Oregon Department of Geology and Mineral Industries
Mineral Land Regulation & Reclamation Program
229 Broadalbin Street SW
Albany, OR 97321-2246
(541) 967-2039
Fax (541) 967-2075

Date: May 16, 2025

To: Governing Board of the Department of Geology and Mineral Industries

From: Sarah Lewis, MLRR Program Manager

Subject: Agenda item, Action item: Contested Case No. 2024-ABC-06377 (DOGAMI No. DGMI-2023-0495) – Final Order regarding *George Jay Williamson*

Recommended Action

That the Governing Board approve the Department's issuance of the Final Order in the form attached as Exhibit 1, which adopts and incorporates Administrative Law Judge Rackstraw's Proposed Order as the Final Order *In the Matter of George Jay Williamson*.

Site Background

This matter relates to the operations of George Jay Williamson ("Williamson") at and adjacent to an approximately 10.81 acre property on Ekroth Road in Tillamook County (the "Ekroth Property"). The Ekroth Property is adjacent to marbled murrelet habitat and Electric Creek, which includes essential salmonid habitat. It is also adjacent to property owned by the Oregon Department of Transportation ("ODOT") and the Oregon Department of Forestry ("ODF").

A prior operator transferred the Ekroth Property, which has long been in mining use, to Williamson in approximately June 2009. Wiliamson requested a transfer of the operating permit on September 29, 2010. The Department issued an operating permit to Williamson on March 12, 2012.

Williamson's operations at the site expanded beyond the site plan on file with the Department. The Department's file documents these expanding operations as well as discussions with Williamson regarding the need for a permit amendment to modify the permit boundary. Williamson continued to expand his operations, including onto ODF and ODOT lands, without obtaining a permit amendment. After repeated attempts to seek voluntary compliance from Williamson were unsuccessful, the Department moved to formal enforcement action.

Williamson Order and OAH Process

On September 20, 2023, after receiving Board approval to proceed with civil penalties, the Department issued a *Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order* (the "Notice") to Respondent. The Notice, among other things, proposed to assess the Board-approved $432,000 in civil penalties. Respondent requested a hearing on October 6, 2023. The Department referred the matter to the Office of Administrative Hearings ("OAH") on October 6, 2023. The Department twice amended the Notice, briefing the

Board regarding these updates at Board meetings and maintaining $432,000 as proposed civil penalties.

On March 15, 2024, Administrative Law Judge ("ALJ") Jennifer H. Rackstraw held a telephone prehearing conference to identify the issues for hearing and establish a schedule. On May 10, 2024, consistent with ALJ Rackstraw's schedule, the Department filed a Motion for Partial Summary Determination. On July 9, 2024, ALJ Rackstraw granted that motion in part, finding that Williamson violated two Department orders, but reserved for hearing whether Respondent committed other violations as well as the penalties and other relief appropriate for the violations.

ALJ Rackstraw presided over a hearing conducted via Webex video conference on July 23, July 24, and August 15, 2024. At the outset of the hearing, the Department withdrew the proposed $6,000 penalty for Williamson's failure to mark boundaries. With that adjustment, which reduced the proposed civil penalties to $426,000, ALJ Rackstraw identified the following issues for hearing:

1. Whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining in unpermitted areas.
2. Whether Respondent violated Operating Permit ID 29-0040 (the Operating Permit) by failing to appropriately shape and stabilize overburden piles.
3. Whether Respondent violated the September 28, 2018 Notice of Violation and Compliance Schedule (the 2018 Order) by failing to submit a remediation plan to the Department by September 30, 2020.
4. Whether Respondent violated the 2018 Order by continuing to mine on Oregon Department of Forestry property (the ODF Property).
5. Whether Respondent violated the March 11, 2021 Notice of Violation and Compliance Schedule (the 2021 Order) by failing to increase reclamation security by April 15, 2021.
6. Whether Respondent failed to pay the annual renewal fees for the Operating Permit that were due on August 31, 2021, August 31, 2022, and August 31, 2023, in violation of ORS 517.800(2).
7. Whether the Department may revoke the Operating Permit. *See* ORS 517.862(2)(b),(c), and (d).
8. Whether the Department may assess $426,000 in total civil penalties against Respondent. *See* ORS 517.992.
9. Whether the Department may require that Respondent reclaim all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order. *See* ORS 517.860(1)(b).

Proposed Order, p. 2-3.

On September 20, 2024, the Department and Williamson submitted written closing arguments. The Department elected not to file a rebuttal, concluding that its written closing adequately addressed the issues raised in Williamson's closing. Williamson filed a rebuttal on September 27, 2024.

On March 27, 2025, ALJ Rackstraw issued a Proposed Order, a copy of which is included in Exhibit 1,[1] that held in the Department's favor on all the issues and proposed that the Department issue the following order:

> Operating Permit ID 29-0040 is revoked, George Jay Williamson is liable to pay $426,000 in total civil penalties, and he must reclaim all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order.

Proposed Order, p. 49.

The complete OAH file for this matter is available at the following link:
Williamson_DOGAMI_OAH_CaseFile

Basis for Recommended Action

Though the Department has statutory authority to enter an order to revoke an operating permit and to require reclamation, the Department's governing statutes give the Board the authority to impose civil penalties. *See* ORS 517.992. The Department has received Board approval to pursue civil penalties in this matter. However, because the Board-approved amount ($432,000) is different than the amount that the Department proposes to adopt and incorporate into the Final Order based on the proposed order of the ALJ ($426,000), staff are seeking confirmation of board approval of this order of civil penalties.

[1] The Proposed Order also attaches and incorporates ALJ Rackstraw's earlier ruling on the Department's Motion for Summary Determination.

THE OREGON DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES

IN THE MATTER OF:	)	OAH Reference No.: 2024-ABC-06377
	)	Agency Case No.: DGMI-2023-0495
GEORGE JAY WILLIAMSON,	)	
	)	**Final Order Assessing Civil Penalties,**
Respondent.	)	**Revoking the Operating Permit, and**
	)	**Requiring Reclamation**

The Department of Geology and Mineral Industries adopts and incorporates by reference the attached proposed order from Senior Administrative Law Judge Jennifer H. Rackstraw and mailed on March 27, 2025, as the Final Order Assessing Civil Penalties, Revoking the Operating Permit, and Requiring Reclamation.

DATED this ___ day of May 2025.

By: ___________________________________
Sarah Lewis,
MLRR Program Manager
Department of Geology and Mineral Industries

NOTICE : You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this order. Judicial review is pursuant to the provisions of ORS 183.482 to the Oregon Court of Appeals.

CERTIFICATE OF SERVICE

I hereby certify that on May____, 2025, I served a copy of the **Final Order Assessing Civil Penalties, Revoking the Operating Permit, and Requiring Reclamation** by certified mail and electronic mail to the addresses listed below:

George Jay Williamson
26005 Trask River Rd.
Tillamook, OR 97141
Email: cjexcavating@yahoo.com

Katie Ireland
Ireland & Ireland PC
PO Box 273
Banks, OR 97106
Email: katie@irelandpc.com; shilo@irelandpc.com; shasta@irelandpc.com

____
Cari Buchner
Oregon Department of Geology and Mineral Industries

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
GEORGE JAY WILLIAMSON	)	OAH Case No. 2024-ABC-06377
	)	Agency Case No. DGMI-2023-0495
	)	

HISTORY OF THE CASE

On September 20, 2023, the Department of Geology and Mineral Industries (Department or DOGAMI) issued a Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order to George Jay Williamson (Respondent). On October 6, 2023, Respondent requested a hearing via counsel. On January 30, 2024, the Department issued an Amended Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order to Respondent.

On January 31, 2024, the Department referred the matter to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw was assigned to preside at hearing. On March 15, 2024, ALJ Rackstraw held a telephone prehearing conference. Attorney Katie Ireland represented Mr. Williamson. Senior Assistant Attorney General Nathan Karman represented the Department. Cari Buchner[1] was also present for the Department. A hearing was scheduled for July 23 and 24, 2024, via video conference. A briefing schedule was also set for the Department's potential filing of a Motion for Summary Determination/Partial Summary Determination.

On April 30, 2024, the Department issued a Second Amended Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order (Second Amended Notice) to Respondent.

On May 10, 2024, the Department filed its Motion for Partial Summary Determination, the Declarations of Cari Buchner and Ed Buchner,[2] and various exhibits. On May 24, 2024, Respondent filed his Objection to the Department's Motion for Partial Summary Determination, the Declarations of Respondent and Katie Ireland, and various exhibits. On May 31, 2024, the Department filed its Reply in Support of Motion for Partial Summary Determination, the

[1] Cari Buchner is the Department's Mining Compliance Coordinator. (Test. of C. Buchner (Day 1).)

[2] Ed Buchner is the Department's Geographic Information System (GIS) Specialist. He has approximately 25 years of experience interpreting aerial imagery. (Test. of E. Buchner (Day 1).)

Supplemental Declaration of Cari Buchner, the Declaration of Nathan Karman, and various exhibits.

On July 9, 2024, ALJ Rackstraw issued a Ruling on Motion for Partial Summary Determination (MSD Ruling), granting in part and denying in part the motion.[3] The MSD Ruling is hereby attached and incorporated into this Proposed Order.

On July 23 and 24, 2024 and August 15, 2024, ALJ Rackstraw held a hearing by Webex video conference. Ms. Ireland represented Respondent. Mr. Karman represented the Department. Ms. Buchner appeared as the agency representative for the Department. The following persons testified: Respondent; Ms. Buchner; Mr. Buchner; Katherine "Kate" Skinner; Vaughn Balzer; Bert "Alan" Mallare; and John Desmarteau. The record remained open after the hearing concluded on August 15, 2024, for written closing arguments.

On September 20, 2024, Respondent filed his Written Closing (Respondent's Closing Statement) and the Department filed its Closing Statement (Department's C+losing Statement), along with a four-page attachment. On September 24, 2024, the Department notified the ALJ of its decision not to file a rebuttal closing statement. On September 27, 2024, Respondent filed his Rebuttal (Respondent's Rebuttal) and Motion to Strike the Admission of the Attachments (Respondent's Motion to Strike).

ISSUES[4]

1. Whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining in unpermitted areas.

2. Whether Respondent violated Operating Permit ID 29-0040 (the Operating Permit) by

---

[3] Summary determination was granted as to the following issues:

- Whether Respondent violated the 2018 Order by failing to submit a remediation plan to the Department by September 30, 2020; and
- Whether Respondent violated the March 11, 2021 Notice of Violation and Compliance Schedule (the 2021 Order) by failing to increase reclamation security by April 15, 2021.

Summary determination was denied as to the following issues:

- Whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining in unpermitted areas;
- Whether Respondent violated the Operating Permit by failing to appropriately shape and stabilize overburden piles; and
- Whether Respondent violated the 2018 Order by continuing to mine on ODF's property.
-

[4] On the record at the hearing on July 23, 2024, the Department withdrew the allegation that Respondent failed to place clearly visible markers to mark the boundaries for all excavation areas, in violation of OAR 632-030-0015(2)(d), and also withdrew the $6,000 proposed civil penalty for that alleged violation.

failing to appropriately shape and stabilize overburden[5] piles.

3. Whether Respondent violated the September 28, 2018 Notice of Violation and Compliance Schedule (the 2018 Order) by failing to submit a remediation plan to the Department by September 30, 2020.

4. Whether Respondent violated the 2018 Order by continuing to mine on Oregon Department of Forestry property (the ODF Property).

5. Whether Respondent violated the March 11, 2021 Notice of Violation and Compliance Schedule (the 2021 Order) by failing to increase reclamation security by April 15, 2021.

6. Whether Respondent failed to pay the annual renewal fees for the Operating Permit that were due on August 31, 2021, August 31, 2022, and August 31, 2023, in violation of ORS 517.800(2).

7. Whether the Department may revoke the Operating Permit. *See* ORS 517.862(2)(b), (c), and (d).

8. Whether the Department may assess $426,000 in total civil penalties against Respondent. *See* ORS 517.992.

9. Whether the Department may require that Respondent reclaim all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order. *See* ORS 517.860(1)(b).

EVIDENTIARY RULINGS

At the hearing, the Department's Exhibits A1 through A46 and Respondent's Exhibits R1 through R101 were admitted into the record without objection.

On September 20, 2024, along with its Closing Statement, the Department submitted a four-page attachment that was not previously admitted into the record.[6] Respondent moved to strike the attachment, arguing that the Department "had ample opportunity to submit evidence" before the close of the evidentiary record and asserting that "trying to submit it during closing is inappropriate." *See* Respondent's Motion to Strike at 6.

The Department did not seek leave to submit additional evidence after the hearing and

---

[5] ORS 517.750(10) defines "overburden" as "the soil, rock and similar materials that lie above natural deposits of minerals."

[6] According to the Department, the attachment "traces (in magenta) the disturbance boundary as of 2009 and places that boundary on subsequent aerials used in Exhibit A20, further highlighting Respondent's continually expanding operations." Department's Closing Statement at 23.

made no showing that anything reasonably prevented it from offering such evidence before the conclusion of the hearing. The four-page attachment is therefore excluded from the record and any references to it in the Department's Closing Statement are stricken.

CREDIBILITY DETERMINATION

One of an ALJ's chief responsibilities is to reconcile conflicting evidence in the record and determine which evidence is more likely than not correct. In the present matter, such a determination requires an assessment of the credibility and reliability of Respondent's testimony.

The Department contends that Respondent's "shifting, inconsistent stories have long been an issue at the site, ultimately leading the agencies to require that all communications with Respondent be in writing in order to ensure an accurate record." Department's Closing Statement at 26-27, *see* testimony of C. Buchner (Day 3). The Department further contends that many of Respondent's arguments in the present matter are contradicted by other record evidence and rely only on his testimony, which the Department asserts is often internally inconsistent and should be rejected.

While a witness is presumed to speak the truth, the presumption may be overcome "by the manner in which the witness testifies, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence." ORS 44.370. A determination of witness credibility may also be based on the inherent probability of the evidence, whether the evidence is corroborated, whether the evidence is contradicted by other testimony or evidence, whether there are internal inconsistencies, and "whether human experience demonstrates that the evidence is logically incredible." *Tew v. DMV*, 179 Or App 443, 449 (2002), *citing Lewis and Clark College v. Bureau of Labor*, 43 Or App 245, 256 (1979) *rev den* 288 Or 667 (1980) (Richardson, J., concurring in part, dissenting in part).

As set forth more fully below, Respondent's hearing testimony regarding certain material matters conflicts with information he asserted, and positions he took, in his sworn written declaration dated May 23, 2024. Additionally, some of Respondent's testimony was internally inconsistent, inherently improbable, logically implausible, and/or in conflict with documentary evidence (including aerial imagery and photographs), eyewitness observation, and expert testimony. Moreover, given the significant civil penalties and remediation actions Respondent faces, he has motive to be untruthful in this matter.

Written Declaration versus hearing testimony

First, in his written declaration, Respondent acknowledged that he fell under the existing 1991 Reclamation Plan when the Department transferred the Operating Permit to him. *See* Exhibit A43 at 2. However, at hearing, he expressed doubt as to whether he ever received the 1991 Reclamation Plan and questioned whether it applied to him. Testimony of Respondent (Day 3).

Second, in his written declaration, Respondent asserted, "When I took over the [Ekroth] property, I was not aware of the previous trespass by Pacific Coast, or the other problems with the pit." Exhibit A43 at 2. However, Respondent admitted at hearing that at the time he sought the transfer of the Operating Permit from Pacific Coast to himself, he was familiar with the site from his prior involvement with Pacific Coast. *See* testimony of Respondent (Day 1) and (Day 3) (testifying about the inaccuracy in paragraph 8 of his written declaration and stating that he did know about the property's condition prior to acquiring it); *see also* Exhibit A12 (showing that Respondent was involved in the onsite DOGAMI inspection in September 2003) and Exhibit A43 at 1 (Respondent admitting that he assisted Mr. Smith and Mr. Unterberger in acquiring the property and starting operations in July 2003).

Third, in his written declaration, Respondent swore that he "never produced any overburden on the site as at the time [he] was on the property, the pit had already opened up and [he] was mining the floor." *See* Exhibit A43 at 3. Respondent repeated this claim under oath on the first day of the hearing. *See* testimony of Respondent (Day 1) (testifying that he only removed material from the floor). In subsequent testimony, however, Respondent several times referred to overburden at the site. *See* testimony of Respondent (Day 1) (referring to "overburden" before correcting himself), (Day 3) (noting that "overburden" or anything that would slide is now gone; referring to "overburden" when discussing Photo 109 at Exhibit R95 at 7; refencing "overburden piles," and noting that he said "overburden" but should have said "reject").[7]

Fourth, Respondent provided conflicting information regarding his entry onto the ODF Property. In his written declaration, he connected his actions on the ODF Property to the 2013 Special Use Permit, claiming that he "consistently worked with ODF to inform them of the land slides," he "asked permission to access their property," and he received from ODF "a special use permit in 2013 which allowed [him] to access their property and build benches and roads to prevent eroding." *See* Exhibit A43 at 2. But after ODF's Kate Skinner highlighted the limited scope and duration of ODF's special use permit and pointed out that Respondent did not construct any benches on ODF's property during the permit term and he did not contact ODF about slides at any point after the 2013 slide until the summer of 2018 (months after the February 2018 slide), Respondent provided differing testimony. *See* testimony of Skinner (Day 1); *see also* Exhibit A45 at 2 (regarding the limited purpose of the permit).

It is not a *de facto* indicator of unreliability for a witness's written declaration and hearing testimony to differ to some extent. Variations and inconsistencies could be due to things such as mere inadvertence, lack of specific recall, excessive passage of time, the receipt of new information, or an evolved understanding of circumstances. Here, however, the factual inconsistencies between Respondent's written declaration and his hearing testimony, when considered alongside his internally inconsistent hearing testimony, the implausibility of some of his testimony, and the overwhelmingly persuasive documentary evidence and expert and eyewitness testimony to the contrary, significantly diminish his credibility.

The 2013 slide

The federal Mine Safety and Health Administration (MSHA) was onsite during an early 2013 slide and held Respondent responsible for the slide and its cleanup. *See* testimony of

[7] As discussed more fully later, the evidence persuasively demonstrates the presence of overburden at the site. *See, e.g.*, Exhibits A20E, A20F, A27 at 3, A14 at 2, and A15 at 2; testimony of Balzer (Days 1 and 2) and C. Buchner (Days 1 and 3).

Respondent (Days 1 and 3). The Department contends that Respondent's early operations from 2009 to 2013, including documented operations along the southern highwall, caused the 2013 slide. Respondent denies operating along the southern highwall near the ODF Property and instead blames ponding behind the highwall on ODF Property as the cause of that slide. Respondent's claims are not reliable. ODF's Skinner credibly testified at hearing that no ponding occurred above the highwall. Testimony of Skinner (Day 1). And, as explained below, the record persuasively establishes that Respondent did in fact operate along the highwall prior to the 2013 slide.

A 2011 aerial image shows an excavator operating in the area of the southern highwall where Respondent has denied operating. *See* Exhibit A20B; testimony of Balzer (Day 3) and testimony of Respondent (Day 3) (identifying the highwall area on Exhibit A20A, claiming that he never mined the highwall, and being unable to identify the excavator in the highwall area on Exhibit A20B); *see also* Exhibit A20C (equipment shown at the base of the highwall). In his "Report of Onsite Inspection Conducted [on] March 25, 2011," Department Hydrogeologist Bob Brinkman identified that Respondent's "most recent excavation was from the south side highwall which is unbenched and extends to approximately 100-ft in height." Exhibit R23 at 1. In a November 5, 2012 letter to Respondent, Ms. Skinner noted that Respondent's operations along the southern highwall had resulted in some smaller slides into the pit floor. Exhibit R28 ("The causes of the [late 2012] slides were the vibration of your operation in the pit and recent rainy conditions."); *see also* test. of C. Buchner (Day 1) (explaining how mining along the unbenched highwall would lead to slides). Finally, during a post-slide inspection on January 14, 2013, the Department's Andre Sampier identified the influence of Respondent's operations as a cause of the slide. *See* Exhibit A14 at 2 (noting that the slide was likely related "in some degree [to] loading from stockpiles near the edge of the pit floor").

Respondent contends that the 2013 slide was not only from the southeastern highwall, but also from the central location of the site that, in 2014, extended south of the Southern Property Line. *See* testimony of Respondent (Day 3). This includes the upper "u-shaped" area that extended far south of the Southern Property Line in 2014, which the Department's Vaughn Balzer[8] testified showed signs of excavation. *See* testimony of Balzer (Day 2). Respondent alleges that the 2013 slide crossed the entirety of Ekroth Road from Highway 101 to the quarry's entrance. Testimony of Respondent (Day 3); *but see* testimony of Balzer (Day 2) (explaining that a slide from that area would have gone north into the pit toward processing equipment, and not to the east as Respondent alleges). Respondent admitted at hearing that his explanation is "kind of weird" and "doesn't make a lot of sense." Testimony of Respondent (Day 3).

The record contradicts Respondent's "weird" claims. For example, photographs show a continuous ridge line and demonstrate that the upper "u-shaped" excavation was not present after the early 2013 slide; instead, trees remained in that location after the slide. *See* testimony of C.

[8] Mr. Balzer is a registered geologist and the Department's Floodplain Mining Reclamationist and Rules Coordinator. The Department has employed him for 19 years in various positions. His responsibilities have included reviewing imagery of mine sites and delineating mining-related disturbances. He has seen hundreds of mine sites in the course of his work. (Test. of Balzer (Days 1 and 2).)

Buchner (Day 3),[9] testimony of Balzer (Day 2), and testimony of Respondent (Day 2) (discussing Exhibit R92 at 2 as the area in front of the u-shaped excavation, which shows trees on the ridge (and tracks up onto a road/bench in front of what would become the upper u-shaped excavation area)). Moreover, Ms. Skinner testified that she walked the Southern Property Line at the highwall after the 2013 slide and that there was no disturbance on ODF lands at the location of the u-shaped excavation. Testimony of Skinner (Day 3). Ms. Skinner also testified that Respondent told her that the slide crossed Ekroth Road across from the southeastern highwall. This is consistent with aerial imagery, which only shows a break in vegetation north (downslope) of the southeastern highwall. *See* testimony of Respondent (Day 3) (Respondent reviewing Exhibit A20D and agreeing that Exhibit R92, showing slide material that cleared vegetation, is the location north of the southeastern highwall where the vegetation breaks and that no other vegetation breaks are visible); *see also* testimony of Balzer (Day 2). This is also consistent with the fact that the slide apparently did not damage any equipment, including the crusher that Respondent continually kept in the area where a slide from the upper u-shaped depression would have gone. *See* testimony of Respondent (Day 3) (not recalling any damage).

Inconsistencies regarding benches

Respondent provided inconsistent hearing testimony regarding the installation of benches. After initially testifying that MSHA required him to install multiple benches after the 2013 slide, detailing the process for creating benches, and stating that he created three benches at the site, Respondent then denied creating any benches after the 2013 slide. *See* testimony of Respondent (Day 1) (testifying that MSHA did not allow him to operate after the 2013 slide without installing benches and that the ODF permit allowed him to install benches) (discussing Exhibit A20E and identifying "roads and benches" that he installed to capture material from the ODF lands) (discussing the use of an excavator to create benches and how they were 50 to 60 feet wide), (Day 2) (acknowledging Ms. Skinner's testimony that benches were not allowed under the ODF permit), (Day 3) (testifying that the only bench that existed at the site was the preexisting one on the eastern end of the property). Such inconsistencies from Respondent weigh against a finding of credibility.[10]

Mining operations after 2018

In his written declaration, Respondent swore that he did not conduct any mining operations after 2018. Exhibit A43 at 3 ("I have not mined or done any work in the pit since 2018."). However, the record persuasively shows that his mining operations were continuous until some point in 2021, with those final three years being his most productive at the site. *See* testimony of C. Buchner (Day 1) (testifying that from August 2019 to July 2020, production was nearly double

[9] When Respondent reviewed one of these photos, he incorrectly assumed that it was prior to the 2013 slide. *See* testimony of Respondent (Day 2) (discussing Exhibit A17 at 7).

[10] A preponderance of credible evidence establishes that Respondent installed the benches that MSHA required of him. *See* Exhibit A45 (Ms. Skinner's observations of the site in March 2013 were that "benches were built from the west and east across the slope * * * [but] there appears to be a middle section of the slope with no bench below and ODF property will continue to be undermined"); testimony of Skinner (Day 1) (recounting the observations memorialized in Exhibit A45).

the average for the site); *see also* Exhibits A41 and A42 (indicating that materials were produced at the site between the periods August 2018 to July 2019 and May 2019 and April 2020).

Steepness claims

The Department contends that Respondent's attempts to explain away many of the "visibly obvious excavations and other mining features (including equipment tracks)" by claiming that the ODF lands were too steep to excavate are erroneous and unreliable. *See* Department's Closing Statement at 29. The record supports this contention.

Respondent bases much of his steepness argument on current site conditions, including conditions visible in the recent drone footage in Exhibits R98, R99, and R100. *See, e.g.*, testimony of Respondent (Day 3) (relying on recent drone footage to highlight steepness compared to 2018) (arguing away equipment tracks visible in 2016 based on steepness evident in later drone footage). The current conditions of the site do not, however, nullify the evidence of excavation and visible access roads and benches with equipment tracks near overburden in earlier photos in the record. *See*, *e.g.*, Exhibits A20E, A20F, A20I, and R42. That Respondent might not be able to drive certain areas of the site today is not necessarily relevant to the issue of whether an area was drivable and/or excavated several years ago.

Imagery shows that the upper "u-shaped" excavation visibly crossing onto ODF property in 2014 was continuously mined after 2014. *See* Exhibit A20D; testimony of Balzer (Days 1 and 2). By 2016, Respondent had created (*i.e.*, excavated) benches extending into that supposedly impassable area. *See* Exhibit A20E; testimony of Balzer (Days 1 and 2) and testimony of Mallare (Day 2) (discussing Exhibit A20E and admitting that the loader could get part of the way up the road/bench and that the excavator would swing the rest of the way).[11] Also, the middle bench that Respondent's operator, Mr. Mallare, testified was undriveable as "too steep" as of 2016 becomes continuous and includes visible tracks in 2017. *See* Exhibits A20F and R42. At hearing, when asked to identify the area too steep to operate on Exhibit R42 (an aerial image from 2017), Respondent identified a portion downslope and to the west, far from the u-shaped area that existed in 2014 and identified in the 2014 aerial photo. *See* testimony of Respondent (Day 3). The record shows that by 2022, that u-shaped area was mined back at least 20 feet south of the Southern Property Line along nearly half of that boundary. *See* Exhibit A20I; testimony of Balzer (Day 2).

Equipment tracks on western ridge

At hearing, Mr. Balzer testified regarding equipment tracks visible on the western ridge in Exhibit A20E. *See* testimony of Balzer (Days 1 and 2). Respondent has offered shifting explanations for those tracks. When discussing 2021 photographs on the first day of hearing, Respondent acknowledged that there had previously been a road along the western ridge that Respondent used to get to the benches. Testimony of Respondent (Day 1). On the second day of hearing, he testified that the tracks were from the straps on the excavator bucket. *Id*. (Day 2). On

[11] At hearing, Respondent explained that he creates benches on steep terrain by "carving into the side of the bank and making the bench * * * that's the only way you can do it." (Test. of Respondent (Day 3).)

the third day of hearing, he testified that the tracks resulted from a compaction roller from an excavator down on the pit floor. *Id*. (Day 3).

The Department alleges that Respondent has significant motive to explain away the tracks on the western ridge because the tracks "connect to the benches/roads on ODF Property, where Respondent admittedly dumped overburden (which he sometimes called reject), and the tracks are near where overburden was documented as sliding toward Electric Creek and toppling trees." Department's Closing Statement at 21.

Respondent's compaction explanation for the tracks conflicts with the testimony of his operator, Mr. Mallare, who admitted under oath that these were equipment tracks. *See* testimony of Mallare (Day 2). Respondent's compaction explanation is also logically implausible. Given that the surface of that ridge was not visible from the quarry floor, the basis for determining that the ridge needed compaction is unknown. *See* Exhibit R94 at 3. Additionally, the record shows that from 2014 to 2016, the vegetation on the ridge was cleared. *Compare* Exhibit A20D with Exhibit A20E. If the ridge was inaccessible, it follows that Respondent could not have cleared the vegetation. Moreover, the ridge is higher than 27 to 30 feet, which is what Respondent alleged as the reach of his excavator. *See* testimony of Respondent (Day 3) (regarding the excavator reach) and Exhibit R94 at 2-3 (showing length of the excavator compared to the western ridge and the lack of consistent access to the highwall). Respondent's claim that the apparent tracks on the western ridge are not appropriately sized for equipment also fails because admitted tracks elsewhere at the site appear to match the size of the tracks on the western ridge. *See* Exhibit A20E and testimony of Respondent (Day 1) (discussing the ramp to the hopper, where equipment would dump material, which shows visible tracks of the same size as equipment and on the western ridge).

Location of photographs

Respondent's challenges to certain photo locations also conflict with other, more reliable evidence. The bulk of his arguments disputing various photo locations relate to the site's current steepness, with Respondent arguing that some areas are now vertical, so the photos could not have been taken from those locations. However, the Department's witness, Ms. Buchner, testified at hearing that she walked and photographed areas that Respondent claims are vertical, and she testified regarding the features on photographs that corroborate the mapped photo locations. *See* testimony of C. Buchner (Day 3). Ms. Buchner also testified that she reviewed each of the mapped areas and confirmed that they were consistent with her recollection and observations during the onsite inspections. *Id*. And, in a supplemental written declaration, Ms. Buchner detailed how the Department captures and maps photo locations. *See* Exhibit A46 at 1-5. Ms. Buchner's hearing testimony and written declarations were detailed, logical, internally consistent, and persuasive.

Respondent's challenge to the location of Photo 80 (Exhibit A17 at 19) illustrates the contrast between his unsupported claims and the Department's more reliable evidence. Ms. Buchner testified, and GPS coordinates verify, that Photo 80 shows Electric Creek. *See* Exhibit A46 at 10 and testimony of C. Buchner (Days 1 and 3). Ms. Buchner testified that the overburden sliding downslope toward Electric Creek was increasing turbidity in the water. Testimony of C. Buchner (Day 3). Respondent, however, argues that Photo 80 actually shows the location of the pond he excavated, and he claims that the photo was likely taken within 10 to 20 feet of the excavator visible in the 2020 aerial image (Exhibit A20H). Testimony of Respondent (Day 3). However, the pond was not yet created when Photo 80 was taken on January 27, 2020. *See* Exhibit A46 at 10 (showing the July 26, 2020 aerial photo with excavation in the pond area, but prior to the creation of the pond). Moreover, Photo 80 shows trees surrounding the water. By 2020, trees had not existed in the location of the eventual pond for one or more years. *See, e.g.*, Exhibit A20G (showing a lack of vegetation in 2018).

In an apparent attempt to explain how Photo 80 could show trees in an area long since cleared, Respondent suggested at hearing that the photo was taken from a vegetated area to the southwest of the pond, near the property corner. *See* testimony of Respondent (Day 3). This, however, conflicts with Respondent's testimony regarding the alleged steepness in that portion of the site — steepness that he claims would have prevented Department staff from taking Photo 87 (Exhibit A17 at 16) in that same general location. *See* Exhibit A46 at 12; testimony of Respondent (Day 3) (testifying that the area identified in Photo 87 is "vertical"). Respondent then revised his hearing testimony, speculating that the photo was taken toward the property line. *See* testimony of Respondent (Day 3).

Formation of the pond

Respondent provided conflicting testimony regarding the formation of the pond that is visible in Exhibit A17 at 20 (Photo 33, taken December 2, 2021). On the first day of hearing, Respondent admitted to creating the pond, testifying that he created it in approximately 2020, by digging out the "shale-ly" rock so that the water — which had been causing slides — had somewhere to go. Testimony of Respondent (Day 1). He explained that he cleaned up material that had accumulated on the floor and then dug down a couple of feet (until he hit basalt), estimating that the process took him between two and three hours. *Id*. On the third day of hearing, however, when counsel for Respondent asked if he intended to put a pond in that area, Respondent answered "no" and then testified that the pond was unintentionally created by blasting. *Id*. (Day 3). This conflicting testimony from Respondent weighs against a finding of credibility.

Conclusion

Given the various factors discussed above, Respondent's testimony — when weighed against site photographs, aerial imagery, testimony from Department witnesses, and other evidence — lacks sufficient reliability and is not persuasive. Where his testimony conflicts with other, more reliable evidence in the record, I accord greater weight to that other evidence.

FINDINGS OF FACT

History of Ekroth Property

1. The Ekroth Property is an approximately 10.81-acre property located in Township 1 North, Range 10 West, Section 22, Tax Lot 700, in Tillamook County. (*See* Exs. A1 and A44 at 27.) The property was acquired by Tillamook County in 1930. (Ex. A44 at 12.) The property is adjacent to marbled murrelet habitat and Electric Creek, which includes essential salmonid habitat.

(Exs. A18 at 1-2 and A19.)

2. In June 1976, Benny Taylor applied to the Department for an Operating Permit to mine the Ekroth Property. On the application, Mr. Taylor indicated that approximately one-fourth of an acre of the property was "affected prior to 7-1-72," approximately one acre was "affected 7-1-72 to date," and the "total acreage affected" was one. (Ex. A2 at 1; *see also* Ex. R9 at 1-2 (on-site inspection conducted pursuant to the application).)

3. On September 22, 1978, Mr. Taylor received an Operating Permit, authorizing surface mining in the "Taylor Pit" on the Ekroth Property. (*See* Ex. A3 at 1-2.) The Operating Permit did not identify any portion of the Ekroth Property as eligible for exemption from provisions of the Oregon Mined Land Reclamation Act for pre-1972 operations. (*See id*.) The Operating Permit contained the following conditions: 1) All access roads, benches, and work areas will be sloped to drain so as to prevent silt laden runoff from reaching the Miami River; and 2) Overburden storage piles will be shaped and stabilized with revegetation so as to minimize material migration and runoff. (*Id*. at 2.)

4. For many mining sites in Oregon that were permitted in the 1970s, the initial Operating Permits did not include or attach site maps unless more than 10 acres of land would be affected or the Department determined that conditions warranted a site map. Oftentimes, in the context of a later permit transfer or other compliance action, the Department has requested a site map and used the map to identify permit boundaries. Such maps often define the extent not only of the permitted area, but also the operator's reclamation responsibilities. (Test. of C. Buchner (Day 1).)

5. On July 18, 1991, Department Reclamationist Frank Schnitzer conducted an inspection at the Ekroth Property. His inspection report states, in part:

> [DOGAMI] has recently been notified that this quarry site, which has been permitted for many years by Benny Taylor, and is owned by Tillamook county, will now be operated by Dennis Hixson[.]
>
> Before Mr. Hixson can assume the Operating Permit for this site, a new reclamation plan including a site plan map on a topographic base map and an adequate bond must be submitted to DOGAMI. The existing reclamation plan which was written in the early 1970[]s cannot be directly transferred because of the lack of detail in relation to current regulatory requirements. A copy of the pending property boundary survey must be submitted to DOGAMI along with the scaled drawing of this site on a topographic base map.
>
> Based on photographs in the DOGAMI file and the observation that scotchbloom and alders are invading the boundary of the disturbance, the size of this quarry has not significantly changed since the early 80[]s or mid 70[]s. Approximately three acres are affected by pit run excavation with a dozer[.]

* * * * *

> The bond will be calculated after the survey and site plan maps are submitted.

(Ex. A4 at 1.)

6. On September 5, 1991, the Department issued a Closure Order to Mr. Hixson, which stated, in part:

> By authority of ORS 517.880, the rock quarry operated by you [at the Ekroth Property] is closed to all surface mining activities. The site shall remain closed until such time as the annual permit fee is paid, [and] the new reclamation plan, site plan map, property boundary survey, and a performance bond are submitted.
>
> * * * * *
>
> The operating permit formerly held by Mr. Benny Taylor is no longer valid. The permit expired on August 31, 1991.
>
> If this site is not brought into full compliance with the provisions of ORS 517.750 et seq. within 30 days of this notice, you must provide evidence that the required reclamation has been completed or is underway and will be completed in accordance with the approved reclamation plan.

(Ex. A5 at 1.)

7. On or about September 12, 1991, Mr. Hixson provided to the Department an Operation and Reclamation Plan, which replaced the 1976 reclamation plan. (*See* Ex. A7 at 1-11; test. of C. Buchner (Day 1).) Mr. Hixson also provided a site plan map dated October 9, 1991 (the 1991 site plan) to the Department. (*See* Ex. A6.) By letter dated November 27, 1991, the Department confirmed receipt of the renewal fee, reclamation plan, the 1991 site plan, property boundary survey, and performance bond and advised that the Closure Order for Mr. Hixson's rock quarry was lifted "immediately."[12] (Ex. A8 at 1.)

8. Sometime in 1991, Mr. Hixson purchased the Ekroth Property from Tillamook County. (Ex. A44 at 12.) In 1992, the Department transferred the Operating Permit from Mr. Taylor to Mr. Hixson. (*See* Ex. A9 at 1.)

9. In July 2003, Trevor Smith and William Unterberger purchased the Ekroth Property. (Ex. R1 at 1-3.) Respondent assisted Mr. Smith and Mr. Unterberger in acquiring the property and starting operations of the rock pit. (Ex. A43 at 1.)

---

[12] The 1991 site plan was required as part of the 1991 Reclamation Plan and was necessary to lift the Closure Order and make the Operating Permit effective. (Test. of C. Buchner (Day 1).)

10. In September 2003, the Department transferred the Operating Permit to Pacific Coast Rock, LLC. (Ex. R14 at 1.) Respondent was a partner in Pacific Coast Rock, LLC at the time of the transfer, until November 2003. (*See* Exs. R7 at 1 and A43 at 1.)

11. On September 24, 2003, the Department's Bob Brinkmann conducted an onsite inspection at the Ekroth Property. His inspection report states, in part:

> I was accompanied on this inspection by Tim Franz with Tillamook County; Dennis Hixson, the permittee; and Trevor Smith, Bill Unterberger and Jay Williamson with Pacific Coast Rock (PCR). The purpose of the inspection was to go over the permit transfer procedures with the interested parties. * * * * *.
>
> This small upland basalt quarry has been relatively inactive over the past several years and a permit transfer form and fee were submitted to DOGAMI in August, 2003. In addition, PCR has submitted a bond to replace the one held by Mr. Hixson. Based on these submittals and the adequacy of the existing reclamation plan this Department has approved the permit transfer. Activity at the site includes extraction from the face which is an unbenched highwall extending to approximately 100-feet and processing the material in a small crusher located on the pit floor. A rock screen and loader were also located onsite and Mr. Williamson indicated that in the near term the plan is to focus on developing benches in the face. The current disturbance is approximately 1-acre and the permit boundary comprises approximately 3-acres. PCR indicated that eventually they intend to expand beyond the 3-acres but understood that it would require amending the existing permit and that it is likely to be several years before the quarry was developed to that stage[.]

(Ex. A12 at 1.)

12. In October 2003, Mr. Smith and Mr. Unterberger transferred the property to Pacific Coast Development, LLC and Pacific Coast Rock, LLC (Pacific Coast). (*See* Ex. R2 at 1-4.) On October 13, 2004, the Department issued a renewed operating permit to Pacific Coast. (Ex. A44 at 42.)

13. Pacific Coast subsequently sought land use approval from Tillamook County for expanded mining operations at the site. (*See* Ex. A44 at 1-76.) In its application to Tillamook County, Pacific Coast noted that "mining permits for three acres have been renewed and maintained annually with ongoing mining activity." (*Id*. at 12.) In December 2005, Tillamook County granted Pacific Coast's request to "expand and continue mining the Ekroth Quarry," allowing mining and processing on Respondent's property to the area identified as the "Recommended Extraction Area" in an attachment to Tillamook County's approval. (*See* Ex. A29 at 1-3.) The "Recommended Extraction Area" does not include all of Respondent's property, and

it includes a 25-foot buffer from Electric Creek and a 50-foot buffer[13] from the ODF Property. (*See id.* at 3.) Despite obtaining this land use approval from Tillamook County, Pacific Coast did not seek, and the Department did not agree, to amend the Operating Permit. (*See* Ex. A13.)

14. On July 9, 2008, Mr. Brinkman conducted another onsite inspection at the Ekroth Property. His inspection report states, in part:

> Although [Pacific Coast] has obtained land use to mine 16-acres (9/05), the current disturbance is less than 3-acres and is within the DOGAMI permit boundary. Mr. Unterberger indicated that [Pacific Coast] will continue to operate within the 3-acre permit boundary and it was indeterminate when an amendment application for an expansion would be submitted to this office.

(Ex. A13 at 1.)

15. During the next several years, there was litigation between Respondent and Pacific Coast/Unterberger/Smith. (*See* Exs. R4 through R6.) In approximately May 2009, Senior Circuit Court Judge Timothy P. Alexander determined that any partnership that had existed between Respondent and the other parties ended by November 3, 2003. (Ex. R7 at 1-2.)

Ekroth Property under Respondent's Ownership

16. In approximately June 2009, Pacific Coast transferred ownership of the Ekroth Property to Respondent. Respondent put the property in the name of his attorney, and then entered into a contract to "purchase the property" from the attorney. (Ex. A43 at 1; *see also* Ex. R8 at 1-5.)

17. In 2009, Respondent approached ODF, seeking approval to excavate onto the ODF Property, including to lower the elevation of the ridgetop on the ODF Property. (*See* Exs. R27, R28, and A45; test. of Skinner (Day 1) (discussing Respondent's 2009 outreach to ODF).)

18. In 2009, the majority of Respondent's operations at the Ekroth Property were located within the area identified by the 1991 Site Plan. (*See* Ex. A20A.)

19. On September 29, 2010, the Department received an application to transfer the Operating Permit from Pacific Coast to Respondent. (*See* Ex. A10 at 1.) On that application, Respondent "acknowledge[d] and accept[ed] responsibility for all lands subject to reclamation on this site affected to date or that may be affected in the future," agreed to "reclaim all lands subject to reclamation in accordance with ORS 517.702 to 517.989," and acknowledged that "the reclamation plan may be modified as a condition of transfer." (*Id.*)

20. On November 15, 2010, Kate Skinner, ODF's Assistant District Forester (Tillamook

---

[13] Buffers (or setbacks) are common at mining sites, and they exist to protect natural resources or adjacent properties from mining related impacts. (Test. of Balzer (Day 2).)

District) at the time, sent a letter to Respondent, which stated, in part:

> [I] know you are anxious to move forward with work and development of your quarry. I have summarized in this letter what additional information ODF needs to receive before proceeding with approval and permitting[.]
>
> You stated that you were given direction by MSHA to cut trees overhanging the quarry. I'm not clear if the MSHA order means trees leaning over the quarry or if they meant trees needed to be cleared back a certain distance from the edge of the quarry face. From our observations at the top of the quarry this morning, it appears you are the owner of any trees leaning over the quarry face and you may go ahead and cut those as you need. If a clearing distance is required by MSHA we will need to mark those trees in the field for you to remove from ODF land.
>
> I reviewed the plans you dropped off * * *. [It is] requested that before ODF can agree to any excavation on our lands, that a more detailed quarry plan is developed and stamped by a geotech engineer. Excavation onto State property should be kept to the minimum to comply with MSHA orders. * * * * *. After we receive an engineer stamped quarry plan, ground-truthing and on-the-ground clearing and excavation boundaries can be marked by ODF personnel.
>
> Once the plans and on-the-ground boundaries are agreed to, we will develop a Special Use Permit with you. The Special Use Permit will allow you to do the work on ODF ownership as well as create a value for the trees that will be removed, the value of rock in the excavation and a cost for taking ODF land out of production[.]

(Ex. R27 at 1-2.)

21. On March 25, 2011, Mr. Brinkman conducted another onsite inspection at the Ekroth Property. (*See* Ex. R23 at 1.) His inspection report states, in part:

> [The] quarry was inactive but had a mobile crusher, two loaders and an excavator located on site. The most recent excavation was from the south side highwall[,] which is unbenched and extends to approximately 100-ft in height. The material being excavated consisted of rock and fines that had sloughed onto the pit floor. Although this was a minor slide[,] it was contained within the quarry and didn't appear to have further instability. Mr. Williamson indicated that once he has cleaned the material off the floor he would go forward with installing benches in the face.

(*Id.*)

22. By May 4, 2011, Respondent's operations had expanded to the west and to the south, including on the southern highwall (which was then near the ODF Property). This included vegetation removal, relocation of overburden, and excavation of the exposed high-quality (gray in color) rock. (*See* Ex. A20B (May 4, 2011 aerial photo); test. of Balzer (Day 2).)

23. On March 12, 2012, the Department issued the Operating Permit to Respondent. There was no modification of the 1991 Reclamation Plan prior to the Department issuing the Operating Permit to Respondent. (*See* Exs. A11 at 1 and A43 at 2 (Respondent acknowledging that he fell under the existing 1991 Reclamation Plan).) The Operating Permit contains the following conditions:

> The Permittee must:
>
> 1. slope all access roads, benches, and work areas to drain so as to prevent silt-laden runoff from reaching the Miami River.
>
> 2. shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.

(Ex. A11 at 1.) The Operating Permit did not authorize mining off of Respondent's Property. (*See id.*; test. of C. Buchner (Day 3).)

24. When the Department issued the permit transfer to Respondent in March 2012, his operations at the Ekroth property likely exceeded the permit area in the 1991 Site Map. But at the time, the Department lacked the technology to assess whether the disturbance matched the 1991 Site Map. Instead, the Department focused primarily on the size of the authorized disturbance (*i.e.*, approximately three acres) to evaluate compliance with the permit area. Since the mining disturbance was still below the three-acre permit area limit, the Department considered the site in compliance at the time of the Operating Permit transfer. (Test. of C. Buchner (Day 1).)

25. By July 6, 2012, Respondent's excavations had expanded west, exposing more of the high-quality gray rock. This mining disturbance continued south of the Southern Property Line, onto ODF's property. (Test. of Balzer (Days 1 and 2); *see* Ex. A20C (July 6, 2012 aerial photo); *compare to* Exs. A20A and A20B (earlier aerial photos showing that the entire Southern Property Line was treed in 2009, and it remained so in May 2011).)

26. On August 21, 2012, Respondent entered into a Contract of Sale of Real Property to purchase the Ekroth Property from Brian Green. (*See* Ex. A1 at 7-17.)

27. On November 5, 2012, Ms. Skinner sent a letter to Respondent, which stated, in part:

> [I]'m sending this letter to capture our efforts to date and to outline our next steps of working together as you address the issues of the high wall at your quarry. * * * * *.
>
> [I]n 2006 our office sent a letter to Bill Unterberger of Pacific Coast Rock,

> LLC stating that the work at the quarry at the time was causing a trespass on ODF property by undermining our lands. We understood Mr. Unterberger to be the operator at the time and had leased the property from you.
>
> [I]n 2009 you approached ODF with an idea to cut trees to the South of your rock quarry and excavate benches on ODF property to stabilize the high face[.]
>
> [I]n 2010 you delivered a copy of plan and profile drawings dated August 9, 2010 to our office. You also informed our office in the fall of 2010, that MSHA had stopped by the quarry and had concerns about overhanging trees. [In] November 2010 I sent a letter to you requesting additional plans and designs so that ODF could better understand your proposal for excavation.
>
> [I]n 2012, you contacted our office again in February stating that MSHA had been back out to the quarry and had issued direction to fix the high face adjacent to ODF property. * * *. Over the summer months you marked areas in the field and ODF reviewed the site. During this time period two slides have occurred from the high face into your pit. The causes of the slides were the vibration of your operation in the pit from recent rainy conditions. In addition, you let me know two trees were undermined on ODF property due to the slides and you had to cut them for worker safety.

(Ex. A43 at 18-19.) The letter also noted that there were potential habitat trees for the federally protected Marbled Murrelet within 300 feet of the permit area and discussed the necessity of surveys, at Respondent's expense. (*Id*. at 19.)

28. On January 3, 2013, Ms. Skinner sent a letter to Respondent stating, in part:

> The attached Special Use Permit allows you to conduct work on ODF ownership to improve the safety of work in your quarry. The permit allows you to remove trees including roots ten feet back from the edge of the existing high wall and create an access trail on a small portion of ODF property. It is my understanding that the tree removal is the minimum requirement from Mine Safety and Health Administration at this time. In addition you are permitted to place a waterbar on the road at the top of the ridge.
>
> The permit <u>does not</u> allow excavation to lower the height or the elevation the ridge top [*sic*] on ODF land. For larger excavation work to take place, surveys for marbled murrelets are required for two years as I've outlined in a previous letter and must be done within policy and laws for threatened species.

> The ridge acts as a topographic barrier between your quarry and potential habitat for the murrelets. The barrier needs to be maintained until surveys determine the absence of murrelets. As I stated * * * to you in November 2012, the cost to perform those surveys would be your responsibility[.]
>
> I know this permit does not give you all the flexibility and approval for activity you would like, but it is what we are able to approve at this time within our policies and obligations to comply with [the] Endangered Species Act.
>
> You will find attached the Special Use Permit that expires March 30, 2013 and requires a payment of $350.00 for removal of land from production. * * *. Attachments include permit location, special requirements and waterbar specifications[.]

(Ex. A23 at 1; underlined emphasis in original.) The Special Use Permit allowed Respondent to cut trees and remove rootwads on approximately 0.1 acre of the ODF Property and create an access trail at the location shown in an exhibit attached to the permit. (*See id*. at 2-9.)

29. Sometime between January 1 and 4, 2013, there was a slide at the Ekroth Property that crossed a portion of Ekroth Road. (*See* Ex. A14 at 1-2.) MSHA was onsite when the slide occurred and deemed Respondent responsible for the slide and its cleanup. (Test. of Respondent (Days 1 and 3).)

30. On January 4, 2013, the Department's Natural Resource Specialist Andre Sampier conducted an onsite inspection at the Ekroth Property to, among other things, "assess a slope failure event above Ekroth Road." (*See* Ex. A14 at 1-2.) His inspection report states, in part:

> By the time I arrived to the site on January 4, 2013 at approximately 10:00 am the materials that failed down slope such as quarry rock, topsoil, subsoil, vegetation, and various types of trees were removed and the road was passable from both traffic lanes. Materials such as topsoil and vegetation were initially stockpiled on a small gravel turnout on the north side of Ekroth Road but have since been removed at Tillamook County's request per [Respondent]. Approximately a dozen large trees such as alders and conifers were put into a single log pile along a portion of the road turnout and still remain. * * * * *. Stockpiles were observed directly above the slope failure scarp, and I observed the scarp of the slope failure event to extend into the stockpiles that were stored along the edge and above the slope failure event. Pit run materials were observed along the base of the slope failure and along the county roadside ditch as well as sidecast down the eastern and western outslope of the failure.
>
> * * * * *
>
> The site is operating under an Operating Permit. According to a May 4,

> 2011 aerial photo, approximately 3 total acres have been disturbed by mining[-]related activities. At the time of the inspection, no active mining operations such as crushing, stockpiling, or excavation extraction were being conducted, though several large operating machines * * * were located on site. DOGAMI records indicate that the last crushing operation was conducted in 2012.

(*Id.*)

31. On March 29, 2013, Ms. Skinner sent a letter to Respondent regarding the expiration of the Special Use Permit. The letter states, in part:

> I'm sending you a letter to close out the Special Use Permit to cut trees, [and] remove rootwads and debris on State Forest land upslope of your quarry. The permit was issued January 3rd and expires on March 30, 2013.
>
> I entered the site from the top on ODF property earlier today. It didn't appear at that time you had any equipment on ODF property. Any cut trees will be left on site as of the expiration of this permit and no additional waste from your operations shall be placed on ODF property.
>
> My observations of the site were that benches were built from the west and east across the slope which should catch any additional material that erodes down the slope before it reaches the quarry floor. However[,] there appears to be a middle section of the slope with no bench below and ODF property will continue to be undermined. It is not clear to me, how this will impact your operations or what your future plans are in this area.
>
> We have talked before about your desire to lower the elevation of ODF property on the ridgetop. To accomplish this work, surveys are required for Marbled Murrelets for two years. I have not had any notice from you that you would like to proceed and pay for those surveys.

(Ex. A45 at 1.) Respondent undertook no actions on the ODF Property pursuant to or during the term of the Special Use Permit. When Ms. Skinner walked the ODF Property on March 29, 2013, she was able to see all the ODF Property that was adjacent to Respondent's Property. At that time, Ms. Skinner observed benches on Respondent's Property, but no benches on the ODF Property. (Test. of Skinner (Days 1 and 3).) The Special Use Permit expired on March 30, 2013. (*See* Ex. A45 at 1-2.)

32. By July 14, 2014, Respondent's mining operations had expanded into the center of the ODF Property, with overburden storage to the south and the east of the excavation area on that property. (*See* Ex. A20D (July 14, 2014 aerial photo); test. of Balzer (Days 1 and 2).)

33. From at least 2014 to 2017, Respondent conducted mining operations on the Oregon Department of Transportation (ODOT) Property located northwest of the Ekroth Property.[14] (*See* test. of Balzer (Day 2) (discussing mining-related activity on the ODOT Property based on Exhibits A20D through A20F; *compare* Ex. A20A *with* Ex. A20H (aerial imagery showing the ODOT Property going from a forested parcel to a disturbed parcel integrated into Respondent's operations); *see also* Ex. A26 (identifying location of the former ODOT lease).) By 2018, Respondent had constructed benches/roads onto the ODOT Property and placed overburden on the property. (Test. of Balzer (Day 2) (discussing Exhibit A20G).)

34. On September 10, 2014, the Department's Natural Resource Specialist Kelly Wood conducted an onsite inspection at the Ekroth Property. (*See* Ex. A15 at 1-3.) At the time, Respondent's mining operations had already disturbed the ODF Property, but then-available aerial imagery and site inspection photos from the pit floor did not show the extent of the disturbance. (Testimony of C. Buchner (Day 1).) Ms. Wood's inspection report states, in part:

> The site is operating under an Operating Permit. According to a Tillamook County Findings and Decision document * * *, approximately 16 acres are included in the Goal 5 Significant Aggregate Resource Inventory for surface mining. Documentation within the DOGAMI file indicates that the Operating Permit boundary does not coincide with the area approved by the county. DOGAMI and Mr. Williamson discussed the Operating Permit boundary at the time of the site visit and DOGAMI discovered that the permittee and DOGAMI have discrepancies regarding the number of acres covered under the DOGAMI Operating Permit.
>
> [I]t appears that DOGAMI conducted an On-Site Inspection on September 24, 2003 * * * to review procedures necessary for a permit transfer. The November 26, 2003 inspection report specifically states "The current disturbance is approximately 1-acre and the permit boundary comprises approximately 3-acres. PCR indicated that eventually they intend to expand beyond the 3-acres but understood that it would require amending the existing permit and that it is likely to be several years before the quarry was developed to that stage[.]" Based on this information and the fact that there have been no subsequent Amendments to the Operating Permit, DOGAMI has concluded that 3 acres are currently covered under the existing DOGAMI Operating Permit.
>
> DOGAMI and Mr. Williamson discussed some of the requirements to amend an Operating Permit[,] including a survey map, land use approval, an application, an Operating and Reclamation Plan, and fees. [M]r.

[14] In 2005, ODOT and Pacific Coast entered into a lease agreement for the period March 1, 2005 through February 28, 2010, allowing Pacific Coast to occupy and use certain ODOT Property for quarry purposes. The lease required the lessee to secure all necessary permits and licenses required (including by the Department). There is no evidence that ODOT renewed the lease after the expiration of the original term. (*See* Ex. A44 at 59-68.)

Williamson stated to DOGAMI that he would like to pursue an Amendment to the DOGAMI Operating Permit to expand the permit boundary. Mr. Williamson requested that DOGAMI provide the Amendment Application documents and requirements with this inspection report. Enclosed are the documents applicable to the Operating Permit Amendment Application[.]

* * * * *

According to a May 4, 2011 aerial photo, 3 acres are disturbed by mining[-]related activities. At the time of the inspection, active mining operations including stockpiling and hauling were being conducted[.]

It appeared that significant overburden materials had been stockpiled along the southeastern portion of the highwall. According to Mr. Williamson, the material was backfilled in this location to reduce the highwall height. The majority of the backfilled slope was not yet vegetated[,] however there was no evidence of localized erosion or instability on the slope. DOGAMI recommends seeding or otherwise securing this area against erosion from wind or rain prior to the upcoming wet season.

* * * * *

As mining[-]related activities continue to proceed at the site, topsoil, subsoil, and overburdened materials should be kept on site for final reclamation purposes. The salvaged materials should be sloped at 2H:1V, seeded annually or otherwise secured against erosion from wind or rain. Retaining all soil and overburden onsite will allow for a lower reclamation security by avoiding the need to include the cost of importing material to accommodate reclamation.

* * * * *

[T]he reclamation security for this site is currently $6,500[,] which is deemed inadequate at this time. As discussed during a follow-up phone call on November 10, 2014, an increase in the reclamation bond is required. Taking into consideration existing slope configurations and materials available on-site for final reclamation, a total reclamation security of $14,500 is now required for your operation. A rider to the existing bond or a new bond may be submitted. Please submit the required reclamation bond by March 31, 2015.

At this time, the site remains in compliance with DOGAMI's Operating Permit with the acknowledgement that an amendment application is required prior to any additional lateral expansion of the site[.]

(Ex. A15 at 1-3.) The Department's longstanding practice has been to mail inspection reports to permittees. (Test. of C. Buchner (Day 3); *but see* test. of Respondent (Day 1) (stating that the Department never informed him of a permit size smaller than his entire property).)

35. On March 31, 2016, Mr. Brinkmann conducted another Department site visit at the Ekroth property. His inspection report for that visit, dated April 15, 2016, states, in part:

> According to the May 4, 2011 DOGAMI aerial photo ~ 3-acres are disturbed by mining[-]related activities[,] which has been determined by DOGAMI to be the permitted acreage for the site. Subsequent to the 2011 DOGAMI aerial, additional acreage beyond the 3-acre limit have been disturbed as shown on a July 30, 2014 Google Earth image.[15] Based on this, a permit amendment for the expansion is now required. Please submit a permit application and fee to this office by May 31, 2016[.]
>
> * * * * *
>
> The site was active with extraction occurring on the southwest end of the quarry where the face is ~50-ft in height and is unbenched. Mr. Williamson indicated that he will continue to lower the face to the level of the pit floor in this part of the highwall. Adjacent to this section on the south side the highwall extends to ~150-ft and contained multiple benches[.]
>
> * * * * *
>
> The reclamation security for any operation must be based on the actual reclamation cost that DOGAMI would have to pay to contract for reclamation of the disturbed area to the standards outlined in the reclamation plan. The reclamation security for this site is currently $6,500[,] which is deemed inadequate at this time. Mr. Williamson was notified in a previous inspection report (9-10-14) as well as in a follow-up phone call on November 10, 2014[,] that a revised reclamation security of $14,500 was required. Because a permit amendment is now required[,] a determination of whether $14,500 is adequate will be made during the evaluation process of the application.
>
> * * * * *
>
> At this time, the site remains in compliance with DOGAMI's Operating Permit with the acknowledgement that permit amendment and 1200A applications are required by May 31, 2016[,] and failure to submit the

---

[15] Because there is a lag for when aerial imagery becomes available, the Department based its determination that Respondent's operations exceeded the three-acre permit limit by the March 31, 2016 inspection date by comparing a July 30, 2014 Google Earth image to a 2011 aerial image. (Test. of E. Buchner (Day 1) (discussing lag); *see* Ex. A16 at 1.)

> applications by the required date will result in issuance of a [Notice of Violation.]

(Ex. A16 at 1-2.)

36. On May 18, 2016, Respondent filed an Operating Permit Amendment Application with the Department to expand the permitted area. (*See* Ex. A25 at 1-2.) On the application, a section titled "Current Permit Information" advised the applicant: "*Do not include expansion area information in this section.*" (*Id*. at 1; underlined and italicized emphasis in original; all caps omitted). In that section, in response to the question, "How many acres * * * are covered by the current Operating Permit?" Respondent wrote "3." (*Id*.; underlined emphasis in original.) Also in that section, in response to the question, "How many acres * * * are currently affected by mining?" Respondent wrote "3 ½." (*Id*.; underlined emphasis in original.) In response to the question, "How many ADDITIONAL acres under the current permit will be affected by mining in the next 12 months?" Respondent wrote "2.0." (*Id*.; underlined emphasis and all caps in original.) Under a section of the application titled, "Expansion Area Information (if applicable)," Respondent indicated that "3.5" acres are "currently affected by mining" and that "5.5" acres "will be affected by mining in the next 12 months." (*Id*.; underlined emphasis in original; all caps omitted). Respondent noted on the application that the primary commodity mined under the Operating Permit was aggregate/basalt. (*Id*. at 2.)

37. By August 23, 2016, Respondent's mining operations included several access points to benches on the southern highwall, with the southernmost bench extending south of the Southern Property Line[16] and equipment tracks continuing back onto Respondent's Property along the western ridge. Since July 2014, there had been additional excavation in the form of benches and additional overburden placed south of the Southern Property Line. (*See* Ex. A20E (August 23, 2016 aerial photo); test. of Balzer (Days 1 and 2); *compare* Ex. A20D (July 2014 aerial).)

38. On September 14, 2016, Respondent provided a proposed Operation and Reclamation Plan to the Department. (*See* Ex. A27 at 1-6.) The plan listed an overburden removal depth of approximately 25 feet. In the plan, in response to the question, "[w]ill soil, overburden, rock waste or crusher reject dumps or stockpiles be created during mining," Respondent answered "yes" and indicated that the quantity was "not yet calculated." (*Id*. at 3.) In the plan, Respondent noted that "[s]oil and overburden materials will be stored adjacent to the State Forestry property line in a low berm" and that "[n]o ponds or dams [would be] constructed." (*Id*.)

39. By June 22, 2017, Respondent's mining operations included multiple access roads/bench floors that extended beyond the Southern Property Line and included equipment tracks. Since August 2016, there had been additional excavation south of the Southern Property Line, as well as material placed south of the Southern Property Line.[17] (*See* Ex. A20F (June 22,

---

[16] At hearing, neither Respondent nor his operator, Mr. Mallare, could explain how the southernmost bench was created. (*See* test. of Respondent (Day 3) and test. of Mallare (Day 2).)

[17] At hearing, Mr. Mallare had no explanation for the changes that occurred on the ODF Property from 2016 to 2017. (*See* test. of Mallare (Day 2).)

2017 aerial photo); test. of Balzer (Days 1 and 2); *see also* test. of Balzer (Day 1) (discussing Exhibit R42, another aerial from 2017).

40. On October 25, 2017, Respondent provided a proposed Permit Area Map (*i.e.*, survey map) to the Department. (*See* Ex. A26 at 1; *see also* Ex. R53 at 1-2.) The narrative of the survey map states that the document provides a survey of the "excavation area [which] is the contoured portion of the map." (Ex. A26.) The contoured portion of the map extends past the proposed 50-foot setback line or buffer along much of Respondent's Property, including the southern portion adjacent to the ODF Property. The contoured portion, or excavation area, also extends across the "Pit Permit Boundary Line," which Respondent's surveyor, Robert Olson, identified as the property boundary, relying on Tillamook County Survey Map A-7990 for the southern boundary, and into both the ODF Property and ODOT Property. (*See id.*; test. of E. Buchner (Day 1).)

41. After receiving Respondent's Amendment Application, the Department reviewed aerial imagery, which revealed the updated extent of mining-related disturbance on the ODF Property. (*See* Ex. R53 at 1 (Department identifying "a notable amount of mining related disturbance located outside of the proposed permit area (primarily to the south)"); test. of E. Buchner (Day 1) (discussing Exhibit R42 (2017 aerial) and how it showed mining beyond the permit boundary proposed in Respondent's Amendment Application).) A review of aerial imagery also led the Department to determine that Respondent's overburden and storage practices caused multiple slides of overburden that potentially impacted Electric Creek. (*See* Exs. A30 at 1, A18 at 3, and A20F (June 2017 aerial image); test. of E. Buchner (Day 1); test. of C. Buchner (Day 1) (discussing receipt and review of the 2017 aerial image).)

42. If the Department had approved Respondent's Amendment Application, Respondent would have been in immediate violation of the amended permit because his mining operations had already crossed the proposed permit boundary. In addition, surface mining had occurred in areas outside the "Recommended Extraction Area" approved by Tillamook County and on lands not owned by Respondent, including lands owned by ODF on which Respondent did not have ODF approval to mine. (*See* Exs. A26, A29 at 3, R42, and R53 at 1; test. of E. Buchner (Day 1) and test. of C. Buchner (Day 3).) The Department cannot issue or amend an operating permit to allow mining in areas lacking county land use approval or landowner approval. (Test. of C. Buchner (Day 1); *see* ORS 517.790(3)(a)[18] and OAR 632-030-0030(3)(b).[19])

---

[18] ORS 517.790(3)(a) states:

> (3) The department may not issue an operating permit to an operator other than the owner or owners of the surface and mineral interests of the lands included within the surface mining area unless the operator:
>
> (a) Has written approval from the owner or owners of all surface and mineral interests of the lands included within the surface mining area[.]

[19] OAR 632-030-0030(3)(b) provides, in part:

> Any conditions and requirements imposed by the Department on an operating permit and reclamation plan, including any modifications made pursuant to OAR

43. Between June 2017 and August 17, 2018, Respondent's mining operations continued south of the Southern Property Line and onto the ODF Property, with an expansion of overburden placement beyond the Southern Property Line. (*See* Exs. A20G (August 17, 2018 aerial photo), A46 at 8, A17 at 11 (photo 100), and R95 at 9 (photo 77) and 10 (photo 255); test. of Balzer (Day 2).)

44. On June 11, 2018, the Department issued a Suspension Order to Respondent, which stated, in part:

> Per the DOGAMI Inspection Report dated April 15, 2016 you were notified that operations were conducted outside the 3[-]acre authorized Operating Permit boundary and that a permit amendment for an expansion was required to bring the site into compliance. * * *. Review of the application materials and Google Earth aerial imagery dated June 22, 2017, indicate that your mining operation has trespassed onto adjacent property that is owned by the State of Oregon and your overburden handling and storage practices have caused multiple landslides that may have impacted Electric Creek, for which the City of Garibaldi holds water rights. DOGAMI believes your site to be in violation of the following:
>
> - Engaging in surface mining without an operating permit. Per ORS 517.790(1) An operator may not engage in surface mining on land without holding a valid operating permit.
>
> - Per ORS 517.790(3) * * *. DOGAMI does not have any evidence that you have authorization from the property owner to mine these lands[.]
>
> - Failure to Comply with Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> By the authority of ORS 517.880 because you are conducting surface mining in areas where you do not hold a permit and are acting in violation of ORS chapter 517 and OAR chapter 632, division 30 as described above, the Oregon Department of Geology and Mineral Industries hereby orders you to suspend all surface mining operations at the mine site referenced above. You are required to stop all surface mining activities except the removal of stockpiled materials[.]

> 632-030-0035, issued subsequent to a final local land-use approval must be compatible with the requirements and conditions of the local government land-use plan and permit, including any conditions established to comply with statewide planning Goal 5, unless more stringent Department requirements are necessary to comply with the provisions of ORS 517.750 to 517.900[.]

> This Suspension Order remains in effect until withdrawn by the written order of the [D]epartment[.]

(Ex. A30 at 1.) There is no evidence that Respondent challenged this Suspension Order or its underlying findings. (*See* Evidentiary Record.)

45. On July 6, 2018, Respondent shared with the Department a video taken on April 18, 2018, appearing to show materials from the ODF Property sliding onto the Ekroth Property. (*See* Exs. R86 (video) and R76 at 3; test. of C. Buchner (Day 3).) The slide included overburden. (Test. of Respondent (Day 3) (identifying "a lot of overburden" in the highwall).) The Department determined that Respondent's mining activity caused the slide — specifically, Respondent's removal of material, both from the toe of the slope and via benching, below the part of the highwall that failed. (Test. of Balzer (Day 2).) Respondent processed and sold marketable material that slid. (Test. of Respondent (Day 1) (discussing screening plant in use in July 2018 inspection photo and sale of material, processing, and agreed-upon amount of slide material sold, and processing of landslide material as depicted on Exhibit A17 at 14); test. of C. Buchner (Day 1) (testifying that Respondent admitted to screening and selling the slid material).)

46. On or about July 7, 2018, the Department conducted another onsite inspection of the Ekroth Property. During the inspection, Cari Buchner took photographs, and the Department confirmed its previous determinations that Respondent's operations trespassed onto State-owned land and that Respondent's overburden handling and storage practices resulted in slides potentially impacting Electric Creek.[20] (*See* Exs. A17 at 11-15, A20F, and A34 at 3; test. of E. Buchner (Day 1); test. of C. Buchner (Days 1 and 3).)

47. On September 20, 2018, Respondent met with one or more attorneys from the Oregon Department of Justice (DOJ), Department personnel (including Ms. Buchner), and representatives from ODF and the Oregon Department of State Lands (DSL) regarding Respondent's "trespass of ODF property." (*See* Exs. A32 and A33 at 1-3.) At the meeting, Respondent agreed to stop mining the ODF Property and to remediate the disturbance. (Test. of C. Buchner (Day 2).) The parties agreed to certain steps going forward, which were later memorialized in a September 25, 2018 letter to Respondent from DOJ Senior Assistant Attorney General Marc Hull. The primary components of the agreement included the following: (1) that Respondent would mark the property boundary "more conspicuously to avoid additional trespasses," using the line perpetuated by Robert Olsen per Tillamook County Survey Record A-7990 (the "Southern Property Line"); (2) that Respondent would pay DSL damages for unpermitted aggregate removal from ODF property and ODF for timber trespass and loss of timber production land; and (3) that Respondent would submit for agency approval an engineer-certified written remediation plan addressing specified criteria prior to beginning restoration or remediation work on the ODF Property. (Ex. A33 at 1-3.) DOJ informed Respondent that if the restoration plan required Respondent to remove additional minerals from the ODF Property, he would need to secure a lease and pay additional compensation to DSL. (*Id*. at 3.)

---

[20] When speaking with Ms. Buchner on July 7, 2018, Respondent did not dispute that there was overburden at the site, but he did dispute that he had placed it there. (Test. of C. Buchner (Day 3).)

48. The Department's Vaughn Balzer estimated that Respondent removed roughly 24,044 cubic yards of material from the ODF Property, resulting in approximately $4,713 in royalty owed to the State. (*See* Ex. A31 at 1-5.) Mr. Balzer summarized his calculations as follows:

> DOGAMI used LIDAR topography acquired in 2009 and compared that to survey data gathered on July 6th, 2018 at the site. Pictures taken during the July 6th, 2018 site inspection were used to help refine the removal estimates. While this is a very rough estimation[,] we feel that it is in the "ballpark" and adequate for the purposes at hand. * * *. A significant portion of the material removed from the [ODF Lands] consisted of overburden (soil and weathered rock) most of which remains onsite (see attached). Based on a rough estimate that 20 percent of the material removed was marketable aggregate, approximately 4,809 Cubic Yards of marketable material were acquired from the removed material from [ODF Lands]. Based on the mineral rate * * * provided below, Mr. Williamson owes a royalty to the state of $4,713.00.

(*Id*. at 1.) DSL is responsible for managing all minerals owned by the State of Oregon. On September 27, 2018, DSL invoiced Respondent for $4,713 as cost reimbursement for Respondent's "extraction of minerals" during his "trespass" on the ODF Property. (*See* Ex. A43 at 16-17; *see also* Ex. R62 at 1.)

49. On September 28, 2018, the Department issued the 2018 Order to Respondent and rescinded the June 11, 2018 Suspension Order. (*See* Ex. A34 at 1-5.) The 2018 Order states, in part:

> On July 6, 2018 DOGAMI conducted a site visit to further determine the extent of the violations described in the DOGAMI Suspension Order issued June 11, 2018. DOGAMI confirmed that mining activity at this site has been conducted outside the permit boundary, resulting in trespass onto state-owned land managed by [ODF]. Surface mining in unpermitted areas is a violation of ORS 517.790 which prohibits engaging in surface mining without an operating permit.
>
> During this site visit DOGAMI also observed the landslides that may have impacted Electric Creek. DOGAMI believes these slides were caused by instability of overburden storage piles. Based on this, the site is also in violation of Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> To rectify these violations, you are hereby ordered to take the following steps:

1. Do not conduct any surface mining outside of the property line between * * * [the Ekroth Property and the ODF Lands].

2. Submit a remediation plan prepared and stamped by a Certified Engineering Geologist (CEG) or Geotechnical Engineer (PE) that addresses [specified criteria].

* * * * *

3. Submit progress reports to DOGAMI throughout implementation of the remediation plan, on a schedule to be determined once the remediation plan has been approved by all agencies.

The above tasks must be completed by September 30, 2020. You may request an extension to the required completion date for bringing this site back into compliance, however the [D]epartment will not consider such a request unless you demonstrate good cause for the delay and show that there has been reasonable effort and progress toward meeting the schedule outlined above.

If you fail to comply with this Notice of Violation and Compliance Schedule, the [D]epartment intends to take enforcement action against you. This may include, but is not limited to, recovery of the reclamation security for this site, issuance of a Suspension Order, or the assessment of civil penalties for the violation of this order. If the [D]epartment elects to recover the reclamation security, the funds will be used to reclaim the property as provided in ORS 517.865. If this amount is insufficient to complete the reclamation as outlined in the Reclamation Plan, a lien may be placed against the property to cover any deficiencies.

* * * * *

You have the right to a contested case hearing * * *. To have a hearing, you must file a written Request for Review with the State Geologist within twenty (21) days from the date this Order was served on you or mailed to you. * * * * *.

The State Geologist will have the opportunity to review and resolve the situation informally pursuant to OAR 632-030-0056. If the State Geologist declines review, fails to provide you with a written decision within 30 days, or if the proposed informal resolution is not acceptable to you, the matter will be referred to a hearing officer and a contested case hearing will be scheduled.

* * * * *

> If the Order becomes final in this manner, you will have the right to appeal the order to the Oregon Court of Appeals under ORS 183.482. * * *. If you do not file a petition for review within [a timely manner], you will lose your right to appeal.

(*Id*. at 3-5; bold emphasis omitted.) Respondent did not appeal the 2018 Order.[21]

50. Between August 2018 and July 26, 2020, Respondent's mining operations continued beyond the Southern Property Line and onto the ODF Property. (*See* Exs. A20H (July 26, 2020 aerial photo), R96 at 2 (Photo 62, showing excavated vertical face on the ODF Property), A17 at 16 (Photo 87, showing excavation, including excavator marks, on the ODF Property in an area that had been forested in August 2018),[22] and A46 at 10; test. of Balzer (Days 1 and 2) and test. of C. Buchner (Days 2 and 3).)

51. On January 27, 2020, the Department conducted another onsite inspection at the Ekroth Property. Photographs that Ms. Buchner took during the inspection show remains of overburden (Photos 70, 71, and 72) and overburden spilling down towards a turbid Electric Creek (Photos 77, 79, and 80). (*See* Ex. A17 at 17-19; test. of C. Buchner (Day 1).)

52. The Department determined that the existing reclamation security of $14,500 for the Ekroth Property (which contemplated mining in only the permitted areas) did not account for the actual costs to reclaim the site. On January 25, 2021,[23] the Department issued a Notice of Action, requiring that Respondent increase the reclamation security at the site to $181,365 by March 1, 2021. (*See* Ex. A36 at 1-2.) The Notice of Action states, in part:

> The reclamation security for this site was last calculated in 2015 using per acre figures from 2001 and based on the acreage disturbed in 2015. The reclamation security has been recalculated based on the current 5.4-acre disturbance on tax lot 700[.]
>
> * * * * *
>
> Per ORS 517.810 and OAR 632-032-0021(12) a decision of the [D]epartment regarding the estimated cost of reclamation or the type of acceptable security may be appealed to the Governing Board as provided in ORS 183.310 to 183.550.

---

[21] *See* MSD Ruling at 14.

[22] Respondent initially testified at hearing that Photo 87 depicted a slide (rather than excavation) on ODF Property, and he claimed that what looked like excavator marks were merely seams of clay. Testimony of Respondent (Day 1). During subsequent testimony, however, he admitted to "scraping" the area, but asserted that the photo showed his property, and not ODF's. *Id*. (Days 2 and 3).

[23] The notice incorrectly lists the year as 2020. (*See* Ex. A36 at 1.)

> Additionally, per OAR 632-030-0021(8) you may submit reclamation cost estimates for consideration by the [D]epartment.

(*Id*.) There is no evidence that Respondent appealed the Notice of Action to the Governing Board. (*See* Evidentiary Record.)

53. The Department did not receive the reclamation security increase from Respondent by March 11, 2021. On March 11, 2021, the Department issued the 2021 Order. (*See* Ex. A37 at 1-2.) The 2021 Order advised that Respondent violated ORS 517.810(1) and OAR 632-030-0021(1) for failing to maintain an adequate reclamation security and ordered Respondent to provide either a security increase of $166,865 or a replacement security in the full amount of $181,365 by April 15, 2021. (*Id*. at 1.) The 2021 Order notified Respondent of his right to request a hearing to appeal the order and also of his right to request an informal review by the State Geologist (with a right to request a hearing if dissatisfied with the State Geologist's review decision). (*Id*. at 2.)

54. Also on March 11, 2021, for Respondent's continued failure to comply with the 2018 Order, the Department issued a Suspension Order, ordering Respondent to suspend all surface mining operations at the Ekroth Property. (Ex. R101 at 1-2.)

55. On March 23, 2021, Respondent requested an informal review by the State Geologist of the March 11, 2021 Suspension Order and the 2021 Order. (Ex. A38 at 1-2.) By letter dated April 22, 2021, State Geologist Brad J. Avy notified Respondent that he had completed his review and found "no basis to reverse or modify" either the Suspension Order or the 2021 Order, noting the "long and documented history of non-compliance and off-site environmental impact[.]" (Ex. A39 at 1.) The letter explained that Respondent had 30 days in which to request a contested case hearing to appeal the review decision. (*Id*. at 1-2.)

56. Respondent's efforts to obtain adequate reclamation security have been unsuccessful. (Test. of Respondent (Day 2).)

57. Meanwhile, on March 22, 2021, Respondent submitted a proposed remediation plan (the Morgan Plan) to the Department. (*See* Ex. R58 at 1; *see also* Ex. R57.) The plan proposed more than 60 additional feet of vertical excavation into the pit floor on portions of Respondent's property and more than 100 additional feet of excavation on portions of the ODF Property. (Ex. R57 at 6; test. of C. Buchner (Day 1).) By letter dated April 2, 2021, Ms. Buchner notified Respondent that the Department, ODF, and DSL were in agreement that the "proposed plan to address [Respondent's] trespass and damage to state-owned land and mining in unpermitted areas" was unacceptable. (*See* Exs. R58 at 1-2 and R59.) The letter stated, in part:

> The plan does not meet the requirements outlined in the Notice of Violation issued September 28, 2018 and proposes further damage and on[]going mining of state-owned land beyond the minimal use necessary to repair your existing damage.
>
> To address the existing violations of state law at this site you must submit a remediation plan prepared and stamped by a Certified Engineering

Geologist (CEG) or Geotechnical Engineer (PE) that addresses the following:

1. Areas of sidecast pullback.
a. The outslope that has slid into Electric Creek in two areas was not addressed in the narrative. This outslope needs to be stabilized without further impacts to Electric Creek.

2. Stormwater drainage plan.
a. The operating and reclamation plan specifies that no settling ponds will be constructed. The proposed remediation plan is inconsistent with the approved operating and reclamation plan.

3. Erosion control measures to be implemented.
a. The operating and reclamation plan specifies that no settling ponds will be constructed. The proposed remediation plan is inconsistent with the approved operating and reclamation plan.

4. Areas of timber clearing.
a. The additional acres of clearing beyond excavation at the top of slope.

5. Areas of excavation and estimated volume of materials to be excavated.
a. The areas of proposed excavation and estimated volume of materials to be excavated do not minimize impact to ODF property.

6. Proposed dimensions and number of benches.
a. The proposed dimensions of 1.5H:1V are acceptable for excavated slopes only. Any fill slopes must be constructed at 2H:1V or flatter, and if slope length exceeds 100 lineal ft may be required at 3H:1V to ensure long[-]term stability per 632-030-0027(3)(c).

b. The operating and reclamation plan does not allow for the importation or fill for reclamation.

7. Equipment ingress/egress plan.

8. Demonstration of the planned design elements that minimize impact to ODF property and resources, including instructions for working around protected species habitat.
a. The plan does not minimize impact to ODF property and resources.
b. The plan does not contain instructions for working around un-surveyed suitable habitat for protected species.

9. Identification of survey controls to be used when constructing benches.

10. Identification of periodic maintenance needs for clearing regrowth and

> maintaining drainage design
>
> 11. Re-establishment of the 50-foot buffer on the southern property line.
>
> For a plan to be approved it must adequately address all of the requirements outlined in the Notice of Violation issued September 28, 2018 and copied above. Please submit a revised plan that addresses all of the requirements no later than May 1, 2021.

(Ex. R58 at 1-2.)

58. Respondent subsequently engaged Erick Staley, a certified engineering geologist, to prepare a plan to address the trespass and damage to the ODF property. Mr. Staley submitted to the Department the framework of a plan that included the elements set forth in the 2018 Order, and the Department tentatively accepted it. (*See* Ex. R85; test. of C. Buchner (Day 1).) Respondent was dissatisfied with Mr. Staley's proposal and ceased paying him for his services. (Test. of C. Buchner (Days 1 and 3); test. of Respondent (Day 2) (testifying that Mr. Staley's plan was what the State wanted, and not what Respondent wanted).)

59. To date, Respondent has not submitted a remediation plan to the Department that, to the Department's satisfaction, addresses the requirements set forth in the 2018 Order. (Test. of C. Buchner (Day 1).)

60. Sometime between July 2020 and June 2022, Respondent created a pond at the site that partially extends across the Southern Property Line, onto the ODF Property. (*See* Exs. A20I (June 2022 aerial image), A17 at 20 (Photo 33), and A46 at 12; test. of Balzer (Days 1 and 2), test. of Buchner (Day 1), and test. of Respondent (Days 1 through 3).)

61. The renewal date for Respondent's operating permit is August 31 of each year. He paid the permit renewal fee due by August 31, 2011 on January 30, 2012 (152 days late). He paid the renewal fee due by August 2012 on December 12, 2012 (103 days late). He paid the renewal fee due by August 2013 on March 28, 2014 (209 days late). He paid the renewal fee due by August 2014 on December 8, 2014 (99 days late). He paid the renewal fee due by August 2015 on November 2, 2015 (63 days late). He paid the renewal fee due by August 2016 on July 27, 2017 (330 days late). He paid the renewal fee due by August 2017 on July 27, 2017 (35 days early). He paid the renewal fee due by August 2018 on November 5, 2018 (66 days late). He paid the renewal fee due by August 2019 on November 15, 2019 (76 days late). (*See* Exs. A40 at 1, A41 at 1, R69 at 1, and R81 at 2.)

62. Respondent has not paid the annual permit renewal fees that were due on August 31, 2021, August 31, 2022, and August 31, 2023. (Test. of C. Buchner (Day 1).)

63. No other state agency has imposed civil penalties against Respondent for the specific violations alleged in this matter. (Test. of C. Buchner (Day 1).)

64. Annual mineral production at the Ekroth Property first exceeded 5,000 tons per year

in 1980. During Respondent's time as the permittee, the site averaged just under 35,000 tons per year.[24] From August 2019 to July 2020, production at the site was more than double the average of previous years. (Test. of C. Buchner (Day 1).)

CONCLUSIONS OF LAW

1. From approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining in unpermitted areas.

2. Respondent violated the Operating Permit by failing to appropriately shape and stabilize overburden piles.

3. Respondent violated the 2018 Order by failing to submit a remediation plan to the Department by September 30, 2020.

4. Respondent violated the 2018 Order by continuing to mine on the ODF Property.

5. Respondent violated the 2021 Order by failing to increase reclamation security by April 15, 2021.

6. Respondent failed to pay the annual renewal fees for the Operating Permit that were due on August 31, 2021, August 31, 2022, and August 31, 2023, in violation of ORS 517.800(2).

7. The Department may revoke the Operating Permit.

8. The Department may assess $426,000 in total civil penalties against Respondent.

9. The Department may require that Respondent reclaim all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order.

OPINION

[24] A 2019 permit renewal notice specifies that the "[c]onversion factor on file with DOGAMI" at that time was 1.5, and it notes that the amount of aggregate/mineral ore produced could be converted from cubic yards to tons by multiplying the amount of cubic yards produced by 1.5. (*See* Ex. A41.) Using that conversion factor and method of calculation, Respondent's annual average mineral production of at least 34,000 tons per year could be converted to cubic yards using the following calculation: 34,000 tons ÷ 1.5 = 22,667 cubic yards.

A 2020 permit renewal notice specifies that the conversion factor at that time was 2.43. (*See* Ex. A42.) Using that conversion factor, Respondent's annual average mineral production of at least 34,000 tons per year could be converted to cubic yards using the following calculation: 34,000 tons ÷ 2.43 = 13,992 cubic yards.

The Oregon Mined Land Reclamation Act (the Act) is codified at ORS 517.702 to ORS 517.992.[25] ORS 517.760 sets forth legislative policy with respect to the Act and provides, in pertinent part:

> (1)(a) It is the policy of the State of Oregon to recognize the important and essential contribution that the extraction of minerals makes to the economic well-being of the state and the nation and to prevent unacceptable adverse impacts to environmental, scenic, recreational, social, archaeological and historic resources of the state that may result from mining operations, while permitting operations that comply with the provisions set forth in ORS 517.702 to 517.951.
>
> (b) Proper reclamation of surface-mined lands is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety and property rights of the citizens of this state.
>
> (2) The Legislative Assembly, therefore, declares that the purposes of ORS 517.702 to 517.951 are:
>
> (a) To provide that the usefulness, productivity and scenic values of all lands and water resources affected by surface mining operations within this state shall receive the greatest practical degree of protection and reclamation necessary for their intended subsequent use[.]

The Department is administered by a Governing Board. ORS 516.080. The Governing Board's duties and powers include, among other things, carrying out the policies set forth in ORS Chapter 517, directing the performance of the Department in carrying out its duties and responsibilities pursuant to ORS Chapter 517, adopting rules necessary for the administration of the laws that the Board is charged with administering, conducting or facilitating investigations related to surface mining and the reclamation of surface-mined lands, and cooperating with other governmental or private agencies. *See* ORS 516.090, ORS 517.740, and ORS 517.840.

Here, the Department has proposed various sanctions against Respondent for the violations alleged in the Second Amended Notice of Violation. The Department has the burden of establishing the alleged violations by a preponderance of the evidence, and it also has the burden of establishing that the proposed sanctions are warranted under the facts of the case. *See* ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Dixon v. Board of Nursing,* 291 Or App 207, 213 (2018) (in administrative proceedings, the preponderance standard generally applies). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

---

[25] OAR 632-030-0010(8).

1. Violation of ORS 517.790(1)

With regard to Respondent's alleged violation of ORS 517.790(1), the Department's Second Amended Notice of Violation states, in part:

> In connection with his operations at or near Ekroth Pit, Respondent * * * [m]ined on lands beyond the boundary approved in the Operating Permit that were not surface mined on July 1, 1972, and extracted more than 5,000 cubic yards of minerals and affected more than one acre in consecutive 12-month periods, from approximately 2012 to 2021[.]
>
> * * * * *
>
> Respondent violated ORS 517.790(1) by engaging in surface mining within the meaning of ORS 517.750(16) at locations not surface mined on July 1, 1972, not subject to an exemption from Oregon mining law, and that were not permitted by the Operating Permit[.]

Second Amended Notice of Violation at 2-3.

ORS 517.790(1) states, in pertinent part:

> A landowner[26] or operator[27] may not allow or engage in surface mining on land not surface mined on July 1, 1972,[28] without holding a valid operating permit from the [Department] for the surface mining operation. A separate permit is required for each separate surface mining operation[.]

---

[26] ORS 517.750(7) defines "landowner" to include:

> (a) The person possessing fee title to the natural mineral deposit being surface mined or explored; and
>
> (b) The owner of an equitable interest in land that is subject to a deed of trust.

[27] ORS 517.750(9) defines an "operator" as follows:

> [A]ny individual, public or private corporation, political subdivision, agency, board or department of this state, any municipality, partnership * * * or any other legal entity whatsoever that is engaged in surface mining operations.

[28] Although Oregon law exempts from the operating permit requirement certain lands within the surfaces and contours of surface mines in existence on July 1, 1972, that exemption does not apply unless the Department issued a certificate of exemption to the mining operation by the statutory deadlines. *See* ORS 517.770(1)(a) through (c). There is no evidence that the Department issued any such certificate of exemption relevant to this matter. (*See* Evidentiary Record.)

As relevant to this matter, ORS 517.750(16)(a)(A) defines "surface mining" to include the following:

> All or any part of the process of mining minerals[29] by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 5,000 cubic yards of minerals are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months, including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for use as access roads.

OAR 632-030-0010(9) defines a "permit area" as follows:

> "Permit Area" means the area covered by an operating permit issued by the Department and defined by boundaries submitted on a map acceptable to the Department under OAR 632-030-0015. The permit area is generally a contiguous parcel and may include multiple excavation and/or processing areas. The permit area may include, but is not limited to, haul roads, buffers, setbacks, reclaimed areas, and areas used for the storage or disposition of any mine product or mine waste material from the surface mining operation, even though separate from the area of extraction. The permit area may be redefined by a permit amendment.

Since 2009, Respondent has been the owner and/or operator of the Ekroth Property. The record establishes, more likely than not, that he was assigned the Operating Permit subject to the 1991 Reclamation Plan, including the 1991 Site Map. Thus, when Respondent became the permittee, and at all material times thereafter (because the permit was never amended), the Operating Permit authorized mining operations on only the mining area depicted on the 1991 Site Map.

The Department contends that the record overwhelmingly demonstrates that from approximately 2012 to 2021, Respondent engaged in surface mining operations outside of the permit area, including at unpermitted areas on the Ekroth Property, the ODF Property, and the ODOT Property.

Respondent does not dispute that he mined outside of the mining area shown in the 1991 Site Map. *See* Respondent's Written Closing at 3. He argues, however, that the map was not disclosed to him when he became the owner/operator/permittee of the Ekroth Property, that

[29] ORS 517.750(8) defines minerals broadly to include "soil, coal, clay, stone, sand, gravel, metallic ore and any other solid material or substance excavated for commercial, industrial or construction use from natural deposits situated within or upon lands in this state."

Department inspectors assured him during site visits[30] that he was in compliance with the operating permit, and that even after a Department inspector told him in 2016 that he was mining outside of the permit area, the Department nonetheless allowed him to continue mining, simply instructing him to submit an amended permit application[31] (which he did in May 2016). In addition, Respondent attributes any disturbances on the ODF Property to landslides and related cleanup, arguing that he did not "knowingly and actively mine[] someone else's property * * * [as he did not] dig into the ground on ODF property, and physically remove the rock[.]" *Id*.

First, the record establishes that Respondent mined material from landslides. This included, according to Respondent, excavation at the base of the slide and the walls from where the material originated. *See* testimony of Respondent (Day 3). According to Respondent, MSHA required such actions irrespective of who owned the property. At hearing, he testified, in part:

> Whenever there is loose rock or whatever * * * if MSHA shows up and you haven't scraped it and they can't see that you scraped it you're in trouble * * * I don't care if it's my property [or] State Forestry Property it's in the mining zone and you better take care of it and so that's what we did * * * anything that's loose * * * we would move it out of there.

Testimony of Respondent (Day 2); *see also id.* (Day 2) ("every time it slid on their property * * * I had to scrape it with my bucket so there was no loose debris"). Even if MSHA did require Respondent's actions following a slide, excavating material that slid on ODF Property still constitutes mining on ODF Property. *See* testimony of Balzer (Day 2) (discussing basis for concluding that excavating slid material is considered mining). Moreover, Respondent processed and sold the material that slid. *See* testimony of Respondent (Day 1) and testimony of C. Buchner (Day 1) (testifying that Respondent admitted to screening and selling the slid material). The Department contends that processing slide material for resale is also mining, which necessarily extends to the area that slid. Department's Closing Statement at 38, *citing to* ORS 517.750(16)(a)(A) (defining "surface mining" to include "processing"). The Department argues that, otherwise, "a permit boundary would be meaningless as operators could intentionally or recklessly expand their permitted mining operations via undermining adjacent property." Department's Closing Statement at 38-39. The Department's argument is reasonable and persuasive. Thus, even if (as Respondent claims) he was only cleaning up landslides on ODF Property that were caused by his predecessors at the site, this constitutes mining on ODF Property.

Additionally, the evidence demonstrates that Respondent's actions caused the slides. The record contains no evidence of a slide occurring from the ODF Property until Respondent started mining and no evidence of a slide after Respondent stopped operations. More likely than not, Respondent's early operations from 2009 to 2013, including documented operations along the

---

[30] Respondent is likely referring to Department site visits in 2011 (Exhibit R23), 2013 (Exhibit A14), and 2014 (Exhibit A15). Notably, during the 2014 site visit, Respondent and the Department's Kelly Wood discussed the three-acre permit boundary, and Respondent expressed an interest in amending the operating permit to expand the permit boundary. *See* Exhibit A15 at 1.

[31] *See* Exhibit A16.

highwall that slid, caused the 2013 slide. Similarly, the record establishes, more likely than not, that the 2018 slide is attributable to Respondent's operations — specifically, excavation under the knob that slid from the ODF Property. (*See* test. of Balzer (Day 2). It is logical to conclude that when mining operations cause a slide, that slide is part of the mining operation. A contrary determination would mean that an operator could intentionally or recklessly expand their permitted operations beyond the permitted area.

Second, the record shows that Respondent did more on the ODF Property than simply clean up landslides. Respondent's operations extended onto the ODF Property along and beyond the southwestern portion of the Southern Property Line northward into the pit, and there is no persuasive evidence of any slides on or from such areas.[32] Furthermore, landslides do not create benches, ponds, equipment tracks, dumped and pushed overburden, and excavator marks on rock. *See* testimony of Balzer (Day 1) and testimony of C. Buchner (Day 1).

The record persuasively establishes that Respondent mined outside of the permit area, including beyond the Southern Property Line onto ODF Property. *See, e.g.,* Exhibits A20A through A20I (photos/images), A17 at 16 (Photo 87, showing excavation marks on the ODF Property, south of the pond in the location of a former ridge) and 20 (Photo 33), A46 at 8, 10, and 12, A18 (Mr. Buchner describing the process he used to create exhibits and show Respondent's continually expanding mining operations), and R95 at 6 (evidence of excavation at the Southern Property Line); testimony of E. Buchner (Day 1) and testimony of Balzer (Day 1) (explaining how property in Western Oregon quickly revegetates without ongoing operations), (Day 2) (opining that Respondent continuously mined beyond the Southern Property Boundary from approximately 2012 to at least 2020), and (Day 3). The first evidence of a disturbance on the ODF Property appears in 2012. *See* Exhibit A20C (July 6, 2012 aerial); testimony of Balzer (Day 1) (discussing the mining-related disturbance south of the Southern Property Line in Exhibit A20C). The record supports a finding that the mining-related disturbances continued to expand onto the ODF property until the Department issued the 2021 Suspension Order (with the 2022 aerial showing signs of excavation along, or across, much of the Southern Property Line). *See* Exhibits A20D through A20I.

The Department also provided evidence of Respondent's mining operations on both the ODOT Property and on and across the southwestern portion of the Southern Property Line. By 2016, the western ridge had moved further west and extended north onto the ODOT Property. *See* Exhibit A20D and testimony of Balzer (Days 1 and 2). By 2017, the western ridge had expanded west, with the northern end mined farther onto the ODOT property. *See* Exhibit A20F; *see also* testimony of Respondent (Day 3) (Respondent admitting to mining the western ridge after 2016).

Third, a preponderance of evidence establishes that Respondent's average production at the site exceeded the 5,000 cubic yard threshold, and that Respondent removed more than 24,000 cubic yards of minerals from the ODF Property.[33] *See* testimony of Buchner (Day 1); *see also* Exhibits A25 at 2, A41, A42, and A31 at 1.

[32] The only documented slide from the ODF Property occurred at the southeastern portion of the site.
[33] The Department contends that when a permittee's operations exceed the permit area or permit boundary, the permittee violates ORS 517.790(1) and the permittee "does not need to separately exceed the acreage

Finally, to the extent Respondent argues that the Tillamook County Land Use approval controls and defines the extent of his authorized mining operations, such argument is not persuasive. A local land use approval process is distinct from the Department's permitting process. *See, e.g.,* Exhibits A44 (Pacific Coast's 2004 request to Tillamook County for its approval to expand mining operations at the site) and A29 (Tillamook County's approval for the requested expansion); *see also* ORS chapter 215 (pertaining to County Land Use Planning) and OAR 632-030-0030 (describing the Department's process for evaluating operating permit applications, which includes notification to affected local government and the steps the Department must take if an application involves a local land-use permit). Moreover, the record demonstrates that Respondent was not in compliance with the Tillamook County Land use approval because his mining operations extended beyond the excavation buffer established by Tillamook County, and they also extended beyond Respondent's property boundary onto state-owned land (*i.e.*, the ODF Property and the ODOT Property). *See* Exhibits A20D through A20I, A26, A29 at 3, R42, and R53 at 1; testimony of E. Buchner (Day 1), testimony of Balzer (Days 1 through 3), and testimony of C. Buchner (Day 3).)

The record persuasively demonstrates that Respondent's mining operations extended beyond the approximately three-acre permit area, beyond the Tillamook County excavation boundary, and beyond the property boundary (and onto adjacent ODF and ODOT lands). The Department has established, by a preponderance of evidence, that Respondent violated ORS 517.790(1) from approximately 2012 to 2021.

2. Violation of the Operating Permit

The Operating Permit includes a condition requiring the permittee to "shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff." Exhibit A11 at 1.

The Department's Second Amended Notice of Violation states, in part:

> In connection with his operations at or near Ekroth Pit, Respondent * * * [i]mproperly shaped and failed to stabilize overburden resulting in slides, including at least two separate slides of material into Electric Creek[.]
>
> * * * * *
>
> Respondent violated the Operating Permit by failing to appropriately shape

---

or mineral surface mining thresholds in ORS 517.750(16) to violate ORS 517.790(1)." Department's Closing Statement at 35. The Department asserts, rather, that "the thresholds associated with the original permitting trigger continue to apply" and any interpretation to the contrary "would create a significant buffer around every permit area, effectively allowing the permittee to continuously expand its permit area by just under an acre each year in different directions," producing an absurd result that would also conflict with ORS 517.992(2)(b)(B) (authorizing the Department to impose a civil penalty of up to $10,000 per day when a permittee's "operation is being conducted * * * [o]utside the permit boundary"). *See id.* The Department's position is logical and persuasive.

> and stabilize overburden piles, resulting in multiple slides of material, including into Electric Creek.

Second Amended Notice of Violation at 2-3.

The evidence persuasively demonstrates the presence of overburden at the site. *See, e.g.*, Exhibits A14 at 2 (2013 inspection report identifying "overburden materials" on the quarry floor), A15 at 2 (2014 inspection report noting "significant overburden materials had been stockpiled along the southeastern portion of the highwall" and recommending seeding or otherwise securing the overburden), A20E (August 2016 aerial image), A20F (June 2017 aerial image), A27 at 3 (Respondent's 2016 "Operating and Reclamation Plan" identifying an "[o]verburden removal depth" of approximately 25 feet and noting that "[s]oil and overburden materials will be stored adjacent to the [ODF] property in a low berm"), A57 at 5 (2020 Morgan Plan, proposing to use overburden from the quarry for backfill); testimony of Balzer (Days 1 and 2) and testimony of C. Buchner (Days 1 and 3).

A review of aerial imagery, along with site inspections, led the Department to determine that Respondent's overburden and storage practices caused multiple slides of overburden that potentially impacted Electric Creek. *See* Exhibits A20F (June 2017 aerial image) and A18 at 3-4 (declaration of E. Buchner); test. of E. Buchner (Day 1); test. of C. Buchner (Day 1) (discussing receipt and review of the 2017 aerial image); test. of Balzer (Days 1 and 2).

At hearing, Mr. Balzer identified the placement of overburden in 2016 along the western ridge above Electric Creek and also farther east to the south of the Southern Property Line. Testimony of Balzer (Days 1 and 2) (explaining his interpretation, based on a review of aerial images and confirmation by site inspection, that overburden material shown in 2016 subsequently slid downslope along the western ridge; also confirming the existence of overburden during the 2018 site inspection). Those locations match the areas identified as "Overburden Slide Areas" in Exhibit A20F, the 2017 aerial image. *Id*. (Day 2).

Mr. Balzer also testified how the southwestern ridge, which was undisturbed native rock in 2016, became piles of primarily overburden in 2018.[34] Testimony of Balzer (Day 2) (discussing changes from 2016 (Exhibit A17 at 10) to 2018 (Exhibit A17 at 14). When reviewing a photo showing overburden on the southwestern ridge (Exhibit R95 at 1) at hearing, Respondent identified the pile as "unstable." Testimony of Respondent (Day 2). Department staff walked the southwestern ridge in July 2018 and confirmed the presence of overburden that was placed in that area, noting that it was not stabilized and was sliding toward Electric Creek. *See* testimony of Balzer (Day 2) (discussing Exhibit A17 at 15) and testimony of C. Buchner (Day 1) (discussing inspection photos showing overburden sliding toward Electric Creek). While some of the material had been recently placed and lacked any vegetation, some overburden included minimal vegetation and would have been placed prior to 2018.[35] Testimony of Balzer (Day 2). In January 2020,

[34] Mr. Mallare confirmed this testimony, but he referred to the material as "reject" and not overburden. *See* testimony of Mallare (Day 2) (discussing placement of "reject" along the western quarry wall).

[35] Even if the piles that existed at the site in July 2018 were the result of the landslide that occurred earlier that year, the piles would still constitute overburden. Either the material that slid was already overburden,

Department staff again walked the southwestern ridge and again documented overburden sliding down the ridge toward Electric Creek. *See* Exhibits A17 at 18-19 (Photos 77, 79, and 80) and A46 at 10; testimony of C. Buchner (Day 1).

The Department has established, by a preponderance of the evidence, that Respondent failed to shape and stabilize overburden piles in violation of the Operating Permit.

3. Violation of the 2018 Order for failing to submit remediation plan as required

Pursuant to ORS 517.860(1)(b),[36] the Department issued the 2018 Order, which states, in part:

> [M]ining activity at this site has been conducted outside the permit boundary, resulting in trespass onto state-owned land managed by [ODF]. Surface mining in unpermitted areas is a violation of ORS 517.790 which prohibits engaging in surface mining without an operating permit.
>
> [T]he site is also in violation of Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> To rectify these violations, you are hereby ordered to take the following steps:
>
> * * * * *
>
> 2. Submit a remediation plan prepared and stamped by a Certified Engineering Geologist (CEG) or Geotechnical Engineer (PE) that addresses [specified criteria].
>
> * * * * *
>
> The above tasks must be completed by September 30, 2020. You may request an extension to the required completion date for bringing this site back into compliance, however the [D]epartment will not consider such a request unless you demonstrate good cause for the delay and show that there has been reasonable effort and progress toward meeting the schedule outlined above.

---

in which case the slide would not change its status, or it included minerals that were removed, which would also mean the remnants were overburden that needed to be properly shaped and stabilized.

[36] As discussed in the MSD Ruling, ORS 517.860(1)(b) allows the Department to issue a compliance order after determining that an operator has not complied with (or is not complying with) the operating permit, the reclamation plan, ORS Chapter 517, or the Department's administrative rules.

Exhibit A34 at 3-4.

The Department alleges that Respondent violated the 2018 Order by "failing to submit a remediation plan by September 30, 2020 as required" by the order. Second Amended Notice of Violation at 3.

As set forth in the MSD Ruling, the Department established this violation as a matter of law. *See* MSD Ruling at 28-30.

4. Violation of the 2018 Order for continuing to mine on ODF property

The Department alleges that Respondent also violated the 2018 Order "by continuing to mine ODF's Property." Second Amended Notice of Violation at 3.

The 2018 Order expressly prohibits Respondent from conducting "any surface mining outside of the property line between * * * [the Ekroth Property and the ODF Lands]." Exhibit A34 at 3.

The record establishes that after the Department's issuance of the 2018 Order on September 28, 2018, Respondent continued to conduct surface mining beyond the Southern Property Line and onto the ODF Property, including by excavating a pond that crossed the boundary,[37] thereby violating the 2018 Order. *See* Exhibits A20H, A20I, A17 at 16; testimony of Balzer (Day 2).

5. Violation of the 2021 Order for failing to increase reclamation security

On March 11, 2021, the Department issued the 2021 Order, advising that Respondent violated ORS 517.810(1) and OAR 632-030-0021(1) for failing to maintain an adequate reclamation security and ordering Respondent to provide either a security increase of $166,865 or a replacement security in the full amount of $181,365 by April 15, 2021. Exhibit A37 at 1-2.

The Department alleges that Respondent violated the 2021 Order "by failing to increase reclamation security by April 15, 2021 as required." Second Amended Notice of Violation at 3.

As set forth in the MSD Ruling, the Department established this violation as a matter of law. *See* MSD Ruling at 30-31.

6. Failure to pay annual renewal fees

The Department contends that Respondent failed to pay his annual renewal fees for the Operating Permit, which were due on August 31, 2021, August 31, 2022, and August 31, 2023. Second Amended Notice of Violation at 2-3.

ORS 517.800(2) provides:

[37] *See* Exs. A20I (June 2022 aerial image), A17 at 20 (Photo 33), and A46 at 12; testimony of Balzer (Days 1 and 2), testimony of Buchner (Day 1), and testimony of Respondent (Days 1 through 3).

> A holder of an operating permit that did not extract minerals during the preceding 12-month period shall pay to the department an annual renewal fee of $1,200. A holder of an operating permit that extracted minerals during the preceding 12-month period shall pay to the department an annual renewal fee of $1,460 and $0.0125 per ton of minerals extracted during the preceding 12-month period.

Pursuant to the rulemaking authority set forth in ORS 517.800(9), the Governing Board adopted OAR 632-030-0022, which states, in part:

> (2) Annual fees are due on the anniversary date of the issuance of the operating permit, limited exemption certificate, or exclusion certificate unless a different renewal date is established by the Department[.]
>
> (3) A permittee or certificate holder must renew their permit or certificate annually, on or before the last day of the month shown on the permit or certificate as the renewal month. * * *. The non[-]refundable annual fee must be paid and the annual report form returned prior to renewal[.]

The record establishes that Respondent has not paid the annual permit renewal fees that were due on August 31, 2021, August 31, 2022, and August 31, 2023. *See* testimony of C. Buchner (Day 1).

7. Revocation of the Operating Permit

The Department has proposed to revoke Respondent's Operating Permit, pursuant to ORS 517.862(2)(b), (c), and (d). ORS 517.862(2) allows the Department to revoke, terminate, or refuse to renew an operating permit if the operator:

> (b) Fails to pay a fee as required by ORS 517.800 within 60 days of the due date;
>
> (c) Fails to provide or maintain a bond or security as required by ORS 517.810; [or]
>
> (d) Fails to comply with an order issued under ORS 517.860[.]

Respondent does not contest the revocation of the Operating Permit, and the record supports the revocation on the grounds that Respondent failed to pay fees required by ORS 517.800, violated the 2018 Order by continuing to mine on ODF Property and by failing to submit a remediation plan to the Department by September 30, 2020, and violated the 2021 Order by failing to increase reclamation security by April 15, 2021.

8. Civil penalty assessment

The Department has proposed to assess $426,000 in total civil penalties against Respondent.

ORS 517.992 provides, in part:

> (2)(a) In addition to any other sanction authorized by law, and subject to the limitations of paragraph (b) of this subsection, the governing board of the State Department of Geology and Mineral Industries may impose a civil penalty of not more than $10,000 per day for any violation of ORS 517.702 to 517.951 * * *, of any rules adopted under those provisions * * *, of any orders issued under those provisions * * * or of any conditions of a permit issued under those provisions[.]
>
> (b) A penalty may be imposed under this subsection only if * * * the operator has failed to comply with an order issued under ORS 517.860 or 517.880, if the operation is being conducted in violation of conditions imposed on an operating permit or reclamation plan pursuant to ORS 517.835[,] or if the operation is being conducted:
>
> * * * * *
>
> (B) Outside the permit boundary; or
>
> (C) Outside a permit condition regarding boundaries, setbacks, buffers or the placement of surface mining refuse.

OAR 632-030-0070[38] pertains to the imposition of civil penalties under ORS 517.992(2) for violations of statutes, rules, orders, and permit conditions and provides, in relevant part:

> (2) Definitions. For purposes of this rule:
>
> * * * * *
>
> (d) "Violation" means conduct for which a penalty may be imposed under ORS 517.992(2).
>
> * * * * *
>
> (5) Civil Penalty — Classification:
>
> (a) Civil penalties imposed under ORS 517.992(2) will be coordinated with other agencies to avoid duplication of penalty for the same violation and be in accordance with the following schedule:

[38] ORS 517.992(12) directs the Department to "adopt rules that provide civil penalties that are commensurate with the severity of violations[.]"

> (A) Class 1. Violation that poses no potential threat to human health, safety, or the environment: no more than $1,000 per day;
>
> (B) Class 2. Violation that poses a potential threat to human health, safety, or the environment, or repeat Class 1 Violation: no more than $3,000 per day. Potential threats to human health, safety, or the environment include, but are not limited to, actions that increase instability, erosion, or an unsafe condition at the site;
>
> (C) Class 3. Violation that poses an immediate but remediable threat to the environment or a repeat Class 2 violation: no more than $6,000 per day. For the purposes of this rule, an "immediate but remediable threat to the environment" means that without a quick response and considering such factors to include, but not limited to slope and erodibility, damage will occur and that upon remediation there will be no lasting effect of that damage.
>
> (D) Class 4. Violation that:
>
> (i) Poses an immediate threat to human health or safety;
>
> (ii) Causes actual human injury;
>
> (iii) Poses a threat to the environment that is immediate and not remediable;
>
> (iv) Causes actual damage to the environment; or
>
> (v) Is a repeat Class 3 violation: $1,000 to $10,000 per day.
>
> (b) Each day of a continuing violation may be treated as a separate violation for purposes of imposing a civil penalty.

The Department asserts that the proposed civil penalties for the violations are "supported by record evidence, justified by Respondent's actions, and authorized under Oregon law." Department's Closing Statement at 2.

Respondent concedes that he bears some responsibility for certain violations in this case, but he argues that the proposed civil penalties (aside from the proposed penalty pertaining to the remediation plan) are "extreme" and disproportionate to the severity of his actions. *See* Respondent's Written Closing at 4, 7-9.

A. Mining outside permit boundary

The Department determined that Respondent's violations of ORS 517.790(1) are Class 4 violations, and it proposes to assess a $10,000 civil penalty for 36 violations, for a total civil penalty of $360,000. *See* Exhibit 1 to the Second Amended Notice of Violation.

Regarding the classification, the Department contends as follows:

> [The evidence] demonstrates actual damage to the environment, including the removal of trees and tree-producing lands from property owned by the State. That property is also adjacent to marbled murrelet and near essential salmonid habitat. Also, Respondent left conditions that continue to pose a threat to human safety, including vertical walls and a pond (which was not allowed in either the 1991 Reclamation Plan or Respondent's Proposed Reclamation Plan). Further, Respondent's operations will require additional disturbance on ODF Property to address the conditions he created and left.

Department's Closing Statement at 43-44. The record supports this contention.

Respondent's mining operations outside the permit boundary were continuous from approximately 2012 to 2021. While OAR 632-030-0070(5)(b) allows the Department to treat *each day* of a continuing violation as a separate violation for civil penalty purposes, the Department has utilized its discretion to significantly limit the number of violations of ORS 517.790(1) to 36.

The Department acknowledges that \$360,000 is a substantial civil penalty, but it asserts that the penalty is nonetheless appropriate because "Respondent's operations caused significant damage over a long period of time." Department's Closing Statement at 44.

It is within the Department's authority to assess a civil penalty of \$360,000 for the established violations of ORS 517.790(1), and the record supports that civil penalty amount.

B. Violation of overburden permit condition

The Department determined that Respondent's violations of the Operating Permit regarding shaping and stabilization of overburden are Class 4 violations, and it proposes to assess a \$10,000 civil penalty for two violations, for a total civil penalty of \$20,000. *See* Exhibit 2 to the Second Amended Notice of Violation.

The Department contends that the classification appropriately reflects "the actual damage to the environment, including to vegetation above Electric Creek and to Electric Creek itself." Department's Closing Statement at 44. *See* testimony of C. Buchner (Days 1 and 3) (discussing environmental harm associated with overburden slide into Electric Creek, essential salmonid habitat). The record supports that contention.

Rather than assessing daily penalties for continuing violations from 2017 to 2020, the Department has proposed to assess only two violations for the documented impacts to Electric Creek evident in aerial imagery and confirmed during the Department's 2018 and 2020 site inspections.

It is within the Department's authority to assess a civil penalty of $20,000 for the established violations of ORS 517.956(1), and the record supports that civil penalty amount.

C. Violations of 2018 Order

As found in the MSD Ruling, Respondent violated the 2018 Order by failing to submit a remediation plan to the Department, as required. Respondent also violated the 2018 Order by continuing to mine the ODF Property.

Respondent does not dispute the proposed fine for the violation of the 2018 Order pertaining to the remediation plan. *See* Respondent's Written Closing at 8. However, when determining the proposed civil penalty amount of $36,000 for the violations of the 2018 Order, the Department did not allocate any particular portion to the violation regarding the remediation plan versus the violation regarding the continued mining of ODF Property. It is therefore appropriate to assess the entire proposed civil penalty amount based on the facts of the case.

The Department asserts that while the violations of the 2018 Order could be considered Class 4 violations based on the actual mining impacts, it chose to treat the violations as merely Class 3 violations on the ground that they posed, and continue to pose, a threat to the environment. *See* OAR 632-030-0070. Class 3 violations are subject to penalties of up to $6,000 per day. *Id*.(5)(a)(C). The Department has proposed the maximum daily penalty amount based on respondent's violation history, the threatened harm to the environment posed by the violations, the economic benefits Respondent gained from the violations, and a lack of mitigating factors. *See* Exhibit 4 to the Second Amended Notice of Violation.

The 2018 Order required Respondent to submit a remediation plan by September 30, 2020, and his failure to do so means that the violation has been continuing since that date.[39] Respondent's continued mining on ODF Property after the issuance of the 2018 Order continued until the Department's 2021 suspension order. Instead of treating these continuing violations as a separate violation for each day they continued, the Department exercised its discretion to assess penalties for only six days, for a total civil penalty of $36,000 ($6,000 x 6 days). *See id*.

It is within the Department's authority to assess a civil penalty of $36,000 for the established violations of the 2018 Order, and the record supports that civil penalty amount.

D. Violation of 2021 Order

As explained in the MSD Ruling, Respondent violated the 2021 Order by failing to increase reclamation security by April 15, 2021. The Department determined that this is a Class 1 violation, which authorizes penalties of up to $1,000 per day. *See* OAR 632-030-0070(5)(a)(A). The Department has charged Respondent with the maximum penalty of $1,000 based on Respondent's violation history and cost saving by failing to maintain the required reclamation security, the

[39] The Second Amended Notice notes that Respondent "remains subject to the requirement to implement a remediation plan pursuant of the 2018 Order." Second Amended Notice at 4.

threatened harm to the environment posed by jeopardizing reclamation, and a lack of mitigating factors. *See* Exhibit 5 to the Second Amended Notice of Violation.

Although the violation has been continuing since April 15, 2021, the Department exercised its discretion to assess penalties for only 10 days, for a total civil penalty of $10,000 ($1,000 x 10 days). *See id*.

It is within the Department's authority to assess a civil penalty of $10,000 for the established violation of the 2021 Order, and the record supports that civil penalty amount.

9. Order for reclamation

The Department proposes that Respondent reclaim[40] all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order.

To reiterate, ORS 517.860(1)(b) provides:

> (1) If [the Department] * * * determines that the operator has not complied with or is not complying with the operating permit, the reclamation plan, the provisions of this chapter or the rules of the department, the department may issue either or both of the following to the operator:
>
> * * * * *
>
> (b) A compliance order. The order may specify a date by which the operator shall rectify any deficiencies. The department may extend the period if delays occasioned for causes beyond the operator's control necessitate more time, but only when the operator is, in the opinion of the department, making a reasonable effort to comply with the order.

When seeking the Operating Permit for the Ekroth Property, Respondent agreed "to reclaim all lands subject to reclamation in accordance with ORS 517.702 to 517.989." *See* Exhibit A10 at 1. At hearing, Respondent did not dispute his obligation to reclaim and fix the site. Testimony of

---

[40] ORS 517.750(13) defines "reclamation" as follows:

> "Reclamation" means the employment in a surface mining operation or exploration of procedures reasonably designed to:
>
> (a) Minimize, as much as practicable, the adverse effects of the surface mining operation or exploration on land, air and water resources; and
>
> (b) Provide for the rehabilitation of surface resources adversely affected by the surface mining operations or exploration through the rehabilitation of plant cover, soil stability and water resources and through other measures that contribute to the subsequent beneficial use of the explored, mined or reclaimed lands.

Respondent (Day 2). Given Respondent's agreement to reclaim the property, as well as his violations of the Operating Permit, the 1991 Reclamation Plan, and ORS 517.790(1), the Department is authorized under ORS 517.860(1)(b) to order Respondent to reclaim the site.

ORDER

I propose that the Department of Geology and Mineral Industries issue the following order:

Operating Permit ID 29-0040 is revoked, George Jay Williamson is liable to pay $426,000 in total civil penalties,[41] and he must reclaim all surface impacts at the Ekroth Property and restore the ODF Property to a stable condition that meets the standards set forth in OAR 632-030-0027 within one year after the Department issues its Final Order.

Jennifer H. Rackstraw
Senior Administrative Law Judge
Office of Administrative Hearings

APPEAL PROCEDURE

The Proposed Order is the Administrative Law Judge's recommendation to the governing board of the Department of Geology and Mineral Industries. If you disagree with any part of this recommendation, you may make written objections, called "exceptions," to the recommendation and present written argument in support of your exceptions. Written argument and exceptions must be filed within twenty-one (21) days after mailing of the Proposed Order. The exceptions should be mailed to:

Governing Board
Department of Geology and Mineral Industries
800 NE Oregon Street, Suite 965
Portland, Oregon 97232

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.

[41] ORS 517.992(3) provides that a civil penalty imposed under that section "shall become due and payable 10 days after the order imposing the civil penalty becomes final by operation of law or on appeal[.]"

CERTIFICATE OF MAILING

On March 27, 2025, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2024-ABC-06377**.**

By: Electronic Mail

George Jay Williamson
26005 Trask River Rd
Tillamook OR 97141
Email: cjexcavating@yahoo.com

Katie Ireland
Ireland & Ireland PC
PO Box 273
Banks OR 97106
Email: katie@irelandpc.com

Cari Buchner
Agency Representative
Department of Geology and Mineral Industries
229 Broadalbin St SW
Albany OR 97231
Email: cari.buchner@dogami.oregon.gov

Nathan Karman
Assistant Attorney General
Department of Justice
100 SW Market St
Portland OR 97201
Email: nathan.a.karman@doj.oregon.gov

Anesia N Valihov *for* Lucy M Garcia
Hearing Coordinator

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
DEPARTMENT OF GEOLOGY AND MINERAL INDUSTRIES

IN THE MATTER OF:	**RULING ON MOTION FOR PARTIAL SUMMARY DETERMINATION**
GEORGE JAY WILLIAMSON	OAH Case No. 2024-ABC-06377 Agency Case No. DGMI-2023-0495

HISTORY OF THE CASE

On September 20, 2023, the Department of Geology and Mineral Industries (Department or DOGAMI) issued a Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order to George Jay Williamson (Respondent). On October 6, 2023, Respondent requested a hearing via counsel. On January 30, 2024, the Department issued an Amended Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order to Respondent.

On January 31, 2024, the Department referred the matter to the Office of Administrative Hearings (OAH). Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw was assigned to preside at hearing. On March 15, 2024, ALJ Rackstraw held a telephone prehearing conference. Attorney Katie Ireland represented Mr. Williamson. Senior Assistant Attorney General Nathan Karman represented the Department. Cari Buchner was also present for the Department. A hearing was scheduled for July 23 and 24, 2024, via video conference. A briefing schedule was also set for the Department's potential filing of a Motion for Summary Determination/Partial Summary Determination.

On April 30, 2024, the Department issued a Second Amended Notice of Violation, Notice of Civil Penalty, Revocation of Operating Permit, and Compliance Order to Respondent.

On May 10, 2024, the Department filed its Motion for Partial Summary Determination (Department's Motion); the Declaration of Cari Buchner,[1] with attached Exhibits 1 through 22 (CB Exhibits 1 through 22); and the Declaration of Ed Buchner,[2] with attached Exhibits 1 through 2i (EB Exhibits 1 through 2i).

On May 24, 2024, Respondent filed his Objection to the Department's Motion for Partial Summary Determination (Objection to Motion); the Declaration of Respondent, with attached

[1] Cari Buchner is the Department's Mining Compliance Coordinator. (Decl. of C. Buchner at 1.)

[2] Ed Buchner is the Department's Geographic Information System (GIS) Specialist. (Dec. of E. Buchner at 1.)

Exhibits 101 through 103 (Respondent Exhibits 101 through 103); and the Declaration of Katie Ireland, with attached Exhibits 101 through 123 (Ireland Exhibits 101 through 123).

On May 31, 2024, the Department filed its Reply in Support of Motion for Partial Summary Determination (Department's Reply); the Supplemental Declaration of Cari Buchner, with attached Exhibits 1 through 8 (Supplemental CB Exhibits 1 through 8); and the Declaration of Nathan Karman, with attached Exhibit 1 (Karman Exhibit 1).

ALJ Rackstraw subsequently took the matter under advisement.

ISSUES

Pursuant to OAR 137-003-0580, as to each of the following issues, whether there are genuine issues as to any material fact and, if not, whether the Department is entitled to a favorable ruling as a matter of law:

1. Whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining in unpermitted areas.

2. Whether Respondent violated Operating Permit ID 29-0040 (the Operating Permit) by failing to appropriately shape and stabilize overburden piles.

3. Whether Respondent violated the September 28, 2018 Notice of Violation and Compliance Schedule (the 2018 Order) by continuing to mine on the Oregon Department of Forestry's (ODF's) property and by failing to submit a remediation plan to the Department by September 30, 2020.

4. Whether Respondent violated the March 11, 2021 Notice of Violation and Compliance Schedule (the 2021 Order) by failing to increase reclamation security by April 15, 2021.

DOCUMENTS/MATERIALS CONSIDERED

The following documents/materials were considered for purposes of this ruling: the Department's Motion; the Declaration of Cari Buchner; CB Exhibits 1 through 22; the Declaration of Ed Buchner; EB Exhibits 1 through 2i; the Objection to Motion; the Declaration of Respondent, Respondent Exhibits 101 through 103; the Declaration of Katie Ireland; Ireland Exhibits 101 through 123; the Department's Reply; the Supplemental Declaration of Cari Buchner; Supplemental CB Exhibits 1 through 8; the Declaration of Nathan Karman; Karman Exhibit 1; and the pleadings.

UNDISPUTED FACTS

1. The Ekroth Property is an approximately 10.81-acre property located in Township 1 North, Range 10 West, Section 22, Tax lot 700, in Tillamook County. (*See* CB Ex. 1.)

2. In June 1976, Benny Taylor applied to the Department for an Operating Permit to mine the Ekroth Property. (*See* CB Ex. 2; *see also* Ireland Ex. 108.) On the application, Mr. Taylor indicated that approximately one-fourth of an acre of the property was "affected prior to 7-1-72," approximately one acre was "affected 7-1-72 to date," and the "total acreage affected" was one. (CB Ex. 2 at 1.)

3. On September 22, 1978, Mr. Taylor received an Operating Permit, authorizing surface mining in the "Taylor Pit" on the Ekroth Property. (*See* CB Ex. 3 at 1.) The Operating Permit did not identify any portion of the Ekroth Property as eligible for exemption from provisions of the Oregon Mined Land Reclamation Act for pre-1972 operations. (*See id.* at 1-2.) The Operating Permit contained the following conditions: 1) All access roads, benches, and work areas will be sloped to drain so as to prevent silt laden runoff from reaching the Miami River; and 2) Overburden storage piles will be shaped and stabilized with revegetation so as to minimize material migration and runoff. (*Id*. at 2.)

4. For many mining sites in Oregon that were permitted in the 1970s, the initial Operating Permits did not include or attach site maps unless more than 10 acres of land would be affected or the Department determined that conditions warranted a site map. Oftentimes, in the context of a later permit transfer or other compliance action, the Department has requested a site map and used the map to identify permit boundaries. Such maps often define the extent not only of the permitted area, but also the operator's reclamation responsibilities. (Suppl. Decl. of C. Buchner at 1-2.)

5. On July 18, 1991, DOGAMI Reclamationist Frank Schnitzer conducted an inspection at the Ekroth Property. His inspection report states, in part:

> [DOGAMI] has recently been notified that this quarry site, which has been permitted for many years by Benny Taylor, and is owned by Tillamook county, will now be operated by Dennis Hixson[.]
>
> Before Mr. Hixson can assume the Operating Permit for this site, a new reclamation plan including a site plan map on a topographic base map and an adequate bond must be submitted to DOGAMI. The existing reclamation plan which was written in the early 1970[]s cannot be directly transferred because of the lack of detail in relation to current regulatory requirements. A copy of the pending property boundary survey must be submitted to DOGAMI along with the scaled drawing of this site on a topographic base map.
>
> Based on photographs in the DOGAMI file and the observation that scotchbloom and alders are invading the boundary of the disturbance, the size of this quarry has not significantly changed since the early 80[]s or mid 70[]s. Approximately three acres are affected by pit run excavation with a dozer[.]

* * * * *

> The bond will be calculated after the survey and site plan maps are submitted.

(*See* Suppl. CB Ex. 1.)

6. On September 5, 1991, the Department issued a Closure Order to Mr. Hixson, which stated, in part:

> By authority of ORS 517.880, the rock quarry operated by you [at the Ekroth Property] is closed to all surface mining activities. The site shall remain closed until such time as the annual permit fee is paid, [and] the new reclamation plan, site plan map, property boundary survey, and a performance bond are submitted.
>
> * * * * *
>
> The operating permit formerly held by Mr. Benny Taylor is no longer valid. The permit expired on August 31, 1991.
>
> If this site is not brought into full compliance with the provisions of ORS 517.750 et seq. within 30 days of this notice, you must provide evidence that the required reclamation has been completed or is underway and will be completed in accordance with the approved reclamation plan.

(*See* Suppl. CB Ex. 2) On September 10, 1991, the Department sent a follow-up closure letter, noting that the September 5, 1991 Closure Order included the wrong identification and section numbers, but that all other information was correct. (*See* Suppl. Decl. of C. Buchner at 1.)

7. Mr. Hixson subsequently provided the requested information—including an Operation and Reclamation Plan (*see* Ireland Ex. 121 at 1-11), which replaced the 1976 reclamation plan, and a site plan map dated October 9, 1991 (the 1991 Site Map) (*see* CB Ex. 4). (*See* Decl. of C. Buchner at 2; Suppl. Decl. of C. Buchner at 1; Suppl. CB Ex. 3.) By letter dated November 27, 1991, the Department confirmed receipt of the renewal fee, reclamation plan, site plan map, property boundary survey, and performance bond and advised that the Closure Order for Mr. Hixson's rock quarry was lifted "immediately." (Suppl. CB Ex. 3 at 1.)

8. In 1992, the Department transferred the Operating Permit from Mr. Taylor to Mr. Hixson. (Decl. of C. Buchner at 2; *see* Ireland Ex. 109.)

9. In July 2003, Trevor Smith and William Unterberger purchased the Ekroth Property. (*See* Ireland Ex. 101.) Respondent assisted Mr. Smith and Mr. Unterberger in acquiring the property and beginning operations of the rock pit. (*See* Decl. of Respondent at 1.)

10. In September 2003, the Department transferred the Operating Permit to Pacific Coast Rock, LLC. (*See* Ireland Ex. 110.)

11. On September 24, 2003, DOGAMI Hydrogeologist Bob Brinkmann conducted an onsite inspection at the Ekroth Property. His inspection report states, in part:

> I was accompanied on this inspection by Tim Franz with Tillamook County; Dennis Hixson, the permittee; and Trevor Smith, Bill Unterberger and Jay Williamson with Pacific Coast Rock (PCR). The purpose of the inspection was to go over the permit transfer procedures with the interested parties. * * * * *.
>
> This small upland basalt quarry has been relatively inactive over the past several years and a permit transfer form and fee were submitted to DOGAMI in August, 2003. In addition, PCR has submitted a bond to replace the one held by Mr. Hixson. Based on these submittals and the adequacy of the existing reclamation plan this Department has approved the permit transfer. Activity at the site includes extraction from the face which is an unbenched highwall extending to approximately 100-feet and processing the material in a small crusher located on the pit floor. A rock screen and loader were also located onsite and Mr. Williamson indicated that in the near term the plan is to focus on developing benches in the face. The current disturbance is approximately 1-acre and the permit boundary comprises approximately 3-acres. PCR indicated that eventually they intend to expand beyond the 3-acres but understood that it would require amending the existing permit and that it is likely to be several years before the quarry was developed to that stage[.]

(CB Ex. 6 at 1; Ireland Ex. 115.)

12. In October 2003, Mr. Smith and Mr. Unterberger transferred the property to Pacific Coast Development, LLC and Pacific Coast Rock, LLC (Pacific Coast). (*See* Ireland Ex. 102.)

13. During the next several years, there was protracted litigation between Respondent and Pacific Coast/Unterberger/Smith. (*See* Ireland Exs. 103 through 106.) In approximately May 2009, Senior Circuit Court Judge Timothy P. Alexander determined that any partnership that had existed between Respondent and Pacific Coast/Smith/Unterberger ended by November 3, 2003. (*See* Ireland Ex. 106 at 1.)

14. In approximately June 2009, Pacific Coast transferred ownership of the Ekroth Property to Respondent. Respondent put the property in the name of his attorney, Brian Greene, and then entered into a contract to "purchase the property" from Mr. Greene. (*See* Decl. of Respondent at 1; *see also* Ireland Ex. 107.)

15. On September 29, 2010, DOGAMI received an application to transfer the Operating Pemit from Pacific Coast to Respondent. (*See* CB Ex. 5.)

16. On March 25, 2011, Mr. Brinkman conducted another onsite inspection at the Ekroth

Property. (*See* Ireland Ex. 120 at 1.) His inspection report states, in part:

> This small upland basalt quarry was inactive but had a mobile crusher, two loaders and an excavator located on site. The most recent excavation was from the south side highwall[,] which is unbenched and extends to approximately 100-ft in height. The material being excavated consisted of rock and fines that had sloughed onto the pit floor. Although this was a minor slide[,] it was contained within the quarry and didn't appear to have further instability. Mr. Williamson indicated that once he has cleaned the material off the floor he would go forward with installing benches in the face.

(*Id.*)

17. On March 12, 2012, the Department issued the Operating Permit to Respondent.[3] (*See* CB Ex. 7 and Ireland Ex. 111.) The Operating Permit contains the following conditions:

> The Permittee must:
>
> 1. slope all access roads, benches, and work areas to drain so as to prevent silt-laden runoff from reaching the Miami River.
>
> 2. shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.

(*See* CB Ex. 7 and Ireland Ex. 111.)

18. On August 21, 2012, Respondent entered into a Contract of Sale of Real Property to purchase the Ekroth Property from Brian Green. (*See* CB Ex. 1 at 13-17.)

19. On January 4, 2013, DOGAMI Natural Resource Specialist Andre Sampier conducted an onsite inspection at the Ekroth Property to, among other things, "assess a slope failure event above Ekroth Road." (*See* Ireland Ex. 118 at 1.) His inspection report states, in part:

> By the time I arrived to the site on January 4, 2013 at approximately 10:00 am the materials that failed down slope such as quarry rock, topsoil, subsoil, vegetation, and various types of trees were removed and the road was passable from both traffic lanes. Materials such as topsoil and vegetation were initially stockpiled on a small gravel turnout on the north side of Ekroth Road but have since been removed at Tillamook County's request per [Respondent]. Approximately a dozen large trees such as alders and conifers were put into a single log pile along a portion of the road turnout and still remain. * * * * *. Stockpiles were observed directly

[3] The delay between 2010 and 2012 was due to issues with Respondent's transfer application and payment of fees/late fees. (*See* Decl. of C. Buchner at 2.)

> above the slope failure scarp, and I observed the scarp of the slope failure event to extend into the stockpiles that were stored along the edge and above the slope failure event. Pit run materials were observed along the base of the slope failure and along the county roadside ditch as well as sidecast down the eastern and western outslope of the failure.
>
> * * * * *
>
> The site is operating under an Operating Permit. According to a May 4, 2011 aerial photo, approximately 3 total acres have been disturbed by mining[-]related activities. At the time of the inspection, no active mining operations such as crushing, stockpiling, or excavation extraction were being conducted, though several large operating machines * * * were located on site. DOGAMI records indicate that the last crushing operation was conducted in 2012.

(*Id*. at 1-2.)

20. On September 10, 2014, DOGAMI Natural Resource Specialist Kelly Wood conducted an onsite inspection at the Ekroth Property. Her inspection report states, in part:

> The site is operating under an Operating Permit. According to a Tillamook County Findings and Decision document * * *, approximately 16 acres are included in the Goal 5 Significant Aggregate Resource Inventory for surface mining. Documentation within the DOGAMI file indicates that the Operating Permit boundary does not coincide with the area approved by the county. DOGAMI and Mr. Williamson discussed the Operating Permit boundary at the time of the site visit and DOGAMI discovered that the permittee and DOGAMI have discrepancies regarding the number of acres covered under the DOGAMI Operating Permit.
>
> [I]t appears that DOGAMI conducted an On-Site Inspection on September 24, 2003 * * * to review procedures necessary for a permit transfer. The November 26, 2003 inspection report specifically states "The current disturbance is approximately 1-acre and the permit boundary comprises approximately 3-acres. PCR indicated that eventually they intend to expand beyond the 3-acres but understood that it would require amending the existing permit and that it is likely to be several years before the quarry was developed to that stage[.]" Based on this information and the fact that there have been no subsequent Amendments to the Operating Permit, DOGAMI has concluded that 3 acres are currently covered under the existing DOGAMI Operating Permit.
>
> DOGAMI and Mr. Williamson discussed some of the requirements to amend an Operating Permit[.] * * * * *. [M]r. Williams stated to DOGAMI that he would like to pursue an Amendment to the DOGAMI

> Operating Permit to expand the permit boundary[.]
>
> * * * * *
>
> According to a May 4, 2011 aerial photo, 3 acres are disturbed by mining[-]related activities. At the time of the inspection, active mining operations including stockpiling and hauling were being conducted[.]
>
> It appeared that significant overburden materials had been stockpiled along the southeastern portion of the highwall. According to Mr. Williamson, the material was backfilled in this location to reduce the highwall height. The majority of the backfilled slope was not yet vegetated[,] however there was no evidence of localized erosion or instability on the slope. DOGAMI recommends seeding or otherwise securing this area against erosion from wind or rain prior to the upcoming wet season.
>
> * * * * *
>
> As mining[-]related activities continue to proceed at the site, topsoil, subsoil, and overburdened materials should be kept on site for final reclamation purposes. The salvaged materials should be sloped at 2H:1V, seeded annually or otherwise secured against erosion from wind or rain. Retaining all soil and overburden onsite will allow for a lower reclamation security by avoiding the need to include the cost of importing material to accommodate reclamation.
>
> * * * * *
>
> [T]he reclamation security for this site is currently $6,500[,] which is deemed inadequate at this time. As discussed during a follow-up phone call on November 10, 2014, an increase in the reclamation bond is required. Taking into consideration existing slope configurations and materials available on-site for final reclamation, a total reclamation security of $14,500 is now required for your operation. A rider to the existing bond or a new bond may be submitted. Please submit the required reclamation bond by March 31, 2015.
>
> At this time, the site remains in compliance with DOGAMI's Operating Permit with the acknowledgement that an amendment application is required prior to any additional lateral expansion of the site[.]

(CB Ex. 9 at 1-3; Ireland Ex. 119.)

21. On March 31, 2016, Mr. Brinkmann conducted another Department site visit at the

Ekroth property. (*See* CB Ex. 10a at 1-3; *see also* CB Ex. 10b (photos 12 and 13).[4]) The inspection report for that visit states, in part:

> According to the May 4, 2011 DOGAMI aerial photo ~ 3-acres are disturbed by mining[-]related activities[,] which has been determined by DOGAMI to be the permitted acreage for the site. Subsequent to the 2011 DOGAMI aerial, additional acreage beyond the 3-acre limit have been disturbed as shown on a July 30, 2014 Google Earth image. Based on this, a permit amendment for the expansion is now required. Please submit a permit application and fee to this office by May 31, 2016[.]
>
> * * * * *
>
> The site was active with extraction occurring on the southwest end of the quarry where the face is ~50-ft in height and is unbenched. Mr. Willaimson indicated that he will continue to lower the face to the level of the pit floor in this part of the highwall. Adjacent to this section on the south side the highwall extends to ~150-ft and contained multiple benches[.]
>
> * * * * *
>
> The reclamation security for any operation must be based on the actual reclamation cost that DOGAMI would have to pay to contract for reclamation of the disturbed area to the standards outlined in the reclamation plan. The reclamation security for this site is currently $6,500[,] which is deemed inadequate at this time. Mr. Williamson was notified in a previous inspection report (9-10-14) as well as in a follow-up phone call on November 10, 2014[,] that a revised reclamation security of $14,500 was required. Because a permit amendment is now required[,] a determination of whether $14,500 is adequate will be made during the evaluation process of the application.
>
> * * * * *
>
> At this time, the site remains in compliance with DOGAMI's Operating Permit with the acknowledgement that permit amendment and 1200A applications are required by May 31, 2016[,] and failure to submit the applications by the required date will result in issuance of a [Notice of Violation.]

(CB Ex. 10a at 1-2.)

22. On May 18, 2016, Respondent filed an Operating Permit Amendment Application

[4] The photographs were taken during the March 31, 2016 inspection, facing west. (Decl. of C. Buchner at 3.)

with the Department to expand the permitted area. (*See* CB Ex. 8 at 1-2.) On the application, a section titled "Current Permit Information" advised the applicant: "*Do not include expansion area information in this section.*" (*Id*. at 1; underlined and italicized emphasis in original; all caps omitted). In that section, in response to the question, "How many acres * * * are covered by the current Operating Permit?" Respondent wrote "3." (*Id*.; underlined emphasis in original.) Also in that section, in response to the question, "How many acres * * * are currently affected by mining?" Respondent wrote "3 ½." (*Id*.; underlined emphasis in original.) In response to the question, "How many ADDITIONAL acres under the current permit will be affected by mining in the next 12 months?" Respondent wrote "2.0." (*Id*.; underlined emphasis and all caps in original.) Under a section of the application titled, "Expansion Area Information (if applicable)," Respondent indicated that "3.5" acres are "currently affected by mining" and that "5.5" acres "will be affected by mining in the next 12 months." (*Id*.; underlined emphasis in original; all caps omitted). Respondent noted on the application that the primary commodity mined under the Operating Permit was aggregate/basalt. (*Id*. at 2.)

23. On October 25, 2017, Respondent provided a proposed Permit Area Map to the Department. (*See* CB Ex. 11.) The Department concluded the following with regard to the map: 1) the map failed to include all areas Respondent had mined on the Ekroth property; and 2) the contours of the excavation area depicted on the map indicated that excavation had occurred beyond the Ekroth Property boundary and onto land owned by the State of Oregon and managed by the Oregon Department of Forestry (the ODF Lands).[5] (*See* Decl. of C. Buchner at 3.) The Department subsequently reviewed aerial imagery and concluded that Respondent had mined approximately 1.5 acres of the ODF Lands, as well as 5.4 acres on the Ekroth Property. (*Id*. at 3-4.)

24. Based on compliance concerns, and a determination that Respondent's amendment application was incomplete, the Department did not amend the Operating Permit. (Decl. of C. Buchner at 4.)

25. On June 11, 2018, the Department issued a Suspension Order to Respondent, which stated, in part:

> Per the DOGAMI Inspection Report dated April 15, 2016 you were notified that operations were conducted outside the 3[-]acre authorized Operating Permit boundary and that a permit amendment for an expansion was required to bring the site into compliance. The amendment application and fee were received by DOGAMI on July 27, 2017. Review of the application materials and Google Earth aerial imagery dated June 22, 2017, indicate that your mining operation has trespassed onto adjacent property that is owned by the State of Oregon and your overburden handling and storage practices have caused multiple landslides that may have impacted Electric Creek, for which the City of Garibaldi holds water rights. DOGAMI believes your site to be in violation of the following:

[55] The ODF Lands are on Tax Lot 01N10W22-200. (*See* Dec. of E. Buchner at 2.)

> - Engaging in surface mining without an operating permit. Per ORS 517.790(1) An operator may not engage in surface mining on land without holding a valid operating permit.
>
> - Per ORS 517.790(3) The department may not issue an operating permit to an operator other than the owner or owners of the surface and mineral interests of the lands included within the surface mining area unless the operator: (a) Has written approval from the owner or owners of all surface and mineral interests of the lands included within the surface mining area; and (b) Maintains a legal interest in the lands that is sufficient to ensure that the operator has the authority to operate and reclaim the lands as provided in the operating permit and reclamation plan. DOGAMI does not have any evidence that you have authorization from the property owner to mine these lands[.]
>
> - Failure to Comply with Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> By the authority of ORS 517.880 because you are conducting surface mining in areas where you do not hold a permit and are acting in violation of ORS chapter 517 and OAR chapter 632, division 30 as described above, the Oregon Department of Geology and Mineral Industries hereby orders you to suspend all surface mining operations at the mine site referenced above. You are required to stop all surface mining activities except the removal of stockpiled materials[.]
>
> This Suspension Order remains in effect until withdrawn by the written order of the [D]epartment[.]

(CB Ex. 13 at 1.)

26. On July 6, 2018, Respondent shared with the Department a video taken on April 18, 2018, appearing to show materials from the ODF Lands sliding onto the Ekroth Property. (Decl. of C. Buchner at 4; *see* CB Ex. 11.) The Department concluded that the materials came from the ODF Lands "because the video was captured from the pit floor looking upslope at the southern highwall, the top of which was located on ODF Lands at the time." (Decl. of C. Buchner at 4.) The Department also concluded that Respondent's mining activity caused the slide. (*See id*.)

27. On or about July 7, 2018, the Department conducted another onsite inspection of the Ekroth Property. (Decl. of C. Buchner at 4.) Cari Buchner took photographs during the inspection. (*See* CB Exs. 14a and 14b; Decl. of C. Buchner at 4.) In her written declaration, Ms. Buchner describes the photographs as follows:

> During this 2018 inspection, I viewed and photographed slides of

> overburden material from Respondent's mining operations on both the Ekroth Property and on the ODF Lands. Attached hereto as Exhibit 14 are certain photos of the Ekroth Property and the ODF Lands taken during that inspection. Exhibit 14a is a composite of three photographs facing west, looking at the unstabilized overburden that has been piled above Electric Creek since the March 2016 inspection. Exhibit 14b is a composite of three photographs showing me on top of that overburden pile, looking downslope toward Electric Creek. The overburden is visible on the downslope where you can see that it has toppled or tilted trees.

(Decl. of C. Buchner at 4-5.) In her declaration, Ms. Buchner also states the following regarding overburden at the property:

> I have also reviewed aerial imagery at the Ekroth Property, including the aerial imagery submitted with the Declaration of Ed Buchner submitted contemporaneously herewith, which consistently shows a lack of vegetation on the overburden. The placement of the material on top of the narrow ridge above Electric Creek and the lack of vegetation rendered the overburden material unstable.

(*Id*. at 5.)

28. DOGAMI Floodplain Mining Reclamationist Vaughn Blazer estimated that Respondent removed more than 24,000 cubic yards of material from the ODF Lands, resulting in approximately $4,713 in royalty owed to the State. In an email dated July 18, 2018, Mr. Blazer explained those calculations as follows:

> DOGAMI used LIDAR topography acquired in 2009 and compared that to survey data gathered on July 6th, 2018 at the site. Pictures taken during the July 6th, 2018 site inspection were used to help refine the removal estimates. While this is a very rough estimation[,] we feel that it is in the "ballpark" and adequate for the purposes at hand. * * *. A significant portion of the material removed from the [ODF Lands] consisted of overburden (soil and weathered rock) most of which remains onsite (see attached).[6] Based on a rough estimate that 20 percent of the material removed was marketable aggregate, approximately 4,809 Cubic Yards of marketable material were acquired from the removed material from [ODF Lands]. Based on the mineral rate * * * provided below,[7] Mr. Williamson owes a royalty to the state of $4,713.00.

(*See* CB Ex. 12 at 1.)

29. On September 20, 2018, Respondent met with one or more attorneys from the

[6] *See* CB Exhibit 12 at 5.

[7] *See* CB Exhibit 12 at 2.

Oregon Department of Justice, Department personnel (including Ms. Buchner), and representatives from ODF and the Oregon Department of State Lands (DSL) regarding Respondent's "trespass of ODF property." (Dec. of C. Buchner at 5; *see* CB Ex. 15 at 1.) At the meeting, the parties agreed to certain steps going forward, which were later memorialized in a September 25, 2018 letter to Respondent from Senior Assistant Attorney General Marc Hull. (Dec. of C. Buchner at 5; *see* CB Ex. 15 at 1-3.)

30. On September 28, 2018, the Department issued the 2018 Order to Respondent and rescinded the June 11, 2018 Suspension Order. (*See* CB Exs. 16, 16a, and 16b.) The 2018 Order states, in part:

> On July 6, 2018 DOGAMI conducted a site visit to further determine the extent of the violations described in the DOGAMI Suspension Order issued June 11, 2018. DOGAMI confirmed that mining activity at this site has been conducted outside the permit boundary, resulting in trespass onto state-owned land managed by [ODF]. Surface mining in unpermitted areas is a violation of ORS 517.790 which prohibits engaging in surface mining without an operating permit.
>
> During this site visit DOGAMI also observed the landslides that may have impacted Electric Creek. DOGAMI believes these slides were caused by instability of overburden storage piles. Based on this, the site is also in violation of Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> To rectify these violations, you are hereby ordered to take the following steps:
>
> 1. Do not conduct any surface mining outside of the property line between * * * [the Ekroth Property and the ODF Lands].
>
> 2. Submit a remediation plan prepared and stamped by a Certified Engineering Geologist (CEG) or Geotechnical Engineer (PE) that addresses [specified criteria].
>
> * * * * *
>
> 3. Submit progress reports to DOGAMI throughout implementation of the remediation plan, on a schedule to be determined once the remediation plan has been approved by all agencies.
>
> The above tasks must be completed by September 30, 2020. You may request an extension to the required completion date for bringing this site back into compliance, however the [D]epartment will not consider such a request unless you demonstrate good cause for the delay and show that

> there has been reasonable effort and progress toward meeting the schedule outlined above.
>
> If you fail to comply with this Notice of Violation and Compliance Schedule, the [D]epartment intends to take enforcement action against you. This may include, but is not limited to, recovery of the reclamation security for this site, issuance of a Suspension Order, or the assessment of civil penalties for the violation of this order. If the [D]epartment elects to recover the reclamation security, the funds will be used to reclaim the property as provided in ORS 517.865. If this amount is insufficient to complete the reclamation as outlined in the Reclamation Plan, a lien may be placed against the property to cover any deficiencies.
>
> * * * * *
>
> You have the right to a contested case hearing * * *. To have a hearing, you must file a written Request for Review with the State Geologist within twenty (21) days from the date this Order was served on you or mailed to you. * * * * *.
>
> The State Geologist will have the opportunity to review and resolve the situation informally pursuant to OAR 632-030-0056. If the State Geologist declines review, fails to provide you with a written decision within 30 days, or if the proposed informal resolution is not acceptable to you, the matter will be referred to a hearing officer and a contested case hearing will be scheduled.
>
> * * * * *
>
> If the Order becomes final in this manner, you will have the right to appeal the order to the Oregon Court of Appeals under ORS 183.482. * * *. If you do not file a petition for review within [a timely manner], you will lose your right to appeal.

(CB Ex. 16b at 1-3; bold emphasis omitted.) Respondent did not appeal the 2018 Order. (Decl. of C. Buchner at 5.)

31. On January 27, 2020, the Department conducted another onsite inspection at the Ekroth Property. (Decl. of C. Buchner at 6.) In her written declaration, Ms. Buchner describes photographs the Department took during the inspection as follows:

> Exhibit 18a is composite of three photos facing west, showing what remains of the overburden. Exhibit 18b is photo from the top of that overburden pile, showing additional overburden spills down toward a turbid Electric Creek.

(*Id.*)

32. The Department determined that the existing reclamation security of $14,500 for the Ekroth Property did not account for the actual costs to reclaim the site. On January 25, 2021,[8] the Department issued a Notice of Action, requiring that Respondent increase the reclamation security at the site to $181,365 by March 1, 2021. (*See* CB Ex. 19 at 1-2.) The Notice of Action states, in part:

> The reclamation security for this site was last calculated in 2015 using per acre figures from 2001 and based on the acreage disturbed in 2015. The reclamation security has been recalculated based on the current 5.4-acre disturbance on tax lot 700[.]
>
> * * * * *
>
> Per ORS 517.810 and OAR 632-032-0021(12) a decision of the [D]epartment regarding the estimated cost of reclamation or the type of acceptable security may be appealed to the Governing Board as provided in ORS 183.310 to 183.550.
>
> Additionally, per OAR 632-030-0021(8) you may submit reclamation cost estimates for consideration by the [D]epartment.

(*Id.*)

33. The Department did not receive the reclamation security increase from Respondent by March 11, 2021. (*See* CB Ex. 20 at 1.) On March 11, 2021, the Department issued the 2021 Order. (*See* CB Ex. 20 at 1-2.) The 2021 Order advised that Respondent violated ORS 517.810(1) and OAR 632-030-0021(1) for failing to maintain an adequate reclamation security and ordered Respondent to provide either a security increase of $166,865 or a replacement security in the full amount of $181,365 by April 15, 2021. (*Id.* at 1.) The 2021 Order notified Respondent of his right to request a hearing to appeal the order and also of his right to request an informal review by the State Geologist (with a right to request a hearing if dissatisfied with the State Geologist's review decision). (*See id.* at 2.)

34. On March 23, 2021, Respondent requested an informal review of the 2021 Order by the State Geologist. (*See* CB Ex. 21 at 1.) By letter dated April 22, 2021, State Geologist Brad J. Avy notified Respondent that he had completed his review and found "no basis to reverse or modify" the 2021 Order, noting the "long and documented history of non-compliance and off-site environmental impact[.]" (CB Ex. 22 at 1.) The letter explained that Respondent had 30 days in which to request a contested case hearing to appeal the review decision. (*Id.* at 1-2.) Respondent did not request a contested case hearing or further appeal the 2021 Order or the State Geologist's review decision. (Decl. of C. Buchner at 6.)

35. To date, Respondent has not submitted the required reclamation bond increase to the

[8] The notice incorrectly lists the year as 2020. (Decl. of C. Buchner at 6; *see* CB Ex. 19 at 1.)

Department. (Decl. of C. Buchner at 6.)

36. Meanwhile, on March 22, 2021, Respondent submitted a proposed remediation plan to the Department. (*See* Ireland Ex. 122 at 1.) By letter dated April 2, 2021, Ms. Buchner notified Respondent that the Department, ODF, and DSL were in agreement that the "proposed plan to address [Respondent's] trespass and damage to state-owned land and mining in unpermitted areas" was unacceptable. (*Id.*) The letter stated, in part:

> The plan does not meet the requirements outlined in the Notice of Violation issued September 28, 2018 and proposes further damage and on[]going mining of state-owned land beyond the minimal use necessary to repair your existing damage.
>
> To address the existing violations of state law at this site you must submit a remediation plan prepared and stamped by a Certified Engineering Geologist (CEG) or Geotechnical Engineer (PE) that addresses the following:
>
> 1. Areas of sidecast pullback.
> a. The outslope that has slid into Electric Creek in two areas was not addressed in the narrative. This outslope needs to be stabilized without further impacts to Electric Creek.
>
> 2. Stormwater drainage plan.
> a. The operating and reclamation plan specifies that no settling ponds will be constructed. The proposed remediation plan is inconsistent with the approved operating and reclamation plan.
>
> 3. Erosion control measures to be implemented.
> a. The operating and reclamation plan specifies that no settling ponds will be constructed. The proposed remediation plan is inconsistent with the approved operating and reclamation plan.
>
> 4. Areas of timber clearing.
> a. The additional acres of clearing beyond excavation at the top of slope.
>
> 5. Areas of excavation and estimated volume of materials to be excavated.
> a. The areas of proposed excavation and estimated volume of materials to be excavated do not minimize impact to ODF property.
>
> 6. Proposed dimensions and number of benches.
> a. The proposed dimensions of 1.5H:1V are acceptable for excavated slopes only. Any fill slopes must be constructed at 2H:1V or flatter, and if slope length exceeds 100 lineal ft may be required at 3H:1V to ensure long[-]term stability per 632-030-0027(3)(c).
> b. The operating and reclamation plan does not allow for the importation

> or fill for reclamation.
>
> 7. Equipment ingress/egress plan.
>
> 8. Demonstration of the planned design elements that minimize impact to ODF property and resources, including instructions for working around protected species habitat.
> a. The plan does not minimize impact to ODF property and resources.
> b. The plan does not contain instructions for working around un-surveyed suitable habitat for protected species.
>
> 9. Identification of survey controls to be used when constructing benches.
>
> 10. Identification of periodic maintenance needs for clearing regrowth and maintaining drainage design
>
> 11. Re-establishment of the 50-foot buffer on the southern property line.
>
> For a plan to be approved it must adequately address all of the requirements outlined in the Notice of Violation issued September 28, 2018 and copied above. Please submit a revised plan that addresses all of the requirements no later than May 1, 2021.

(*Id*. at 1-2.)

37. To date, Respondent has not submitted a remediation plan to the Department that, in the Department's view, addresses the requirements set forth in the 2018 Order. Respondent has not implemented any approved remediation plan. Respondent stopped submitting periodic progress reports to the Department in November 2019. (Decl. of C. Buchner at 6.)

38. The Ekroth Property is currently under a Suspension Order for Respondent's alleged failure to comply with the 2021 Order. (Decl. of C. Buchner at 6.)

CONCLUSIONS OF LAW

1. The Department is not entitled to summary determination on the issue of whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining at unpermitted areas because there are genuine issues of material fact that must be explored at hearing.

2. The Department is not entitled to summary determination on the issue of whether Respondent violated the Operating Permit by failing to appropriately shape and stabilize overburden piles because there are genuine issues of material fact that must be explored at hearing.

3. There is no genuine issue as to any material fact relevant to whether Respondent

violated the 2018 Order by failing to submit a remediation plan to the Department by September 30, 2020, and the Department is entitled to a favorable ruling as a matter of law on that issue. The Department's Motion does not address the issue of whether Respondent violated the 2018 Order by continuing to mine ODF's property, so that remains a valid issue for hearing.

4. There is no genuine issue as to any material fact relevant to whether Respondent violated the 2021 Order by failing to increase reclamation security by April 15, 2021, and the Department is entitled to a favorable ruling as a matter of law on that issue.

OPINION

Summary Determination Standard

OAR 137-003-0580 governs motions for summary determination and provides, in part:

> (1) Not less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues * * * in the contested case[.]
>
> * * * * *
>
> (6) The [ALJ] 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 [ALJ] 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.
>
> (9) A party or the agency may satisfy the burden of producing evidence through affidavits[.]
>
> (10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any. * * * .

> (11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.

Pursuant to OAR 137-003-0580(6)(a), I have considered the briefs, declarations, exhibits and pleadings. And, as required under OAR 137-003-0580(7), I have viewed the evidence in the manner most favorable to Respondent, the non-moving party.

Oregon Mined Land Reclamation Act

The Oregon Mined Land Reclamation Act (the Act) is codified at ORS 517.702 to ORS 517.992.[9] ORS 517.760 sets forth legislative policy with respect to the Act and provides, in pertinent part:

> (1)(a) It is the policy of the State of Oregon to recognize the important and essential contribution that the extraction of minerals makes to the economic well-being of the state and the nation and to prevent unacceptable adverse impacts to environmental, scenic, recreational, social, archaeological and historic resources of the state that may result from mining operations, while permitting operations that comply with the provisions set forth in ORS 517.702 to 517.951.
>
> (b) Proper reclamation of surface-mined lands is necessary to prevent undesirable land and water conditions that would be detrimental to the general welfare, health, safety and property rights of the citizens of this state.
>
> (2) The Legislative Assembly, therefore, declares that the purposes of ORS 517.702 to 517.951 are:
>
> (a) To provide that the usefulness, productivity and scenic values of all lands and water resources affected by surface mining operations within this state shall receive the greatest practical degree of protection and reclamation necessary for their intended subsequent use[.]

The Department is administered by a Governing Board. ORS 516.080. The Governing Board's duties and powers include, among other things, carrying out the policies set forth in ORS Chapter 517, directing the performance of the Department in carrying out its duties and responsibilities pursuant to ORS Chapter 517, adopting rules necessary for the administration of the laws that the Board is charged with administering, conducting or facilitating investigations related to surface mining and the reclamation of surface-mined lands, and cooperating with other governmental or private agencies. *See* ORS 516.090, ORS 517.740, and ORS 517.840.

---

[9] OAR 632-030-0010(8).

1. Alleged violation of ORS 517.790(1)

With regard to Respondent's alleged violation of ORS 517.790(1), the Department's Second Amended Notice of Violation states, in part:

> In connection with his operations at or near Ekroth Pit, Respondent * * * [m]ined on lands beyond the boundary approved in the Operating Permit that were not surface mined on July 1, 1972, and extracted more than 5,000 cubic yards of minerals and affected more than one acre in consecutive 12-month periods, from approximately 2012 to 2021[.]
>
> * * * * *
>
> Respondent violated ORS 517.790(1) by engaging in surface mining within the meaning of ORS 517.750(16) at locations not surface mined on July 1, 1972, not subject to an exemption from Oregon mining law, and that were not permitted by the Operating Permit. Respondent conducted these unpermitted mining operations from approximately 2012 to 2021.

Second Amended Notice of Violation at 2-3.

ORS 517.790(1) states, in pertinent part:

> A landowner[10] or operator[11] may not allow or engage in surface mining on land not surface mined on July 1, 1972,[12] without holding a valid operating permit from the [Department] for the surface mining operation. A separate permit is required for each separate surface mining operation[.]

As relevant to this matter, ORS 517.750(16)(a)(A) defines "surface mining" to include

---

[10] ORS 517.750(7) defines "landowner" to include:

> (a) The person possessing fee title to the natural mineral deposit being surface mined or explored; and
>
> (b) The owner of an equitable interest in land that is subject to a deed of trust.

[11] ORS 517.750(9) defines an "operator" as follows:

> [A]ny individual, public or private corporation, political subdivision, agency, board or department of this state, any municipality, partnership, association, firm, trust, estate or any other legal entity whatsoever that is engaged in surface mining operations.

[12] Although Oregon law exempts from the operating permit requirement certain lands within the surfaces and contours of surface mines in existence on July 1, 1972, that exemption does not apply unless the Department issued a certificate of exemption to the mining operation by the statutory deadlines. *See* ORS 517.770(1)(a) through (c).

the following:

> All or any part of the process of mining minerals by the removal of overburden and the extraction of natural mineral deposits thereby exposed by any method by which more than 5,000 cubic yards of minerals are extracted or by which at least one acre of land is affected within a period of 12 consecutive calendar months, including open-pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for use as access roads.

ORS 517.750(8) defines minerals broadly to include "soil, coal, clay, stone, sand, gravel, metallic ore and any other solid material or substance excavated for commercial, industrial or construction use from natural deposits situated within or upon lands in this state."

OAR 632-030-0010(9) defines a "permit area" as follows:

> "Permit Area" means the area covered by an operating permit issued by the Department and defined by boundaries submitted on a map acceptable to the Department under OAR 632-030-0015. The permit area is generally a contiguous parcel and may include multiple excavation and/or processing areas. The permit area may include, but is not limited to, haul roads, buffers, setbacks, reclaimed areas, and areas used for the storage or disposition of any mine product or mine waste material from the surface mining operation, even though separate from the area of extraction. The permit area may be redefined by a permit amendment.

The Department contends that when Respondent became the permittee, and at all material times while Respondent was the permittee, "the Operating Permit authorized mining operations on only the mining area depicted on the 1991 Site Map." *See* Department's Motion at 4. The Department argues that the undisputed facts establish that Respondent engaged in surface mining at unpermitted areas on both the Ekroth Property and on ODF Lands. *Id.* at 9.

The Department explains its position, in part, as follows:

> Respondent is an owner and was, at all relevant times for the violations alleged in the Notice Order, an operator. There can no reasonable dispute that Respondent engaged in surface mining when he was mining aggregate (mostly basalt) at and near the Ekroth Property. Respondent admitted to mining more than three acres in his 2016 amendment application. Even though this understates the actual extent of his mining operations (closer to 6.9 acres, including 1.5 acres on the ODF Lands), this admitted acreage exceeds the one[-]acre threshold. Also, in connection with his [2016] amendment application, Respondent identified that he removed more than 5,000 cubic yards of material at the Ekroth Property within the prior year and expected to remove more than 5,000 cubic yards the next year. In

> addition, * * * DOGAMI calculated more than 24,000 cubic yards of minerals removed from the ODF Lands. Indeed, Respondent's actions to receive a transfer of the Operating Permit and efforts to amend the Operating Permit are consistent with the fact that Respondent was engaging in surface mining and needed a permit.
>
> [A]nd as depicted in [EB] Exhibits 2a through 2i * * *, Respondent engaged in this surface mining on lands not authorized by the Operating Permit, including unpermitted lands on the Ekroth Property and on the ODF Lands. While the Operating Permit allowed mining on approximately three acres of the Ekroth Property, Respondent mined approximately 5.4 acres of the Ekroth Property. Respondent mined land without a permit on the Ekroth Property after being told that it was unpermitted. Respondent also mined beyond the boundaries of the Ekroth Property, on the unpermitted and environmentally sensitive ODF Lands. No portion of the Ekroth Property or the ODF Lands was exempt from the permitting requirement for pre-1972 mining operations, in part because DOGAMI never issued a certificate of exemption for mining operations on those properties[.]

Id. at 8-9. The Department contends that even if there is a factual dispute as to how many acres beyond the permit boundary Respondent mined, "there is no reasonable dispute that he mined beyond the boundary and violated ORS 517.790(1)." *See* Department's Reply at 7, fn 5.

Respondent claims that he "never mined outside of the permit area as alleged by the Department" and he "never mined ODF property." *See* Declaration of Respondent at 2.

First, Respondent contends that "the actual permit area is undefined in the Operating Permit." *See* Objection to Motion at 6. He disputes that the 1991 site map (submitted to the Department by former permittee Hixson) defines the "permitted mining area" to which Respondent is subject. *Id.* at 7. He contends that the 1991 site map fails to clearly define a "permitted area," identifying only where the current (at that time) mining was to occur, and not "where the mining was to stop." *Id*. He also disputes the Department's contention that the permit area allegedly shown in the 1991 site map is three acres, arguing that "*at best* the area [depicted in the map] is a little over 2 acres." *Id.* at 8-9. (Emphasis in original.) He contends that it was not until filing the current Motion that the Department defined the permitted area for the Ekroth Property as the area described in the 1991 site map, and that since 2003, the Department had instead "repeatedly stated and enforced * * * that the operating permit authorizes mining on approximately three acres, and that the 'permitted area' consisted of the three acres that was the 'disturbed area' as depicted in a 2011 aerial photo. *Id.* at 8. He claims that the Department, in its current Motion, "has drastically changed their [*sic*] position from historical practice and comments, in a frugal attempt to prove the[] allegation that Respondent mined outside of the permitted area[.]" *Id*. He argues that the "Operative Permit" in this case "does not limit mining or set any conditions on the area to be mined, in any way." *Id*. at 10. He concludes, based on his view of the relevant facts and interpretation of various statutes and administrative rules, that "the only way to interpret the operating permit is that it allows mining on the entire Ekroth Road property." *Id*.

In its Reply, the Department challenges Respondent's credibility, pointing out the following allegedly contradictory evidence:

> [I]t bears noting that Respondent's Declaration includes, in addition to self-serving, unsubstantiated statements, statements inconsistent with the factual record. For example, Respondent claims that he has not mined since 2018. * * *. However, Respondent submitted reports to DOGAMI in 2019 and 2020 in which he certified to producing a significant tonnage of minerals in connection with the Operating Permit. * * *. Also, his operations created a pond on the pit of the floor which appeared between July 2020 and June 2022. * * *. He also claims that he "was not willing to go onto ODF's property," but the aerials show benches on the ODF Property[.]

Department's Reply at 8, fn 6.

Respondent contends that what the Department claims represents his "mining ODF property" is false because "in reality, all [he] did was clean up numerous landslides." *See* Objection to Motion at 4. He argues that while Pacific Coast and previous owners of the Ekroth Property mined areas on the ODF Lands, he never "mined" in those areas. *Id*. at 11. Rather, he asserts that he merely "clean[ed] up multiple landslides that occurred on ODF property * * * due to Pacific Coast Rock LLC['s] improper mining and not due to my mining." *See* Declaration of Respondent at 2. He cites to Ireland Exhibits 118 and 120, as well as to a portion of the Declaration of C. Buchner, claiming that those materials "support[] the factual assertion that the slides are what degraded ODF property and not Respondent's mining." *See* Objection to Motion at 11. He asserts that without any facts to support its argument, the Department "has presumed that because a[e]rial photos show that ODF property has been altered, that it necessarily follows that [he] mined ODF property." *Id*. at 12. Respondent argues that the Department "has no actual knowledge and has submitted no actual proof that the cause of the ODF ground being disturbed was due to Respondent mining the ground." *Id*.

The Department argues that Respondent's contention that he has not mined the ODF Property (but was merely the recipient of acres of landslides from the ODF Lands) is not credible:

> Respondent's argument is essentially that he was authorized to mine up to the ODF Property, which he did perfectly up to the property boundary (land use setback notwithstanding), but that the disturbance on the adjacent ODF Property were landslides of different, non-mineral material unrelated to his mining operations (while admitting that slides stopped after his operations). * * *. He argues this although, based on the aerial photographs, the encroachment and expansion into ODF Property occurred while Respondent was the permittee. *Compare* [EB] Ex. 2c

> (showing no disturbance on the ODF Property in 2012) *and* [EB] Ex. 2g (showing significant disturbance and development of mining operations on the ODF Property in 2018). He also argues this although, in a 2013 letter to close out its Special Use permit, the Oregon Department of Forestry (the "ODF") correctly warned Respondent that his operations would continue to undermine the ODF Property. * * *. He also argues this although he sold the material from the ODF Property and was required to reimburse the State for the same. * * *. Respondent's statements are not credible and fail to create a genuine issue of material fact.

Department's Reply at 7-8.

The Department further contends that even taking Respondent's "factual premise at face value," he still mined the ODF Property because the broad definition of "surface mining" in ORS 517.750(16)(a) "extends to adjacent or off-site operations * * * and to activities beyond mere excavation, including processing of materials and the 'production of surface mining refuse.'" *Id.* at 8-9. The Department contends that the construction of benches, which Respondent admits to installing on the ODF Property in 2013 pursuant to an ODF special use permit,[13] constitutes "surface mining":

> Once the mining area or volume thresholds are exceeded at a site (or if the site does not have an exclusion certificate), the definition of surface mining applies broadly to ancillary, support, and other activities that are "part of the process," including adjacent or offsite activities. * * *. This broad definition includes the construction and use of benches in connection with mining. *See, e.g.,* [Supplemental CB] Ex. 6 (depicting and discussing benches as a key element of an open pit mine); *see also* 30 C.F.R. §56.3131 (federal regulations discussing benching in the context of mining methods to ensure stability).
>
> In Respondent's Objection, he admits to installing benches on the ODF Property in 2013, stating that the construction of these benches was pursuant to the ODF Permit. * * *. And aerial photos show additional benches were installed on the ODF Property between 2014 and 2018, well after the expiration of the ODF Permit. * * *. The 2018 aerial photograph shows a contiguous mining operation that extends onto the ODF Property, including a bench extending from the Ekroth Property to the ODF Property[.]
>
> * * * * *
>
> [T]his constitutes surface mining as a matter of law[.]

Id. at 8-10.

---

[13] In his Declaration, Respondent states, "ODF granted me a special use permit in 2013 which allowed me to access their property and build benches and roads to prevent eroding." Declaration of Respondent at 2.

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. *See 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.)

I conclude that there are disputed issues of fact that are material to whether Respondent violated ORS 517.790(1), as alleged by the Department. As previously noted, the Department's operative notice in this case alleges that Respondent violated ORS 517.790(1) by mining "on lands beyond the boundary approved in the Operating Permit" or "at locations * * * not permitted by the Operating Permit" and "extract[ing] more than 5,000 cubic yards of minerals [or] affect[ing] more than one acre in consecutive 12-month periods" from approximately 2012 to 2021. *See* Second Amended Notice of Violation 2-3. Respondent disputes the allegations (as detailed above) and his denials create genuine issues of fact as to whether during each of the years 2012 through 2021, he engaged in surface mining in a manner that violated ORS 517.790(1).

2. Alleged violation of the Operating Permit

The Operating Permit includes a condition requiring the permittee to "shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff." *See* CB Exhibit 7.

With regard to Respondent's alleged violation of the Operating Permit, the Department's Second Amended Notice of Violation states, in part:

> In connection with his operations at or near Ekroth Pit, Respondent * * * [i]mproperly shaped and failed to stabilize overburden resulting in slides, including at least two separate slides of material into Electric Creek[.]
>
> * * * * *
>
> Respondent violated the Operating Permit by failing to appropriately shape and stabilize overburden piles, resulting in multiple slides of material, including into Electric Creek.

Second Amended Notice of Violation at 2-3.

In her written declaration, Department Mining Compliance Coordinator Cari Buchner describes photographs she took during an onsite inspection at the Ekroth Property on or about

July 7, 2018, as follows:

> During this 2018 inspection, I viewed and photographed slides of overburden material from Respondent's mining operations on both the Ekroth Property and on the ODF Lands. Attached hereto as Exhibit 14 are certain photos of the Ekroth Property and the ODF Lands taken during that inspection. Exhibit 14a is a composite of three photographs facing west, looking at the unstabilized overburden that has been piled above Electric Creek since the March 2016 inspection. Exhibit 14b is a composite of three photographs showing me on top of that overburden pile, looking downslope toward Electric Creek. The overburden is visible on the downslope where you can see that it has toppled or tilted trees.

Declaration of C. Buchner at 4-5; s*ee* CB Exhibits 14a and 14b. In her declaration, Ms. Buchner also states the following regarding overburden at the property:

> I have also reviewed aerial imagery at the Ekroth Property, including the aerial imagery submitted with the Declaration of Ed Buchner submitted contemporaneously herewith, which consistently shows a lack of vegetation on the overburden. The placement of the material on top of the narrow ridge above Electric Creek and the lack of vegetation rendered the overburden material unstable.

Declaration of C. Buchner at 5.

In his Declaration, Respondent asserts that the photographs the Department alleges show evidence of his failure to stabilize overburden piles in July 2018 depict material that "were not overburden piles * * * [but were the] result of a landslide that [he] was in the process of cleaning up." *See* Declaration of Respondent at 3. He contends that the photographs were taken when he was "actively trying to clean up the slide and was actively working in the area." *Id*. He asserts that the landslide was "likely caused by previous rock crushing and trespass by Pacific Coast." *Id*. He claims that he "never produced any overburden on the site [because] at the time that [he] was on the property, the pit had already been opened up and [he] was mining the floor." *Id*.

The Department contends that Respondent's claim that he never produced any overburden at the Ekroth Property is not credible and should be rejected. Department's Reply at 12. To support its contention, the Department points to a draft Operating and Reclamation Plan submitted to the Department (along with an application to expand the Operating Permit), wherein Respondent identified the removal of approximately 25 feet of overburden and indicated that "[s]oil and overburden materials will be stored adjacent to the State Forestry property line in a low berm." *See* Supplemental CB Exhibit 8 at 3. The Department contends that, although the draft Operating and Reclamation Plan was not accepted, aerial images in EB Exhibit 2g show Respondent's continued expansion of his operations and such expanded activity "generated the forecasted overburden that he stored in improperly shaped and stabilized piles, including those depicted on [EB] Exhibit 2f, which spilled." Department's Reply at 12.

ORS 517.750(10) defines "overburden" as "the soil, rock and similar materials that lie above natural deposits of minerals."

The Department contends that even if, as Respondent contends, the piles that existed on the Ekroth Property in July 2018 were "large piles of dirt caused by the landslide that occurred in 2018," the piles would still constitute overburden. *See* Department's Reply at 11 (citing to Objection to Motion at 14). The Department argues as follows:

> Here, either the material that slid was already overburden, in which case the slide would not change its status, or it included minerals which were removed, which would also mean the remnants were overburden. In other words, even assuming Respondent's proffered facts as true, he still violated the Operating Permit condition by failing to shape and stabilize these piles to minimize material migration and runoff[.]

Id.

The Department contends that the photographs and declarations it submitted demonstrate Respondent's "consistent failure to shape and stabilize overburden piles." *Id*. For example, the Department asserts that the image in EB Exhibit 2f, which was captured on June 22, 2017, shows slides of stockpiled overburden towards Electric Creek that predated the 2018 slides of overburden from the ODF Property. *Id*. Moreover, the Department contends that the July 2018 photographs (*i.e.*, CB Exhibits 14a and 14b) "show vegetation already established on slide material, which is consistent with the vegetation visible on Exhibit 2f—demonstrating that a slide of overburden toward Electric Creek predated the * * * April 18, 2018 * * * landslide caught on video." *Id*. The Department argues that "even accepting Respondent's facts as true, and that he stockpiled the landslide material in 2018, and accepting his argument that such material somehow loses its character as overburden as a result of a slide," the Department produced evidence of other slides of overburden "from improperly shaped and stabilized piles." *Id*. at 11-12.

I conclude that there are disputed issues of fact that are material to whether Respondent violated the condition in the Operating Permit requiring that he "shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff." Specifically, there remain factual questions as to what precisely Respondent was required to do to satisfy the condition. Respondent contends that to the extent the condition required that he "at all times, regardless of what he is doing or the time of year, ensure that all dirt is stabilized with revegetation," such requirement is "counterintuitive and absurd, [and] it also goes against historical practices and requirements of the Department which have only required that he reseed annually and/or before the rain/wet season." *See* Objection to Motion at 15 (citing to Ireland Exhibits 118 and 119, which recommend "annual" seeding or otherwise securing the area against erosion from wind or rain "prior to the upcoming season"). The Department asserts that Respondent's violation of the Operating Permit is not due merely because of a lack of vegetation, but from "the consistent slides of overburden material." Department's Reply at 11, fn 11. These factual matters must be further explored at hearing.

3. Alleged violation of the 2018 Order

ORS 517.860(1)(b) provides:

> (1) If * * * the [Department] determines that the operator has not complied with or is not complying with the operating permit, the reclamation plan, the provisions of this chapter or the rules of the [D]epartment, the [D]epartment may issue * * * the following to the operator:
>
> * * * * *
>
> (b) A compliance order. The order may specify a date by which the operator shall rectify any deficiencies. The [D]epartment may extend the period if delays occasioned for causes beyond the operator's control necessitate more time, but only when the operator is, in the opinion of the [D]epartment, making a reasonable effort to comply with the order.

Pursuant to ORS 517.860(1)(b), the Department issued the 2018 Order, which states, in part:

> [M]ining activity at this site has been conducted outside the permit boundary, resulting in trespass onto state-owned land managed by [ODF]. Surface mining in unpermitted areas is a violation of ORS 517.790 which prohibits engaging in surface mining without an operating permit.
>
> [T]he site is also in violation of Operating Permit Condition #2: The permittee must shape and stabilize overburden storage piles with vegetation so as to minimize material migration and runoff.
>
> To rectify these violations, you are hereby ordered to take the following steps:
>
> 1. Do not conduct any surface mining outside of the property line between * * * [the Ekroth Property and the ODF Lands].
>
> 2. Submit a remediation plan prepared and stamped by a Certified Engineering Geologist (CEG) or Geotechnical Engineer (PE) that addresses [specified criteria].
>
> * * * * *
>
> 3. Submit progress reports to DOGAMI throughout implementation of the remediation plan, on a schedule to be determined once the remediation plan has been approved by all agencies.
>
> The above tasks must be completed by September 30, 2020. You may request an extension to the required completion date for bringing this site

> back into compliance, however the [D]epartment will not consider such a request unless you demonstrate good cause for the delay and show that there has been reasonable effort and progress toward meeting the schedule outlined above.

CB Exhibit 16b at 1-2.

In the Second Amended Notice of Violation, the Department alleges that Respondent violated the 2018 Order "by continuing to mine ODF's Property and failing to submit a remediation plan by September 30, 2020 as required" by the order. Second Amended Notice of Violation at 3.

Because the Department's Motion does not address the issue of whether Respondent violated the 2018 Order "by continuing to mine ODF's Property," that remains a valid issue for hearing.

As to whether Respondent violated the 2018 Order by failing to submit a remediation plan by September 30, 2020, there are no material facts in dispute and, for the reasons that follow, the Department is entitled to a favorable ruling as a matter of law on that issue.

It is uncontested that Respondent did not appeal the 2018 Order and that he did not submit a proposed remediation plan to the Department by September 30, 2020.

Respondent argues that the Department lacked the statutory authority to require the remediation plan. *See* Objection to Motion at 17. He contends that for the 2018 Order to be a valid compliance order under ORS 517.860(1)(b), the Department needed to order "compliance" with either the Operating Permit or the Reclamation Plan. *Id*. at 18.

The Department asserts that Respondent may not now challenge the legality of an order that he failed to timely appeal and which has become final as a matter of law. The Department is correct.

Even so, Respondent's legal argument fails because he has construed ORS 517.860(1)(b) too narrowly. The statutory provision allows the Department to issue a compliance order after determining that an operator has not complied with (or is not complying with) the operating permit, the reclamation plan, ORS Chapter 517, or the Department's administrative rules.

The 2018 Order specifically states that the compliance actions ordered therein are based on the Department's determination that Respondent violated 1) ORS 517.790; and 2) Operating Permit Condition #2. *See* CB Exhibit 16b at 1. Given those determinations, the Department did not exceed its authority in issuing the 2018 Order and requiring that Respondent rectify those violations in the manner so directed. *See* ORS 517.860(1)(b) (providing that a compliance order "may specify a date by which the operator shall rectify any deficiencies").

The Department is entitled to summary determination on the issue of whether Respondent violated the 2018 Order by failing to submit a remediation plan to the Department by September

30, 2020.

4. *Alleged violation of the 2021 Order*

The following facts are uncontested: On January 25, 2021, the Department issued a Notice of Action, requiring that Respondent increase the reclamation security at the Ekroth Property to $181,365 by March 1, 2021. The notice informed Respondent of his right to appeal the decision to the Governing Board. *See* CB Exhibit 19 at 1-2.[14] Because the Department did not receive the reclamation security increase from Respondent by the March 1, 2021 deadline, the Department determined that Respondent violated ORS 517.810(1)[15] and OAR 632-030-0021(1)[16] for failing to maintain an adequate reclamation security and issued the 2021 Order, pursuant to ORS 517.860(1)(b). The 2021 Order ordered Respondent to provide either a security increase of $166,865 or a replacement security in the full amount of $181,365 by April 15, 2021. *See* CB Exhibit 20 at 1-2. Respondent timely requested an informal review of the 2021 Order by the State Geologist, and by letter dated April 22, 2021, the State Geologist notified Respondent that he found "no basis to reverse or modify" the 2021 Order, noting the "long and documented history of non-compliance and off-site environmental impact[.]" *See* CB Exhibit 22 at 1. Respondent had 30 days in which to request a contested case hearing to appeal the review decision, but he did not request a contested case hearing or further appeal the 2021 Order or the State Geologist's review decision. Declaration of C. Buchner at 6. Respondent has not submitted the required reclamation bond increase to the Department. *Id*.

In the Second Amended Notice of Violation, the Department alleges that Respondent violated the 2021 Order "by failing to increase reclamation security by April 15, 2021 as required" by the order. Second Amended Notice of Violation at 3.

---

[14] There is no evidence that Respondent appealed the January 25, 2021 Notice of Action to the Governing Board.

[15] ORS 517.810(1) provides, in part:

> (1) Before issuing or reissuing an operating permit for any surface mining operation or issuing or reissuing an exploration permit for any exploration activity, the [Department] shall require that the applicant for the permit file with it a bond or security acceptable to the [D]epartment in a sum to be determined by the [D]epartment but in an amount not to exceed the total cost for reclamation if the [D]epartment were to perform the reclamation. The decision of the [D]epartment may be appealed to the governing board of the [Department] as provided in ORS chapter 183[.]

[16] OAR 632-030-0021(1) states:

> No Operating Permit shall be issued or renewed until a bond or alternative form of security for a surface mining site is accepted by the Department. The bond or other security must be maintained until the Department determines that the surface mining site has been reclaimed in accordance with the approved reclamation plan.

Despite failing to request a hearing to appeal the State Geologist's review decision, or otherwise seeking to timely appeal the 2021 Order, Respondent currently challenges the authority of the Department to issue the 2021 Order (and implicitly, the 2021 Notice of Action on which the 2021 Order was based). As previously discussed with regard to the 2018 Order, Respondent may not now challenge the legality of an order that he failed to timely appeal and which has become final as a matter of law. In addition to that bar to Respondent's legal challenge, his arguments are not well-taken. The Department's analysis is, however, persuasive:

> [DOGAMI] has authority to issue compliance orders for violations of ORS Chapter 517. DOGAMI based the increased security on the increased disturbance size on the Ekroth Property, which violated ORS 517.790(1). * * * * *. DOGAMI, based on Respondent's statutory violations and DOGAMI's determination of a deficient bond, ordered Respondent to increase the bond, giving multiple opportunities for review. As with the 2018 Order, the 2021 Order was proper when issued and remains proper now. And Respondent failed to comply with its terms.
>
> Respondent argues that the "key language" is found in ORS 517.810(1), which requires a bond or security acceptable to the [D]epartment "[b]efore issuing or reissuing an operating permit for any surface mining operation * * *." This provision imposes an obligation on DOGAMI to ensure adequate bonding or security during certain permit actions. Nothing in that provision, however, suggests that DOGAMI lacks authority over security or bonding outside of the permitting context. Instead, DOGAMI, through ORS 517.860(1)(b), has authority to issue compliance orders when an operator violates statutes, rules, or orders leading to deficiencies. When an operator's violations, like Respondent's here, lead to a deficient bond, DOGAMI can issue a compliance order to correct that deficiency. A contrary interpretation would not only unduly restrict DOGAMI's authority under ORS 517.860(1)(b), but would also jeopardize the Department's ability to ensure the "greatest practical degree of protection and reclamation." Inspections occur throughout the life cycle of a permit, and DOGAMI might discover violations that render the security or bonding deficient at time far away from permit issuance or reissuance. * * *. If DOGAMI had to wait for the permitting decision to correct this deficiency, it would create significant time gaps of insufficient security, a "condition[] that would be detrimental to the general welfare, health, safety and property rights of the citizens of this state."

There are no material facts in dispute and the Department is entitled to a favorable ruling as a matter of law on the issue of whether Respondent violated the 2021 Order by failing to increase reclamation security by April 15, 2021.

RULING

The Motion for Partial Summary Determination filed by the Department of Geology and Mineral Industries is granted in part and denied in part, as follows:

1. The Department is not entitled to summary determination on the issue of whether, from approximately 2012 to 2021, Respondent violated ORS 517.790(1) by engaging in surface mining at unpermitted areas because there are genuine issues of material fact.

2. The Department is not entitled to summary determination on the issue of whether Respondent violated the Operating Permit by failing to appropriately shape and stabilize overburden piles because there are genuine issues of material fact.

3. The Department is entitled to summary determination on the issue of whether Respondent violated the 2018 Order by failing to submit a remediation plan to the Department by September 30, 2020.

4. The Department is entitled to summary determination on the issue of whether Respondent violated the 2021 Order by failing to increase reclamation security by April 15, 2021.

Issues not resolved by this ruling will be adjudicated at the hearing scheduled for July 23 and 24, 2024.

Jennifer H. Rackstraw
Senior Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF MAILING

On July 9, 2024, I mailed the foregoing **RULING ON MOTION FOR PARTIAL SUMMARY DETERMINATION** issued on this date in OAH Case No. 2024-ABC-06377**.**

By: Electronic Mail

George Jay Williamson
26005 Trask River Rd
Tillamook OR 97141
Email: cjexcavating@yahoo.com

Katie Ireland
Ireland & Ireland PC
PO Box 273
Banks OR 97106
Email: katie@irelandpc.com; Shilo@irelandpc.com; Shasta@irelandpc.com

By: Electronic Mail

Cari Buchner, Agency Representative
Department of Geology and Mineral Industries
229 Broadalbin St SW
Albany OR 97231

Nathan Karman, Assistant Attorney General
Department of Justice
100 SW Market St
Portland OR 97201

Lucy M Garcia
Hearing Coordinator