilities when considering operations within 100 feet of a Type F stream.

The culvert was installed in the same location as the bridge and without more detailed evidence of when the culvert was installed and the bridge was removed, it is assumed it was done during the in-stream work period. Erosion and scouring that has occurred after culvert installation is no more than one cubic yard of native material. Negligible damage has occurred with this crossing to date.

Citations and repair orders were issued to John West on November 10, 2016 with corrected documents reissued on December 23, 2016 for the following violations of the FPA:

- Violation of ORS 527.670(6), no repair order issued (Administrative violation).
 - *An Operator, timber owner, or landowner, before commencing and operation, shall notify the State Forester.*

- Violation of OAR 629-605-0170(2). no repair order issued (Administrative violation).
 - *Statutory Written Plans for Operations near Type F and Type D Streams: 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, and that is within 100 feet of a Type F or Type D stream.*

- Violation of OAR 629-625-0320(2) (a), repair order issued.
 - *Stream Crossing Structures: Operators shall design and construct stream crossing (culverts, bridges and fords) to pass a peak flow that at least corresponds to the 50-year return interval. Repairs include removal of the existing crossing and not replacing or replacing it with a structure that will meet the 50-year return interval and allow migration of adult and juvenile fish.*

- Violation of OAR 629-625-0320(2) (b), repair order issued.
 - *Stream Crossing Structures: Operators shall design and construct stream crossing (culverts, bridges and fords) to allow migration of adult and juvenile fish upstream and downstream during conditions when fish movement in that stream normally occurs. Repairs include removal of the existing crossing and not replacing or replacing it with a structure that will meet the 50-year return interval and allow migration of adult and juvenile fish.*

John West of Brimstone Natural Resources Co. appealed the repair orders on December 6, 2016. John West through his legal counsel waived the timeline requirements for this hearing. The Department coordinated with the Office of Administrative Hearings (OAH) to set a contested case hearing, which was conducted by an administrative law judge (Administrative Law Judge (ALJ) Rick Barber) on March 29 & 30, 2017. John West (Respondent) presented seven exhibits. The Department presented 32 exhibits. The Assistant Attorney General for Department of Justice (DOJ), represented the Department because of complexity and possible legal argument surrounding the administrative search warrant along with mining laws, specifically jurisdiction of Oregon Forest Practices Act over mining activities. ALJ Barber allowed for written closing arguments to be submitted on April 18, 2017. ALJ Barber issued the proposed final order on June 19, 2017.

The proposed final order finds in favor of the Agency (ODF) positions and finds the Respondent (John West) arguments unpersuasive. The deadline for filing exceptions was June

27, 2017. The record of the hearing and exhibits are available for Board members to review by contacting Greg Wagenblast at (503)945-7382.

The Board may schedule oral or written argument if it is determined to be necessary or appropriate to assist in making a decision. According to OAR 629-001-0045(3)(a), the Board may only take argument from the State Forester and any party that filed exceptions to the proposed order, with such argument being limited to matters raised in those written exceptions. The deadline for written exceptions was June 27, 2017. No party submitted exceptions.

ALTERNATIVES CONSIDERED

Upon review of the ALJ's proposed order and record in this case, the Board can:

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; or
2. Remand the matter to the ALJ for further hearing on such issues as the Board specifies and to prepare a revised proposed order as appropriate under OAR 137-003-0655(2); or
3. 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; or
4. Enter a final order adopting the recommendations (proposed order) of the ALJ.

The Department supports alternative 3 utilizing the Final Order (Attachment 2) which incorporates and modifies the ALJ's proposed order (Attachment 1) to clarify ODF's authority and the timeline for making repairs. The modification complies with OAR 137-003-0655 and 0665 as it does not change the ALJ's proposed order in any substantial manner, nor does it change any finding of fact made by the ALJ.

RECOMMENDATION

Issue a Final Order that incorporates and modifies the ALJ's proposed order.

ATTACHMENTS

- (1) ALJ Proposed Order
- (2) Draft Final Order