

Agenda Item No.:	03
Work Plan:	Administrative Work Plan
Topic:	Final Orders
Presentation Title:	Final Order – Douglas County, By and through the Douglas County Public Works Department
Date of Presentation:	January 8, 2025
Contact Information:	Greg Wagenblast, Civil Penalties Administrator, Private Forests Division 541-525-6462 greg.wagenblast@odf.oregon.gov Scott Swearingen, Field Support Manager, Private Forests Division 503-945-7473 Scott.Swearingen@odf.oregon.gov

SUMMARY

The Department issued a citation to the Douglas County Public Works Department alleging that the County violated the Forest Practices Act by failing to file a Notification of Operation prior to removing trees along Hubbard Creek Road. Douglas County contested the Notice of Violation, Cease and Repair Orders. The matter was referred to the Office of Administrative Hearings for a contested hearing. The parties each filed motions for summary determination. Administrative Law Judge Bradley Schmidt ruled in favor of the Department and issued a proposed order upholding the Department’s actions. The Board is now called upon to consider issuance of a Final Order.

FACTUAL BACKGROUND for ODF Case No. 23-DG021

On August 24, 2023, lightning strikes started a series of wildfires that combined to form the Tyee Ridge Complex Fire in northern Douglas County, Oregon, near and adjacent to Hubbard Creek Road. The fire burned approximately 8,000 acres. The Tyee Ridge Complex Fire was contained on September 18, 2023.

Hubbard Creek Road is a county roadway under the maintenance jurisdiction of Douglas County (“Respondent”). It is set in a low valley with steep hillsides and provides access to industrial timberland, several homesites, and farmland.

As part of the response to the Tyee Ridge Complex Fire, timber fallers within the Department’s Incident Management Teams cut trees that they found to be a hazard to fire crews, structures, or roadways, including trees along Hubbard Creek Road.

From approximately September 14, 2023, when the fire was ending, to around September 19, 2023, Respondent’s arborist evaluated and inventoried trees which posed a hazard to the traveling public on Hubbard Creek Road.

From September 25, 2023, to September 27, 2023, Respondent obtained consent (in the form of a “license”) from three landowners with land abutting Hubbard Creek Road. This license

provided Respondent with permission to enter the private property and remove hazard trees near and adjacent to Hubbard Creek Road. On October 18, 2023, the Douglas County Commissioners approved the licenses.

On October 19, 2023, Department Stewardship Foresters (SFs) Kyle Temple and Cody Frieler were traveling along Hubbard Creek Road and observed tree felling activities along Hubbard Creek Road. The activities were on lands adjacent to Hubbard Creek Road owned by various landowners, including Cannonball Timber Holdings, LLC, and Betty Lamb.

SFs Temple and Frieler stopped along Hubbard Creek Road and talked to Marq Randall of Dig N Haul Excavation, Inc. (Dig N Haul) and Respondent's Public Works Director, Scott Adams. Mr. Adams stated that he was directing the activities on behalf of Respondent. Mr. Adams further stated that no NOAP was needed for the felling and removal of the hazard trees, but that if the trees were to be sold at a later date, then a NOAP would be filed at that time. SF Temple stated that he believed a NOAP was required for the entire project.

On October 23, 2023, SF Temple and SF Cody Lokan visited the site again. They talked to Mr. Randall. SF Temple observed that the felling and removal of trees was still occurring along Hubbard Creek Road.

On October 27, 2023, Respondent Commissioner Tim Freeman contacted SF Tyler Ramos to confirm Respondent's position that it would not be filing a NOAP.

On October 30, 2023, SF Temple served a citation on Respondent, through Mr. Adams, at the Douglas County Courthouse. SF Temple also delivered a courtesy copy to Mr. Randall at the site.

On October 30, 2023, the Oregon Department of Forestry (Department) issued a Notice of Violation/Citation, Order to Cease Further Violation, and Order to Repair Damage or Correct Unsatisfactory Condition Caused by Violation (Repair Order) to Douglas County, by and through the Douglas County Public Works Department (Respondent).

On November 21, 2023, Respondent requested a hearing, and the Department referred the hearing request to the Office of Administrative Hearings (OAH).

OFFICE OF ADMINISTRATIVE HEARINGS

The OAH assigned Senior Administrative Law Judge (ALJ) Bradley A. Schmidt to preside over the matter. On February 21, 2024, ALJ Schmidt convened a prehearing conference to review the hearing issues, schedule the hearing, and set related deadlines.

Pursuant to the agreed upon motion schedule, the parties filed Motions for Summary Determination, along with responses and replies, as well as supporting exhibits, affidavits and declarations. In addition, the parties jointly provided Stipulated Facts for Motion for Summary Determination.

ALJ Schmidt issued a ruling on the Motions for Summary Determination and issued a Proposed Order on October 2, 2024 (Attachment 01). The Proposed Order finds in favor of the Department's action. Specifically, the Proposed Order denies Douglas County's motion and grants the Department's motion.

The proposed order included Undisputed Facts as he determined from the records, motions and affidavits submitted. These Undisputed Facts are provided in Attachment 01, page 3 through page 8.

ALJ Schmidt determined there were two issues involved with this contested case:

1. Whether there are any genuine issues as to any material facts and, if not, whether one of the parties is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.
2. Whether Respondent's failure to file a Notification of Operations (NOAP) related to its contracting for the removal of hazard trees along Hubbard Creek Road in October 2023 violated the notice requirements of the Forest Practices Act (FPA). ORS 527.670(6); OAR 629-605-0150(1).

For purposes of the proposed order, the ALJ considered the following records: the pleadings, the motions, the responses, the replies, the Stipulated Facts, the Affidavit of Dominic M. Carollo, the Affidavits of Scott Adams, Respondent's Exhibits 1 through 8, the Affidavits of Kyle Temple, the Declarations of Matthew B. DeVore, and Department Exhibits A01, A02, A04, A18, A32, A35, A48, A65, A67, and A73 through A83.

ALJ Schmidt determined the following Conclusions of Law based on the contested case:

1. There are no genuine issues as to any material facts and the Department is entitled to a favorable ruling as a matter of law.
2. Respondent's failure to file a NOAP related to its contracting for the removal of hazard trees along Hubbard Creek Road in October 2023 violated the notice requirements of the FPA.

The Proposed Order denies Douglas County's Motion for Summary Determination and grants the Department's Motion for Summary Determination. The Proposed Order further proposes that the Department issue an order that Douglas County, by and through the Douglas County Public Works Department, failed to submit to the State Forester a Notification of Operations and Application for Permit of Power Driven Machinery prior to conducting forest operations in violation of ORS 527.670(6) and OAR 629-605-0150(1).

EXCEPTIONS

The Administrative Procedures Act allows parties to make objections to proposed orders, in the form of "exceptions." ORS 183.460; OAR 137-003-0650. Consistent with the Department's rules, the Proposed Order explained that "exceptions shall be confined to factual and legal

issues which are essential to the ultimate and just determination of the proceeding.” OAR 629-001-0040(1). Exceptions “shall be based only on grounds that:

- (A) A necessary finding of fact is omitted, erroneous, or unsupported by the preponderance of the evidence on the record;
- (B) A necessary legal conclusion is omitted or is contrary to law or the board's policy;
or
- (C) Prejudicial procedural error occurred.” OAR 629-001-0040(2)(a).

In addition, the Proposed Oder explained that exceptions must specify the disputed finding, opinions, or conclusions. The party submitting exceptions must specify the nature of the suggested error and provide alternative or corrective language. OAR 629-001-0040(2)(b).

The Proposed Order set a deadline for filing exceptions of seven days after the date of the filing of the proposed order. Douglas County requested, and the Department agreed, to extend the deadline for filing exceptions to October 18, 2024. Douglas County filed timely exceptions on October 17, 2024, via email and hardcopy received by US Mail on October 21, 2024. Those exceptions are attached to this report.

RECORD OF PROCEEDING

The record of the proceedings is available for Board members to review prior to the Board of Forestry meeting by contacting Greg Wagenblast at (541)525-6462 or greg.wagenblast@odf.oregon.gov and a hardcopy will be available at the Board of Forestry meeting.

The Board’s decision must be based on the record established through the contested case hearing process. ORS 183.482(7). Any information about the facts at issue that Board members acquire from other sources may be ex parte communication. Ex parte communication is defined as “an oral or written communication to an agency decision maker during its review of the contested case not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding.” OAR 137-003-0660(1). However, this definition specifically excludes “any communication from agency staff or counsel about legal issues or about facts in the record.” OAR 137-003-0660(1). If a Board member receives an ex parte communication during their review of the contested case, the Board member must give all parties notice of the substance of the communication or a copy of the communication, and provide the other party with an opportunity to rebut the substance of the ex parte communication. ORS 183.462; OAR 137-003-0660(2).

BOARD’S ALTERNATIVES

Upon review of the proposed order and record presented in this case, pursuant to OAR 629-001-0045(3) the Board can:

1. Entertain written and/or oral argument from the State Forester and any party that filed exceptions to the proposed order 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 administrative law judge 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 a final order adopting the recommendations (proposed order) of the hearings officer; or
4. Reject the hearing officer's proposed order and adopt a different final order that contains the necessary findings of fact and conclusions of law based on the record.

RECOMMENDATION

The Department recommends that the Board approve Alternative 3 and issue a Final Order adopting the ALJ's proposed order. A draft Final Order is included as Attachment 03.

ATTACHMENTS

- (1) Ruling on Motions for Summary Determination and Proposed Order for ODF Case No. 23-DG021
- (2) Exceptions for ODF Case No. 23-DG021 filed by Douglas County attorney
- (3) Draft Final Order for ODF Case No. 23-DG021

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

IN THE MATTER OF:)	RULING ON MOTIONS FOR
)	SUMMARY DETERMINATION
DOUGLAS COUNTY, BY AND)	AND PROPOSED ORDER
THROUGH THE DOUGLAS)	
COUNTY PUBLIC WORKS)	OAH Case No. 2023-ABC-06272
DEPARTMENT)	Agency Case No. 23-DG021

HISTORY OF THE CASE

On October 30, 2023, the Oregon Department of Forestry (Department) issued a Notice of Violation/Citation, Order to Cease Further Violation, and Order to Repair Damage or Correct Unsatisfactory Condition Caused by Violation (Repair Order) to Douglas County, by and through the Douglas County Public Works Department (Respondent).¹ On November 21, 2023, Respondent requested a hearing, and the Department referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Bradley A. Schmidt to preside over the matter.

On February 21, 2024, ALJ Schmidt convened a prehearing conference to review the hearing issues, schedule the hearing, and set related deadlines. Attorney Dominic M. Carollo represented Respondent. Assistant Attorney General (AAG) Matthew B. DeVore represented the Department, with Department employees Greg Wagenblast and Kirk Ausland also attending. ALJ Schmidt scheduled the hearing for October 29, 2024, in Roseburg, Oregon. The parties agreed to file any Motions for Summary Determination (MSDs) by May 31, 2024, with responses due on June 21, 2024, and replies to responses due on July 5, 2024.

On May 23, 2024, the Department filed a motion to change the MSD deadlines, with no objection from Respondent. ALJ Schmidt granted the motion, which changed the deadline for filing an MSD to July 12, 2024, with responses due August 2, 2024, and replies due August 16, 2024.

On July 12, 2024, the Department and Respondents each filed an MSD. With its MSD, the Department filed an Affidavit of Kyle Temple (First Temple Affidavit), a Declaration of

¹ The Repair Order only directed Respondent to file a Notification of Operations (NOAP) related to the removal of hazard trees along Hubbard Creek Road.

Matt DeVore,² and Exhibits A01, A02, A04, A32, A35, A65, A67, A74, and A75. Respondent included Exhibits 1 through 8 and the Affidavit of Scott Adams (First Adams Affidavit) with its MSD. In addition, the parties jointly provided Stipulated Facts for Motion for Summary Determination.

On August 2, 2024, the parties filed responses in opposition to the other party's MSD with additional supporting documents, as follows: the Department provided an Affidavit of Kyle Temple (Second Temple Affidavit), a Declaration of Matt DeVore, Exhibit A18, and Exhibits A76 through A82; Respondent provided the Second Affidavit of Scott Adams (Second Adams Affidavit).

On August 16, 2024, the parties filed replies. With its reply, the Department included a Declaration of Matt DeVore and Exhibit A83. ALJ Schmidt took the matter under advisement.

ISSUES

1. Whether there are any genuine issues as to any material facts and, if not, whether one of the parties is entitled to a favorable ruling as a matter of law. OAR 137-003-0580.

2. Whether Respondent's failure to file a Notification of Operations (NOAP) related to its contracting for the removal of hazard trees along Hubbard Creek Road in October 2023 violated the notice requirements of the Forest Practices Act (FPA). ORS 527.670(6); OAR 629-605-0150(1).

DOCUMENTS CONSIDERED

For purposes of this ruling and proposed order, the ALJ considered the following: the pleadings, the MSDs, the responses, the replies, the Stipulated Facts, the Affidavit of Dominic M. Carollo, the Affidavits of Scott Adams, Respondent's Exhibits 1 through 8, the Affidavits of Kyle Temple, the Declarations of Matthew B. DeVore, and Department Exhibits A01, A02, A04, A18, A32, A35, A48, A65, A67, and A73 through A83.³

STIPULATED FACTS

1. On August 24, 2023, lightning strikes started a series of wildfires that combined to form the Tye Ridge Complex Fire in northern Douglas County, Oregon, near and adjacent to Hubbard Creek Road. The fire burned approximately 8,000 acres. The Tye Ridge Complex Fire was contained on September 18, 2023.

2. Hubbard Creek Road is a county roadway under the maintenance jurisdiction of Respondent. It is set in a low valley with steep hillsides and provides access to industrial

² The Department's three Declarations of Matt DeVore attested to the authenticity of other documentary evidence but did not contain independent assertions of fact. As such, they receive no subsequent citation.

³ This constitutes all of the exhibits submitted for consideration with the MSD, the responses, and the replies (the Department did not mark its exhibits in sequential numerical order).

timberland, several homesites, and farmland.

3. As part of the response to the Tye Ridge Complex Fire, timber fallers within the Department's Incident Management Teams cut trees that they found to be a hazard to fire crews, structures, or roadways, including trees along Hubbard Creek Road.

4. From approximately September 14, 2023, when the fire was ending, to around September 19, 2023, Respondent's arborist evaluated and inventoried trees which posed a hazard to the traveling public on Hubbard Creek Road.

5. From September 25, 2023 to September 27, 2023, Respondent obtained consent (in the form of a "license") from three landowners with land abutting Hubbard Creek Road. This license provided Respondent with permission to enter the private property and remove hazard trees near and adjacent to Hubbard Creek Road. On October 18, 2023, the Douglas County Commissioners approved the licenses.

6. On October 19, 2023, Department Stewardship Foresters (SFs) Kyle Temple and Cody Frieler were traveling along Hubbard Creek Road and observed tree felling activities along Hubbard Creek Road. The activities were on lands adjacent to Hubbard Creek Road owned by various landowners, including Cannonball Timber Holdings, LLC, and Betty Lamb.

7. SFs Temple and Frieler stopped along Hubbard Creek Road and talked to Marq Randall of Dig N Haul Excavation, Inc. (Dig N Haul) and Respondent's Public Works Director, Scott Adams. Mr. Adams stated that he was directing the activities on behalf of Respondent. Mr. Adams further stated that no NOAP was needed for the felling and removal of the hazard trees, but that if the trees were to be sold at a later date, then a NOAP would be filed at that time. SF Temple stated that he believed a NOAP was required for the entire project.

8. On October 23, 2023, SF Temple and SF Cody Lokan visited the site again. They talked to Mr. Randall. SF Temple observed that the felling and removal of trees was still occurring along Hubbard Creek Road.

9. On October 27, 2023, Respondent Commissioner Tim Freeman contacted SF Tyler Ramos to confirm Respondent's position that it would not be filing a NOAP.

10. On October 30, 2023, SF Temple served a citation on Respondent, through Mr. Adams, at the Douglas County Courthouse. SF Temple also delivered a courtesy copy to Mr. Randall at the site.

UNDISPUTED FACTS

1. Since 2022, Respondent has contracted with Dig N Haul for county road services, including the removal of hazard trees, in situations where Respondent lacks the manpower and/or equipment to complete the required services. (Ex. 7 at 1; First Adams Aff. at 4-5; Second Adams Aff. at 3.)

2. Between September 14, 2023 and September 19, 2023, Respondent's arborist identified 279 trees to be removed from along Hubbard Creek Road (55 within and 224 outside of the county's right of way) as follows: 155 Douglas firs, 6 madrones, 12 cedars, 33 maples, 32 grand firs, and 41 others (such as hemlock, Oregon myrtle, and chinquapin). (Ex. A75 at 1, 3-15.) The trees ranged in height from 20 feet to 160 feet, with an average height of approximately 70 feet. (*Id.* at 2.)

3. Prior to the completion of Respondent's hazard abatement along Hubbard Creek Road, none of the landowners had applied to convert the land to a use other than as forestland. (Second Temple Aff. at 1.)

4. Hubbard Creek Road is located between steep slopes in the Tye Core area, a geographical region with features increasing the risk of landslides. In 1996, a rapid landslide occurred along Hubbard Creek Road due to a clearcut and heavy rains, resulting in multiple deaths. (First Temple Aff. at 2.)

5. The Department uses the 15-day waiting period following the filing of the NOAP to complete or examine existing geotechnical (or "geotech") studies of landslide danger in the operation area to ensure that the operation will not negatively impact public safety. (First Temple Aff. at 7; Ex. A32 at 5-10.) The Department also uses the 15-day waiting period to determine whether the operation will impact riparian resources. (First Temple Aff. at 7; Ex. A32 at 2.)

6. After speaking with Mr. Randall and Mr. Adams on October 19, 2023, SF Temple contacted Gabe Crane of Cannonball Timber Holdings and Roseburg Forest Products. SF Temple informed Mr. Crane that no NOAP had been filed for the operation occurring along Hubbard Creek Road. Mr. Crane filed NOAP number 2023-730-11302 that evening. (First Temple Aff. at 4; Ex. A04 at 1.) The NOAP covered only the property owned by Cannonball Timber Holdings. (First Temple Aff. at 5; Ex. A04 at 1.) The Department had an existing geotech study for this property from 2020. (Ex. A04 at 5-8.)

7. Also on the afternoon of October 19, 2023, SF Temple emailed Mr. Adams to reiterate that Respondent needed to file a NOAP related to the hazard abatement along Hubbard Creek Road. (First Temple Aff. at 5; Ex. A02 at 1.)

8. On October 30, 2023, Mr. Crane filed a NOAP for the Betty Lamb property. (First Temple Aff. at 7; Ex. A32 at 1.) During the 15-day waiting period, the Department conducted a geotech study and riparian impact evaluation. (First Temple Aff. at 7; Ex. A32 at 2-10.) The Department found that this property contained High Landslide Hazard Locations (HLHLs). (First Temple Aff. at 7; Ex. A32 at 8.) The Department also found that the property contained a fish-bearing stream, which would normally require the filing of a written plan before the commencement of an operation. (First Temple Aff. at 7; Ex. A32 at 2.)

9. The hazard tree abatement contracted by Respondent and completed by Dig N Haul along Hubbard Creek Road between October 18, 2023 and October 30, 2023 resulted in the felling of between approximately 200 and 500 trees. (First Temple Aff. at 7; Exs. A48 at 1, A73 at 1.)

10. At least some of the trees felled in Respondent’s hazard abatement represented a danger to the county roadway and the traveling public using Hubbard Creek Road. (First Adams Aff. at 2; Second Adams Aff. at 3; First Temple Aff. at 8.) A failure to remove the trees could have increased the risk of landslide along Hubbard Creek Road in the impending wet season. (First Adams Aff. at 2-3.)

11. Subsequent to the removal of the hazard trees, Respondent undertook efforts to revegetate the slopes above Hubbard Creek Road to further mitigate the landslide danger. (First Adams Aff. at 6.)

12. In abating the hazard trees along Hubbard Creek Road, Dig N Haul felled the trees, removed them from their original locations on the slope above Hubbard Creek Road, limbed them, sawed them into logs consistent with commercial timber sales, and decked them, *i.e.*, stacked them in an area that could be used as a staging area for their removal. (First Temple Aff. at 3, 7; Exs. A48 at 1, A73 at 1; First Adams Aff. at 4; Second Adams Aff. at 2.) The decking area was located on the property of Betty Lamb. (First Temple Aff. at 3.)

13. As of April 19, 2024, some or all of the decked logs remained where they were left at the conclusion of the hazard abatement activity. (Second Temple Aff. at 1-2.)

14. On December 21, 2021, the Department promulgated in its publicly available Forest Practices Rule Guidance the following official analysis of the term “forestland” as used to determine FPA applicability and as defined in OAR 629-600-0100(26), in relevant part:

*** * * Is the activity on “forestland?”**

Forestland defined for Forest Practices Administration.

“Forestland” is defined broadly in ORS 527.620 “Definitions” and includes any land being used to grow and harvest forest tree species, even if that is not the **primary** use of the land. The zoning, tax status, other state or local statutes, ordinances, rules or regulations that may apply to the parcel are not considered when making the forestland determination. If forest tree species are growing on the land and activities for managing or harvesting trees for commercial purposes have been or are being conducted, it is forestland.

Forestland: Any size tract or patch of trees that can be harvested for a commercial forest product regardless of the surrounding land use or zoning of the land, including:

- Strips of timber along streams on farm or range land. There is an exemption for the *establishment* and *management* of forested patches intended to mitigate the effects of agricultural practices on the environment or fish and wildlife resources, such as trees that are established or managed for windbreaks, riparian filters, or shade strips immediately adjacent to actively farmed lands. This exemption does

not apply to the *harvest* of such forested patches.

- Patches of timber that remain inside urbanized areas that are not exempted by the FPA definition of “operation.”
- Patches of timber within the urban growth boundary of local governments that have not adopted land use regulations that supplant the FPA.
- Natural or unmaintained areas of public parks and campgrounds (Not including areas of publicly-accessible parks and campgrounds maintained for public use, as these are considered to be already converted to non-forest land).
- The forested portions of rights-of-ways are considered “forestland” for purposes of FPA administration.

Non-forestland, considered to be already converted to a non-forest use, includes:

- “Yard” or grounds around maintained residential structures and outbuildings to the extent of 1.5 times the height of on-site trees currently growing in the vicinity, per guidance for hazard trees from Oregon Occupational Safety and Health Division.
 - The portions of parks, campgrounds, and day-use areas that are maintained/landscaped, or developed with maintained buildings or other structures, and where people are normally present.
 - Includes publicly- and privately-owned parks, campgrounds, and day-use areas, with the condition that the public is invited to use the facilities.
 - “Developed with building or other structures” does not include:
 - Hiking trails outside publicly-accessible parks, campgrounds and day-use areas.
 - Privately-owned facilities not generally open for public use.
- Developed and maintained public campgrounds and park areas that are not managed for the growing and harvesting of tree species, rather are managed exclusively for recreation. Incidental tree harvests in public campgrounds or parks that are non-forestland would not be reforested with the intent of future commercial tree harvest.
- Tree nurseries and seed orchards.
 - Statute excludes from the definition of “operation” those activities relating to tree nurseries and seed orchards (ORS 527.620).
 - The 1995 Memorandum of Agreement on pesticide regulation between the Board of Forestry and ODA states that the definition of forestland does not include tree nurseries or seed orchards.
- “Utility rights-of-way” such as power line or gas pipeline

corridors, where commercial trees have already been harvested. However, within the non-forestland portion of the ROW, notifications are required for incidental commercial forest harvest for DOR and PDM purposes only. There is typically a federal/state/regional/local process for such conversions. ODF's policy is that it wants to be included in the planning stages, but that most of its resource protection concerns would be addressed in the existing formal process. **Note:** Notifications are needed for stream crossings, road building and harvesting. Where written plans are needed, they would usually be in the form of existing planning documents. Other concerns, such as landslides and public safety should be considered in the planning process.

Because the definition of an "operation" reads ". . . activity relating to the establishment, management or harvest of forest tree species . . .," forest practice's jurisdiction extends to adjacent land crossed in order to access forestland. Examples: A road, used however occasionally in forest operations, that crosses residential or agricultural land to reach forestland. ODF will regulate the resource-affecting activities on a road crossing federal land to access an operation on private forestland.

(Ex. A65 at 21-22, emphasis original.)

15. On January 12, 2022, the Department promulgated the following official interpretation of OAR 629-605-0500 in its publicly available Forest Practices Rule Guidance:

APPLICATION:

This rule is not used for enforcement. A PFAP [Plan for Alternate Practice] is required to modify a forest practice rule **relating to the listed waters and their RMAs** [riparian management areas], to address forest health or public safety concerns. The operator must comply with the standard practice unless there is an approved PFAP. Without such a plan, ODF takes enforcement action under that rule for failure to follow the standard practice.

ADMINISTRATION:

This rule only allows the reduction of protection requirements (not an increase or more restrictive requirements). It does not relax administrative requirements for notifications, written plans or their waiting periods.

Note: In circumstances where a hazard immediately threatens life or improved property such as homes and public roads (an "emergency"), actions to respond to and mitigate the emergency would not be considered an "operation" under the Oregon FPA. Thus, in these limited

circumstances, the FPA would not apply on forestland. After the emergency has passed, any subsequent activities related to growing and harvesting of forest tree species would be forest practices and subject to the protection standards and administrative requirements of the Act.

The SF must use his/her best professional judgment in determining if there is a legitimate forest health or public safety hazard involving streams, lakes, wetlands, and their RMAs. The potential hazard tree zone is considered to be 1.5 time[s] tree heights from the road or other infrastructure, plus additional distance for upslope hazard trees or snags. In making this determination, the SF may consult with appropriate other agencies or Salem staff. One objective of this rule is to improve forest health by allowing removal of diseased or infested trees that pose a substantial risk to upland stands. This objective of the rule does not extend to salvaging all dying trees from the RMA.

* * * * *

In public safety situations, often individual trees or groups of trees will need to be harvested to protect improvements. In those situations, if the basal area target can be met by other trees in the RMA, then there is no need to modify the basal area requirements. Example: Unstable woody debris in a stream directly threatens a culvert or bridge. An acceptable PFAP would allow the woody debris to be approved for removal from the aquatic area.

Note: Nothing in this rule allows the department to suspend the mandatory comment period required before approving a PFAP that is part of a statutory written plan as discussed in OAR 629-605-0173(3).

Hazard trees and snags felled under this section must be left in place unless moved only as necessary to abate the hazard or used for stream improvement. OAR 629-642-0100(3), -0105(7), -0400(3).

The operator may wish to remove a hazard tree in an RMA which would otherwise be required to be retained. Because of the public safety hazard that leaving this tree poses, the rules allow for this modification even though the result is not “equal or better”, OAR 629-605-0100(2)(d) and -0173.

Note: Non-forestland, considered to have been already converted to non-forest use, includes the distance around residential structures that is 1.5 times the tree height, plus additional distance for upslope hazard trees or snags. Non-forestland is not under the FPA jurisdiction. See guidance for OAR 629-600-0100 that addresses activity on forestland[.]

(Exs. 4 at 84-85, A67 at 84-85, emphasis original.)

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material facts and the Department is entitled to a favorable ruling as a matter of law.
2. Respondent's failure to file a NOAP related to its contracting for the removal of hazard trees along Hubbard Creek Road in October 2023 violated the notice requirements of the FPA.

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling * * *.

Issues may be resolved on a motion for summary determination only where the application of law to the facts requires a single, particular result. Therefore, the issues on summary determination must be purely legal. *King v. Department of Public Safety Standards and*

Training, 289 Or. App. 314, 321 (2017) (citing *Hamlin v. PERB*, 273 Or App 796, 798 (2015)). An ALJ may not grant a motion for summary determination simply because the weight of the evidence favors one party over the other. *Id.* at 322 (citing *Watts v. Board of Nursing*, 282 Or App 705, 714 (2016) (“If there is evidence creating a relevant fact issue, then no matter how ‘overwhelming’ the moving party’s evidence may be, or how implausible the nonmoving party’s version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing.”)); *see also Staten v. Steel*, 222 Or App 17, 31 (2008), *rev den*, 345 Or 618 (2009) (stating that a court does not weigh the evidence on a motion for summary judgment).

Pursuant to OAR 137-003-0580(6)(a), I considered the pleadings, the MSDs, the Responses, the Replies, the Stipulated Facts, the Affidavit of Dominic M. Carollo, the Affidavits of Scott Adams, Respondent’s Exhibits 1 through 8, the Affidavits of Kyle Temple, the Declarations of Matthew B. DeVore, and Department Exhibits A01, A02, A04, A18, A32, A35, A48, A65, A67, and A73 through A83. Pursuant to OAR 137-003-0580(7), I reviewed the evidence in a light most favorable to Respondent.⁴ Based upon that review, there are no material facts in dispute regarding whether Respondent was required to file a NOAP under the FPA. The Department is entitled to a favorable ruling, thus resolving all issues in this matter. The currently scheduled hearing will be cancelled in light of this Ruling and Proposed Order.

Respondent’s Failure to File NOAP

The Department contends that Respondent failed to file a NOAP as required by ORS 527.670(6), part of the Oregon Forest Practices Act (FPA), codified at ORS 527.610 through ORS 527.770, ORS 527.990(1), and ORS 527.992. ORS 527.610(1). Respondent contends that it was not subject to the notice requirement in ORS 527.670(6).

ORS 527.670(6) states, in relevant part:

An operator, timber owner or landowner, before commencing an operation, shall notify the State Forester. The notification shall be on forms provided by the State Forester and shall include the name and address of the operator, timber owner and landowner, the legal description of the operating area, and any other information considered by the State Forester to be necessary for the administration of the rules promulgated by the board pursuant to ORS 527.710. Promptly upon receipt of such notice, the State Forester shall provide a copy of the notice to whichever of the operator, timber owner or landowner did not submit the notification.

A systematic analysis of the above law with regard to the stipulated and undisputed facts shows that Respondent’s hazard abatement activities in October 2023 fell within its purview.

The FPA’s general framework

⁴ However, to the extent that the affidavits submitted by the parties asserted legal conclusions, such as whether certain statutory definitions applied, these legal conclusions were disregarded. All legal conclusions contained herein are those of the ALJ based upon an application of the relevant laws and rules to the undisputed facts.

The FPA directs the actions of the Department and the State Board of Forestry (Board) with regard to “forestland,” defined as “land that is used for the growing and harvesting of forest tree species, regardless of how the land is zoned or taxed or how any state or local statutes, ordinances, rules or regulations are applied.” ORS 527.620(8). The Board is a seven-member panel appointed by the governor to supervise forest policy and, with the Department, promulgate rules in accordance with the legislature’s mandates. ORS 526.009(1); ORS 526.016(1); ORS 526.031(1); ORS 526.041(1). The Oregon legislature set forth the policy concerns and purpose of the FPA in ORS 527.630, as follows in relevant part:

(1) Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Therefore, it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water, fish and wildlife resources * * * and to ensure the continuous benefits of those resources for future generations of Oregonians.

(2) It is recognized that operations on forestland are already subject to other laws and to regulations of other agencies which deal primarily with consequences of such operations rather than the manner in which operations are conducted. It is further recognized that it is essential to avoid uncertainty and confusion in enforcement and implementation of such laws and regulations and in planning and carrying out operations on forestlands.

(3) To encourage forest practices implementing the policy of [the FPA], it is declared to be in the public interest to vest in the State Board of Forestry exclusive authority to develop and enforce statewide and regional rules pursuant to ORS 527.710 and to coordinate with other state agencies and local governments which are concerned with the forest environment.

(4) It is recognized that ensuring compliance with, and enforcing, [the FPA] and rules and orders adopted or issued thereunder is essential to protect Oregon’s natural resources. It is further recognized that onsite inspections are necessary to further the policy of [the FPA].

(5) It is recognized that enforcement of the policy of [the FPA] is necessary to support the integrity of the policy and give the public confidence that standards for forest practices are being followed. It is further recognized that an effective enforcement program must include:

(a) Adequate training and education of enforcement officers, operators, timber owners and landowners.

(b) Clear technical guidance.

(c) Implementation expectations that are transparent and easily understood by operators, timber owners and landowners.

(6) It is declared to be the policy of the State of Oregon that the program for implementing enforcement under [the FPA] be adequately funded, and that the board:

(a) Use inspections and enforcement as tools to deter future violations and to educate and train operators, timber owners and landowners.

(b) In exercising enforcement discretion, including discretion to impose penalties, prioritize addressing significant violations, other consequential violations and the actions of repeat violators.

* * * * *

(8) The board shall adopt and enforce forest practice rules to reduce the risk of serious bodily injury or death from a rapidly moving landslide only in accordance with ORS 527.710(10). As used in this subsection, “rapidly moving landslide” has the meaning given in ORS 195.250.⁵

As set forth in ORS 527.670, the Oregon legislature contemplated that certain forest operations would require a notice filed with the Department. ORS 527.670(1) states that “[t]he State Board of Forestry shall designate the types of operations for which notice shall be required.”

Similarly, ORS 527.710 states, in relevant part:

(1) In carrying out the purposes of [the FPA], the State Board of Forestry shall adopt, in accordance with applicable provisions of ORS chapter 183 [the Administrative Procedures Act], rules to be administered by the State Forester establishing standards for forest practices in each region or subregion.

(2) The rules shall ensure the continuous growing and harvesting of forest tree species. Consistent with ORS 527.630, the rules shall provide for the overall maintenance of the following resources:

(a) Air quality;

⁵ “‘Rapidly moving landslide’ means a landslide that is difficult for people to outrun or escape.” ORS 195.250(3).

(b) Water resources, including but not limited to sources of domestic drinking water;

(c) Soil productivity; and

(d) Fish and wildlife.

* * * * *

(10) In addition to its responsibilities under subsections (1) to (3) of this section, the board shall adopt rules to reduce the risk of serious bodily injury or death caused by a rapidly moving landslide directly related to forest practices. The rules shall consider the exposure of the public to these safety risks and shall include appropriate practices designed to reduce the occurrence, timing or effects of rapidly moving landslides. As used in this subsection, “rapidly moving landslide” has the meaning given that term in ORS 195.250.

Under the above laws, the legislature delegated broad authority to the Board and Department to set rules and provide technical guidance regarding forest practices. This includes the authority to designate which forest operations require the filing of a notice. The Board adopted rules in OAR Chapter 629, divisions 600 through 680 to implement the directives in the FPA. OAR 629-600-0050.

The hazard abatement was an “operation” requiring the filing of a notice.

In ORS 527.620(13), the Oregon legislature provided the following relevant definition for purposes of the FPA:

“Operation” means any commercial activity relating to the establishment, management or harvest of forest tree species^[6] except as provided by the following:

(a) The establishment, management or harvest of Christmas trees, as defined in ORS 571.505, on land used solely for the production of Christmas trees.

(b) The establishment, management or harvest of hardwood timber,

⁶ ORS 527.620(7) states:

“Forest tree species” means any tree species capable of producing logs, fiber or other wood materials suitable for the production of lumber, sheeting, pulp, firewood or other commercial forest products except trees grown to be Christmas trees as defined in ORS 571.505 on land used solely for the production of Christmas trees.

including but not limited to hybrid cottonwood * * *.

(c) The establishment, management or harvest of trees actively farmed or cultured for the production of agricultural tree crops, including nuts, fruits, seeds and nursery stock.

(d) The establishment, management or harvest of ornamental, street or park trees within an urbanized area, as that term is defined in ORS 221.010.

(e) The management or harvest of juniper species conducted in a unit of less than 120 contiguous acres within a single ownership.

(f) The establishment or management of trees intended to mitigate the effects of agricultural practices on the environment or fish and wildlife resources, such as trees that are established or managed for windbreaks, riparian filters or shade strips immediately adjacent to actively farmed lands.

(g) The development of an approved land use change after timber harvest activities have been completed and land use conversion activities have commenced.

See also OAR 629-600-0100(93) (echoing the above definition).

Respondent argues that the above definition of “operation” does not apply to its hazard abatement for multiple reasons. First, Respondent contends that the hazard abatement did not involve the “harvest” of forest tree species. This contention is not persuasive. The legislature did not define the word “harvest” for purposes of the above statute, and the Board did not adopt a definition of the word in its related rules. The term “harvest” is not defined by statute or rule in the context of the FPA. Therefore, one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) (“[W]ords of common usage typically should be given their plain, natural, and ordinary meaning.”). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. *State v. Murray*, 340 Or 599, 604 (2006) (“Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.”). The common definition of “harvest” is “the act or process of gathering in a crop.” *Webster’s Third New Int’l Dictionary* 1036 (unabridged ed 1993). The parties provided no evidence that the legislature intended the word “harvest” to be interpreted other than as in this common usage. *State v. Gaines*, 346 Or 160, 171-72 (2009).

A review of related statutes supports the conclusion that the legislature intended the common definition of “harvest” to apply. In ORS 527.620(9) through (11), the legislature defined harvest types 1, 2, and 3; all are operations involving the felling of forest tree species requiring various levels of subsequent remediation (*e.g.*, reforestation). *See also* OAR 629-600-0100(64) – (67) (mirroring the statutory definitions and adding “Harvest type 4” involving the

commercial thinning of residual trees). Because the hazard abatement involved the felling of trees and the gathering of logs to a decking area, it met the common definition of “harvest” regardless of Respondent’s purposes or its expectations regarding the potential sale of the logs.

Respondent also argues that its hazard abatement was not an “operation” because it was not “commercial.” As with the word “harvest,” the legislature did not define the word “commercial” as used in the above statute. However, the Board adopted the following definition in OAR 629-600-0100(23):

“Commercial” means of or pertaining to the exchange or buying and selling of commodities or services. This includes any activity undertaken with the intent of generating income or profit; any activity in which a landowner, operator, or timber owner receives payment from a purchaser of forest products; any activity in which an operator or timber owner receives payment or barter from a landowner for services that require notification under OAR 629-605-0140; or any activity in which the landowner, operator, or timber owner barter or exchanges forest products for goods or services. This does not include firewood cutting or timber milling for personal use.

Respondent contends that because it contracted for the removal of trees for the sole purpose of hazard abatement, the activity was not “undertaken with the intent of generating income or profit.” Respondent argues that the abatement thus did not meet the above definition of “commercial.” Although the Department alleges that Respondent or a landowner bartered, exchanged, and/or sold some or all the resulting logs, Respondent has provided evidence to contradict these allegations. As such, the exchange or sale of forest products cannot form a basis for finding the abatement was “commercial” in the present ruling.

Nevertheless, the undisputed facts compel the conclusion that the hazard abatement “pertain[ed] to the exchange or buying and selling of commodities or services” in fulfillment of OAR 629-600-0100(23). First, whether or not Respondent or the landowners at any point took further action to appraise or pursue a sale of the resulting logs, Respondent unquestionably purchased a service from its contractor, Dig N Haul, to carry out a harvest of forest species. In addition, the undisputed evidence established that this harvest involved the limbing, sawing, and decking of the felled trees. This resulted in stacks of merchantable logs. In other words, the process employed by Respondent through its contractor transformed the trees from a natural feature of the landscape into a commonly sold raw material ready for offsite sale and use.

Respondent argues that its processing of the felled trees was merely a commonsense way to handle the logistics of the hazard abatement, especially given that to leave the trees in place on the steep slope could result in their eventual slide into the roadway. Even accepting this argument as true, it does not change the commercial nature of this processing, particularly because of the scale of the project. Respondent abated the hazard by commodifying hundreds of trees over several days of work. Given the scope of Dig N Haul’s undertaking and the number of decked logs, Respondent’s contention that these should be considered merely incidental to a noncommercial project is unpersuasive. In addition, none of the enumerated exceptions to the

definition of “operation” apply. ORS 527.620(13)(a) – (g). Respondent’s hazard tree abatement was thus an operation under ORS 527.620(13). As the entity conducting that operation, Respondent was an operator under ORS 527.620(14). Therefore, Respondent was required to file a NOAP under ORS 527.670(6).

Respondent further argues that the agency’s definition of “commercial” in OAR 629-600-0100(23) is overbroad and exceeds the rulemaking authority of the agency. This argument is not persuasive. In its rulemaking process, the Board could have defined operations as “commercial” only if initiated with the primary purpose of generating profits. Instead, it decided to consider an operation “commercial,” as in the present matter, merely by the way it is carried out, such as by a paid private contractor and/or by converting trees into saleable logs. The rule’s definition is entirely consistent with the rulemaking authority granted to the Board and the policy considerations set forth in the FPA. In ORS 527.670(1), the legislature delegated to the Board the authority to determine what operations require the filing of a notice. As such, while reasonable minds might disagree on what constitutes a “commercial” operation, it was entirely within the Board’s authority to extend the notice requirement to operations “commercial” by how they are carried out rather than by their aims. Because the legislature specifically distinguished the FPA from other forest-related regulations due to its concern with “the manner in which operations are conducted,” the Board appears to be effectuating the legislature’s purposes in defining operations as “commercial” merely by the way they are conducted. ORS 527.630(2). Finally, to the extent that the determination of the “commercial” nature of the hazard abatement relies upon the Department’s interpretation of the definition contained within OAR 629-600-0100(23) rather than the text of the definition itself, that interpretation deserves substantial deference given the broad authority granted by the legislature. *State v. Acosta*, 112 Or App 191, 195-96 (1992) (quoting *Bailey v. Board on Police Standards*, 100 Or App 739, 742 (1990)).

Respondent also disputes that its hazard abatement fell within Department or FPA jurisdiction based on the question of whether it occurred on “forestland.” However, the undisputed facts established that the area of the hazard abatement extended from Respondent’s right-of-way to privately-owned land outside the right-of-way and contained hundreds of mature trees, such as Douglas firs and maples. There was no effort by the landowners to convert the land to a non-forestland use. Although the parties dispute whether Respondent (or the landowners) ever intended to barter or sell the resulting logs, there is no evidence to dispute that these logs constitute merchantable lumber. While the landowners might not have chosen October 2023 as the time to harvest the trees on that segment of land in the absence of the Tyee Ridge Complex Fire, the undisputed facts showed that the growth of lumber was at least one use of the land.

The Department’s official guidance explains that “forestland” means “[a]ny size tract or patch of trees that can be harvested for a commercial forest product regardless of the surrounding land use or zoning of the land, including * * * [t]he forested portions of rights-of-ways.” Exhibit A65 at 21. It further states that “[i]f forest tree species are growing on the land and activities for managing or harvesting trees for commercial purposes * * * are being conducted, it is forestland.” *Id.* Under the legislature’s broad grant of authority to the Department to regulate and provide technical guidance regarding forest practices, this official guidance must receive substantial deference. *Acosta*, 112 Or App at 195-96 (quoting *Bailey*, 100 Or App at 742). The abatement occurred on forestland under the purview of the FPA.

The County Roads Act does not exempt Respondent from the notice requirement.

Alternatively, Respondent argues that the County Roads Act, codified in ORS chapter 368, exempts it from filing the notice required by ORS 527.670(6). Respondent unquestionably bears the responsibility for, and attendant authority to carry out, maintenance of its county roads and the prevention of hazards thereon. ORS 368.016; *see also, e.g., Donaca v. Curry County*, 303 Or 30 (1987) (declining to grant counties blanket tort immunity for failure to abate county road hazards). But the question of whether this responsibility and authority exempt it from having to file a NOAP when performing road hazard abatements is a separate question.

Referring to the County Roads Act, Respondent specifically argues that ORS 368.271, titled “Abatement of road hazard by county,” empowers counties to abate road hazards without having to submit to Department procedures. This argument is unpersuasive. ORS 368.251 through ORS 368.281 address road hazards on county roads, defined as “public road[s] under the jurisdiction of a county.” ORS 368.001(1). ORS 368.256 sets the relevant guidelines landowners must follow to prevent hazards to county roads:

(1) Except as authorized by the county governing body, an owner or lawful occupant of land shall not allow:

* * * * *

(b) Any * * * tree * * * or other natural or man-made thing on that land to present a danger to or create a hazard for the public traveling on a public road or facilities within the right of way of the public road by obstructing, hanging over or otherwise encroaching or threatening to encroach in any manner on a public road that is under county jurisdiction.

(2) A person is not in violation of this section if there is no reasonable method for the person to control, stop or remove the cause of the violation.

Under ORS 368.261(1) and (2), a county road official can issue an order directing a person in violation of ORS 368.256 to abate the violation within a specified period. If the person does not abate the violation by the deadline, ORS 368.261(3) and ORS 368.266 provide for the holding of a hearing before the county governing body. If at the hearing the county governing body determines that the violation of ORS 368.256 occurred as alleged, it “shall order that person to abate the violation within a time fixed by the county governing body, which time shall not be less than 10 days.” ORS 368.266(3).

In arguing that the County Roads Law exempts it from filing a notice of operation, Respondent primarily relies upon ORS 368.271, which can sometimes allow the county to abate violations of ORS 368.256 without turning to the order and hearing process described above. ORS 368.271 states in relevant part:

(1) A county road official may abate a violation of ORS 368.256 at any

time if any of the following occur:

(a) If the period of time established for abatement of the violation under ORS 368.266 passes and the person ordered to abate the violation has not done so within that time.

(b) If a reasonable attempt to provide service [of a notice of hearing] under ORS 368.266 has been made and no owner or lawful occupant of the property has been located and served.

(c) If the county road official determines that the violation creates a substantial risk of damage, injury or other emergency condition that requires abatement without delay and without notice or hearing. A county road official is not required to comply with ORS 368.261 and 368.266 when the county road official abates a violation under this paragraph.

(2) A county road official may take any reasonable actions under this section to abate the violation of ORS 368.256.

(3) A county and its officers, agents and employees are exempt from liability for any reasonable acts performed under this section, including, but not limited to, any reasonable trespass or conversion of personal property.

Respondent's reliance upon this statute is misplaced. The County Roads Act contains no explicit exemptions from the FPA. ORS 368.251 – ORS 368.281. Both parties submitted evidence of the legislative history of the County Roads Act, none of which evinces a legislative intent to completely release counties from the FPA when abating hazards. A county's authority to abate emergency hazards without resorting to the order and hearing process under ORS 368.271 thus does not necessarily exempt the county from the notice requirement of ORS 527.670(6) where the abatement involves the harvesting of forest species from forestland. Indeed, ORS 527.630(2) recognizes that laws outside the FPA govern forest practices, and ORS 527.630(3) commissions the Department with coordinating with local governments regarding forest practices governed by those other laws, such as the County Roads Act. This coordination can take the form of, for example, requiring a NOAP to alert the Department when a county intends to initiate the harvest of forest tree species. In other words, given the context of the statutes in question, Respondent and other counties are generally bound by the FPA's notice requirements when engaged in operations, even when those operations involve the abatement of county road hazards.

That said, there may be cases where circumstances would make it reasonable for a county to harvest hazard trees without submitting to the Department's notice process. Where this is the case, the liability shield within ORS 368.271(3) could potentially apply. However, even construing all evidence in favor of Respondent, the evidence established that it was not reasonable for it to proceed in the present matter without filing the notice required by ORS 527.670(6). As of September 19, 2023, Respondent's arborist had catalogued the extent of the

hazard to be abated. This consisted of a list of trees to be removed from private property near and within the county's right-of-way. There was no evidence that Respondent did not understand the scope of the hazard to be abated (and was thus incapable of filing an accurate NOAP) once its arborist completed this catalogue. Respondent reached out to the relevant landowners starting on September 25, 2025, to contract for its entry onto private property to remove the trees. This evidence further establishes that Respondent was planning an operation well in advance of the operation's commencement, which did not occur until after the County Commissioners approved the landowner licenses on October 18, 2023.

OAR 629-605-0150(1) requires that operators give only 15 days advance notice before commencing an operation. Moreover, under OAR 629-605-0150(2), the Department may grant a waiver of the 15-day timeline where "the State Forester has already previewed the operation site or has otherwise determined the operation to have only minor potential for resource damage." As such, the undisputed evidence showed that Respondent did not have a reasonable basis not to file the required notice between the time when it apprehended the extent of the hazard and when it began its abatement.

Respondent's resort to ORS 368.271(3) is also complicated by the fact that the undisputed evidence demonstrates Respondent's hazard abatement did not proceed under ORS 368.271 at all. Respondent made no effort to direct the landowners to abate the hazard or submit to a hearing process as contemplated by ORS 368.261 and ORS 368.266, despite having ample time to do so. Rather, Respondent engaged in its approximately month-long process of seeking the landowners' agreement and having its commissioners approve the resulting licenses. As such, the undisputed evidence shows that, rather than proceed immediately with the expectation that "any reasonable trespass or conversion of personal property" resulting from the hazard abatement would be excused by ORS 368.271(3), Respondent charted a careful course with the cooperation of the landowners without resorting to the more punitive measures outlined in ORS 368.261, ORS 368.266, and ORS 368.271. Respondent could have shown similar care with regard to the Department's mandates but did not do so. Because Respondent's failure to file the notice did not constitute a "reasonable act performed under" ORS 368.271, ORS 368.271(3) does not shield it from enforcement by the Department.

Potential notice exceptions for certain hazardous conditions

The Department's regulations provide for exceptions to the notice requirement of ORS 527.670(6) where operators encounter certain unsafe conditions. OAR 329-605-0400; OAR 629-605-0500. OAR 629-605-0400 states:

Compliance with worker safety regulations is essential for ensuring the safety of operators and their employees. Regulation of forest practices must be achieved in a manner which allows operators to comply with applicable federal and state safety requirements. In administering the forest practice rules to meet the resource protection goals, especially requirements related to working near snags, residual green trees and unstable material, the State Forester shall use appropriate discretion.

Similarly, OAR 629-605-0500 states:

Protection requirements for streams, lakes, wetlands and riparian management areas may be modified by approval of a plan for an alternate practice by the State Forester for reasons of forest health or because of hazards to public safety or property. Hazards to public safety or property include hazards to river navigation and hazards to improvements such as roads, bridges, culverts, or buildings. Forest health concerns include fire, insect infestations, disease epidemics, or other catastrophic events not otherwise addressed in OAR 629-642-0600. Such modifications of protection requirements should prevent, reduce or alleviate the forest health conflict or hazard while meeting the intent of the protection goals as much as possible.

Neither of these provisions apply in the present matter. Respondent did not harvest trees as a matter of *worker* safety. The undisputed evidence showed that the operation at issue involved the removal of trees as a matter of danger to the public and a county road. The harvest was not required to maintain the safety of workers already present in the operation's location for other purposes. Therefore, OAR 629-605-0400 does not apply.

By its explicit terms, OAR 629-605-0500 also does not appear to apply. Respondent did not request a modification to the notice requirement; it merely elected not to file the NOAP. Setting this detail aside, the Department's published guidance interprets OAR 629-605-0500 as exempting from the definition of "operation" the felling of trees presenting an immediate threat to life or improved property, such as roads. This guidance would not apply to the present matter because Respondent converted the timber into saleable logs rather than leaving them unprocessed. Exhibit 4 at 85; Exhibit A67 at 85. Moreover, as explained above, Respondent did not consider the trees it felled to constitute an immediate hazard requiring immediate action, as shown by its decision to negotiate licenses with the landowners rather than trespass the land to abate the hazard under the protection of ORS 368.271(3). Therefore, OAR 629-605-0500 does not provide a basis to absolve Respondent of the notice requirement between its identification of the hazard around September 19, 2023, and its initiation of the abatement on or about October 18, 2023.

Indeed, Respondent's failure to file the NOAP had the potential to further increase the danger to Hubbard Creek Road and the traveling public. As explained above, one of the purposes of the FPA, and one of the Department's mandates thereunder, is to mitigate the danger of landslides related to forest practices. ORS 527.710(10). The Board and Department adopted the "shallow, rapidly moving landslide and public safety rules" in OAR Chapter 629, division 623 "to reduce the risk of serious bodily injury or death caused by shallow, rapidly moving landslides directly related to forest practices." OAR 629-623-0000(2) – (3). Under OAR 629-623-0100(1), the Department is required "to screen proposed operations for high landslide hazard locations [HLHLs] that may affect exposed populations." As part of this process, the Department may mandate a geotech review to assess the danger of a proposed operation in HLHLs. OAR 629-623-0250(3).

The undisputed evidence shows that the purpose of the 15-day waiting period is to allow the Department to complete a geotech review if necessary. The undisputed evidence also shows that the hazard abatement area contains HLHLs. Granted, there is no allegation that Respondent's hazard abatement actually increased the danger along Hubbard Creek Road given the nature of the hazard abated and Respondent's subsequent revegetation efforts. But the failure to file a NOAP prevented the Department from carrying out its mandate to review operations for landslide risk. Given the specific danger of landslides in the hazard location, acknowledged by both parties, the evidence is persuasive that this failure fell afoul of the legislature's expressed intentions in the FPA. Had such an operation been carried out by a less competent county administration, a failure to file a NOAP could easily have increased landslide risks. Respondent was required to facilitate coordination with the Department by filing a NOAP before initiating its hazard abatement.

It must be noted that the present ruling does not represent a commentary on Respondent's competence to manage hazards without Department assistance. It may well be that Respondent has correctly characterized the Department's requirement of a NOAP as a needless distraction in the present situation. Nevertheless, an examination of the relevant laws and rules establishes that, as dictated by the Oregon legislature, it is a requirement the Department is entitled to impose upon Respondent under the specific circumstances of this case. Therefore, Respondent violated the notice requirement of ORS 527.670(6) when it failed to file a NOAP related to the removal of hazard trees along Hubbard Creek Road in October 2023.

RULINGS AND ORDER

The Motion for Summary Determination filed by Douglas County, by and through the Douglas County Public Works Department, is DENIED.

The Oregon Department of Forestry's Motion for Summary Determination is GRANTED.

I propose the Oregon Department of Forestry, Private Forests issue the following order:

Douglas County, by and through the Douglas County Public Works Department, failed to submit to the State Forester a Notification of Operations and Application for Permit of Power Driven Machinery prior to conducting forest operations in violation of ORS 527.670(6) and OAR 629-605-0150(1).

Bradley A. Schmidt

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:

Greg Wagenblast, Civil Penalties Administrator
Department of Forestry, Private Forests Division
2600 State Street
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.*

SERVICEMEMBERS' CIVIL RELIEF ACT

Unless otherwise stated in this order, the Office of Administrative Hearings (OAH) has no reason to believe that a party to this proceeding is subject to the Servicemembers' Civil Relief Act (SCRA). If a party to this proceeding is a servicemember who did not appear for the hearing, within the servicemember's period of service, or 90 days after their termination of service, that party should immediately contact the agency to address any rights they may have under the SCRA.

CERTIFICATE OF MAILING

On October 2, 2024, I mailed the foregoing RULING ON MOTIONS FOR SUMMARY DETERMINATION AND PROPOSED ORDER issued on this date in OAH Case No. 2023-ABC-06272.

By: Electronic Mail and Certified Mail

Dominic Carollo
Carollo Law Group
PO Box 2456
Roseburg OR 97470
Email: dcarollo@carollolegal.com

Nolan Smith
Carollo Law Group LLC
PO Box 2456
Roseburg OR 97470
Email: nsmith@carollolegal.com

By: Electronic Mail

Douglas County, by and through The Douglas County Public Works Department
c/o Paul Meyer
1036 SE Douglas Avenue
Roseburg OR 97470
Email: dcarollo@carollolegal.com

Kisha Harp
Carollo Law Group LLC
PO Box 2456
Roseburg OR 97470
Email: kharp@carollolegal.com

Greg Wagenblast
Agency Representative
Oregon Department of Forestry
2600 State Street
Salem OR 97310
Email: greg.wagenblast@ODF.oregon.gov

Matthew B Devore
Assistant Attorney General
Department of Justice
1162 Court St NE
Salem OR 97301
Email: matt.b.devore@doj.oregon.gov

Anesia N Valihov
Hearing Coordinator

1 BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
2 STATE OF OREGON
3 FOR THE
4 OREGON DEPARTMENT OF FORESTRY
5 PRIVATE FORESTS

6 IN THE MATTER OF:)
7)
8 DOUGLAS COUNTY, BY AND) RESPONDENT’S EXCEPTIONS TO
9 THROUGH THE DOUGLAS) PROPOSED ORDER
10 COUNTY PUBLIC WORKS)
11 DEPARTMENT) OAH Reference No.: 2023-ABC-06272
12) Agency Case No.: 23-DG021
13)
14 Respondent.)

15 **EXCEPTIONS**

16 Respondent hereby takes exception to the Ruling on Motions for Summary Determination
17 and Proposed Order (“Proposed Order”) filed in this matter on October 2, 2024. Counsel for the
18 Oregon Department of Forestry (“ODF” or “Department”) represented that the Department agreed
19 to accept these exceptions if submitted on or by October 18, 2024. These exceptions are being
20 submitted on October 17, 2024, and are therefore timely submitted in the manner provided by the
21 Proposed Order.

22 Respondent takes exception as follows:

23 1. Exception is taken to the Proposed Order’s omission of findings of fact and
24 conclusions of law concerning the Oregon Department of Forestry’s past practice or policy of
allowing hazard tree abatement to occur without filing of a Notification of Operations and
Application for Permit (“NOAP”). Exhibit 1, page 4 of the Affidavit of Dominic M. Carollo in
support of Douglas County’s Motion for Summary Determination states that ODF is not aware of
any instances in the past ten years where a county has been subject to a Notice of Violation/Citation
arising out of efforts to cut, fell, remove, harvest, or sell trees in connection with removing or

1 mitigating a hazard tree.

The following corrective language is required:

2 The Department admits that it is not aware of any instances in the past ten years where a
3 county has been subject to a Notice of Violation/Citation arising out of efforts to cut, fell, remove,
4 harvest, or sell trees in connection with removing or mitigating a hazard tree. The Department may
5 not exercise its discretion inconsistent with its prior agency practice without explaining any
6 inconsistency. Viewed in the light most favorable to Respondents, the record indicates that the
7 Department has a prior agency practice of allowing Oregon counties to cut, fell, or remove hazard
8 trees without first filing a NOAP.

9 2. Exception is taken to the erroneous conclusion that Respondent's hazard tree
10 abatement did not proceed under ORS 368.271, and to the omission of findings and conclusions
11 concerning Mr. Scott Adam's affidavit describing Mr. Adam's determination of a need for
12 immediate hazard tree abatement without delay. ORS 368.271(1)(c) provides that a county road
13 official need not comply with ORS 368.261 and 368.266 when the official determines that there is
14 a "substantial risk of damage, injury or other emergency condition that requires abatement without
15 delay." Scott Adams, Douglas County's road official, stated in his first affidavit that he
16 "determined that these hazard trees and landslide risks created a substantial risk of damage or
17 injury to Hubbard Creek Road and the travelling public, and that an emergency condition existed
18 that required immediate abatement without delay." First Adams Aff. at ¶ 7. The Department has
19 not refuted this statement, therefore it is uncontested that Mr. Adam's made the requisite
20 determination for abatement without delay under ORS 368.271(1)(c).

21 *The following corrective language is required:*

1 It is uncontested that Respondent relied on ORS 368.271(1)(c) to abate hazard trees without
2 delay. Respondent’s road official, Mr. Scott Adams, made the requisite determination that the
3 hazard trees and landslide risks adjacent to Hubbard Creek Road “created a substantial risk of
4 damage or injury to Hubbard Creek Road and the travelling public, and that an emergency
5 condition existed that required immediate abatement without delay.” First Adams Aff. at ¶ 7. This
6 determination waived Respondent’s duty to comply with ORS 368.261 and 368.266. This
7 determination also triggered Respondent’s authority to abate the necessary hazard trees through
8 any reasonable actions taken without delay.

9 3. Exception is taken to the lack of any legal conclusions regarding the phrase
10 “without delay” as used in ORS 368.271(1)(c). The Proposed Order indicates that notice of hazard
11 trees abated under the authority of ORS 368.271 must be provided to ODF, triggering a 15-day
12 waiting period, before abatement may occur. Respondent requests findings and conclusions on the
13 Legislature’s intent to allow hazard tree abatement to occur “without delay” where the county road
14 official makes the requisite determination under ORS 368.271(1)(c).

15 *The following corrective language is required:*

16 The phrase “without delay” indicates an intent of the Legislature to allow counties to
17 remove hazard trees without interference from any procedural requirements, including the
18 requirements of the FPA, where the county road official has determined that a hazard tree(s)
19 “creates a substantial risk of damage, injury or other emergency condition that requires abatement
20 without delay and without notice or hearing.” Requiring counties to wait up-to 15 days to abate
21 hazard trees, following the requisite finding by the county road official, is inconsistent with the
22 intent of the Legislature, as revealed by the plain text of ORS 368.271(1)(c).

23 4. Exception is taken to the Proposed Order’s erroneous or omitted conclusions
24

1 concerning the effect of ODF’s guidance which explains, among other things, that “[i]n
circumstances where a hazard immediately threatens life or improved property such as homes and
public roads (an ‘emergency’), actions to respond to and mitigate the emergency would not be
2 considered an ‘operation’ under the Oregon FPA. ... The potential hazard tree zone is considered
3 to be 1.5 time tree heights from the road or other infrastructure, plus additional distance for upslope
4 hazard trees or snags. ... Hazard trees and snags felled under this section must be left in place
5 unless moved only as necessary to abate the hazard[.]” Carollo Aff. at 128—129. Respondent
6 requests additional conclusions on the legal consequence of this exception to the NOAP
7 requirement for “operations.”

8 *The following corrective language is required:*

9 The Department has adopted a written policy exempting the mitigation of hazard trees from
10 the FPA where said trees pose an immediate threat to public roads. The uncontested evidence
11 establishes that the trees adjacent to Hubbard Creek Road posed such an immediate threat to the
12 road. First Adams Aff. at ¶ 7. Thus, the Department’s written policy instructs that Respondent’s
13 efforts to remove hazard trees did not constitute an “operation” subject to the FPA.

14 5. Exception is taken to the omission of findings and conclusions concerning the
15 necessity of removing trees from the landscape upslope of Hubbard Creek Road, and the proper
16 means of accomplishing said removal. The Proposed Order acknowledges that a failure to remove
17 the hazard trees upslope of Hubbard Creek Road could have increased the risk of landslide. ODF’s
18 written guidance allows for the removal of hazard trees without the filing of a NOAP “as necessary
20 to abate the hazard[.]” Carollo Aff. at 129. The Proposed Order concludes, without explanation,
19 that Respondent’s limbing, bucking, and decking of hazard trees rendered the Department’s
21 that Respondent’s limbing, bucking, and decking of hazard trees rendered the Department’s
22 written exceptions to the FPA in the felling and removal of hazard trees inapplicable. The second
23
24

1 affidavit of Scott Adams was uncontested in explaining that Douglas Cuntly “felled and removed
trees from the hillside along Hubbard Creek Road because, in the County’s professional judgment
as the authority over its roadways, the trees posed a hazard to the travelling public. The County’s
2 contractor de-limbed the trees, and cut them to a certain length, because it was necessary to safely
3 place the trees in a location where they would not pose a risk to the travelling public. It would have
4 been impossible, and incredibly unsafe, to try and remove whole, un-limbed, trees from their
5 location above Hubbard Creek Road ... The trees that were placed in log decks were placed there
6 because that was the safest option.” Second Adams Aff. at ¶ 4. Respondent requests findings and
7 conclusions regarding whether the removal of hazard trees was necessary in the circumstances,
8 and whether Respondent’s means of removal of the trees was proper given the safety risks and
9 logistical impossibilities of removing between 200 and 500 whole, un-limbed, and un-bucked,
10 trees.

11 *The following corrective language is required:*

12 The Department’s guidance allows for the removal of hazard trees as necessary to abate
13 hazards, without complying with the FPA. Carollo Aff. at 129. The uncontested evidence
14 establishes that removal of the hazard trees upslope from Hubbard Creek Road was necessary to
15 abate the risk of trees sliding into the roadway, and landslides. Adams Aff. at ¶ 7—11; Second
16 Adams Aff. at ¶ 4. The Department’s guidance does not place restrictions on how the removal of
17 hazard trees is to be accomplished. Where a substantial number of hazard trees must be removed,
18 the practical and logistical limitations of removing entire trees, limbs and all, must be considered.
20 In this instance, the removal of 200—500 hazard trees, and space limitations along Hubbard Creek
21 Road, made it practically impossible for trees to be removed whole. Given that the Department’s
22 guidance does not prohibit the bucking, limbing, and decking of hazard trees where necessary to
23
24

1 abate hazards, Respondent lawfully accomplished its hazard tree abatement by placing hazard trees
2 in log decks, where they no longer posed a risk to Hubbard Creek Road, and where the risk of tree
3 slide or landslide was fully abated. This action was consistent with the Department's guidance on
4 the matter.

6 **REQUESTED RELIEF**

7 Respondent requests the following relief in response to the above exceptions:

- 8 a. A Final Order addressing the exceptions described above, and granting Respondent's
9 motion for summary determination;
- 10 b. Any other relief the OAH or Department determines just, equitable, and/or necessary to
11 properly address the issues raised in this case.

12 DATED October 17, 2024.

13 **CAROLLO LAW GROUP**

14 *s/ Dominic M. Carollo*

Dominic M. Carollo, OSB No. 093057

Email: dcarlo@carollolegal.com

Nolan G. Smith, OSB No. 215034

Email: nsmith@carollolegal.com

CAROLLO LAW GROUP LLC

MAIL: P.O. BOX 2456

ROSEBURG, OR 97470

OFFICE: 2315 OLD HIGHWAY 99 SOUTH

ROSEBURG, OR 97471

PH: (541) 957-5900

Of Attorneys for Respondents

1 **CERTIFICATE OF FILING AND SERVICE**

2 I certify that on October 17, 2024, I filed the foregoing RESPONDENT’S EXCEPTIONS
3 TO PROPOSED ORDER with the Oregon Department of Forestry by mail and email to:

4 Greg Wagenblast, Civil Penalties Administrator
5 Department of Forestry, Private Forests Division
6 2600 State Street
7 Salem, OR 97310
8 greg.wagenblast@ODF.oregon.gov

9 I further certify that on October 17, 2024 I served a true and correct copy of the foregoing
10 RESPONDENT’S EXCEPTIONS TO PROPOSED ORDER on the parties by email at the
11 following address:

12 Greg Wagenblast
13 2600 State Street
14 Salem OR 97310
15 Primary: (541) 525-6462
16 greg.wagenblast@ODF.oregon.gov
17 *Agency Representative*

18 Matthew B Devore
19 1162 Court St NE
20 Salem OR 97301
21 Primary: (503) 947-4342
22 matt.b.devore@doj.state.or.us
23 *Attorney for Oregon Department of Forestry*

24 DATED October 17, 2024.

CAROLLO LAW GROUP

s/Dominic M. Carollo
Dominic M. Carollo, OSB #093057
dcarollo@carollolegal.com
Carollo Law Group LLP
Mail: P.O. Box 2456
Roseburg, OR 97470
Office: 2315 Old Highway 99 South
Roseburg, OR 97471
Telephone: 541-957-5900
Attorney for Respondent

**BEFORE THE BOARD OF FORESTRY
STATE OF OREGON**

IN THE MATTER OF:

**DOUGLAS COUNTY, BY AND
THROUGH THE DOUGLAS
COUNTY PUBLIC WORKS
DEPARTMENT**

Respondent.

FINAL ORDER

OAH Case No. 2023-ABC-06272
Agency Case No. 23-DG021

The Board of Forestry, at a meeting in Salem on January 8, 2025, by consensus affirms the Citation 2023-DG021, issued by Kyle Temple, Stewardship Forester, and adopts and incorporates by reference the attached proposed order issued by Administrative Law Judge Bradley A. Schmidt, on October 2, 2024. Douglas County, by and through the Douglas County Public Works Department submitted exceptions to the proposed order which were considered by the Board, but did not justify any changes to the proposed order.

Dated this _____ day of January, 2025

By: _____
Cal Mukumoto
State Forester and
Secretary to the Board of Forestry

RIGHT TO JUDICIAL REVIEW

If you are dissatisfied with the Order, you may request rehearing or reconsideration by the Board. To do so, you must file a petition for rehearing or reconsideration pursuant to OAR 137-003-0675 and OAR 629-001-0050 within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. A petition for rehearing or reconsideration must state with specificity the grounds for objection to the order, and the remedy sought. If you do not file a petition for rehearing or reconsideration within the time limits provided, you will lose your opportunity for rehearing or reconsideration and you will lose your right to appeal to the Oregon Court of Appeals. (OAR 137-003-0675 and OAR 629-001-0050).

If, after you have filed a petition for rehearing or reconsideration, the Board issues an Order you are dissatisfied with, you have the right to appeal that Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal, you must file a petition for judicial review with the Court of Appeals within 60 days from the day the Order was served on you.

If, 60 days after you have filed a petition for rehearing or reconsideration, the Board has not issued an order, your petition will be considered denied and at that time you will have the right to appeal the original Order to the Court of Appeals pursuant to ORS 183.480 and ORS 183.482. To appeal, you must file a petition for judicial review with the Court of Appeals within 60 days from the day that your petition is deemed denied. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.