

**STATE OF OREGON
THE OREGON FISH AND WILDLIFE COMMISSION**

In the Matter of
**Winchester Water Control District,
owner and operator of
Winchester Dam**

**Notice of Non-Compliance; Proposed
Order; and Opportunity for Contested
Case Hearing**

The state of Oregon, through the Oregon Fish and Wildlife Commission and the Oregon Department of Fish and Wildlife (collectively, “ODFW” or “Department”) protects and enhances Oregon’s fish and wildlife and their habitats for use and enjoyment by present and future generations. ODFW administers the state’s fish passage laws including Oregon Revised Statutes (ORS) 509.580 to 509.910 and Oregon Administrative Rules (OAR) 635-412-0001 through 0065.

Based on the following facts, ODFW has concluded that you, the Winchester Water Control District (WWCD), failed to comply with the requirements of ORS 509.585(4) and OAR 635-412-0020(3), prior to conducting work in August and September of 2023 on Winchester dam that constituted “construction,” as defined in OAR 635-412-0005(10)(b)(ii); therefore, ODFW requires you to install fish passage at Winchester dam consistent with applicable standards and in the timeline established in this proposed order as more particularly set forth below. ODFW is also offering an opportunity for a contested case hearing regarding the non-compliance and proposed order (collectively, this “Notice”).

I. BACKGROUND

The Department reviewed the completion report submitted by the WWCD, or its contractor, to the Oregon Water Resources Department in November 2023 for its dam safety repair work undertaken on Winchester dam in August and September of 2023 (hereinafter referred to as “Winchester Dam Repair Project” or the “project”). This report detailed the actual work that was performed by WWCD or its contractors for this project. Exhibit C (Completion Report). Based on our review of this report, WWCD conducted work that was not disclosed to, or otherwise provided to, the Department for review in the WWCD’s October 18, 2022, application for temporary blockage of fish passage. Exhibit A (2022 FPPA). A comparison between the planned work and the additional work carried out on this project is set forth in Exhibit E (Actual Work Comparison Report).

WWCD carried out additional work¹ to the upstream and top face of the dam that constitutes “construction,” as defined in 635-412-0005(10)(b)(i) and (ii), specifically, work that cumulatively amounted to replacement of 30% by structure volume and work to the upstream or top face of the dam that exceeded 30 percent of that area, respectively. WWCD did not comply with its obligations set forth in ORS 509.585(4) and OAR 635-412-0020(3) that required WWCD to submit a fish passage plan or request an exemption prior to conducting that additional work that constituted “construction” in August and September of 2023. WWCD is, therefore, already subject to an obligation to install fish passage or alternatives to fish passage, and pursuant to ORS 506.625(3)(b)(A), ODFW issues this proposed order to construct fish passage at Winchester dam in accordance with the terms and conditions contained herein.

II. FINDINGS OF FACT

1. On October 18th, 2022, WWCD submitted an application for temporary blockage of fish passage pursuant to OAR 635-412-0035(10) (2022) to ODFW, for proposed dam safety repairs to Winchester Dam (hereinafter “2022 FPPA”). Exhibit A (2022 FPPA).
2. WWCD’s proposed dam safety repairs (“planned work”) would prevent or preclude upstream passage of native migratory fish by temporarily dewatering and closing the fish ladder located at Winchester dam.
3. The Winchester dam is located at River Mile 6.90 on the North Umpqua River, a tributary of the Umpqua River, a direct Pacific Ocean tributary in Douglas County, OR (the “waters”).
4. The Department determined that the following native migratory fish (NMF) species are currently present or have historically been present in the waters:
 - i. Winter Steelhead;
 - ii. Summer Steelhead;
 - iii. Fall Chinook;
 - iv. Spring Chinook;
 - v. Coho Salmon;
 - vi. Cutthroat Trout;
 - vii. Chum Salmon;
 - viii. Pink Salmon;
 - ix. Sockeye Salmon;
 - x. Pacific Lamprey;
 - xi. Umpqua Pikeminnow;
 - xii. Tye Sucker; and
 - xiii. Sturgeon.

¹ Within this *Notice*, the repair work that WWCD included in its October 18th, 2022, fish passage permit application will be referred to as “planned work,” and the additional repair work that WWCD completed in 2023 that was not included in that application will be referred to as “additional work.”

Exhibit F (List of Native Migratory Species). The exhibit sets out the Department's observations from the period 2015 through 2024 based upon a subset of video analyzed and the data presently available for that time period, with exception being Chum salmon data being included from 1999 forward in time. *Id.* The migration periods indicated therein represent the Department's earliest and latest observations of each run. *Id.*

5. ODFW reviewed the amount of planned work in the 2022 FPPA and determined that the planned work did not constitute or otherwise qualify as "construction" under then-applicable administrative rule: OAR 635-412-0005(10) (2022).
6. The planned work contained in the 2022 FPPA included the following components:
 - a. "Component 1 – Repair dam face near fish ladder to eliminate false attractant flows." WWCD explained that "[t]his involves removing an existing log boom and replacing a small section of the dam face with a new concrete section." Exhibit A (2022 FPPA) at 4 and 16 (Figure 6, Attachment 1: Project Figures). This work was intended to limit unintended flows into the adjacent fish ladder that may create a false attractant for migrating fish. Exhibit A (2022 FPPA) at 4.
 - b. "Component 2 – Repair timber faced portions of the dam by installing intermediate vertical steel supports and horizontal steel walers that tie them together." Exhibit A (2022 FPPA) at 4, and 17 - 18 (Figure 6A and Figure 6B, Attachment 1: Project Figures). WWCD explained that "[t]he vertical steel components will be located on repaired concrete sills (on which existing vertical timber components rest)," and that depending upon conditions encountered during construction, "some of the existing timber elements may need to be repaired or replaced." Exhibit A (2022 FPPA) at 4-5, and 17-18 (Figure 6A and Figure 6B, Attachment 1: Project Figures).
 - c. "Component 3 – Fill voids in the existing dam embankment using polyurethane foam." Exhibit A (2022 FPPA) at 5. WWCD explained that "[t]here are several known areas where embankment material has been washed out of the dam creating voids behind the wall face." Exhibit A (2022 FPPA) at 5 and 20 (Figure 6D, Attachment 1: Project Figures).
 - d. "Component 4 – Install a sheet pile cutoff wall and re-configure existing concrete paving along the stream bottom to bridge the gap between the cutoff wall and the upstream dam face." Exhibit A (2022 FPPA) at 5 and 19 (Figure 6C, Attachment 1: Project Figures). WWCD explained that "[s]heet piles will be installed upstream of the spillway/gate section of the dam and south powerhouse. The sheets will be advanced into the bedrock to cut off the flow of water. The sheet pile will be installed with a crane on a barge. If additional concrete needs to be removed that was not removed during Phase 1, a turbidity curtain will be installed around the concrete designated to be removed outside of the sheet pile cutoff wall (see Plan Sheet TW01, Attachment 2 from FPPA). The extent of the concrete surfacing will then be re-configured in the area to bridge the gap between the dam face and the

sheet pile cutoff wall which will prevent river water from migrating through the stream bottom in the space between the cutoff wall and the dam face.” Exhibit A (2022 FPPA) at 5, referring to construction plans on pages 24 - 37. This work was intended “to address the critical issue of subsurface water migration below the southern portion of the dam and south powerhouse.” Exhibit A (2022 FPPA) at 5.

7. In 2018, ODFW staff identified and reported a hole in the upstream portion of the north end of Winchester dam. Between 2018 and the work that occurred in 2023, WWCD carried out temporary fixes to plug the hole, but with limited success. This hole in Winchester dam allowed water to pass through the dam itself near the fish ladder entrance, potentially creating false attraction flow for migrating fish. ODFW staff notified WWCD, as well as other natural resource agencies, of this deterioration, which was then monitored by ODFW.
8. ODFW’s monitoring confirmed that the condition worsened over time, and that the hole in the dam in the upstream portion of the north end of Winchester dam were a likely indication that the timber dam elements were in poor condition due to heavy deterioration evident in the timber posts, which likely resulted in water leakage throughout Winchester dam.
9. Winchester dam is listed on the ODFW statewide inventory of artificial obstructions prioritized for enforcement purposes based on the needs of native migratory fish: ODFW has named the current list: “ODFW 2019 Statewide Fish Passage Barrier Priority List.” Exhibit F (ODFW 2019 Statewide Fish Passage Barrier Priority List).²
10. After ODFW’s review of the 2022 FPPA, ODFW determined that the planned work would constitute a temporary blockage of fish passage, because planned work would prevent or preclude upstream passage of native migratory fish by temporarily dewatering and closing the fish ladder located at Winchester dam.
11. On December 29, 2023, ODFW issued a “ODFW Fish Passage Authorization #PA-17-0138 --- Winchester Dam Repair Project North Umpqua River” for the anticipated temporary blockage of fish passage.³ Exhibit B (ODFW’s December 2022 FPA).

² This list is also available at <https://www.dfw.state.or.us/fish/passage/docs/2019%20Fish%20Passage%20Priority%20List.pdf>. This list is produced as directed by ORS 509.585(3).

³ Exhibit B (ODFW’s December 2022 FPA), at 1, stated:

ODFW finds the proposed Winchester Dam repairs described in the [2022] FPPA (the “Project”) prevents or precludes upstream passage of native migratory fish by temporarily dewatering and closing the fish ladder located at Winchester Dam; therefore, this Fish Passage Authorization is required by ORS 509.585 and [] Oregon Administrative Rule (OAR) 635-412-0020, 635-412-0035(1) and (10) prior to WWCD commencing the project.

12. Because the Department was making its approval of temporary blockage of fish passage under the fish passage rules in effect in December 2022, the Department stated in the fish passage authorization that it issued to WWCD:

This Fish Passage Authorization expires December 31, 2023, and only applies to the dam repair and other activities specifically proposed in the October 18th, 2022 Fish Passage Application. Proposed Winchester Dam repairs as described in the October 18th, 2022, FPPA do not exceed the threshold in OAR 635-412-0005(9)(b) in place at the time of this Fish Passage Authorization that would trigger a review of permanent fish passage at Winchester Dam. Future repair actions to Winchester Dam will be subject to the administrative rules in place at the time of WWCD's application or ODFW's approval, or both.

Exhibit B (ODFW's December 2022 FPA), at 1.

13. Between October 18, 2022, when WWCD submitted its 2022 FPPA and August 7, 2023, when WWCD, or its contractors, commenced work, WWCD did not amend its 2022 FPPA to address any changes to its planned work nor submit to ODFW any new fish passage plan or request for an exemption for any additional work to be completed at the Winchester dam.
14. Between August 7, 2023, and September 5, 2023, WWCD, or its contractors, carried out work on the Winchester Dam that was not disclosed nor otherwise specifically described within WWCD's 2022 FPPA.⁴
15. The Completion Report (Exhibit C) identifies that WWCD carried out the following additional work at Winchester Dam:
 - a. Installation of approximately 150 linear feet of Ultra High Molecular Weight (UHMW) sheeting on the top/upstream face of the dam (along timber portion)⁵;

⁴ See *supra* Note 1, this work is referred to throughout this *Notice* as "additional work."

⁵ See Exhibit C (Completion Report) at 5 (Section 2.5) ("***Dam cap repairs:*** Repairs to the timber cap included new ultra high molecular weight (UHMW) sheeting on the entire surface and additional work at the fish ladder/timber dam area interface. The additional work included reconstructing portions of the gate inlet subframing, planking, and wood sheeting. Minor areas of concrete repair in the concrete cap section were completed, and the timber header under the downstream edge was replaced at several locations"); Exhibit D (Conditional Assessment) at 3-4 ("The timber cap covers the top of the dam and protects the internal timber members and embankment from impact damage and scour. There were two locations identified where the timber cap was damaged. At these locations, the internal timber framing was replaced in-kind. The UHMW sheeting had some rips and tears in it along the whole timber cap, so all the sheeting was replaced in-kind. See the as-builts for more details."). See also Exhibit D (Conditional Assessment) at 3 (Section 2.2) ("The timber cap consists of one layer of 2-inch by 12-inch timber planking and two layers of tongue and groove plywood covered with an ultra high molecular weight (UHMW) sheeting that is nailed to the planks. The cap is located on the northern section of the dam and was replaced in-kind in 2013. The timber cap covers

- b. Approximately 360 square feet of additional wood deck repair and approximately 120 square feet of wood deck repair adjacent to the Axillary Water Supply Intake Gate⁶;
- c. Concrete wall at fishway/dam connection along north abutment lengthened and extended beyond design plans submitted in 2022 FPPA. The physical dimensions of the concrete wall, parallel to the dam, is 1 foot longer, 11 inches taller, and 3 inches thicker and perpendicular to the dam is 9 inches longer, 1 foot wider, but 2 feet 6 inches shorter than presented in the design plans⁷;
- d. Reinforced concrete sill widened and made deeper than design plans submitted in 2022 FPPA. The volume of concrete is approximately 66-70 cubic yards, compared to the 42 cubic yards of concrete presented in the design plans, or 24 to 28 additional cubic yards of concrete than presented in the design plans⁸;
- e. Foam injections to fill voids along south bank near the powerhouse not included in 2022 FPPA, which resulted in unknown volume or amount of foam used⁹; and
- f. Concrete cap work at Bay 40 resulted in additional concrete fill. The specific quantity is unknown, but estimated to be approximately 3 feet wide, 4 feet long

the top of the dam and protects the internal timber members and embankment from impact damage and scour. There were two locations identified where the timber cap was damaged. At these locations, the internal timber framing was replaced in-kind. The UHMW sheeting had some rips and tears in it along the whole timber cap, so all the sheeting was replaced in-kind. See the as-builts for more details.”).

⁶ Exhibit C (Completion Report) at 5 (Section 2.5) (“**Reconstruct upstream side fish ladder gate area (As-Built Plans, sheet C02):** Reconstructed the timber crib framing, sheathing, and cap material at the upstream fish ladder gate. Reconstruction in the area included aggregate infill to replace depleted embankment.”).

⁷ Exhibit C (Completion Report) at 5 (Section 2.5) (“**New concrete wall at fish ladder/timber dam interface to correct attractant flows in the area:** The L-shaped reinforced concrete wall, founded on basalt bedrock, was constructed with some modification. The wall length parallel to the dam was increased and wall top profile adjusted to best suit the geometry of existing features.”).

⁸ Exhibit C (Completion Report) at 6 (Section 2.5) (“**New reinforced concrete sill:** Installed the reconstructed reinforced concrete sill along the entire timber dam length with modifications to suit existing conditions that included a wider and deeper sill cross section at several locations. The deeper sill sections necessitated additional reinforcement and rock dowel length extensions.”).

⁹ ODFW on-site inspections and photos taken on Aug. 17, 2023 (Exhibit H (On-site Photo Documentation of UHMW Sheeting)) evidence foam injection occurred along south bank upstream of south dam/powerhouse abutment. WWCD’s contractor did not conduct this activity, but such additional work was mentioned on page 6, section 3.3, of the 2023 Winchester Dam Inspection and Repair Project. Exhibit C (Completion Report) at 7 (“DOWL received information from the contractor that foam injection work was completed to fill voids and arrest leakage beneath the structure in this area. DOWL did not participate in or observe this work. Reference Appendix 9 for this information.”).

and 1 foot - 6 inches deep or approximately 1 cubic yard of concrete¹⁰

The footnote reference beside each element of additional work set forth above refers to the applicable section(s) of the Completion Report (Exhibit C) that discloses that work carried out by WWCD, or its contractor(s). ODFW completed an assessment comparing the planned work and actual work completed in 2023 at Winchester dam in order to determine the extent of additional work, which is set forth in Exhibit E (Actual Work Comparison Report).

- 16.** ODFW staff documented through visual observations, which is also identified in the Completion Report (Exhibit C) that WWCD undertook additional work to address a weakness in the dam (e.g., water leakage) through alteration of the Winchester dam face by complete replacement (approximately 150 linear feet) of the Ultra High Molecular Weight (UHMW) sheeting on the top/upstream face of the dam, which encompassed the entire face of the timber portion of Winchester dam. Exhibit H (On-Site Photo Documentation of UHMW Sheeting).
- 17.** Based on ODFW's assessment of the as-built design sheets contained with the Completion Report (Exhibit C) and validated from site visit photographs (Exhibit H), this UHMW sheeting installation translates to approximately 43% of the linear length of Winchester dam, which in turn corresponds to approximately the same area of the top/upstream face of Winchester dam.¹¹
- 18.** This additional work described immediately above carried out by WWCD, or its contractors, included work to the upstream or top face of the dam that exceeded 30 percent of the area of the upstream or top face of the dam (e.g., UHMW sheeting on top/upstream face of the dam).
- 19.** This additional work described above, and carried out by WWCD, or its contractors, included UHMW sheeting intended to mend or cover weakness in the dam face, or to modify the surface of Winchester dam, to address leakage through the dam face.

¹⁰ Exhibit D (Conditional Assessment) at 4 (Section 2.3) (“The concrete cap is located on the southern section of the dam and was constructed in 1976. The function of the concrete cap is to cover the top of the dam and protect the internal timber from damage, as well as prevent scour of the dam backfill material. The concrete cap has minor spalling and section loss throughout. There are some surface level cracks. At approximately bay 40, there was a hole through the concrete cap, which created a void within the dam backfill. This location was filled in with concrete during the 2023 repairs. See the as-builts for more details on the location of this hole and repair.”).

¹¹ These measurements and calculations were derived by ODFW's Fish Passage Engineer through a comparison of the existing and as built design plans to the photos and information gained during site visits. The physical measurements and resulting calculations were measured above the natural ground gradeline that is used to impound water.

20. ODFW observed during project implementation site visits approximately 360 square feet of additional wood deck repair and 120 square feet of wood deck repair adjacent to intake gate occurred during August and September of 2023 beyond what was described in the 2022 FPPA. This additional work carried out by WWCD, or its contractors, modified the surface of Winchester dam, and modified the surface area of the dam in a manner that contributed to the cumulative total that exceeds 30 percent of the area of the upstream or top face of the dam.
21. ODFW observed during project implementation site visits that WWCD's replacement of the concrete wall at fishway/dam connection along north abutment in 2023 occurred in a manner beyond design plans submitted in the 2022 FPPA with respect to both length and extent. Specifically, the concrete wall parallel to the dam is 1 foot longer, 11 inches taller, and 3 inches thicker; while the wall perpendicular to the dam is 9 inches longer, 1 foot wider, but 2 feet 6 inches shorter than presented in the design plans submitted in the 2022 FPPA. This replacement of the existing structure (dam) is in an unknown volume but represents an amount that when combined with other planned and additional replacement of the structure may exceed 30 percent by structure volume.
22. ODFW observed during project implementation site visits that WWCD widened and made deeper the reinforced concrete sill more than described in design plans submitted in the 2022 FPPA. The volume of concrete is approximately 66-70 cubic yards, compared to the 42 cubic yards of concrete presented in the design plans submitted in the 2022 FPPA. This replacement of the existing structure (dam) is approximately 24 to 28 additional cubic yards of concrete than presented in the design plans, and when combined with other planned and additional replacement of the structure may exceed 30 percent by structure volume.
23. ODFW observed during project implementation site visits that WWCD filled voids by foam injections along the south bank near the powerhouse, which was not included in 2022 FPPA. The foam injections both modifies the surface area and mends the surface to prevent leakage. This repair, patch, or modification of the surface area of the upstream, downstream, or top face of the dam is in an unknown amount but represents an amount that when combined with other additional repair or modification work on surface area of the dam exceeds 30 percent of that area.
24. ODFW determined that WWCD conducted concrete cap work at Bay 40 that resulted in additional concrete fill. The additional work is estimated to be approximately 3 feet wide, 4 feet long and 1 foot 6 inches deep. This replacement of the existing structure (dam) is approximately 1 additional cubic yard of concrete than presented in the design plans, and when combined with other planned and additional replacement of the structure may exceed 30 percent by structure volume.
25. Prior to carrying out the additional work set forth in the foregoing paragraphs and as particularly described *infra* in this Notice, WWCD did not submit to ODFW either a fish passage plan or a request for an exemption.

26. Winchester dam's existing fishway does not meet current published state fish passage design standards and criteria¹² in the following respects:
- a. Inadequate fishway attraction flows at the fishway entrance(s) and excessive false attraction flows. This discrepancy from design standards and criteria can prevent or delay upstream migrating fish from finding the fish ladder entrance, which can result in fish injury, or harm, including stress by NMF expending effort in multiple attempts to leap over the dam;
 - b. Auxiliary water supply (AWS) system is significantly undersized to provide criteria attraction flows at many fish passage design flows, particularly the higher fish passage design flows. This discrepancy from design standards and criteria can prevent or delay upstream migrating fish from finding the fish ladder entrance, which can result in fish injury or harm, including stress by NMF expending effort in multiple attempts to leap over the dam;
 - c. Fishway location (northbank vs. southbank) is adversely affecting passage success:
 - i. North Umpqua River channel morphology and corresponding NMF migratory patterns results in delay or prevention of successful passage due to existing fishway location and inadequate fishway attraction flow. This discrepancy in design standards and criteria can result in NMF injury or harm, or both, including increased stress due to NMF expending energy in multiple attempts to leap over the dam and the delay associated with attempting to find the fishway entrance;
 - d. Limited personnel access to safely maintain and operate the fishway and auxiliary water supply (AWS) system.
 - i. Lack of proper fishway and AWS maintenance can result in improper fishway and AWS performance, which can prevent or delay upstream migrating NMF species from finding the fish ladder entrance and navigating upstream through the fishway. This discrepancy in design standards and criteria due to lack of or insufficient fishway and AWS maintenance can result in fish injury or harm, or both, including stress to migrating fish.
 - e. Non-conforming fishway design aspects.
 - i. This discrepancy in design standards and criteria can prevent or delay upstream migrating NMF species from effectively and efficiently migrating through the fishway, which can result in fish injury or harm, including stress, by expending undue effort in multiple attempts to swim through the fishway components. These include:
 1. inadequate fishway weir geometry, general lack of weir maintenance and deterioration of fishway weirs,
 2. inadequate lamprey passage,

¹² Current Oregon fish passage design standards and criteria are consistent with federal fish passage design guidelines, though Oregon has established fish passage design standards and criteria for more fish species.

3. deteriorated internal fishway walls are spalling¹³ which can cause abrasions to fish and result in fish injury or harm, including stress,
4. presence of exposed rebar in certain locations, which can cause injuries and abrasions to fish and result in fish harm and mortality,
5. AWS diffusers are in poor condition and can allow access by fish into the AWS system, which can result in fish entrainment within the AWS which can cause injuries, harm, and mortality as well as fish passage delay or prevention,
6. inadequate energy dissipation within the fishway, which can result in the prevention or delay of upstream migrating fish effectively migrating through the fishway,
7. AWS system is not adequately screened and current intake flow velocities exceed screening criteria approach velocities, which can result in impingement of fish on the screen, entrainment of downstream migrating juvenile fish into the AWS, and can result in fish injury, harm, and mortality,
8. water surface elevation jump height differentials associated with the weirs within the fishway exceed criteria for *Catostomus* species and juvenile salmonids, which results in decreased migration and an increase in fish injuries and/or mortalities; and
9. inadequate water depths below the crest of dam for downstream migrating fish species that pass over dam to ensure fish safely fall into water of adequate depth. This discrepancy in design standards and criteria can result in fish falling directly on the concrete apron or rocks immediately below the dam, which can result in fish injury, harm, and mortality.

27. At various times over the last several years, ODFW has communicated to WWCD the discrepancies between the existing fish passage at Winchester dam and the existing published state and federal fishway design standards and criteria. ODFW has identified the discrepancies noted above in more detail in an internal memo between ODFW staff in Exhibit I (Discrepancy in Fish Passage Criteria).

28. Following ODFW's review of the report set forth in Exhibit C (Completion Report), ODFW ascertained it would be advisable to order the installation of fish passage at the Winchester dam consistent with the conditions provided for *infra* Part VI.

29. Installation of fish passage at Winchester dam is advisable because of the critical importance of upstream habitat access and habitat connectivity to NMF in the North Umpqua River above Winchester dam to the continued existence of all NMF in the North Umpqua River. Exhibit F (List of Native Migratory Species) (listing 13 native migratory species present or historically present in the relevant waters and migratory periods). The

¹³ Concrete spalling is the process of concrete deteriorating and breaking away, often appearing as flaking, chipping, or pitting. These conditions can be abrasive to fish traversing through a fish ladder and may cause harm or injury.

North Umpqua River hosts unique fish populations to the Oregon coast, in particular spring Chinook and summer steelhead. These populations are reliant upon utilizing cold-water refugia as adults during the summer. There is also scientific evidence that suggests migration of Pacific lamprey, a State sensitive species, is delayed or prevented, or both, at Winchester dam. The Department has determined that at a minimum there is approximately 160 miles of upstream quality mainstem river habitat above Winchester dam. Providing fish passage at an artificial obstruction (dam) using a fish ladder that meets current state and federal design criteria will allow all NMF species efficient uninterrupted habitat access without undue harm, physical injury, stress and migration delay, which is necessary to maintain such populations. Because of the number of NMF species that utilize habitat upstream of the Winchester dam, their unique and diverse life histories and migratory patterns, and the extent and quality of the upstream habitat, Winchester dam is identified as a high priority fish passage barrier to the State and is on the 2019 Statewide Fish Passage Barrier Priority List and ranked as a Group #1 priority barrier. For these reasons and due to the extent of the existing deficiencies of fish passage at Winchester dam identified in Paragraph 26 above, installation of a state and federally compliant fish passage structure at Winchester dam is advisable and would benefit all NMF in the North Umpqua River. As one example, Oregon Coast Coho are listed as a threatened species under the federal Endangered Species Act and, like Chinook and summer steelhead, utilize habitats situated upstream of Winchester dam; therefore, efficient and unimpeded access is vital to promote recovery and survival of these species.

III. APPLICABLE LAW

Due to the length of statutes and administrative rules that are relevant to this *Notice* such references are contained within Exhibit G (Applicable Law).

IV. DISCUSSION

ORS 509.585(4) and OAR 635-412-0020(3) requires that *before* any activity that qualifies as “construction” on an artificial obstruction, as defined by OAR 635-412-0005(10), the owner or operator of that artificial obstruction is required to submit to ODFW a fish passage plan or a request for an exemption. Activities that constitute or otherwise qualify as “construction” under that applicable rule are defined as a fish passage *trigger* (OAR 635-412-0005(49)). WWCD’s failure to submit the relevant fish passage plan or request for an exemption, and to receive ODFW’s approval before a trigger occurs, constitutes non-compliance with ORS 509.585(4) and OAR 635-412-0020(3), rendering WWCD already subject to an obligation to install fish passage or alternatives to fish passage, and thereby, authorizing the Commission to order installation of fish passage pursuant to ORS 509.625(3)(b)(A).

To reiterate, ODFW did not authorize the planned work itself but instead ODFW authorized the temporary blockage of fish passage during a specified in-water work period

that was necessary for WWCD to carry out its planned work.¹⁴ Since the planned work as described in WWCD’s 2022 FPPA did not exceed the threshold in the then-applicable definition of “construction” so as to constitute a trigger requiring fish passage or alternatives to fish passage to be provided by WWCD prior to its planned work, ODFW’s authority in December 2022 was limited to approving a temporary blockage of fish passage pursuant to OAR 635-412-0035(10). This rule subsection sets forth the “[r]equirements for fish passage * * * when temporary artificial obstructions are in place.” *See id.* Here, WWCD’s 2022 FPPA explained that WWCD would temporarily dewater and close the fish ladder located at Winchester dam that would prevent or preclude upstream passage of native migratory fish.

The activities at issue in this *Notice* relate to additional work that occurred in 2023 that WWCD did not submit to ODFW for its review prior to undergoing that additional work, whether through an amended request for fish passage authorization or by a submittal of a fish passage plan or request for exemption prior to carrying out that additional work as required by ORS 509.585(4) and OAR 635-412-0020(3).

V. CONCLUSIONS OF LAW

The terms repair, patch, or modification are not defined in rule, and their respective plain ordinary, dictionary definitions are as follows: “repair” means “the act or process of replacing a part or putting together what is torn or broken”¹⁵; a “patch” is defined as “a piece of material used to mend or cover a hole or a weak spot,”¹⁶ and a modification is defined as “the making of a limited change in something.”¹⁷

WWCD’s installation of Ultra High Molecular Weight (UHMW) sheeting on surface area of Winchester dam in 2023 constituted a repair, patch, or modification to the Winchester dam, because such UHMW sheeting mended the dam face or otherwise prevented by that modification water leakage occurring on the dam face due to timber dam element deterioration. OAR 635-412-0005(10)(b)(A)(ii).

¹⁴ ODFW understands that WWCD was required by federal law to seek authorization from the U.S. Army Corps of Engineers to carry out the repair work it conducted in August 2023, which was dam safety work required by the Oregon Water Resources Department. Each of those agencies issue permits only for activities that fall within their relevant jurisdiction. ODFW’s authorization to temporarily block fish passage during a specified in-water work period was necessary for WWCD to carry out its planned work set forth in ODFW’s Fish Passage Authorization issued in December of 2022, but ODFW was not authorizing the work itself. Exhibit B (ODFW’s December 2022 FPA) (“ODFW finds the proposed Winchester Dam repairs described in the FPPA (the “Project”) prevents or precludes upstream passage of native migratory fish by temporarily dewatering and closing the fish ladder located at Winchester Dam; therefore, this Fish Passage Authorization is required by ORS 509.585 and in Oregon Administrative Rule (OAR) 635-412-0020, 635-412-0035(1) and (10) prior to WWCD commencing the project.”).

¹⁵ *See Webster’s Third New International Dictionary*, at 1923.

¹⁶ *Id.* at 1653.

¹⁷ *Id.* at 1452.

WWCD's installation of UHMW sheeting on surface area of Winchester dam in 2023 constituted or otherwise qualified as construction, because this repair, patch, or modification occurred on approximately 43% of the linear length of the dam. *See* OAR 635-412-0005(10)(b)(A)(ii) (defining "construction" as that term is used in Oregon's Fish Passage laws to mean a repair, patch, or modification "to over 30 percent of the area of the upstream, downstream, or top face of the dam (measured above the natural ground gradeline that is used to impound water).").

WWCD's installation of UHMW sheeting on surface area of Winchester dam in 2023 required WWCD to submit a fish passage plan or request for an exemption prior to carrying out that additional work. *See* ORS 509.585(4) (requiring an owner or operator of an artificial obstruction to obtain "[a]pproval of the proposed fish passage facility or of the alternatives to fish passage prior to construction * * * of the artificial obstruction in any waters of this state"); OAR 635-412-0020(3) (requiring same).

WWCD's failure to submit a fish passage plan or request for an exemption, and to receive ODFW's approval, before WWCD installed/replaced UHMW sheeting on approximately 43% of the linear length of the dam, renders WWCD in non-compliance with ORS 509.585(4) and OAR 635-412-0020(3); therefore, subject to an obligation to install fish passage or to provide alternatives to fish passage at the Winchester dam. ORS 509.585(4) (requiring *before* any activity that qualifies as "construction" on an artificial obstruction, as defined by OAR 635-412-0005(10), the owner or operator of an artificial obstruction to request and receive approval from ODFW of a fish passage plan or an exemption); OAR 635-412-0020(3) (requiring same).

In addition, WWCD's installation to surface area of upstream, downstream, or top face of the dam of approximately 360 square feet of additional wood deck repair and 120 square feet of wood deck repair adjacent to intake gate and additional foam injections filling voids along south bank near powerhouse, modified the surface area of the dam in a manner that contributed to the cumulative total that exceeds 30 percent of the area of the upstream or top face of the dam. *See* OAR 635-412-0005(10)(b)(A)(ii) (defining "construction" as that term is used in Oregon's Fish Passage laws to include for existing dams a repair, patch, or modification that combined with other repairs, patches, or modifications, cumulatively exceed "over 30 percent of the area of the upstream, downstream, or top face of the dam (measured above the natural ground gradeline that is used to impound water).").

Further, WWCD's replacement of an additional volume to the concrete wall at fishway/dam connection along north abutment, a wider and deeper concrete sill, and concrete cap work at Bay 40, when combined with other planned and additional replacement of the structure may exceed 30 percent by structure volume. *See* OAR 635-412-0005(10)(b)(A)(i) (defining "construction" as that term is used in Oregon's Fish Passage laws to include "[f]or existing dams * * * either a single or cumulative * * * replacement of 30 percent by structure volume.").

Accordingly, WWCD's failure to submit a fish passage plan or request for an exemption, and to receive ODFW's approval of same, before WWCD repaired approximately

480 square feet of additional wood deck, replaced the concrete wall at fishway/dam connection along, replaced additional concrete wall at fishway/dam connection along north abutment, reinforced concrete sill, injected foam along south bank near powerhouse, and performed concrete cap work at Bay 40, may render WWCD in non-compliance with ORS 509.585(4) and OAR 635-412-0020(3); therefore, WWCD may also be subject to an obligation to install fish passage or to provide alternatives to fish passage at the Winchester dam for this additional reason. ORS 509.585(4) (requiring *before* any activity that qualifies as “construction” on an artificial obstruction, as defined by OAR 635-412-0005(10), the owner or operator of an artificial obstruction to request and receive approval from ODFW of a fish passage plan or an exemption); OAR 635-412-0020(3) (requiring same).

It is the policy of the state to provide fish passage for NMF at artificial obstructions. ORS 509.585(1). Oregon law provides that a person owning or operating an artificial obstruction shall, prior to construction of an artificial obstruction in any waters of this state where native migratory fish are or historically have been present, obtain ODFW approval of a fish passage plan or an exemption. ORS 509.585(4) and OAR 635-412-0020(3).

ODFW has concluded it is advisable to install fish passage at Winchester dam because the dam is listed as a fish passage priority on ODFW’s 2019 Statewide Fish Passage Barrier Priority List and due to the critical importance to the continued existence of all NMF in the North Umpqua River of potentially (if not more than) 160 miles of quality upstream mainstem river habitat above Winchester dam. Fish passage at Winchester dam that meets existing passage design criteria would allow NMF species efficient uninterrupted access without undue harm, physical injury, stress, and migration delay. Fish passage at Winchester dam that conforms to current state and federal design standards is necessary to maintain fish populations in the Umpqua River Basin as well as to promote recovery and survival of state sensitive and state and federally-listed threatened NMF species.

ORS 509.625(3)(b)(A) authorizes ODFW to order installation of fish passage at Winchester dam without regard for funding sources because WWCD is already subject to an obligation to install fish passage or provide alternatives to fish passage at Winchester dam.

VI. PROPOSED ORDER

Based upon the Findings of Fact contained herein and consistent with the Conclusions of Law set forth above, the Department proposes to issue the following order:

Pursuant to ORS 509.625(3)(b)(A), WWCD must install fish passage at Winchester dam consistent with the following timeline and applicable criteria set forth in OAR 635-412-0035(1), (2), (7), and (10) to accommodate passage of the NMF and their corresponding migratory timing identified in Exhibit F (List of Native Migratory Species), except as amended by prior written authorization of ODFW:

1. January 1, 2025, to December 31, 2025 (12 months)

a. Project Engineering Design Plans Development and Completion:

i. Upstream passage requirements:

- 1. vertical slot (possible dual slot) fishway configuration,**

2. 6” pool to pool Water Surface Elevation (WSE) differential,
3. provide provisions to ensure adequate lamprey passage as well as all other native migratory fish,
4. screened auxiliary water system (AWS),
5. provide criteria attraction flow,
6. develop detailed construction sequencing and other plans consistent with requirements set forth below;
and, as necessary to monitor effectiveness of the fish passage facility,
7. fish counting window and facility,
8. pit tag arrays at the fishway entrance(s), midpoint, and exit(s), and
- ii. Downstream passage requirements:
 1. modify spillway to maintain regulated WSE above the dam,
 - a. modeled flows and design to compliment passage at fishway,
 - b. screen fishway AWS designed to current NMFS guidelines,
- iii. Detailed de-watering, work area isolation, and fish rescue and salvage plans;
- iv. Design related to the permanent abandonment of the North Bank Fishway;
- b. Interagency Coordination:
 - i. Frequent check-ins with ODFW: kickoff, preliminary, 30%, 60%, 90% and 100% final design intervals;
 - ii. Include local, county, state and federal regulatory agencies in design development and review;
- c. Final Engineering Design Plans and Specifications:
 - i. 100% engineered stamped design plan set & specifications.

2. January 1, 2026, to June 30, 2026 (6 months)

- a. Permit Submission and Acquisition:
 - i. ODFW Fish Passage Plan Authorization, including approval of plan for work area isolation,
 - ii. Fish Rescue & Salvage Permit(s);
 - iii. Oregon Water Resources Department confirmation of valid water right(s) or authorization(s), as applicable;
 - iv. U.S. Army Corps of Engineers-Oregon Department of State Lands Joint Fill-Removal Permit;
 - v. NOAA Fisheries ESA Consultation;
 - vi. Oregon Department of Environmental Quality, Clean Water Act, Section 401 Certification;
 - vii. National Historic Preservation Act (Section 106) Authorization;
 - viii. Local and County Permit(s);
 1. FEMA Floodway Permit,
 - ix. Any other applicable federal or state permit(s) required.

3. July 1, 2026, to December 31, 2028 (29 months)

- a. Project Implementation/Construction:

- i. Appropriate agency notification in advance of project commencement,
- ii. Frequent coordination, site inspections and schedule updates,
- iii. In-water work shall be complete during ODFW approved in-water work periods,
- iv. Isolate work site as required for anticipated high water events during multi-year construction phases,
- v. Maintain temporary fish passage,
- vi. Detailed fish rescue and salvage plan based on regulatory agency input and approval, including
 - 1. adequately staffed and managed fish salvage and relocation operations, and
 - 2. use of temporary water management and work area isolation to avoid harm to applicable species,
- vii. Construct new fishway and AWS (2026 -2027 in-water work windows),
- viii. Permanently abandon existing North Bank Fishway and related infrastructure (2028 in-water work window);
- ix. Project completion December 31, 2028.

4. January 1, 2029, to December 31, 2039 (10 years or to be determined)

- a. Post Project Installation Certification and Long-term Monitor & Reporting.

5. WWCD Long-term Ownership, Maintenance, and Operation of Fishway

- a. ORS 509.610 requires WWCD to maintain and operate fish passage in such repair so as to provide adequate fish passage of NMF species at all times, including without limitation monitoring and evaluating ongoing effectiveness of fish passage.

VII. RIGHT TO A HEARING

You are entitled to request a hearing as provided by the Oregon Administrative Procedures Act (chapter 183, Oregon Revised Statutes) and OAR 137-003-0001. To request a hearing, you must file a written request with the Oregon Department of Fish and Wildlife to the address and contact person specified immediately below **within 30 days of the service date of this Notice** (e.g. within 30 days of the date of mailing). If a request for hearing is not postmarked within this 30-day period, your right to a hearing shall be considered waived. Requests must be made to:

**Oregon Department of Fish and Wildlife
 ATTN: Greg Apke, ODFW Fish Screens and Passage Program Manager
 4034 Fairview Industrial Drive SE
 Salem, OR 97302**

If you request a hearing, you will be notified of the time and place of the hearing. If the recipient of this enforcement notice is a corporation, partnership, limited liability company, unincorporated association, trust, or other entity that is not a natural person or individual, it must be represented in the contested case process by an attorney unless

otherwise authorized by law. Furthermore, the attorney representing such a corporation or other entity must ratify the request for hearing, in writing, within 28 days of the date that the request is received by ODFW, see OAR 137-003-0550. This provision does not, however, require any entity to be represented by an attorney at any informal conference. Individuals may but are not required to be represented by counsel. The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources. ODFW will be represented by legal counsel. Any hearing will be conducted by an administrative law judge from the Office of Administrative Hearings, assigned as required by ORS 183.635. Such a hearing would be governed by ORS chapter 183 as well as OAR 635-001-0005 and OAR 137-003-0501 through -0700. The Oregon Fish and Wildlife Commission has authority to issue the final order. Included with this mailing is information on the procedures, right of representation, and other rights of parties relating to the conduct of the hearing.

VIII. FINAL ORDER BY DEFAULT

As noted above, if you do not request a hearing within 30 days of the service date of this *Notice*, if you withdraw your request for a hearing, if you notify ODFW or the Administrative Law Judge that you do not intend to appear for the hearing, or if you fail to appear for a hearing on this matter, you will waive your right to a hearing and this *Notice* automatically becomes a *Final Order by Default*. Upon any default, the Department designates its file in this matter as the record, adopts the factual allegations as described herein as findings of fact, and adopts as conclusions of law the conclusions stated herein as a *prima facie* case.

When any final order regarding this Notice becomes final you will have the right to appeal to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the date this order becomes final. If you do not file a petition for judicial review within this time period, you will lose your right to appeal.

IX. NOTICE TO ACTIVE DUTY SERVICEMEMBERS

Active duty service members have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information, contact the Oregon State Bar (800-452-8260), the Oregon Military Department (503-584-3571), or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll-free telephone number.

Issued this 17th day of September, 2024.



Debbie Colbert, Director
Oregon Department of Fish and Wildlife

Notice of Hearing-Notice to Members of the Armed Forces

Active duty Service members have a right to stay these proceedings under the federal Service members Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

In order to qualify for the protections of the SCRA, a service member must show that he/she is: (1) an active duty service member; or (2) a member of the reserve component activated to serve in active federal service; or (3) a National Guard service member under Title 10 of the US Code; or (4) a National Guard service member under Title 32 of the US Code called to active duty for 30 days or more pursuant to a contingency mission specified by the President or Secretary of Defense or serving on Annual Training orders. Some provisions of the SCRA also cover dependents of qualifying service members who rely on the service member for at least half of their income. The SCRA continues to provide some protections for a short period of time after service is concluded. Additional protections may be available under ORS 399.238 if you are a member of the Oregon National Guard. It is important that you be aware of your dates of services at the time you contact the OAH and at hearing.

If you think you may qualify under one of the above criteria it is important that you notify the OAH, and the agency that initiated the action, prior to your hearing date so that steps can be taken to ensure that your rights under the SCRA are followed. You may also contact your Judge Advocate General at the installation where or near where you serve or your chain of command for more information regarding your rights under the SCRA.

Notice to Veterans of the Armed Forces

In 2011, the Oregon Legislature enacted Senate Bill 241 (SB 241). The purpose of SB 241 is for state agencies to assist in informing veterans of access to benefits. The Oregon Department of Veteran's Affairs has published a 40-page comprehensive benefit magazine containing state and federal veteran benefits information including: the disability claims process; contact information for veteran services offices; how to access health care; veteran transportation; veteran trauma education; long term care options; dependent and survivor benefits; burial benefits; education options; home loan information; taxation deferral and exemptions; employment resources and preferences; auto adaptive and clothing allowances; ID, DMV license plates; medals and records; homelessness resources, veterans court's information and recreation benefits and memorials. You can read the entire magazine online at: <http://www.oregon.gov/odva/Documents/Veterans%20Benefits%20Magazine%202012%20sm.pdf>

You can obtain other information regarding your benefits at:
<http://www.oregon.gov/ODVA/pages/index.aspx>

Comunicado de Audiencia – Comunicación a Miembros de las Fuerzas Armadas

Los miembros de las Fuerzas Armadas (Ejército, Marina, Aeronáutica, Infantería de Marina, Guardia Costera y Guardia Nacional) podrán aspirar a la protección acordada por “Servicemembers’ Civil Relief Act” (SCRA) (Ley de Asistencia Civil a miembros del Servicio) 501 50 USC § y normas relacionadas, conforme a enmienda. El SCRA otorga protecciones a miembros del servicio y a las personas a su cargo que reúnan requisitos específicos. Quienes reúnan los requisitos del SCRA podrán someter su pedido ante el “Office of Administrative Hearings” (OAH) (Oficina de Audiencias Administrativas) solicitando su diferimiento por causa de servicio militar. El SCRA suministra, además, otras protecciones. Para más informaciones, los miembros del servicio podrán contactar el “Oregon State Bar” desde el territorio del Estado a través de su línea gratuita, llamando al (800) 452-8260 / (503) 620-0222 ó al Oregon Military Department, llamando al (800) 452-7500. Podrá accederse al “Legal Assistance Legal Services Locator” de las Fuerzas Armadas de los EEUU a través de: legalassistance.law.af.mil

Para aspirar a las protecciones del SCRA, el miembro del servicio deberá presentar evidencias de ser: miembro activo del servicio, o (2) miembro del módulo de reserva activado para prestar servicios en el servicio federal activo; o (3) miembro del servicio de la Guardia Nacional, de conformidad al Title (Título) 10 del US Code (Código de los EEUU) o (4) miembro del servicio de la Guardia Nacional de acuerdo al Title (Título) 32 del US Code (Código de los EEUU) llamado para cumplir servicios activos durante 30 días o más en cumplimiento de misiones eventuales especificadas por el Presidente o la Secretaría de Defensa o en servicio de disposiciones de Entrenamiento Anual. Algunas de las provisiones del SCRA cubren también a las personas a cargo de los miembros del servicio que tengan derecho y que representen por lo menos la mitad de su ingreso. El SCRA continuará proporcionando algunas protecciones por un breve periodo de tiempo una vez que el servicio haya sido completado. Los miembros del “Oregon National Guard” podrán contar con protecciones adicionales, de conformidad con ORS 399.238. Es importante que conozca las fechas de servicios, tanto en el momento en que contacte el OAH, como en el momento de la audiencia.

De considerarse encuadrado dentro de los requisitos mencionados, es importante que, con anterioridad a la fecha de audiencia, notifique al OAH y a la agencia en la que inició la acción, de manera de poder tomarse los recaudos necesarios para asegurar que los derechos otorgados por SCRA sean tenidos en consideración. En relación a los derechos mencionados en SCRA y, para mayor información, podrá también contactar al “Judge Advocate General” de la sede en la que presta servicios, a una cercana a ésta, o a su cadena de commandos.

Aviso a los veteranos de las fuerzas armadas

En 2011, el Cuerpo Legislativo de Oregon promulgó el Proyecto de Ley del Senado número 241 (SB 241). El propósito del SB 241 es que las agencias estatales ayuden a informar a los veteranos sobre el acceso a beneficios. El Departamento de Asuntos para Veteranos de Oregon ha publicado una completa revista de 40 páginas sobre los beneficios, la cual contiene información sobre beneficios estatales y federales para veteranos incluyendo: el proceso de reclamación por discapacidad; información de contacto de las oficinas de servicios para veteranos; cómo obtener acceso a atención médica; transporte para veteranos; educación sobre trauma para veteranos; opciones de atención médica a largo plazo; beneficios para dependientes y sobrevivientes; beneficios funerarios; opciones educativas; información de préstamos para vivienda; aplazamiento de impuestos y exenciones; recursos y preferencias laborales; adaptaciones para vehículos y asignaciones para ropa; identificaciones, placas DMV; medallas y registros; recursos de vivienda, información legal para veteranos y beneficios recreativos y de monumentos. Puede leer la revista completa en línea en: <http://www.oregon.gov/odva/Documents/Veterans%20Benefits%20Magazine%202012%20sm.pdf>. Usted puede obtener más información sobre sus beneficios en: <http://www.oregon.gov/ODVA/pages/index.aspx>

NOTICE OF CONTESTED CASE RIGHTS AND PROCEDURES

Pursuant to ORS 183.413(2), you are entitled to be informed of the following:

1. Time and place of hearing. You will receive notice from the Office of Administrative Hearings of the time, date and place of the hearing once the hearing is scheduled. Please see Notice for information and requirements on how to request a hearing.

2. Issues to be considered at hearing. The issues to be considered at hearing are set forth in the notice issued by ODFW (attached hereto), and those issues related to the notice that are properly before the presiding officer to this proceeding. You have the right to respond to all issues properly before the presiding officer and to present evidence and witnesses on those issues.

3. Authority and Jurisdiction for Hearing. The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapter 183 of the Oregon Revised Statutes; the Attorney General's Office of Administrative Hearing Rules, OAR 137-003-0501 to 137-003-0700.

4. Right to attorney. You may be represented by an attorney at the hearing. Parties are ordinarily and customarily represented by counsel. You are not required to be represented by counsel unless you are an agency, trust, corporation, partnership, limited liability company, or unincorporated association. If you are not represented at the hearing and during the hearing you determine that representation by an attorney is necessary, you may request a recess to allow you an opportunity to secure the services of an attorney. The hearing officer or administrative law judge will decide whether to grant such a request. ODFW will be represented by an attorney.

5. Legal aid organizations may be able to assist a party with limited financial resources.

6. Notice to Active Duty Servicemembers. Active duty service members have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information, you may contact the Oregon State Bar (800-452-8260), the Oregon Military Department (503-584-3571), or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll-free telephone number.

7. Administrative Law Judge. The person presiding at the hearing is known as the Administrative Law Judge (ALJ). The ALJ will rule on all matters that arise at the hearing, subject to agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 or OAR 137-003-0569. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings (OAH). The OAH consists of employees of, and independent contractors with, the Chief ALJ.

The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Oregon Fish and Wildlife Commission.

8. Discovery. Discovery is permitted in this proceeding as provided in OAR 137-003-0566 through OAR 137-003-0572. You must first ask the agency to provide you with copies of documents or other information relevant to this proceeding. If you are not satisfied with the response of the agency, you may ask the ALJ to order production of the information you seek in accordance with applicable rules.

9. Witnesses. A witness must testify under oath or affirmation to tell the truth. The agency or ALJ will issue subpoenas for witnesses on your behalf upon a showing that their testimony is relevant to the case and is reasonably needed by you to establish your position. If you are represented by an attorney, your attorney may issue subpoenas for attendance of witnesses at hearing. Payment of witness fees and mileage to the person subpoenaed is your responsibility.

10. Order of evidence. A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the agency's proposed action is appropriate. The order of presentation of evidence is normally as follows:

- a. Testimony of witnesses and other evidence of agency in support of its proposed action.
- b. Testimony of your witnesses and your other evidence.
- c. Rebuttal evidence by agency and by you.

11. Burden of presenting evidence. The burden of presenting evidence to support an allegation or position rests upon the proponent of the allegation or position. If you have the burden of proof on an issue, or if you intend to present evidence on an issue in which the agency has the burden of proof, you should approach the hearing prepared to present the testimony of witnesses, including yourself, and other evidence that will support your position. All witnesses are subject to cross-examination and also to questioning by the ALJ.

12. Admissible evidence. Relevant evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible and will be received. Evidence that is irrelevant, immaterial, or unduly repetitious is excluded. Hearsay evidence is often admissible. The fact that it is hearsay generally affects how much reliance the agency or ALJ will place on it in reaching a decision.

There are four kinds of evidence:

- a. Knowledge of the agency or ALJ. The agency or ALJ may take "official notice" of facts based on the agency's or ALJ's knowledge in a specialized field. This includes notice of general, technical or scientific facts. The agency or ALJ may also take "judicial notice" of a fact that is not subject to reasonable dispute in that it is generally known or is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. You will be informed if the agency or ALJ takes "official notice" or "judicial notice" of any fact and you will be given an opportunity to contest any facts so noticed.

- b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of the facts may be received in evidence.
- c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.
- d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.

13. Objections to evidence. Objections to the admissibility of evidence must be made at the time the evidence is offered. Objections are generally made on one of the following grounds:

- a. The evidence is unreliable;
- b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;
- c. The evidence is unduly repetitious and duplicates evidence already received.

14. Continuances. There are normally no continuances granted at the end of the hearing for you to present additional testimony or other evidence. However, if you can show that the record should remain open for additional evidence, the ALJ may grant you additional time to submit such evidence.

15. Record. A record will be made of the entire proceeding to preserve the testimony and other evidence for appeal. This may be done by use of a tape or digital recorder or court reporter. The record is generally not transcribed, unless there is an appeal to the Court of Appeals. However, you may obtain a copy of the tape recording upon payment of the costs of making a copy of the tape. If a court reporter is used, you may obtain a transcript or a copy of the court reporter's transcript upon payment of a transcription fee or other fee that the parties may agree upon.

16. Proposed Order and Exceptions. The ALJ will issue a proposed order in the form of findings of fact, conclusions of law and recommended agency action. You will be provided with a copy and you will be given an opportunity to make written objections, called "exceptions," to the ALJ's recommendations. You will be notified when exceptions to the proposed order must be filed.

17. Final Order. The Oregon Fish and Wildlife Commission will render the final order in this case. The Commission may modify the proposed order issued by the ALJ. If the Commission modifies the proposed order in any substantial manner, the Commission in its order will identify the modification and explain why the Commission made the modification. The Commission may modify a proposed finding of "historical" fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

18. Appeal. If you wish to appeal the final order, you must file a petition for judicial review with the Oregon Court of Appeals within 60 days after the final order is served upon you. See Oregon Revised Statutes 183.482.

CERTIFICATE OF SERVICE

On **September 17, 2024**, I mailed the foregoing *Notice of Non-Compliance, Notice of Proposed Order, and Opportunity for Contested Case Hearing, including Exhibits*, to the following individual(s) by First Class **and** Certified Mail **and** Email.

Winchester Water Control District
PO Box 661
Winchester, OR 97495
rbeckley@terrafirmafs.com

Dominic M. Carollo
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Svetlana Gulevkin

Svetlana M. Gulevkin
Oregon Department of Justice