BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON DEPARTMENT OF FISH AND WILDLIFE

IN THE MATTER OF:	)	**PROPOSED ORDER**
	)	
WINCHESTER WATER CONTROL DISTRICT	)	OAH Case No. 2024-ABC-06772
	)	DOJ File No. 635020-GN0277-24
	)	

HISTORY OF THE CASE

On September 17, 2024, the Oregon Department of Fish and Wildlife (Department) issued a Notice of Non-Compliance, Proposed Order, and Opportunity for Contested Case Hearing (Notice) to the Winchester Water Control District (Respondent), which required that Respondent install fish passage at Winchester Dam consistent with the Department's current standards. On October 3, 2024, Respondent requested a hearing to contest the Notice. On October 29, 2024, the Department referred the matter to the Office of Administrative Hearings (OAH) for the scheduling of a contested case hearing. The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Alison Webster.

On December 3, 2024, ALJ Webster convened a prehearing conference to clarify the hearing issues, schedule the hearing, and set filing deadlines. Senior Assistant Attorney General (AAG) Anika Marriott represented the Department, with Fish Passage and Screens Program Manager Gregory Apke also appearing for the Department. Attorneys Dominic Carollo and Nolan Smith represented Respondent. ALJ Webster scheduled the hearing for July 14 through 18, 2025, and set the following relevant filing deadlines: March 14, 2025, for any motions for summary determination (MSDs); April 2, 2025, for any MSD Responses; and April 9, 2025, for any Replies in support of an MSD.

On December 9, 2024, the OAH reassigned the matter to Senior ALJ Bradley A. Schmidt.

On February 6, 2025, WaterWatch of Oregon, the Steamboaters, the Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (Limited Parties) jointly filed a Petition for Party Status with the Department. On February 28, 2025, the Department issued an Order Conditionally Approving Limited Party Status, which granted limited party status and set parameters on the Limited Parties' participation in the contested case.[1]

[1] The Order Conditionally Approving Limited Party Status permitted the Limited Parties to participate in the proceedings in the following ways: written response to a party's MSD (but not the ability to independently file motions); submission of exhibits at the hearing (but no participation in the discovery process); cross-examination of Department and Respondent witnesses during the hearing (but not the

On March 12, 2025, Respondent filed an MSD with supporting documents. On March 14, 2025, the Department filed an MSD with supporting documents. On April 2, 2025, the Department and Respondent both filed a Response with additional supporting documents, and the Limited Parties filed a Brief in Opposition to Respondent's MSD. On April 9, 2025, the Department and Respondent both filed a Reply.

On May 2, 2025, the Department filed a Motion to Compel Response to Discovery Requests (Discovery Motion) and supporting documents. On May 8, 2025, Respondent filed a Response in Opposition to ODFW's Motion to Compel and Cross Motion for Order Regarding Expert Disclosures (Cross Motion). On May 15, 2025, the Department filed a Response to the Cross Motion.

On May 29, 2025, ALJ Schmidt issued a Ruling on Motions for Summary Determination, which granted in part and denied in part the Department's MSD and denied Respondent's MSD.[2] ALJ Schmidt also issued a Ruling that granted in part and denied in part the Department's Discovery Motion and denied Respondent's Cross Motion.

On July 14, 2025, ALJ Schmidt convened the hearing at the Office of Administrative Hearings in Salem, Oregon. Mr. Carollo and Mr. Smith represented Respondent, with Respondent's president, Ryan Beckley, attending the hearing and testifying as a witness for both the Department and Respondent. Ms. Marriott represented the Department, with Mr. Apke appearing from the Department and testifying on its behalf. The Department called the following additional witnesses: Department Fish Passage Engineer Joel Watts; DOWL[3] Project Manager James Stupfel; DOWL Project Engineer Ben Wardell; TerraFirma[4] Commercial Program Manager Andrea Knudson; TerraFirma Project Manager Daniel Holborow; Department Fish Biologist Evan Leonetti; and Department Director Shaun Clements, PhD. Respondent called the following additional witnesses: former Department Fish Screen and Passage Program Manager Alan Ritchey; Strata Design Geotechnical Engineer Frederick Thrall, PhD; Department Fish Technician Fabian Carr; and Department Umpqua Watershed District Manager Greg Huchko. In rebuttal, the Department recalled Mr. Watts and Mr. Huchko.

The parties completed all witness testimony on July 17, 2025, but asked that the record remain open for the submission of written closing arguments. ALJ Schmidt granted the parties

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ability to call their own witnesses), and submission of a written closing argument if the ALJ permitted the named parties to submit written closing arguments. The Limited Parties acted as a unified entity throughout the proceedings.

[2] The Ruling on Motions for Summary Determination ruled that the Department did not exceed its statutory authority in enacting the current version of OAR 635-412-0005(10)(b) but otherwise ruled against the issues raised by the parties in their Motions.

[3] DOWL is the engineering firm that was contracted by Respondent in the project that is at issue in the present matter.

[4] TerraFirma is the primary contractor that executed the project that is at issue in the present matter. Its owner and president, Mr. Beckley, is also president of Respondent's board.

until September 10, 2025, for the submission of written closing arguments, with responses due by October 10, 2025.

The Department, Respondent, and the Limited Parties all submitted timely written closing arguments on September 10, 2025.

On October 10, 2025, the Department, Respondent, and the Limited Parties all submitted timely written responses. The record closed on October 10, 2025.

ISSUES

1. Whether Respondent executed "construction" on Winchester Dam during the repairs it completed in August and September of 2023. ORS 509.580; ORS 509.585; OAR 635-412-0005(9) (2006), *amended by* DFW 154-2022 (January 1, 2023); OAR 635-412-0020(2) (2006), *amended by* DFW 154-2022 (January 1, 2023); OAR 635-412-0005(10); OAR 635-412-0020(2).

2. If so, whether the Department may require that Respondent install Department-approved fish passage at Winchester Dam in accordance with the terms of the Notice. ORS 509.585; ORS 509.625; OAR 635-412-0005(49); OAR 635-412-0020.

EVIDENTIARY RULINGS

Department Exhibits

The status of the exhibits offered into evidence by the Department is as follows:

Department Exhibits		
No.	**Status**	**Respondent Objections; ALJ's Rulings**
A1	Admitted	None
A2	Admitted	None
A3	Admitted	None
A4	Admitted	None
A5	Admitted	None
A6	Admitted	Relevance and Lack of Foundation; Objections Overruled
A7	Admitted	Relevance and Lack of Foundation; Objections Overruled
A8	Admitted	Relevance and Lack of Foundation; Objections Overruled
A9	Admitted	None
A10	Admitted	Relevance and Lack of Foundation; Objections Withdrawn
A11	Admitted	None
A12	Admitted	Relevance and Lack of Foundation; Objections Overruled
A13	Admitted	None
A14	Admitted	None
A15	Admitted	Relevance and Lack of Foundation; Objections Overruled

A16	Admitted	Relevance and Lack of Foundation; Objections Overruled
A17	Admitted	Relevance and Lack of Foundation; Objections Overruled
A18	Admitted	Relevance and Lack of Foundation; Objections Overruled
A19	Admitted	Relevance and Lack of Foundation; Objections Overruled
A20	Admitted	Relevance and Lack of Foundation; Objections Overruled
A21	Admitted	Relevance and Lack of Foundation; Objections Overruled
A22	Admitted	Relevance and Lack of Foundation; Objections Overruled
A23	Admitted	Relevance and Lack of Foundation; Objections Overruled
A24	Admitted	Relevance and Lack of Foundation; Objections Overruled
A25	Admitted	Relevance and Lack of Foundation; Objections Overruled
A26	Admitted	None
A27	Admitted	Relevance and Lack of Foundation; Objections Overruled
A28	Admitted	None
A29	Admitted	None
A30	Admitted	Relevance and Lack of Foundation; Objections Overruled
A31	Admitted	Relevance and Lack of Foundation; Objections Overruled
A32	Admitted	Relevance and Lack of Foundation; Objections Overruled
A33	Admitted	Relevance and Lack of Foundation; Objections Overruled
A34	Admitted	Relevance and Lack of Foundation; Objections Overruled
A35	Admitted	Relevance and Lack of Foundation; Objections Overruled
A36	Admitted	Relevance and Lack of Foundation; Objections Overruled
A37	Admitted	None
A38	Admitted	None
A39	Admitted	None
A40	Admitted	None
A41	Admitted	None
A42	Admitted	Relevance and Lack of Foundation; Objections Overruled
A43	Admitted	Relevance and Lack of Foundation; Objections Overruled
A44	Admitted	None
A45	Admitted	None
A46	Admitted	None
A47	Admitted	None
A48	Admitted	None
A51	*Withdrawn*	
A52	Admitted	None

Respondent Exhibits

At the hearing, the ALJ reserved ruling on the admission of a few of Respondent's exhibits. The first exhibit still awaiting ruling is R36, an email from Mr. Huchko to Mr. Beckley dated April 14, 2020. The email purports to summarize a March 20, 2020, conversation between

Mr. Huchko and Mr. Beckley regarding Respondent's repair efforts at Winchester Dam. The Department objected to this exhibit because it was not authenticated at the hearing. The Department's objection is construed as an argument that, absent testimony to establish that the document is authentic, it is not evidence "of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs" and so should not be admitted into evidence under ORS 183.450(1).

However, a review of other documents admitted into evidence without objection sufficiently corroborated the contents of R36 to militate in favor of its admission. For example, Exhibits R37 and R38 consist of email threads between Mr. Watts, Department employee Tim Walters, and Mr. Beckley, which occurred between April 23, 2020 and May 8, 2020. Mr. Huchko was copied on both email threads, which touched upon some of the same information conveyed in Exhibit R36. Similarly, Exhibit R39 consists of an email from Mr. Huchko to Mr. Beckley dated June 17, 2020, summarizing a meeting they had earlier that day to discuss the need for additional repairs at the dam. This corroborated that Exhibit R36 is the type of communication that Mr. Huchko sent to Mr. Beckley regarding their conversations. None of the substantive information within Exhibit R36 differs in any material respect from the other evidence admitted at the hearing. In short, Exhibit R36 appears to be of a piece with the other evidence admitted, merely adding minor details to the timeline of events. Given its consistency with the other evidence, it appears to be sufficiently reliable to admit into evidence. The Department's objection is overruled, and Exhibit R36 is admitted.

The ALJ also reserved ruling on the admissibility of Respondent's Exhibits R160 and R163. These two exhibits are declarations of DOWL employee Brian Meunier in support of a stay of proceedings in *Waterwatch of Oregon v. Winchester Water Control District*, a case before the US District Court for the District of Oregon. The Department objected to these exhibits because Mr. Meunier would not be present for the hearing and thus would not be available for cross examination. This objection alludes to ORS 183.450(3), which states that "[e]very party shall have the right of cross-examination of witnesses who testify" in contested case hearings.

Because Mr. Meunier did not testify, ORS 183.450(3) did not apply. ORS 183.450(1) states, in relevant part:

> Irrelevant, immaterial or unduly repetitious evidence shall be excluded * * *. All other evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs shall be admissible. * * *. Objections to evidentiary offers may be made and shall be noted in the record. Any part of the evidence may be received in written form.

Mr. Meunier's declarations consisted of "statement[s], other than [those] made by [a] declarant while testifying at the * * * hearing, offered in evidence to prove the truth of the matter asserted." OEC 801(3). In other words, the evidence within R160 and R163 consists of hearsay. *Id.*; *see also* OEC 801(4)(a) ("A statement is not hearsay if * * * [t]he declarant testifies at the * * * hearing and is subject to cross-examination concerning the statement * * *.").

As explained by the Oregon Supreme Court, "Hearsay evidence is as admissible under

ORS 183.450(1) as any other evidence as long as it meets the statutory test of reliability." *Reguero v. Tchr. Standards & Pracs. Comm'n*, 312 Or 402, 417 (1991) (footnote omitted). Over the course of the hearing, no evidence was presented to suggest that the information in Exhibits R160 and R163 was unreliable. Sworn declarations submitted during the course of litigation are evidence of a type commonly relied upon by reasonably prudent persons—including federal judges—in conduct of serious affairs. Therefore, the Department's objections are overruled, and Exhibits R160 and R163 are admitted into evidence.

Given these rulings, the status of the Respondent's exhibits is as follows:

Respondent Exhibits		
No.	**Status**	**Department Objections; ALJ's Rulings**
R1	Admitted	None – Admitted by Stipulation of the Parties
R2	Admitted	None – Admitted by Stipulation of the Parties
R3	Admitted	None – Admitted by Stipulation of the Parties
R4	Admitted	None – Admitted by Stipulation of the Parties
R5	*Withdrawn*	
R6	Admitted	Lack of Authentication; Objection Overruled
R7	Admitted	Lack of Authentication; Objection Overruled
R8	Admitted	Lack of Authentication; Objection Overruled
R9	Admitted	Lack of Authentication; Objection Overruled
R10	Admitted	Lack of Authentication; Objection Overruled
R11	Admitted	Lack of Authentication; Objection Overruled
R12	Admitted	Lack of Authentication; Objection Overruled
R13	Admitted	None
R14	Admitted	None
R15	Admitted	None
R16	Admitted	None
R17	Admitted	None
R18	Admitted	None
R19	Admitted	Lack of Authentication; Objection Overruled
R20	Admitted	Lack of Authentication; Objection Overruled
R21	Admitted	Lack of Authentication; Objection Overruled
R22	Admitted	Lack of Authentication; Objection Overruled
R23	Admitted	Lack of Authentication; Objection Overruled
R24	Admitted	Lack of Authentication; Objection Overruled
R25	Admitted	Lack of Authentication; Objection Overruled
R26	Admitted	Lack of Authentication; Objection Overruled
R27	*Withdrawn*	
R28	*Held in Reserve – Not Offered*	
R29	Admitted	None

R30	Admitted	None
R31	Admitted	None
R32	Admitted	Relevance and Lack of Foundation; Objections Overruled
R33	Admitted	Relevance and Lack of Foundation; Objections Overruled
R34	Admitted	None – Admitted by Stipulation of the Parties
R35	Admitted	None – Admitted by Stipulation of the Parties
R36	Admitted	Lack of Authentication; Objection Overruled (See Above)
R37	Admitted	None – Admitted by Stipulation of the Parties
R38	Admitted	None – Admitted by Stipulation of the Parties
R39	Admitted	None – Admitted by Stipulation of the Parties
R40	*Withdrawn*	
R41	Admitted	None – Admitted by Stipulation of the Parties
R42	Admitted	None – Admitted by Stipulation of the Parties
R43	Admitted	None – Admitted by Stipulation of the Parties
R44	Admitted	None – Admitted by Stipulation of the Parties
R45	Admitted	None – Admitted by Stipulation of the Parties
R46	*Withdrawn*	
R47	Admitted	None – Admitted by Stipulation of the Parties
R48	Admitted	None – Admitted by Stipulation of the Parties
R49	*Withdrawn*	
R50	Admitted	None – Admitted by Stipulation of the Parties
R51	Admitted	None – Admitted by Stipulation of the Parties
R52	Admitted	None – Admitted by Stipulation of the Parties
R53	Admitted	None – Admitted by Stipulation of the Parties
R54	Admitted	None – Admitted by Stipulation of the Parties
R55	Admitted	None – Admitted by Stipulation of the Parties
R56	Admitted	None – Admitted by Stipulation of the Parties
R57	Admitted	None – Admitted by Stipulation of the Parties
R58	Admitted	None – Admitted by Stipulation of the Parties
R59	Admitted	None – Admitted by Stipulation of the Parties
R60	Admitted	None – Admitted by Stipulation of the Parties
R61	*Held in Reserve – Not Offered*	
R62	Admitted	None – Admitted by Stipulation of the Parties
R63	*Held in Reserve – Not Offered*	
R64	*Held in Reserve – Not Offered*	
R65	Admitted	None – Admitted by Stipulation of the Parties
R66	Admitted	None – Admitted by Stipulation of the Parties
R67	Admitted	None
R68	Admitted	None – Admitted by Stipulation of the Parties
R69	Admitted	None – Admitted by Stipulation of the Parties

R70	Admitted	None
R71	Admitted	None
R72	*Held in Reserve – Not Offered*	
R73	Admitted	None – Admitted by Stipulation of the Parties
R74	Admitted	None – Admitted by Stipulation of the Parties
R75	Admitted	None – Admitted by Stipulation of the Parties
R76	Admitted	None – Admitted by Stipulation of the Parties
R77	Admitted	None
R78	Admitted	None
R79	Admitted	None
R80	Admitted	None
R81	Admitted	None – Admitted by Stipulation of the Parties
R82	Admitted	None – Admitted by Stipulation of the Parties
R83	*Held in Reserve – Not Offered*	
R84	*Withdrawn*	
R85	*Held in Reserve – Not Offered*	
R86	*Withdrawn*	
R87	*Held in Reserve – Not Offered*	
R88	Admitted	None
R89	*Held in Reserve – Not Offered*	
R90	Admitted	None – Admitted by Stipulation of the Parties
R91	*Held in Reserve – Not Offered*	
R92	*Held in Reserve – Not Offered*	
R93	*Held in Reserve – Not Offered*	
R94	*Held in Reserve – Not Offered*	
R95	*Held in Reserve – Not Offered*	
R96	*Held in Reserve – Not Offered*	
R97	*Held in Reserve – Not Offered*	
R98	*Held in Reserve – Not Offered*	
R99	Admitted	None
R100	*Held in Reserve – Not Offered*	
R101	*Held in Reserve – Not Offered*	
R102	*Held in Reserve – Not Offered*	
R103	*Held in Reserve – Not Offered*	
R104	Admitted	None
R105	Admitted	None – Admitted by Stipulation of the Parties
R106	Admitted	None – Admitted by Stipulation of the Parties
R107	Admitted	None – Admitted by Stipulation of the Parties
R108	Admitted	None – Admitted by Stipulation of the Parties
R109	*Withdrawn*	

R110	Admitted	None – Admitted by Stipulation of the Parties
R111	Admitted	None – Admitted by Stipulation of the Parties
R112	*Withdrawn*	
R113	Admitted	None
R114	Admitted	None – Admitted by Stipulation of the Parties
R115	Admitted	None – Admitted by Stipulation of the Parties
R116	Admitted	None – Admitted by Stipulation of the Parties
R117	Admitted	None
R118	Admitted	None – Admitted by Stipulation of the Parties
R119	Admitted	None
R120	Admitted	None – Admitted by Stipulation of the Parties
R121	Admitted	None – Admitted by Stipulation of the Parties
R122	*Held in Reserve – Not Offered*	
R123	*Held in Reserve – Not Offered*	
R124	Admitted	None
R125	Admitted	None
R126	Admitted	None
R127	Admitted	None
R128	Admitted	None – Admitted by Stipulation of the Parties
R129	Admitted	None – Admitted by Stipulation of the Parties
R130	Admitted	None – Admitted by Stipulation of the Parties
R131	Admitted	None – Admitted by Stipulation of the Parties
R132	Admitted	None – Admitted by Stipulation of the Parties
R133	Admitted	None
R134	Admitted	None – Admitted by Stipulation of the Parties
R135	Admitted	None – Admitted by Stipulation of the Parties
R136	Admitted	None – Admitted by Stipulation of the Parties
R137	*Withdrawn*	
R138	Admitted	None
R139	Admitted	None
R140	Admitted	None
R141	Admitted	None
R142	*Held in Reserve – Not Offered*	
R143	*Held in Reserve – Not Offered*	
R144	*Held in Reserve – Not Offered*	
R145	*Held in Reserve – Not Offered*	
R146	*Held in Reserve – Not Offered*	
R147	*Held in Reserve – Not Offered*	
R148	*Held in Reserve – Not Offered*	
R149	*Withdrawn*	

R150	Admitted	None – Admitted by Stipulation of the Parties
R151	Admitted	None
R152	Admitted	Relevance; Objection Overruled
R153		*Held in Reserve – Not Offered*
R154		*Held in Reserve – Not Offered*
R155	Admitted	None
R156		*Held in Reserve – Not Offered*
R157		*Held in Reserve – Not Offered*
R158		*Held in Reserve – Not Offered*
R159	Admitted	None – Admitted by Stipulation of the Parties
R160	Admitted	Unable to Cross Examine Witness; Objection Overruled (See Above)
R161	Admitted	None – Admitted by Stipulation of the Parties
R162		*Held in Reserve – Not Offered*
R163	Admitted	Unable to Cross Examine Witness; Objection Overruled (See Above)
R164	Admitted	None
R165		*Held in Reserve – Not Offered*
R166		*Held in Reserve – Not Offered*
R167		*Held in Reserve – Not Offered*
R168		*Held in Reserve – Not Offered*
R169		*Held in Reserve – Not Offered*
R170		*Held in Reserve – Not Offered*
R171		*Held in Reserve – Not Offered*
R172		*Held in Reserve – Not Offered*
R173		*Held in Reserve – Not Offered*
R174		*Held in Reserve – Not Offered*
R175		*Held in Reserve – Not Offered*
R176		*Held in Reserve – Not Offered*
R177		*Held in Reserve – Not Offered*
R178	Admitted	None
R179	Admitted	None
R180	Admitted	None
R181	Admitted	None
R182	Admitted	None
R183	Admitted	None
R184		*Held in Reserve – Not Offered*
R185	Admitted	None
R186	Admitted	None
R187	Admitted	Relevance
R188	Admitted	Relevance
R189		*Held in Reserve – Not Offered*

R190		*Held in Reserve – Not Offered*
R191		*Held in Reserve – Not Offered*
R192		*Held in Reserve – Not Offered*
R193		*Held in Reserve – Not Offered*
R194		*Held in Reserve – Not Offered*
R195		*Held in Reserve – Not Offered*
R196		*Held in Reserve – Not Offered*
R197		*Held in Reserve – Not Offered*
R198		*Held in Reserve – Not Offered*
R199	Admitted	None – Admitted by Stipulation of the Parties

Limited Party Exhibits

In advance of the hearing, the Limited Parties provided documents marked Exhibit L1 through L26. At the hearing, the Limited Parties clarified that it was holding all exhibits in reserve and only offering them as it deemed necessary over the course of the hearing. The Limited Parties ultimately only offered Exhibits L25 and L26. Respondent objected to the admission of these documents based on relevance and lack of foundation. The objections were overruled; Exhibits L25 and L26 were admitted into evidence.

FINDINGS OF FACT

General Background: Winchester Dam and its Environment

1. The North Umpqua River is a tributary of the Umpqua River that is inhabited, and historically has been inhabited, by native migratory fish species, including winter steelhead, summer steelhead, fall chinook, spring chinook, coho salmon, cutthroat trout, chum salmon, pink salmon, sockeye salmon, pacific lamprey, Umpqua pikeminnow, tyee sucker, and sturgeon. (Exs. A1 at 2, A27 at 13, A31 at 2-3, A32 at 1.)

2. Winchester Dam (the Dam) spans the North Umpqua River in Douglas County, Oregon, approximately five miles north of Roseburg, Oregon, and approximately 118 river miles from the Pacific Ocean, to which the waters of the North Umpqua River and Umpqua River ultimately flow. (Exs. A2 at 1, A10 at 1, R67 at 5; test. of Watts.)

3. At the location of the Dam, the North Umpqua River flows in a roughly southwesterly direction. The Dam lies perpendicular to this flow. (Ex. A13 at 1; test. of Watts.)

4. The Dam was originally constructed in approximately the late nineteenth century and reconstructed in approximately 1905. (Ex. A4 at 3; test. of Beckley.) The Dam was originally constructed as a log crib dam, in which a lattice of horizontal and vertical logs were filled in on the upstream side with natural materials such as rocks, gravel, and sand, with the bulk of the Dam's volume composed of natural infill material. (Exs. A2 at 109, A4 at 3, 155, A12 at 3, A41 at 13; test. of Thrall.)

5. Between 1907, when the Dam's height was increased from its original 4 feet to 16 feet, and the construction of the Fishway in 1923, there was no fish passage at the Dam. (Ex. R67 at 53.) The Fishway was constructed (and still exists) on the downstream side of the Dam near its abutment with the north bank of the North Umpqua River using a pool and weir design (also known as a "fish ladder"). (*Id.*; Exs. A12 at 22, A13 at 1; test. of Watts.)

6. Native migratory fish species utilize the Dam's fish ladder for upstream migration year-round. (Exs. A32 at 1, R178 at 1, R179 at 1, R180 at 1, R181 at 1, R183 at 1.)

7. The efficacy of a dam's fish ladder is reduced when there is inadequate flow of water through the fish ladder or where there are alternate flows of water over or through the dam (such as via leaks) that are strong enough to draw fish away from the fish ladder and induce fish to attempt passage in locations without a way upstream. These alternate flows that draw fish away from a functional fish ladder are called "false attraction flows." (Exs. A12 at 6, 11, A19 at 44-45; test. of Watts, Apke.) Adequate water attraction flow through a fish ladder can be accomplished by means of an auxiliary water system intake (AWS). (Ex. A31 at 5-6.) The Dam has an AWS, located near the southern end of the upstream side of the Fishway. (Ex. A13 at 1; test. of Watts.)

8. For a time, the Dam was owned and operated by an electric power generation company as a hydroelectric power source, with the original powerhouse constructed from concrete on the south abutment of the North Umpqua River. (Exs. R25 at 2; test. of Beckley.) Eventually, the Dam's hydroelectric equipment in the original powerhouse became inoperable. (Test. of Beckley.)

The Dam's Acquisition by Respondent and Subsequent Developments

9. After construction of the Dam, residential property was developed on the banks of the Dam's upstream impoundment. After flooding caused extensive damage to the Dam in approximately 1964, the owners of residential properties along the Dam's upstream impoundment formed the Winchester Water Control District (Respondent), which purchased the Dam from the electric power generation company for one dollar. (Test. of Beckley.)

10. Respondent has quasi-municipal powers and is run by a voluntary nine-person elected Board, with one board member serving as President. (Exs. R57 at 1, R161 at 2.) Respondent's membership consists of the owners of approximately 120 properties near the Dam, and members pay annual assessments for maintenance of the Dam. (Ex. R161 at 2.)

11. As a result of the multiple repairs, additions, and reinforcements to the Dam, both before and after its acquisition by Respondent, the original crib dam structure has become to some degree replaced by, or encased within, subsequent iterations of timber lattice, concrete, and steel. (Exs. A4 at 3-6, 15-17, 115, A41 at 3, 12-13; test. of Watts, Beckley.)

12. In 1983, pursuant to a partnership between Respondent and power generation company Elektra, a new hydroelectric power generation facility was constructed on the north abutment of the Dam. This included the construction of an intake structure (with a fish screen and bypass) upstream of a new North Power Building. It also included the blasting of a new

tailrace[5] into the bedrock south of the new North Power Building, where juvenile fish were deposited downstream. The tailrace joined the North Umpqua River near the entrance to the fish ladder. (R67 at 53-55.) Because of the negative impact of the tailrace on salmonid fish passage, an additional entrance to the fish ladder was added in 1984. (*Id.* at 53, 56.) The Fishway fish ladder thus has two entrances: the original entrance (now referred to as the low water entrance) on its south side, and the entrance added in 1984 (now referred to as the high water entrance) on its north side. (*Id.*; test. of Holborow).

13. In 1985, hydroelectric power generation at the Dam ceased. (Ex. R67 at 56, 60; test. of Beckley.) The Dam now exists to create the impoundment benefitting the properties whose owners compose Respondent. (Ex. R186.)

14. In addition to the Fishway and the remains of the original powerhouse, North Power Building, and intake structure described above, the Dam has a timber dam structure, which replaces (and/or contains the remnants of) the original log crib dam. The timber dam structure extends from the north shore of the North Umpqua River and constitutes the majority of the Dam's span across the river: approximately 392 feet of the total of approximately 529 feet across the North Umpqua River at the Dam's location. The Dam's concrete Fishway lies on the downstream side of the northernmost end of the timber dam structure, with the Fishway's spillway/exit just to the north of the timber dam structure. (Exs. A13 at 1, R25 at 1; test. of Watts.) The timber dam itself has two subdivisions: the 193 feet to the north has a timber cap, and the 199 feet to the south has a concrete cap. (Exs. A4 at 3, 115, A12 at 3-4, 10, 19, A13 at 1; test. of Watts.) The southernmost extreme of the timber dam structure abuts the concrete Spill Gate section of the Dam (containing the original powerhouse), which constitutes the southernmost Dam component and abuts the south bank of the North Umpqua River. The concrete Spill Gate extends approximately 137 feet from the south bank of the North Umpqua River to the southernmost point of the timber dam portion of the Dam. (Ex. A13 at 1; test. of Watts.)

15. The timber cap portion of the timber dam is clad with plywood boards configured in a peaked shape that comes to a crest approximately 5.5 feet upstream of the vertical downstream face of the Dam. This crest is approximately two feet higher than the top of the downstream face of the Dam. As the timber cap extends upstream from its crest, its face slopes downward, traversing a vertical distance of approximately 5.6 feet over a horizontal upstream distance of approximately 12.75 feet. (Ex. A2 at 109.) Since 1996, the timber cap has been covered with ultra-high molecular weight (UHMW) sheeting, which serves to more effectively deflect river debris, thus reducing damage to the timber cap. (Test. of Beckley.) Upstream of the UHMW-covered timber cap, the Dam has no cladding and consists entirely of infill materials. (Exs. A2 at 31, 109, A9 at 2, A41 at 1, 6, 9, 12-13; test. of Watts.)

16. Respondent partially replaced the UHMW sheeting in 2006. (Ex. A41 at 3-4; test. of Beckley.) Respondent again replaced the UHMW sheeting in 2013 in a repair project that also included the filling of the original Powerhouse with gravel to mitigate leakage through the structure. (Exs. A41 at 6-7, R32 at 1-2, 4, R33 at 4; test. of Beckley.)

[5] A tailrace is "a race for conveying water away from a point of industrial application (as a waterwheel or turbine)." *Webster's Third New Int'l Dictionary* 2329 (unabridged ed 1993).

The Need for Repairs Becomes Apparent and Respondent Begins Planning

17. In 2018, Ryan Beckley, owner and president of TerraFirma Foundation Systems, was elected as President of Respondent's Board. Mr. Beckley has had a lifelong interest in the Dam, with multiple generations of his family having owned property above the Dam. (Test. of Beckley.) From his election to the Board through the completion of the project at issue in the present matter, Mr. Beckley repeatedly discussed with Department personnel the Department's fish passage concerns and made repeated suggestions to the Department for potential repairs to address the Department's concerns. (Exs. R37 at 3-4, R38 at 1-6, R60 at 1-4; test. of Beckley, Apke.)

18. Also in 2018, Department staff noted the development of a hole in the upstream face of the Dam. (Ex. A1 at 4.) The hole was located near the AWS for the fish ladder. As the hole grew, Mr. Beckley led an effort to drop sandbags into the hole as a temporary mitigation to leakage through the Dam. On approximately five occasions starting in 2018, individuals working on behalf of Respondent dropped sandbags into the hole, eventually totaling approximately 1,000 sandbags, to reduce leakage. (Exs. A1 at 4, A45 at 1, R35 at 3, R134 at 1, R135 at 1, R136 at 1; test. of Beckley.)

19. In 2019, the Department added the Dam to the Statewide Fish Passage Barrier Priority List. (Ex. A8 at 2; test. of Leonetti.)

20. On October 16, 2019, the Oregon Water Resources Department (OWRD) issued its Inspection Summary related to an inspection of the Dam conducted by the OWRD Dam Safety Program on October 11, 2019. (Ex. R35 at 1.) During the inspection, OWRD inspectors observed several issues with leakage through the Dam. OWRD inspectors observed a whirlpool on the upstream side of the Dam, near the south bank of the North Umpqua River and the old powerhouse, where a sinkhole had previously been known to exist. (*Id.* at 1-2.) The OWRD inspectors also observed water leaking through the Dam at the abutment of the timber cap and concrete cap sections of the Dam and near the southern edge of the Fishway structure. (*Id.* at 2-3.) In the Inspection Summary, OWRD noted that the hole near the AWS, which Respondent had repeatedly filled with sandbags during 2018, appeared to have grown "significantly" over the past year and advised that a permanent solution to the issue was necessary. (*Id.* at 4.) OWRD rated the Dam as "Deficient" in the category of "Seepage/Leakage." (*Id.* at 1.) The OWRD inspectors were unable to assess the overall structural integrity of the Dam. (*Id.* at 1, 3-4.) In the Inspection Summary, OWRD advised Respondent that it needed to have a qualified structural engineer inspect the Dam to assess its safety. (*Id.* at 3-4.) OWRD downgraded the Dam's condition rating from "FAIR" to "POOR" and warned Respondent that a failure to assess the Dam's structural integrity and address its leakage issues could result in a further downgrading to "UNSATISFACTORY" accompanied by administrative enforcement. (*Id.* at 1, 5.)

21. Based upon the potential for OWRD to initiate administrative action against Respondent, Mr. Beckley and the rest of Respondent's Board decided to undertake the structural repairs to the Dam that are the subject of the present litigation. (Ex. R57 at 1; test. of Beckley.)

22. In approximately early 2020, Respondent engaged the services of engineering firm DOWL to conduct a structural inspection on the Dam and design the structural repairs necessary to address the concerns of the OWRD Dam Safety Program. (Ex. R37 at 1.)

23. On or about March 20, 2020, Department Umpqua District Fish Biologist Greg Huchko spoke with Mr. Beckley regarding the Department's ongoing fish passage concerns at the Dam. Specifically, Mr. Huchko wished to discuss the hole near the Fishway AWS and resultant false attraction flow from the leakage out of the downstream face near the Fishway, as well as eroded concrete and exposed rebar on and near the fish ladder that could injure fish. Mr. Huchko explained that the water pouring through the Dam at that location was not only distracting fish from the fish ladder, but had had been observed both in 2019 and 2020 to have caused fish to leap at the Dam, a potential cause of fish injury. Mr. Huchko requested that Respondent address the eroded concrete and exposed rebar as soon as possible. Mr. Huchko expressed the Department's desire that the hole and false attraction flow be addressed by September 30, 2020. (Ex. R36 at 1.)

24. On April 14, 2020, Mr. Huchko sent Mr. Beckley a letter reiterating the Department's concerns as discussed on or about March 20, 2020. In the letter, Mr. Huchko reiterated the Department's wish for the hole and resultant false attraction flow to be addressed by September 30, 2020. (Exs. R36 at 1, R39 at 1.)

25. During April and May 2020, Department staff continued to communicate with Mr. Beckley regarding the concerns of false attraction flow resulting from the hole near the AWS, as well as concerns regarding rough concrete and exposed rebar near the fish ladder's low water entrance that could be contributing to fish injuries. (Exs. A36 at 1-6, A37 at 1-4.) Mr. Beckley suggested less labor-intensive solutions, such as fastening a section of conveyor belt material over the hole. (Ex. R37 at 1, 4.) Department staff, including Fish Passage Engineer Joel Watts, initially insisted upon a more permanent solution to the issue, such as the installation of a steel cap. However, Department staff eventually acquiesced to a more temporary solution. This acquiescence was based upon Mr. Beckley's representation on May 6, 2020, that Respondent would have DOWL design a permanent solution after their planned inspection of the Dam in September 2020, and that he would involve the Department in determining the scope of the repair. (*Id.* at 1-4.)

26. On May 8, 2020, Mr. Beckley emailed Department staff to solicit a list of issues the Department wanted DOWL to include in the expected repair project. (Ex. R38 at 1-2.) Tim Walters, an Umpqua District Fish Biologist at the time, responded on May 12, 2020, with the following list:

> 1. Smooth out fish ladder concrete wall by ladder entrances near the dam, and restore to original height. Ensure a smooth continuous surface with no gaps or abrupt surface changes as it transitions between areas of new and old material.
> 2. Eliminate any exposed rebar/exposed sharp metal edges at/near ladder wall at ladder entrances near the dam (including metal anchor below the wall)[.]
> 3. Provide long-term fix to false attraction hole through dam near ladder entrances.

4. Provide long-term fix to holes through dam along dam face (false attraction)[.]
5. Smooth man-made rough areas (rebar, etc[.]) along downstream face of dam to avoid fish injury as fish jump at the dam[.]
6. Complete all repairs as directed by Oregon Water Resources Department (for example, flow under the south abutment)[.]

(*Id.* at 1; test. of Beckley.)

27. On June 17, 2020, Mr. Beckley met with Mr. Huchko and Mr. Walters at the Dam. At that meeting, the Department staff reiterated that their main concern was the ongoing false attraction flow near the Fishway resulting from the hole near the AWS on the upstream face of the Dam. Mr. Huchko and Mr. Walters acknowledged that Respondent's efforts towards mitigating this issue had been helpful but expressed the Department's desire for a more effective and durable solution. Mr. Beckley explained that Respondent's collaboration with OWRD was ongoing and that, due to logistical and financial constraints, a permanent solution to the issues raised by the Department was unlikely to be implemented during the upcoming OWRD inspection or during the remainder of 2020. (Ex. R39 at 1.)

28. On December 8, 2020, Mr. Walters spoke with Mr. Beckley about the condition of the Dam. During the conversation, Mr. Beckley reiterated his good faith efforts to address fish passage issues by means of temporary fixes including sandbags to block false attraction flow and the grinding and/or covering of rough surfaces. Mr. Beckley informed Mr. Walters that DOWL had not yet completed the final repair design, and that final inspection of the Dam would be completed when the more extensive repairs were completed. Mr. Walters advised Mr. Beckley that Respondent should begin the process of obtaining all the necessary permits to perform the Dam repairs. (Ex. R43 at 1.)

29. On December 9, 2020, Mr. Walters emailed Mr. Beckley to both recap their conversation of the prior day and inform Mr. Beckly that Department employees had recently observed that the sandbags filling the hole in the Dam had sunken into the Dam, resulting in increased false attraction flow. (Ex. R43 at 1.)

30. On January 27, 2021, Mr. Walters spoke with Mr. Beckley regarding the Department's ongoing fish passage concerns, including the "growing hole/depression in the dam adjacent to the fish ladder" with the resultant false attraction flow and "re-exposed eroded concrete and rebar at the foot of the dam and on the fish ladder" that could cause fish injuries. (Ex. R45 at 1.)

31. On February 1, 2021, Mr. Beckley emailed OWRD inspector Tony Janicek to inform him that Respondent would not be able to meet the deadline to have a ballot measure to fund the repair project on the May 2021 ballot, thus delaying completion of planned repairs. Mr. Beckley also informed Mr. Janicek that DOWL was working on contingency plans for additional issues that might be discovered during the repair process. Mr. Beckley added the following:

We will still need to perform an intermediate "repair" on the North end of the

> dam immediately adjacent to the ladder. We have discussed building a small cofferdam out of sandbags, opening up the area that has a shown a small hole, filling the cavity with double[-]wrapped sand bags and replacing the plywood and UHMW cover as well as installing a layer of 1.25" marine plywood on the dam face where the "false attractant" flow is occurring. This should satisfy, at least temporarily, the concerns of [the Department] with respect to impacts to fish passage.

(Ex. R44 at 1.)

32. On February 10, 2021, Department Fish Screen and Passage Program Manager Alan Ritchey sent a letter to Mr. Beckley with reference to the conversation between Mr. Beckley and Mr. Walters on January 27, 2021. Mr. Ritchey expressed the Department's appreciation for Respondent's temporary repairs but asserted that the repairs were ultimately not effective and that the false attraction flow and rough surfaces needed to be permanently addressed as soon as possible. (Ex. R45 at 1-2.)

33. On March 9, 2021, Department Fish Passage Program Coordinator Greg Apke organized and convened the first of several meetings of the Department's Fish Passage Task Force regarding administrative rule revisions related to fish passage in OAR chapter 635, division 412. (Exs. A27 at 3, A29 at 4.) These meetings included the development of proposed changes to definitions relevant to fish passage within OAR 635-412-0005, including an expansion of what would constitute a "trigger" of fish passage review by the Department. (Exs. A27 at 6-9, A29 at 4-6, R65 at 1; test. of Apke.) The purpose of this expansion was to close what the Department regarded as a "loophole" in the existing rules, whereby a party could undertake incremental repairs to a dam which would not trigger the requirement to repair inadequate fish passage, such as by resurfacing a dam without a significant impact on dam's structural volume. At the time, the applicable rules only "triggered" Department authority to require updated fish passage where a repair constituted 30 percent of the total structural volume of the dam. (Ex. A27 at 7, 10; test. of Apke.) The Department determined that an expansion of what constitutes a fish passage "trigger" would bring the rules into better conformity with the legislative intent of Oregon's fish passage statutes to have the owners of artificial obstructions gradually improve fish passage to meet Department standards. (Ex. A27 at 7-8; test. of Apke.) Over the course of the rules review process, the Department proposed multiple potential redefinitions of what could constitute a fish passage "trigger" and solicited public comment on its proposals. (Exs. A27 at 3, 7-8.) Under Mr. Apke's leadership, the Department held approximately 25 additional Fish Passage Task Force meetings between March 2021 and October 7, 2022, to discuss various rule changes, including the fish passage "trigger" standard. (Exs. A27 at 3, A29 at 4-6.)

34. On March 15, 2021, Mr. Beckley sent an email to Mr. Ritchey, Mr. Huchko, and Mr. Apke in response to Mr. Ritchey's February 10, 2021, letter. (Ex. R48 at 3.) Mr. Beckley provided the following updates to Respondent's repair plans:

> We are working with engineers and contractors, developing plans to address the conditions near the entrance to the fish ladder in two phases. The first phase will be during the low water period late this summer, and the second

> phase will be in the late summer of 2022. Phase I will include a localized coffer dam on the upriver side, allowing access to the sources of the leakage that will be filled with material sufficient to stem the flow, and then facing the dam at the place of concern with either 1.25-inch marine plywood or metal, to assure there are no false points of flow that are attractive to fish. The "sharp edges" concern will be addressed by cutting away or grinding sharp, exposed concrete or metal edges that may injure jumping fish. The 2021 work will also include engineering inspections of the exposed structures and tie rods, so that the design of repairs to be completed in 2022 are certain to be long lasting. The work planned for 2021 will be fully adequate to address the issues of concern but will not be as permanent as the work planned for 2022.

(*Id.* at 4.) Mr. Beckley went on to inform the Department employees that the final work would not be completed until 2022 due to the need for bond financing. (*Id.*)

35. On March 16, 2021, Mr. Ritchey emailed a response to Mr. Beckley and asked for details regarding the proposed 2021 coffer dam, any plans for fish salvage during the project, the material to be used to fill in the Dam, and the expected timeline for completion. (Ex. R48 at 2-3.) Mr. Ritchey also reminded Mr. Beckley that he should reach out to the U.S. Army Corps of Engineers (USACE), OWRD, and Oregon Department of State Lands (ODSL) to begin the process of obtaining any permits necessary to complete the project. (*Id.* at 3.)

36. On April 12, 2021, Mr. Ritchey again emailed Mr. Beckley for an update on the planned repairs to the Dam. (Ex. R48 at 2.) The following day, Mr. Beckley responded that Respondent "is continuing to work with our engineers and the appropriate regulatory agencies to develop a repair plan and schedule." (*Id.* at 1.) Mr. Beckley stated that he would be scheduling a meeting regarding the project soon and concluded by stating that he would provide "a more comprehensive update when I have more information to share." (*Id.* at 2.) Later that day, Mr. Ritchey responded to Mr. Beckley, informing him that, per observations made by Department staff that morning, the "depression on the upstream side [of the Dam] has grown about 20% larger since our last observation and now has a more well defined hole in the center that is about the size of a basketball. This appears to be in the plywood/Teflon type cover over the log cribs." (*Id.* at 1.)

37. On July 7, 2021, Respondent filed a request with the USACE for an interagency meeting to include the Department, ODSL, Oregon Department of Environmental Quality (ODEQ), the National Marine Fisheries Service (NMFS), and OWRD. (Exs. R50 at 1, R51 at 1.) The subject of the meeting would be inspection and repair of the Dam "to ensure [its] continuing safe operation." (Ex. R51 at 1.) In its meeting request, Respondent included the following as a "brief breakdown of the proposed work" to be performed in the repair project:

> a. Northern Dam Abutment (near fish ladder)
> - An existing concrete wall and log flow diverter are not currently functioning properly. Water is rushing through this area in the vicinity of the fish ladder. This is creating a false attractant flow that may reduce the effectiveness of the ladder.

- The wall/flow diverter will be inspected to determine how best to decrease the false attractant flow.
- Possible repairs include replacing the log diverter and repairing the leaking wall section with concrete, wood, or other suitable materials.
- **This repair will consist of replacing existing structural elements. There is no anticipated increase in footprint or fill below ordinary high water mark (OHW). Work will take place when the water surface behind the dam is lowered[,] which will limit direct impacts to aquatic species as well as impacts to water quality.**

b. Timber Dam Section
   - Work on this section will include:
     i. Tie rod testing and replacement. If rods fail during testing, new rods and anchors will have to be drilled into the bedrock.
     ii. Timber cribbing inspection and replacement.
     iii. Fill removal and replacement to inspect and repair voids in fill behind the face of the dam.
     iv. Placement of polyurethane foam or grout to fill voids in the fill behind the timber cribbing.
   - Repairs will be made in-kind with similar materials where feasible.
   - **These repairs will consist of replacing existing structural elements and engineered fill that make up the timber faced section of the dam. There is no anticipated increase in footprint or fill below OHW. Work will take [place] when the water surface behind the dam is lowered[,] which will limit direct impacts to aquatic species as well as impacts to water quality.**

c. Southern Repair
   - Several areas of scour near the spillway/gate section and southern dam abutment/powerhouse will be repaired.
   - Repairs will likely include placement of concrete or grout to seal off the scour holes. This may include spraying concrete against the existing structure to provide long term protection and prevent future leaks from forming.
   - **Work for these repairs is limited to the area within the existing dam footprint. Scoured areas will be replaced with hardened fill material, but no loss of waters will result.**
   - **Work for these repairs will be completed within cofferdams located upstream and downstream of the work areas.**

(*Id.* at 2-3, emphasis original.) According to the meeting request, design work was ongoing and was expected to be completed by spring 2022, with the project to be performed in the summer of 2022 as permitted by the Department. (*Id.* at 3.) In the "Applicant Questions" section of the meeting request, Respondent included the following, directed to the Department: "Can [the Department] confirm that the project, as described, will not trigger fish passage review under Oregon law? Note – the project will not come close to replacing 30% of the dam with the proposed maintenance work." (*Id.* at 5.)

38. The requested interagency meeting was held on July 21, 2021. (Exs. R41 at 1, R50 at 1, R51 at 1, R54 at 1.)[6] Mr. Beckley and DOWL representatives James Stupfel and Brian Meunier attended, as did Mr. Huchko and Mr. Ritchey. The following agencies also had representatives at the meeting: the USACE, ODEQ, NMFS, the National Oceanic and Atmospheric Administration (NOAA), and the Oregon State Marine Board (OSMB). At the meeting, the Department employees asked about fish passage during the completion of repairs. The DOWL representatives confirmed that, during work performed on the north side of the Dam, fish passage would need to be closed off for a period of between one and two weeks. (Ex. R41 at 1.) The DOWL representatives asked the Department employees about whether Respondent would be required to install new fish passage. The Department employees stated that it was difficult to answer with certainty but that it would be unlikely that the repair project would meet the then-current 30 percent volume threshold to trigger the requirement for new fish passage. (*Id.* at 3.) The meeting did not include any discussion of the replacement of either the wood substrate or UHMW sheeting on the upstream face of the Dam. (*Id.* at 1-4.)

39. During October 2021, Respondent's Board undertook a campaign to persuade members to vote in favor of securing bond funding to complete Dam repairs in 2022. (Ex. R57 at 1-4.) As part of that campaign, the Board explained to members that the repairs were necessary to satisfy new safety standards promulgated by OWRD, and that a failure to complete the repairs could result in the removal of the Dam. (*Id.* at 1-2.) The Board warned members that "[i]f [Respondent] does not make the needed repairs, we run the risk of being ordered to remove the dam or having it being taken over by eminent domain or other process by a state or federal agency." The Board further warned members that, if an agency took over and removed the Dam, Respondent could be required to pay for the removal at an estimated cost of $10 million to $15 million, and that the removal of the Dam would also likely result in a significant loss in members' property value. (*Id.* at 2.)

40. On October 14, 2021, Mr. Beckley reached out to Mr. Ritchey and Mr. Huchko and, reminding them of the upcoming 2022 repair project's goal of addressing the issue with false attractant flow, asked "if there [are] any other items that [Respondent] can or should address that would serve to improve fish passage." (Ex. R58 at 1.) Mr. Ritchey responded on October 21, 2021, with a list that, in addition to the fixes discussed at the interagency meeting, asked for a general effort to "reduce other areas of false attraction" and an update of fish passage to meet current Department standards. Failing a full fish passage upgrade, Mr. Ritchey suggested that the project could nevertheless provide an "opportunity to conduct a thorough assessment of the current conditions that would feed into a design concept for implementation in future years." (Ex. R59 at 2.) In response to this latter suggestion by Mr. Ritchey, Mr. Beckley emailed on November 12, 2021, that he agreed to have continued conversations with the Department about economical ways to improve fish passage in the future and asked to set up a meeting with Department staff. (*Id.* at 1.)

[6] Pursuant to ORS 183.450(4) and OAR 137-003-0615, the ALJ takes judicial notice of the following facts, which are the subject of general knowledge or readily determined by resort to sources whose accuracy cannot be reasonably questioned: 1. Emails generally receive an automatic, accurate time and date stamp; 2. July 21, 2020, fell on a Tuesday; and 3. July 21, 2021, fell on a Wednesday. Based upon these judicially noticed facts the date on the minutes for the interagency meeting is a typo, and the meeting occurred on the date set forth above. (Exs. R41 at 1, R50 at 1, R51 at 1, R54 at 1.)

41. On November 2, 2021, Respondent's membership approved the Board's proposed $3 million bond levy to fund the proposed Dam repair project. (Ex. R161 at 7.)

42. On January 20, 2022, Mr. Beckley held the proposed meeting between Respondent, DOWL, and the Department. Respondent member Juan Yraguen attended, as did DOWL employees Mr. Meunier, Mr. Stupfel, and Jeremy Doschka. On behalf of the Department, Mr. Ritchey, Mr. Huchko, Mr. Watts, and Mr. Apke attended the meeting. At the meeting, Mr. Stupfel informed the Department that DOWL had updated its repair plans to include the installation of a steel reinforcement lattice to the downstream face of the Timber Dam. In response to Department inquiries, Mr. Meunier clarified that they would strive to ensure these steel components presented minimal danger of fish injury and that, although the total volume of steel had not yet been calculated, it was expected to fall well short of 30 percent of the Dam's total volume, the threshold then in effect to trigger new fish passage requirements. (Ex. R60 at 1.) The parties present also discussed the use of polyurethane foam to fill both the known voids in the Dam and others that could be discovered during the project. Mr. Stupfel and Mr. Meunier stated that, as with the steel elements, the volume of foam employed in the project was not expected to reach 30 percent of the total Dam volume. (*Id.* at 2.) Mr. Apke told those present that the Department would ultimately need verification of the volume of the repairs. (*Id.* at 3.) The DOWL representatives stated that August 1 through October 1 was their proposed timeframe for in-water work, approximately three weeks of which would involve dewatering the Dam and closing down fish passage. Mr. Huchko suggested that, to minimize impacts on migratory fish, the project should begin in mid-July, which would allow the dewatering to be completed well in advance of salmonid migration in September. (*Id.* at 2.) There was no discussion at the meeting regarding the replacement of the UHMW sheeting or underlying wood substrate on the upstream face of the timber cap. (*Id.* at 1-4; test. of Apke.)

43. On February 2, 2022, Mr. Doschka emailed Mr. Apke, Mr. Huchko, and Mr. Ritchey, to advise that DOWL was preparing its fish passage approval application for the repair project on the Dam and to ask for guidance on what form to use. Mr. Apke responded that DOWL should submit a technical memorandum along with design plans, as the forms available from the Department were not suited to the project. (Ex. R62 at 1.)

44. On April 4, 2022, DOWL filed a Technical Memorandum with OWRD on Respondent's behalf to apply for OWRD's approval to modify the Dam in the planned repair project. (Ex. R164 at 1.)

45. On May 31, 2022, David DeKrey, Senior Biologist at DOWL, emailed Mr. Huchko for information to assist in Mr. DeKrey's preparation of a biological assessment for the expected Dam repairs. (Exs. A42 at 1, R65 at 1-2.) Mr. Huchko forwarded the email to Mr. Ritchey and Mr. Apke to ask if they would like to contribute to a response. (Ex. R65 at 1.) In his June 3, 2022, response to Mr. Huchko, Mr. Apke remarked, "What will be interesting[] is[,] if our new fish passage rules are adopted later this year, how might changes to fish passage triggers at dams intersect this project[] (keep this under the hat for now)." (Ex. R65 at 1.) By that time, the Fish Passage Task Force had discussed possible changes to the existing volume "trigger" for Department fish passage review, but the Department had not yet proposed establishing a separate

"trigger" based upon surface replacement. (Ex. A42 at 2; test. of Apke.)

46. At some time in approximately the spring of 2022, Respondent and Mr. Beckley determined that they would be unable to complete the Dam repair project in 2022 and that it would have to be put off to the following year.[7] (Test. of Beckley.)

47. On August 29, 2022, Mr. DeKrey held a meeting between DOWL, Respondent, and the Department regarding fish passage during the Dam repair project. Mr. Meunier and Mr. Stupfel also attended the meeting from DOWL. Mr. Beckley attended the meeting for Respondent. (Ex. R66 at 1.) Mr. Huchko, Mr. Ritchey, Mr. Apke, and Assistant Umpqua District Fish Biologist Evan Leonetti attended the meeting from the Department. (*Id.*; Ex. R31 at 1.) The DOWL representatives explained the scope of the project as follows:

> Work Elements:
> 1. Phase 1
> a. Draw down reservoir
> b. Salvage fish within containment
> c. False attractant flow repairs
> d. Timber dam repairs (steel support lattice)
> e. Repair voids/seepage paths using foam (concurrent with timber section repairs)
> f. Remove existing exposed/dewatered concrete paving
> g. Duration: 3-4 weeks (3-week ladder shut-off).
> 2. Phase 2
> a. Install sheet pile cutoff wall with vibratory hammer (functions as containment initially)
> b. Salvage fish within sheet pile "coffer dam"
> c. Remove remaining existing concrete paving and sediment
> d. Place new concrete paving between sheet pile and dam face
> e. Place foam to fill seepage paths
> f. Cut off sheet pile at new concrete paving

[7] There was no specific evidence in the record as to what caused this delay. When discussing the delay in his testimony, Mr. Beckley stated that Respondent needed "significant[] time * * * for fabricated materials and things like that that needed to be done." (Test. of Beckley.) However, although Mr. Beckley testified that he could not "speak specifically to what agency or why there were delays," he laid primary blame for the delay upon Oregon's administrative agencies, asserting that it "felt like that was * * * an intentional act" of obstruction. (*Id.*) Mr. Beckley singled out the Department, testifying that it was "a significant contributing factor * * * to the delay" preventing execution of planned repairs in 2022. (*Id.*) However, when asked if he could recall any specific actions or statements by Department staff that demonstrated an intent by Department personnel to delay the Dam repair project, he answered, "Just the general timeline of the responses through all of 2022. * * * [W]e felt as though we had a comprehensive submission in early 2022." (*Id.*) The record as a whole failed to corroborate this assertion. Indeed, the record lacks any evidence of delayed responses or other acts of obstruction by Department personnel in the months leading up to the originally proposed time for the project in late summer 2022. There is no evidence that Respondent filed any applications with the Department related to the repairs at issue before October 18, 2022. (*See, e.g.,* Ex. A2 at 1.) It was thus not possible to make a finding regarding the cause of the delay, let alone to attribute the delay to the Department.

(Ex. R66 at 1, emphasis removed.) DOWL representatives conveyed their estimate that the total volume of the repairs would constitute 1.6 percent of the total volume of the Dam. DOWL representatives also conveyed their estimate that, due to necessary dewatering, the Dam's fish ladder would need to be shut down from approximately July 27, 2023 to August 17, 2023. (*Id.*) The DOWL representatives outlined their fish salvage plan, which had been prepared in consultation with the Department, and indicated that they would soon complete a fish passage memo and Fish Passage Plan Application (FPPA). (*Id.* at 2.)

48. On October 7, 2022, the Department's Fish Passage Task Force conducted the final meeting, which culminated the rulemaking process initiated in March 2021, and adopted draft rule revisions to rules affecting fish passage. (Exs. A29 at 3, 6, R77 at 2-4.) This included a proposal to "[s]pecify that activities subject to a threshold for triggering fish passage review apply to excavation or replacement of 30% by structure volume of the dam **or** modifications to over 30% of the area of the upstream, downstream or top face of the dam." (Ex. R77 at 4, emphasis original.) The proposed rule would be presented for adoption at the Oregon Fish and Wildlife Commission meeting scheduled for December 16, 2022, with a proposed effective date of January 1, 2023. (Exs. A28 at 1, 4, 7, A44 at 1-81.)

Respondent's FPPA

49. On October 18, 2022, Respondent filed the FPPA with the Department. (Ex. A2 at 1-3; test. of Apke.) The purpose of the FPPA was to request that the Department approve a temporary cessation of fish passage for a three-week dewatering period to facilitate repairs in normally submerged areas of the Dam, during which period the North Umpqua River would be directed entirely through the Dam's spill gates. (Ex. A2 at 1-8.) The FPPA proposed to complete in-water construction work during the period July 22 through September 15, the period of minimum fish migration, with the initial phase of the project to include the three-week dewatering of the Dam. (*Id.* at 3, 5-6.)

50. The FPPA included a 111-page Technical Memorandum composed of the following:

- An eight-page narrative description of the proposed repair project authored by Mr. DeKrey (Ex. A2 at 3-10);
- A 13-page "Project Figures" attachment documenting the location of the Dam, its existing conditions, the project area, and the temporary and permanent changes to the Dam (*id.* at 11-23);
- A 14-page "Construction Plans" attachment including technical drawings for work proposed on the project and materials specifications (*id.* at 24-37);
- A 62-page attachment regarding the safety of URETEK foam (one of the materials proposed for filling holes in the dam) (*id.* at 38-99);

- A two-page attachment of gate velocity calculations (*id.* at 100-01);

- A five-page attachment containing photographs of the Dam during conditions expected to be similar to those at the proposed timeframe of the repair work (*id.* at 102-06); and

- A seven-page attachment containing calculations of the total volume of planned repairs as compared to the volume of the Dam in its entirety. (*Id.* at 107-13.)

51. The FPPA Technical Memorandum described the work to be performed on the Dam as follows:

> Repairs to the dam will occur in two phases * * *. Phase 1 work will consist of work on the timber portion of the dam (Components 1-3 described below) and partial removal of the exposed concrete paving above the south power building (Component 4). * * *
>
> The proposed work can be broken down into four main components, described as follows:
>
> Component 1 – Repair dam face near fish ladder to eliminate false attractant flows. This involves removing an existing log boom and replacing a small section of the dam face with a new concrete section * * *. This work will limit unintended flows into the adjacent fish ladder which may create a false attractant for migrating fish. There will be no impact to the existing fish ladder.
>
> Component 2 – Repair timber faced portions of the dam by installing intermediate vertical steel supports and horizontal steel whalers that tie them together [on the downstream face of the dam]. The vertical steel components will be located on repaired concrete sills (on which existing vertical timber components rest) * * *. Along with this repair, some of the existing timber elements may need to be repaired or replaced depending on conditions encountered during construction.
>
> Component 3 – Fill voids in the existing dam embankment using polyurethane foam. There are several known areas where embankment material has been washed out of the dam creating voids behind the wall face * * *. These areas need to be filled and doing so with foam will likely be the least intrusive and overall most effective solution. The proposed product is Uretek brand deep injection (UDI) foam, which is a lightweight, expansive geopolymer material. * * *
>
> 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 * * *. This work will address the critical issue

> of subsurface water migration below the southern portion of the dam and south powerhouse. Sheet 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 * * *. 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.

(Ex. A2 at 4-5.)

52. The FPPA Project Figures attachment used color-coded illustrations to show the extent of the project. Temporary impacts (such as work platforms) were shaded green, and permanent impacts were shaded red. (Ex. A2 at 16-22.) Components marked as permanent impacts included the following: a reinforced concrete wall near the fish ladder in the north power building; a concrete sill, vertical posts, horizontal whalers, and tie backs along the downstream face of the dam; concrete removal and fill to the south power building; and polyurethane foam filling voids in the downstream face and holes through the dam. (*Id.* at 16-20.)

53. Figure 6D in the Project Figures attachment, entitled "Polyurethane Foam Repair Impacts (Phase 1), included two diagrams. The first diagram, labeled "TIMBER DAM EMBANKMENT – PLAN VIEW," showed a plan of the Dam with six numbered points shaded in red, the first four of which were on the timber cap of the timber dam. (Ex. A2 at 20.) These six points were designated as "TYPE 1 REPAIR LOCATIONS/IMPACTS." The second diagram, labeled "POLYURETHANE FOAM HOLE REPAIR DETAIL," showed a cross section of the timber cap area of the timber dam with two regions shaded in red: a small trapezoid in the downstream face of the Dam and an irregular belt from the downstream face of the Dam to just behind the leading edge of the upstream timber cap. (*Id.*) This irregular belt bore the label "TYPE 1 REPAIR VOID/SEEPAGE PATH FILLED WITH POLYURETHANE FOAM." (*Id.*) Figure 6D also listed the square feet (sf) of each of the six "TYPE 1 REPAIR LOCATIONS/IMPACTS," the four on the timber cap listed as follows:

> ① 100 SF
> ② 5 SF
> ③ 5 SF
> ④ 10 SF

(*Id.*) The diagrams on Figure 6D did not shade (in green or red) any portion of the surface of the timber cap depicted. (*Id.*) The Project Figures attachment did not list any other permanent impacts to the timber cap. (*Id.* at 11-23.)

54. The FPPA's Construction Plans attachment included a page numbered C02 and entitled "TIMBER DAM EMBANKMENT REPAIRS," which depicted the same two diagrams

as on Figure 6D but with no color shading and some alterations to labels and annotations. (Ex. A2 at 27.) C02 described the six numbered points as holes in the Dam, and included the following information regarding the four holes on the timber cap:

> ① 10 FT UPSTREAM FROM CENTER OF LOG TO CENTER OF HOLE. HOLE IS 10 FT WIDE.
> ② 56 FT FROM END OF LOG TO CENTER OF HOLE. HOLE IS 5 FT WIDE BY 1 FT DEEP.
> ③ 70 FT FROM END OF LOG TO CENTER OF HOLE. HOLE IS 3 FT WIDE BY 1 FT DEEP.
> ④ 79 FT FROM END OF LOG TO CENTER OF HOLE. HOLE IS 5 FT WIDE BY 2 FT DEEP.

(*Id.*)

55. DOWL's labeling of Dam components in the illustrations throughout the Technical Memorandum often included either an (E) for "existing" or an (N) for "new" to denote whether the component was already a part of the Dam or would be added during the repair project. (Exs. A2 at 16-21, 27, 30-37, A12 at 7-8; test. of Watts.)

56. Among the many technical drawings in the FPPA's Construction Plans, DOWL included two pages of "STRUCTURAL REPAIR DETAILS," containing plan, section, and/or elevation views of 13 repair locations on the Dam (marked as illustrations G through S). (Ex. A2 at 34-35.) Illustration J, entitled "TIMBER DAM – WOOD CAP REPAIR," consists of a section view of the structure of the timber cap of the timber dam with the surface of the upstream face of the Dam labeled as follows:

> (E[xisting]) ULTRA HIGH MOLECULAR WEIGHT POLYETHYLENE SHEETING OVER WOOD SHEATHING ON 2X PLANKING; REMOVE AND REPLACE SHEETING OR WOOD SUBSTRATE IN-KIND AS REQUIRED. STAGGER PLANK JOINTS, FASTEN TO SUPPORT TIMBERS WITH ½" LAG SCREWS AND GLUE MEMBRANE PER MFG INSTRUCTIONS[.]

(Ex. A2 at 34.) The FPPA did not otherwise mention the replacement of UHMW sheeting or wood substrate on the timber cap section of the timber dam. (Ex. A2 at 1-113; test. of Watts.)

57. In its narrative section, the FPPA stated: "This project will not trigger fish passage review relative to the permanent dam condition as the total volume of repairs will not exceed 30 percent of the total dam volume (OAR 635-412-0005(9)(b)), as described below." (Ex. A2 at 3.) The attachment with volume calculations calculated the total volume of Winchester Dam at 7,221 cubic yards (cy), with 116 cy of planned additions to the Dam, constituting an addition of 1.6 percent to the total dam volume. (*Id.* at 111.) The planned additions included a total of 22 cy of polyurethane foam to fill voids and holes in the Dam. (*Id.* at 20, 111-13.)

58. The FPPA's only proposed improvements to the Fishway structure were the reinforcement of the concrete at its southeast corner and repair of the hole near the AWS. The FPPA did not include any plans to relocate or upgrade the design of the fish ladder itself. (Ex. A2 at 16-23, 27, 30.)

59. At the time of the FPPA's filing, Respondent and DOWL understood that some amount of surface replacement on the upstream portion of the Dam would be included in the repair project, but understood that the total extent of surface material that would need to be replaced would not be known until the Dam was dewatered for the project. (Test. of Beckley, Stupfel.)

Adoption of New Rule after FPPA Filing

60. Between the filing of the FPPA on October 18, 2022, and the Department's issuance of the Fish Passage Approval (FPA) on December 29, 2022, Mr. Beckley became increasingly concerned that the Department was intentionally delaying approval of the FPPA until after the implementation of the new, expanded definition of what constituted a fish passage "trigger" under Department rules. At Mr. Beckley's direction, his attorney and DOWL repeatedly contacted the Department to persuade the Department to approve the FPPA before the effective date of any new rule. (Test. of Beckley.)

61. On or about December 14, 2022, Department staff met with Mr. Beckley regarding the FPPA. (Ex. A48 at 1.)

62. On or about December 14, 2022, Mr. Beckley called Dr. Shaun Clements, the Department's Deputy Administrator of the Fish Division, and expressed his concerns, first, that the new rule regarding fish passage "triggers" was meant specifically to target Respondent; and second, that the Department was deliberately delaying approval of the FPPA to hold Respondent accountable under the new rule once it became effective. (Ex. A43 at 1, 3; test. of Clements.) Mr. Beckley also voiced his concern regarding the possibility that the new rule could become effective immediately upon adoption, meaning that the repair project would be subject to the new rule unless the FPPA were approved before the December 16, 2022, vote. Dr. Clements expressed his understanding that the rule would not become effective until January 1, 2023, and that the FPPA would be held to the existing rule if it were approved prior to the new rule's effective date. (Test. of Clements.)

63. On December 14, 2022, Respondent, through counsel, submitted a comment to the Oregon Fish and Wildlife Commission in opposition to the proposed rules to be considered on December 16, 2022. (Ex. R75 at 19-26.)

64. On December 15, 2022, Dr. Clements emailed Mr. Beckley to follow up on their conversation and wrote:

> As I noted on our call earlier this week, the proposed rules will not apply to [Respondent's] current repair project if it is approved before the effective date

> of the rules (should the Commission adopt them tomorrow). The effective date is Jan 1, 2023. Feel free to call me if you want to discuss further[.]

(Ex. A48 at 2-3.)

65. On December 16, 2022, Mr. Beckley responded to Dr. Clements' email to express frustration with the response of Department staff to the FPPA at the December 14, 2022, meeting and to level accusations at the Department. Mr. Beckley stated that "it was clear that [Department] staff intend to be abundantly thorough, providing more pages of notes than we had pages of submissions." (Ex. A48 at 1.) Mr. Beckley labeled a suggestion that Respondent install temporary fish passage during repairs as "absurd," claiming that Department records prove that no fish migration occurs during the requested dewatering period. (*Id.*) Mr. Beckley claimed that all issues of exposed rebar and false attractant flow had already been solved well in advance of the FPPA. Regarding exposed rebar, Mr. Beckley claimed that he had removed all exposed rebar within days of being told of it by Department staff, that this had been done "over THREE YEARS AGO," and that various Department staff were already aware that this work was complete. (*Id.*, emphasis original.) Mr. Beckley also claimed that, three years before, Respondent had implemented "incredibly effective mitigation measures" to address false attraction flow at the Dam. (*Id.*) Mr. Beckley continued, "I would also assume that you are aware that one of the main reasons for the planned repair project is to permanently address the design flaw that has led to the false attractant flow. But if not, you are now informed." (*Id.*)

66. Later on December 16, 2022, the Oregon Fish and Wildlife Commission voted to adopt the proposed rule expanding the definition of what constitutes a fish passage review "trigger," with an effective date of January 1, 2023. (Ex. A44 at 78-79; test. of Apke.)

67. On December 29, 2022, the Department issued the FPA, #PA-17-0138, approving the FPPA filed on October 18, 2022, but limiting closure of upstream fish passage to the period August 7 through August 28. (Ex. A3 at 1-2.) The Authorization approved "all work related to [the Dam] described in the FPPA * * * subject to" several conditions, which included "[p]ost project monitoring and reporting." (*Id.* at 1, 3.) The FPA specified that

> [m]onitoring and reporting shall include * * * established photo points depicting dam repair activities during and throughout the duration of and after the project [and] validation of final volumes of repairs to the dam * * *. [The m]onitoring report shall be submitted to [the Department] by December 31, 2023.

(*Id.* at 3-4.)

68. The FPA included the following language:

> This Fish Passage Authorization expires December 31, 2023, and only applies to the dam repair and other activities specifically proposed in the [FPPA]. Proposed * * * Dam repairs as described in the October 18th, 2022, FPPA do not exceed the threshold in OAR 635-412-0005(9)(b) [defining "construction"

> and "major replacement" with the existing 30-percent volume threshold] in place at the time of this [FPA] 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 [Respondent's] application or [the Department's] approval, or both.

(Ex. A3 at 4.)

Work Performed – August and September of 2023

69. On or about August 3, 2023, the Department learned that the repair project would include the construction of a temporary bridge, which was not included in the original FPPA or FPA. (Ex. R107 at 1.) The bridge would connect the northern shore of the North Umpqua River with the Fishway on the downstream side of the Dam and was necessary to carry out the repair project. (Ex. A4 at 11; test. of Beckley.) A Department employee alerted Respondent that an additional application would be required for the construction of the temporary bridge because it constituted a new artificial obstruction in the river. (Ex. R110 at 1; test. of Beckley.) Respondent proceeded to construct the bridge to facilitate the repair project and, on August 4, 2023, filed a Fish Passage Approval Application for the temporary bridge. (Exs. R106 at 1-5, R110 at 1.) The Department retroactively approved the temporary bridge on August 14, 2023, pursuant to ORS 509.585 and OAR 635-412-0035(1), (3), and (10). (Ex. R110 at 1-3.)

70. Respondent's contractors started the process of dewatering the Dam on the evening of August 6, 2023, for the in-water repair work to begin on August 7, 2023. (Test. of Beckley.) Dewatering the Dam involved the opening of the spill gates towards the Dam's south side. Because all North Umpqua River water that flowed to the Dam was being allowed to exit through the spill gates when the Dam was dewatered, the Department considered the remaining elevation of impoundment on the upstream side of the Dam to be "run-of-the-river" condition. In other words, the high point of the upstream impoundment during dewatering represented the elevation at which the Dam structure itself began to impede the flow of the North Umpqua River. (Test. of Watts.) When the upstream side of the Dam was fully dewatered, the impoundment came approximately as high as the bottom of the upstream leading edge of the Dam's timber cap (*i.e.*, the lowest elevation of manmade materials, upstream of which the Dam is entirely composed of infill materials). (Ex. A41 at 8; test. of Watts.)

71. TerraFirma served as the primary contractor on the repair work performed during the 2023 repair project.[8] (Test. of Stupfel, Beckley.) Although Respondent's contractors did not complete all planned repairs, repair work on the project ended on or about September 1, 2023.[9]

[8] There was no evidence or allegation of any impropriety in Respondent's employment of Mr. Beckley's own company to complete the Dam repairs. The evidence at hearing showed that, after Respondent advertised the project and held a pre-bid meeting attended by approximately 17 general contractors, no other general contractor bid on the project. (Test. of Beckley.)

[9] This end date does not include removal of temporary materials (such as graded infill for Dam access) and rewatering of the Dam, which continued until approximately September 6, 2023, and required Respondent to obtain an extension from the Department for ongoing in-water work. (Ex. R131 at 1-11.)

(Exs. A4 at 12-22, R131 at 20.) Most of the work performed during the project involved adding structural support to the downstream face of the Dam, and Respondent's contractors had to make several changes to the original steel lattice and tieback rod design to accommodate conditions unknown prior to initiation of work. (Exs. A4 at 12-22, A37 at 2-79; test. of Beckley.)

72. During the project, Mr. Beckley had a TerraFirma worker remove all exposed rebar and other metal in and around the fish ladder to prevent fish injuries, resulting in the removal of almost 400 pounds of exposed metal from the Dam. (Test. of Beckley.) As planned, the repair project did not include a design upgrade for, or relocation of, fish passage at the Dam. (Ex. A4 at 12, 15.)

73. Work to address the hole near the AWS, which was a noted source of false attractant flow to be addressed in the project, began with the removal of UHMW sheeting and plywood in the area of the hole on August 9, 2023. (Ex. A37 at 8.) The repair to the hole near the AWS involved more structural interventions and fill within the Dam than originally planned. (Exs. A4 at 12, A37 at 11-12, 14-15, 23-24, 36.) By August 19, 2023, TerraFirma employees had completed necessary structural repair and had filled the hole near the AWS. They had also started replacement of surface plywood and UHMW sheeting in that area. (Ex. A37 at 38.)

74. Ultimately, Respondent had TerraFirma replace additional plywood and almost all the UHMW sheeting on the timber cap due to surface damage, with the exception of approximately 270 sf of sheeting near the northern end of the timber cap that TerraFirma determined was undamaged. (Ex. R25 at 1; test. of Holborow, Beckley.) The UHMW replacement included the sheeting applied atop a portion of the Fishway structure and the sheeting applied to the incline between the vertical downstream face and the crest of the timber cap of the Dam. (Ex. R25 at 1; test. of Watts, Holborow, Beckley.) This surface replacement was completed by approximately August 25, 2023. (Ex. A37 at 64; test. of Watts.) As further protection for the timber cap, Respondent moved infill material (river rock) over its leading edge and a few feet up the manmade upstream surface material of the Dam. (Exs. A37 at 72, A41 at 1-2, R24 at 1, R25 at 1; test of Beckley.)

75. On August 17, 2023 and August 25, 2023, Mr. Apke, Mr. Watts, and other Department employees visited the Dam to assess the condition of the Dam now observable during dewatering. (Ex. A37 at 57; test. of Apke, Watts.) During the August 17, 2023, visit, Mr. Apke observed the replacement of materials on the upstream face of the Dam and concluded that this appeared to exceed what had been included in the FPPA and FPA. (Test. of Apke.) By the August 25, 2023, visit, the UHMW sheeting replacement was complete, thus making its full scale observable to Department staff. (Test. of Watts.) Despite their observations, no Department employees alerted Respondent to the possibility that the completed work may have exceeded the surface replacement permissible without fish passage review under the revised rule effective January 1, 2023. (Test. of Apke, Watts, Beckley.)

76. On or about November 1, 2023, DOWL filed a Completion Report with the Department on Respondent's behalf. (Ex. A4 at 1.) The Completion Report explained the execution of the Dam repair project and provided as-built plans. (*Id.* at 4-22.) Under the heading "Timber Dam Structural Reinforcements," the Completion Report stated, "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." (*Id.* at 5.) The as-built plans contained pages from the FPPA's Construction Plans attachment with color-coded annotations to indicate deviations from the FPPA: notes in red and blue and voided information (such as planned work not performed) in green. (*Id.* at 10.) The Timber Dam Embankment – Plan View diagram on Page C02, Timber Dam Embankment Repairs, had an outline in blue added to show the extent of hole number 1, with the extent of "[t]imber cribbing reinforced or replaced in kind," "[h]ole filled with rock," and "[t]imber cap replaced in kind" illustrated in red to show the expanded scope of the work performed. (*Id.* at 12.) In a plan view diagram of the timber dam, the as-built plans included an annotation in red on the timber cap stating, "All UHMW sheeting was replaced." (*Id.* at 17.) The same diagram had an area on the timber cap marked and annotated in red, "replaced plywood in-kind." (*Id.*)

77. The total volume of work performed on the Dam during the 2023 repair project constituted less than 30 percent of the total volume of the Dam. (Ex. A12 at 17-18.)

The Department's Enforcement Decision

78. In the field of geotechnical engineering, which includes the design and evaluation of dams, "natural ground gradeline" is not a commonly used term with a widely understood definition. (Test. of Thrall.) The Department interprets the phrase "natural ground gradeline that is used to impound water" in OAR 635-412-0005(10)(b)(A)(ii) to mean the point above which no water is impounded by an artificial obstruction during run-of-the-river conditions. (Test. of Watts, Apke.) Under this interpretation, the total upstream surface area of the Dam measured above the natural ground gradeline that is used to impound water is 7,194.5 sf, as follows: 2,668.2 sf of upstream face on the timber cap section; 2,738.8 sf of upstream face on the concrete cap section; and 1,787.5 sf on the upstream face of concrete Spill Gate section of the Dam (from the south end of the timber dam to the south bank of the North Umpqua River). (Exs. A12 at 16, A13 at 1, A16 at 1; test. of Watts.) The replacement of all but approximately 270 sf of UHMW sheeting on the upstream surface of the timber cap represented a replacement of approximately 2,398.2 sf of the upstream surface area of the Dam (2,668.2 sf total area of upstream face at timber cap – 270 sf not replaced). This represented a replacement of approximately 33 percent of the Dam's upstream surface (2,398.2 sf replaced ÷ 7,194.5 sf total upstream face area = 0.33, or 33%). (Test. of Watts.)

79. The Dam does not meet Oregon design standards for fish passage and would require significant changes to meet Oregon standards, including the following: relocation of the fish ladder entrance to a location in closer proximity to the thalweg[10] of the North Umpqua River (nearer the south bank of the river); increase in attraction flow through the fish ladder to at least 473 cubic feet per second (cfs); reduction of continued false attraction flows over and through the Dam; sufficient pool size to prevent fish injury; and water surface elevation differentials no greater than 6 inches. (Exs. A12 at 18-24, A19 at 42-43, 48-54, A27 at 13-15, A31 at 5-6; test. of Watts, Leonetti.)

[10] The thalweg of a river is "the line following the lowest part of a valley whether under water or not." *Webster's* at 2367.

80. If the fish passage were redesigned to incorporate a vertical slot design (or dual vertical slot design) with AWS, this would provide the most reliably adequate attraction flow through the fish ladder under the varying water elevations of the North Umpqua River. (Exs. A12 at 21-22, A19 at 61, 64-66, A20 at 7, A24 at 5, A25 at 298.) The Dam's current pool and weir design tends to collect sediment/debris, rendering passage ineffective without frequent maintenance/cleaning. (Ex. A12 at 22.) A vertical slot (or dual vertical slot) design is not susceptible to sediment accumulation and would thus require less maintenance than the current configuration. (Exs. A12 at 22-23, A20 at 7; test. of Watts.) It would also more effectively accommodate the diversity of migratory fish species in the North Umpqua River because it provides adequate passage to juveniles and suckers, who struggle with pool and weir ladders. (Exs. A12 at 22-23, A20 at 2; test. of Watts.) In the location of the Dam, it therefore constitutes the most effective fish ladder design. (Ex. A12 at 21-23; test. of Watts.)

81. On September 17, 2024, the Department issued to Respondent the Notice at issue in the present matter. (Ex. A1 at 1, 17.) The Notice included the following findings: that several native migratory fish species are and have historically been present in the waters around the Dam; that the work performed on the Dam in August and September 2023 included work not previously disclosed to the Department in the FPPA; that the undisclosed work included the replacement of over 30 percent of the upstream face of the Dam;[11] that Respondent did not obtain advance approval for installation of fish passage or a waiver thereto; and that the Dam's current fish passage falls short of Department standards. (*Id.* at 2-11.)

82. Based upon the findings, the Notice mandated design parameters and a timeline for installation of new fish passage at the Dam that would conform to Department fish passage standards. (Exs. A1 at 14-16, A12 at 18-25.) Specifically, the Notice mandated the following, in relevant part:

> Pursuant to ORS 509.625(3)(b)(A), [Respondent] must install fish passage at [the 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 [native migratory fish] * * *, 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),

[11] The Notice also alleged that the undisclosed work exceeded 30 percent of the total volume of the Dam and 30 percent of the total surface area of the top face of the Dam. (Ex. A1 at 5-8.) The Department now concedes that the work fell short of 30 percent of the total volume of the Dam. (Test. of Watts.) The present Order makes no findings, and reaches no conclusions, regarding the Department's allegation that Respondent also replaced more than 30 percent of the top face of the Dam.

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 [native migratory fish species] 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[.]

* * * * *

2. January 1, 2026, to June 30, 2026 (6 months)
a. Permit Submission and Acquisition[.]

* * * * *

3. July 1, 2026, to December 31, 2028 (29 months)
a. Project Implementation/Construction[.]

* * * * *

4. January 1, 2029, to December 31, 2039 (10 years or to be determined)
a. Post Project Installation Certification and Long-term Monitor & Reporting.

(Ex. A1 at 14-16.)

83. Based upon similarly-sized projects with similar site conditions, the Notice provides reasonable time for compliance with the Notice's conditions, including design, permitting, and construction/implementation of Department-compliant fish passage. (Ex. A27 at 27-28.)

CONCLUSIONS OF LAW

1. Respondent executed "construction" on Winchester Dam during the repairs it completed in August and September of 2023.

2. The Department may require that Respondent install Department-approved fish passage at Winchester Dam, but may not require the construction of a fish counting window, a fish counting facility, or pit tag arrays.

OPINION

In the present matter, the Department contends that Respondent executed "construction" at the Dam, thereby triggering the fish passage review process set forth in Oregon law and rule, and that it may therefore require that Respondent install Department-approved fish passage at the Dam. As the proponent of these positions, the Department bore the burden of proving, more likely than not, that the alleged trigger occurred and that it may require new fish passage. *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) (asserting that generally the burden of proof 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). *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987) (explaining that proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false). Respondent bore the burden of proving, more likely than not, any facts necessary to support the affirmative defenses it has proposed. The Department met its burden; Respondent did not.

Fish Passage Statutory Requirements

In ORS 509.585, the Oregon legislature broadly mandated the provision of fish passage for native migratory fish species in this state. ORS 509.580 provides the following definitions related to the fish passage mandate:

> As used in ORS 509.580 to 509.590, 509.600 to 509.645 and 509.910:
>
> (1) "Artificial obstruction" means any dam, diversion, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.
>
> (2) "Construction" means:
>
> (a) Original construction;
>
> (b) Major replacement;
>
> * * * * *

> (6) "Native migratory fish" means those native fish that migrate for their life cycle needs and that are listed in the rules of the State Fish and Wildlife Director.

Utilizing the above definitions, the Oregon legislature described the fish passage mandate and the Department's enforcement mechanism thereof in ORS 509.585, as follows in relevant part:

> (1) It is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish and the Legislative Assembly finds that cooperation and collaboration between public and private entities is necessary to accomplish the policy goal of providing passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS chapter 509, fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present.
>
> (2) Except as otherwise provided by this section * * *, a person owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish.
>
> (3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory of artificial obstructions in order to prioritize enforcement actions based on the needs of native migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of the artificial obstruction on the native migratory fish, the biological status of the native migratory fish stocks in question and any other factor established by the department by rule. The department shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless requested by persons owning or operating an artificial obstruction, the department shall primarily direct its enforcement authority toward priority projects, emergencies and projects described in subsection (4) of this section. The priority project list shall be subject to periodic review and amendment by the department and to formal review and amendment by the commission no less frequently than once every five years.
>
> (4) A person owning or operating an artificial obstruction shall, prior to construction * * * in any waters of this state, obtain a determination from the department as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have been present in the waters, the person owning or operating the artificial obstruction shall either submit a proposal for fish

passage to the department or apply for a waiver pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the alternatives to fish passage must be obtained from the department prior to construction, permit modification or abandonment of the artificial obstruction.

(5) Consistent with the purpose and goals of the Oregon Plan, the department shall seek cooperative partnerships to remedy fish passage problems and to ensure that problems are corrected as soon as possible. The department and the person owning or operating the artificial obstruction are encouraged to negotiate the terms and conditions of fish passage or alternatives to fish passage, including appropriate cost sharing. The negotiations may include, but are not limited to, consideration of equitable factors.

(6) The department shall submit a proposed determination of the required fish passage or alternatives to fish passage to the commission for approval. The determination may be the result of the negotiations described in subsection (5) of this section or, if no agreement was reached in the negotiations, a determination proposed by the department. * * *.

(7)(a) The commission shall waive the requirement for fish passage if the commission determines that the alternatives to fish passage proposed by the person owning or operating the artificial obstruction provide a net benefit to native migratory fish.

(b) Net benefit to native migratory fish is determined under this subsection by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed alternatives to fish passage. Alternatives to fish passage must result in a benefit to fish greater than that provided by the artificial obstruction with fish passage. The net benefit to fish shall be determined based upon conditions that exist at the time of comparison.

(c) The State Fish and Wildlife Director shall develop rules establishing general criteria for determining the adequacy of fish passage and of alternatives to fish passage. The general criteria shall include, but not be limited to:

(A) The geographic scope in which alternatives must be conducted;

(B) The type and quality of habitat;

(C) The species affected;

(D) The status of the native migratory fish stocks;

(E) Standards for monitoring, evaluating and adaptive management;

(F) The feasibility of fish passage and alternatives to fish passage;

(G) Quantified baseline conditions;

(H) Historic conditions;

(I) Existing native migratory fish management plans;

(J) Financial or other incentives and the application of incentives;

(K) Data collection and evaluation; and

(L) Consistency with the purpose and goals of the Oregon Plan.

(d) To the extent feasible, the department shall coordinate its requirements for adequate fish passage or alternatives to fish passage with any federal requirements.

(8) A person owning or operating an artificial obstruction may at any time petition the commission to waive the requirement for fish passage in exchange for agreed-upon alternatives to fish passage that provide a net benefit to native migratory fish as determined in subsection (7) of this section.

(9)(a) Artificial obstructions without fish passage are exempt from the requirement to provide fish passage if the commission:

(A) Finds that a lack of fish passage has been effectively mitigated;

(B) Has granted a legal waiver for the artificial obstruction; or

(C) Finds there is no appreciable benefit to providing fish passage.

* * * * *

(12) A person subject to a decision of the commission under this section shall have the right to a contested case hearing according to the applicable provisions of ORS chapter 183.

Two of the sections set forth above merit further discussion here. ORS 509.585(4) obligates the owners of artificial obstructions (such as dams) to, prior to construction, consult the Department regarding the historic or current presence of native migratory fish at the obstruction. Where the Department determines that native migratory fish are, or historically have been, present, ORS 509.585(4) sets a further requirement that the obstruction's owner receive either Department approval for fish passage or a waiver. As such, this subsection creates a general expectation that construction (including "major replacement") at artificial obstructions will

include the installation of Department-compliant fish passage wherever fish migration occurs.

Turning to ORS 509.585(3), this subsection requires that the Department create a priority list of artificial obstructions to funnel enforcement towards situations determined to be more urgent based upon "the degree of impact of the artificial obstruction on the native migratory fish, the biological status of the native migratory fish stocks in question and any other factor established by the department by rule." For obstructions that have merited addition to the priority list, ORS 509.585(3) empowers the Department to utilize the firmer enforcement mechanisms set forth in ORS 509.625.

ORS 509.625, entitled "Power of department to inspect artificial obstructions and have fish passage constructed or remove obstruction," contains the following provision:

> (3)(a) The commission may order a person owning or operating an artificial obstruction on the priority list created pursuant to ORS 509.585 who has been issued a water right, owners of lawfully installed culverts or owners of other lawfully installed obstructions to install fish passage or to provide alternatives to fish passage if the commission can arrange for nonowner or nonoperator funding of at least 60 percent of the cost.
>
> (b) Notwithstanding paragraph (a) of this subsection, the commission may order installation of fish passage or alternatives to fish passage without regard to funding sources:
>
> (A) If the person owning or operating the artificial obstruction is already subject to an obligation to install fish passage or to provide alternatives to fish passage under ORS 509.585[.]

In other words, where the owner of a dam on the priority list engaged in "construction," but failed to go through the process of obtaining approval for, and installing, Department-approved fish passage, the Department may mandate the installation of Department-compliant fish passage at the owner's cost.

The Department has enacted rules to effectuate the above statutory mandates and clarify the meaning of "construction." As touched upon in the factual findings, these rules received an important revision partway through the relevant events. Because the updated rules became effective January 1, 2023, one set of rules was in effect at the time of the FPPA and FPA, and a later set of rules (the current version, still in effect as of this writing) was in effect at the time the repair project was completed.

The relevant regulatory definitions in OAR 635-412-0005 (2006), effective prior to January 1, 2023, read as follows:

> (3) "Artificial obstruction" means any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.

* * * * *

(9) "Construction" means:

(a) Original construction;

(b) Major replacement, which includes:

(A) for dams and diversions, excavation or replacement of 30 percent by structure volume of the dam, including periodic or seasonal replacements, unless:

(i) Only checkboards are replaced; or

(ii) Fish passage approval has already been obtained in writing from the Department for expected replacement.

* * * * *

(10) "Dam" means a structure, or group of structures with different functions, spanning or partially-spanning a stream in one location in order to pool water, facilitate the diversion of water, or raise the water surface elevation.

OAR 635-412-0020 (2006) (the regulation effectuating ORS 509.585 prior to January 1, 2023) stated in relevant part as follows:

(1) No person shall construct or maintain any artificial obstruction across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for native migratory fish.

(2) Prior to construction * * *, a person owning or operating an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters, unless the owner or operator assumes the presence of native migratory fish.

(3) If the Department determines, or the owner or operator assumes, that native migratory fish are or were historically present in the waters, prior to construction * * * the person owning or operating the artificial obstruction shall either:

(a) Obtain from the Department an approval determination of a fish passage plan that meets the requirements of OAR 635-412-0035 [listing Department fish passage criteria] for the specific artificial obstruction[;]

* * * * *

(d) Obtain a waiver from fish passage requirements for the artificial obstruction * * *; or

(e) Obtain an exemption from fish passage requirements for the artificial obstruction * * *.

The current definitions in OAR 635-412-0005,[12] effective during the completion of the repair project on the Dam, provide in pertinent part:

(4) "Artificial obstruction" means any dam, diversion, dike, berm, levee, tide or flood gate, road, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish. Preventing the migration of native migratory fish includes causing a significant delay in the time taken for passage of native migratory fish.

* * * * *

(10) "Construction" with respect to artificial obstructions subject to these rules, means:

(a) Original construction;

(b) Major replacement, which includes:

(A) For existing dams and diversions, either a single or cumulative:

(i) Excavation or replacement of 30 percent by structure volume;

(ii) Repairs, patches, or modifications 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); or

(iii) Repairs, patches, or modifications different than the original configuration and that reduce, as determined by the Department, the adequacy of fish passage including periodic or seasonal replacements, unless only checkboards are replaced, or in the case of existing seasonal dams or diversions, the artificial obstruction is in compliance with a water right(s), other regulatory requirements, and the artificial obstruction maintains an open channel connection with adequate water flow and depth conditions that meet OAR 635-412-0035(2) when instream water is available and between the fish

[12] As noted above, the Department asked in its MSD for a ruling on whether it exceeded its statutory authority in implementing the definition of "major replacement" in OAR 635-412-0005(10)(b)(A)(ii). The Ruling on Motions for Summary Determination issued on May 29, 2025, found that Department acted within its statutory authority in enacting the current definition. The discussion therein is incorporated here by reference.

passage design streamflow range.

* * * * *

(11) "Dam" means a structure, or group of structures with different functions, spanning or partially-spanning a stream in one location in order to pool water, facilitate the diversion of water, or raise the water surface elevation.

* * * * *

(49) "Trigger"[13] means any event or activity that qualifies as construction * * * pursuant to Division 412 rules associated with or at any artificial obstruction that requires an owner or operator of that artificial obstruction to provide fish passage or alternatives to fish passage consistent with such rules. A trigger at one artificial obstruction physically connected to another artificial obstruction requires passage be addressed at both connected structure(s).

Applying these updated definitions, the current version of OAR 635-412-0020, also effective January 1, 2023, states in relevant part:

(1) No artificial obstruction may be constructed or maintained across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without providing passage for native migratory fish.

(2) Prior to a trigger, an owner or operator of an artificial obstruction shall obtain a determination from the Department as to whether native migratory fish are or were historically present in the waters of this state where the artificial obstruction is located, unless the owner or operator assumes the presence of native migratory fish.

(3) If the Department determines, or the owner or operator assumes, that native migratory fish are or were historically present in the waters of this state where the artificial obstruction is located, prior to a trigger the owner or operator of the artificial obstruction shall either:

(a) Obtain Department approval of a fish passage plan that meets the requirements of OAR 635-412-0035 [listing Department fish passage criteria] for the specific artificial obstruction; [or]

* * * * *

(d) Obtain an exemption from fish passage requirements for the artificial obstruction * * *.

The evidence at the hearing established that the work performed on the Dam during the

[13] The word "trigger" was not included in the previous version of the rule. OAR 635-412-0005 (2006).

repair project met the definition of a trigger at the time the work was completed, under the rule in effect on January 1, 2023. Respondent replaced a total of 2,398.2 sf of UHMW sheeting on the upstream surface of the Dam. The total upstream surface area of the Dam, measured above the natural ground gradeline used to impound water is 7,194.5 sf. Therefore, the evidence established that Respondent replaced more than 30 percent of the area of the upstream face of the Dam (measured above the natural ground gradeline that is used to impound water). This met the definition of "construction" in OAR 635-412-0005(10)(b)(A)(ii) that was in effect at the time the replacement was performed and completed. Because the work was not completed in accordance with an FPA issued prior to January 1, 2023 (as discussed in more detail below), it thus constituted a fish passage trigger under OAR 635-412-0005(49). Native migratory fish species live, and historically have lived, in the region of the North Umpqua River where the Dam is located. Under ORS 509.585(4), Respondent was required to receive advance approval for fish passage in conformity with Department standards. It did not do so. Because the Department placed the Dam on the Statewide Fish Passage Barrier Priority List as of 2019, Respondent's failure to obtain approval for installation of fish passage during the project activated the Department's enforcement authority under ORS 509.625. ORS 509.625(3)(b)(A) thus empowers the Department to require Respondent to install fish passage at the Dam that conforms to current Department standards at Respondent's expense.

Respondent advances several arguments to undermine this conclusion. Respondent first contests the Department's interpretation of term "natural ground gradeline used to impound water," which is not defined anywhere in the relevant statutes or rules. Respondent submits that the "natural ground gradeline" is at the bedrock upon which the Dam is built. Respondent argues that the upstream surface of the Dam, measured above the natural ground gradeline used to impound water, therefore includes all of the infill material upstream of the timber cap's leading edge. This interpretation results in a much larger calculation of the total surface area of the upstream face, rendering the area of UHMW replacement proportionately smaller. Respondent concludes that its repair project fell well short of the 30 percent threshold to constitute a trigger.

Respondent's interpretation of "natural ground gradeline" is not unreasonable, especially given its use in other contexts, but this argument is ultimately unpersuasive under Oregon's methodology for construction of administrative rules. The interpretation of an administrative rule begins with the rule's text and context. *OR-OSHA v. United Parcel Service, Inc.*, 312 Or App 424, 436 (2021). Where terms are not defined within the applicable rules, Oregon courts look to the plain meaning of the terms. *See, e.g.*, *id.* at 437. If, given the plain meaning of the terms, an agency's interpretation of its rule is plausible, Oregon courts will give that interpretation the force of law. *Id.* at 434, 436.

The term "natural ground gradeline" has no special or particular meaning for the geotechnical engineers who design and evaluate dams. The lack of specialized understanding for the term is further illustrated by the absence of an entry for "natural ground gradeline," or even "gradeline," in the *Oxford Dictionary of Construction, Surveying, & Civil Engineering* (2020). In other words, the terminology is a creation of the Department and is susceptible to interpretation by means of the common understanding of the words as found in a regular English dictionary.

The word "natural" commonly means "in accordance with or determined by nature,"

"based upon the operation of the natural world," or "not artificial." *Webster's Third New Int'l Dictionary* 1506 (unabridged ed 1993). The word "ground" means "the surface of the earth" or "the bottom of * * * a body of water." *Id.* at 1002. "Gradeline" means "a longitudinal[14] reference line or slope to which a highway or railway is built." *Id.* at 985. Finally, to "impound" water is to "collect" the water "for irrigation, hydroelectric use, flood control, or similar purpose." *Id.* at 1136.

The context in which the Department added "natural ground gradeline used to impound water" to the rule also assists with their interpretation. The words appear in a parenthetical after the phrase, "Repairs, patches, or modifications to over 30 percent of the area of the upstream, downstream, or top face of the dam[.]" The placement of that parenthetical shows that it is intended to qualify, limit, or clarify what constitutes "30 percent of the area" under the rule. Notably, no such parenthetical existed in the prior version of the rule, under which a project needed to replace 30 percent of the total volume to constitute "major replacement." Under that prior version, the Department calculated the total structural volume of a dam to include all infill material within the prism of the dam, down to bedrock. Therefore, the inclusion of the parenthetical communicates that a calculation of whether a given project can be considered "[m]ajor replacement" under OAR 635-412-0005(10)(b) and ORS 509.580(2)(b) must consider something other than the area of the entire face down to the bedrock. After all, if the text were meant to communicate the same, all-inclusive measurement as before, it would be phrased as before, with no qualifications. As such, the context of the phrase "natural ground gradeline that is used to impound water" suggests that it is meant to constrain the amount of a given face that is considered in this calculation.

The Department interpreted the phrase "natural ground gradeline used to impound water" to mean the elevation at which the water of the North Umpqua River intercepted the Dam when in run-of-the-river conditions due to full opening of the Dam's spill gates. While this interpretation is not the only plausible way to understand the relevant rule, it does constitute a plausible interpretation based upon the plain meaning of the terms employed. When the Dam's spill gates are open, the condition of the riverbed (or "ground") is "natural" in the sense that all water is being allowed downstream rather than collecting in the impoundment that results from the existence of the Dam. The river is thus, in a sense, not being held in place artificially and is instead being allowed to travel in accordance with the river's natural flow, at least to the greatest extent possible given its passage through a manmade gate. The use of the term "gradeline" can be understood to mean an imaginary reference line at the level of the "natural" river flow, and above which is the portion of an obstruction "used to impound water," *i.e.*, to artificially collect the water in the manner for which a dam was built. This interpretation constrains the calculation of surface replacement consistent with the context in which the words have been employed in the rule. As such, the Department's application of the phrase "natural ground gradeline used to impound water" is plausible. Under Oregon jurisprudence, the Department's interpretation thus receives the force of law, regardless of the existence of other possible interpretations. Thus, the Department was correct in its calculation that the repair project exceeded the 30 percent threshold to constitute a fish passage trigger.

[14] "Longitudinal" means "placed or running lengthwise." *Webster's* at 1333.

Respondent next argues that the Department was bound to apply the volume-only rule in effect at the time of the FPPA and FPA, rather than the surface-area calculation that came into effect on January 1, 2023, and which was in effect at the time of the project. To support the argument that the earlier rule should apply, Respondent relies on language in the FPA and in contemporaneous communications from Department staff.

On December 15, 2022 (two weeks before issuance of the FPA and a day before the vote of the new rules), Dr. Clements communicated to Mr. Beckley the following:

> As I noted on our call earlier this week, the proposed rules [including the expanded, surface-area trigger for fish passage review] will not apply to [Respondent's] current repair project if it is approved before the effective date of the rules (should the Commission adopt them tomorrow). The effective date [of the proposed rules] is Jan 1, 2023.

Exhibit A48 at 2-3. In accord with this communication, the FPA stated as follows to communicate the Department's determination that new fish passage was not warranted by the repair project as proposed:

> This Fish Passage Authorization expires December 31, 2023, and only applies to the dam repair and other activities specifically proposed in the [FPPA]. Proposed * * * Dam repairs as described in the October 18th, 2022, FPPA do not exceed the threshold in OAR 635-412-0005(9)(b) [(2006), defining "construction" and "major replacement" for purposes of fish passage rules] in place at the time of this [FPA] 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 [Respondent's] application or [the Department's] approval, or both.

Exhibit A3 at 4.

Given the wording of the above paragraph, which limits its determination to "the dam repair and other activities *specifically proposed*" in the FPPA, the FPA obviously did not grant Respondent carte blanche to complete whatever work it deemed fit during dewatering with no possibility of fish passage enforcement. *Id.* (emphasis added). In fact, the FPA required that Respondent provide post-project verification of the volume of repairs to allow the Department to determine whether the actual work still avoided the need for fish passage review. In this context, Dr. Clements' invocation of the law in effect at the time of the FPPA can only be understood as applying to the repair project as presented in the FPPA, because this was the only "project" then proposed. In other words, Dr. Clements' communication cannot be understood as telling Respondent that the older rule would apply no matter what Respondent elected to do during dewatering. Both the FPA and Dr. Clements communicated to Respondent that the activities proposed in the FPPA would be evaluated under the rules then in effect, but neither communicated that work neither proposed in the FPPA nor evaluated for the FPA would be governed by the older rule even after the new rule came into effect. With reference to the phrasing of the FPA, work performed on the Dam that was not included in the FPPA would

constitute separate, future repair actions, which would be governed by whatever rule was in effect either at the time of a later application for fish passage plan approval or, if no such approval was sought, at the time the work was performed. *Compare, e.g.*, OAR 635-412-0005(9)(b)(A)(ii) (2006) (exempting from the definition of "construction," and thus from fish passage review, any project that has already received fish passage approval from the Department at the time the 2006 rule came into effect) *with* OAR 635-412-0005(10) (providing no such exemption).

Respondent does not challenge the above reasoning or contend that the FPA allowed expansion of the work beyond what was included in the FPPA. Rather, Respondent contends that its FPPA unambiguously disclosed the extent of the surface repair to be performed during the repair project, and that the FPA thus granted the Department's approval to perform these surface repairs without fish passage review, pursuant to the rules in effect at the time of the FPA. Respondent argues that application of the new rule would therefore "impair existing rights, create new obligations or impose additional duties with respect to" the FPPA and FPA. *Strizver v. Wilsey*, 210 Or App 33, 38, *rev den*, 342 Or 474 (2007) (citations omitted). This would likely constitute an impermissible retroactive application of the rule. *See id.* at 37-38 (setting out the methodology for determining whether a law may be applied retroactively).

A review of the facts undermines Respondent's argument. It is true that the FPPA unambiguously states that the existing UHMW sheeting would be replaced "IN-KIND AS REQUIRED." Exhibit A2 at 34. However, to declare that materials will be replaced "as required" without a more specific estimate is inherently ambiguous. Elsewhere in the FPPA, Respondent slated four specific holes in the upstream surface of the timber cap for repair with estimated widths of 10 feet, 5 feet, 3 feet, and 5 feet, and estimated surface areas of 100 sf, 5 sf, 5 sf, and 10 sf. As such, the FPPA suggests only minimal surface repairs, *i.e.*, up to the extent necessary to cover the enumerated holes, or approximately 120 sf. Given the contents of the FPPA, it would therefore be unreasonable for the Department to extrapolate that a near-total replacement of the Dam's UHMW sheeting was contemplated by the FPPA.

This is especially so given the broader context of the repair project planned and carried out by Respondent. The planned work addressing holes in the upstream surface of the Dam was a minor appendage to the main undertaking of addressing structural concerns raised by OWRD. This was illustrated by the fact that the planned work addressing the holes in the upstream surface of the timber cap was not even mentioned in the FPPA's narrative description of the work to be performed. Exhibit A2 at 4-5. The $2 million bond and DOWL contract resulted from the OWRD structural concerns, not from the Department's concerns about holes causing false attraction flow. Ultimately, the bulk of the planning effort and execution of work on the project took place on the downstream face of the Dam, where Respondent installed complex interventions to address OWRD's concerns. This focus may well have been justified, but it nevertheless left the Department with little reason to conclude that surface replacement on the upstream face of the Dam, where none of the proposed structural interventions applied, would much exceed the modest dimensions suggested by the FPPA.

Because the surface replacement on the Dam's upstream face far exceeded what was included in the FPPA, any opinion in the FPA regarding the existence of a fish passage trigger

did not relate to that surface replacement. As explained by the FPA, the surface replacement thus constituted a "[f]uture repair action" in relation to that described in the FPPA. Exhibit A3 at 4. Because the surface replacement at issue was not included in the FPPA or FPA, the application of the new rule did not "create new obligations or impose additional duties with respect to" the FPPA or FPA. *Strizver* at 38. The Department's use of the 2023 rule was therefore not a retroactive application of new requirements on the project described in the FPPA. Indeed, the Department had no basis to go back to the rule that was in effect at the FPPA's filing and approval. The rule in effect at the time of the repairs was the only rule the Department could apply.[15]

Respondent next contends that it should prevail in the present matter on a theory of equitable estoppel. Equitable estoppel is defined as a "defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way." *Black's Law Dictionary* 590 (8th ed 2004). As explained by the Oregon Court of Appeals,

> The theory of equitable estoppel requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.

Wilkinson v. PERB, 188 Or App 97, 102 (2003) (quoting *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428 (1999)) (internal quotation marks omitted).

Equitable estoppel applies to government agencies only in rare circumstances. *Mannelin v. DMV*, 176 Or App 9, 13 (2001) (quoting *Employment Div. v. Western Graphics Corp.*, 76 Or App 608 (1985)). "[T]o establish estoppel against a state agency, a party must have relied on the agency's representations and the party's reliance must have been reasonable." *Wilkinson v. PERB*, 188 Or App 97, 102 (2003) (quoting *State ex rel SOSCF v. Dennis*, 173 Or App 604, 611, *rev den*, 332 Or 558 (2001)) (internal quotation marks omitted). "[T]he existence of a law in the public domain makes reliance on a contrary representation patently unreasonable, precluding estoppel." *Arken v. City of Portland*, 351 Or 113, 140 (2011) (citing *Committee in Opposition v. Oregon Emergency Correc.*, 309 Or 678, 686 (1990)), *adh'd to on recons sub nom Robinson v. PERB*, 351 Or 404. Moreover, "an agency's representations cannot, through estoppel, force the agency to act contrary to statute." *Mannelin*, 176 Or App at 15 (citing *Bankus v. City of Brookings*, 252 Or 257, 260 (1969)); *see also Bowen v. PERB*, 227 Or App 444 (2008), *rev den*, 346 Or 589 (2009) (rejecting petitioner's estoppel argument and holding that even if the petitioner was misled by information from an agent of PERS, a false representation cannot force PERS to act contrary to its governing statutes).

Respondent's theory of estoppel is that the Department deliberately misrepresented which rule would apply so as to induce Respondent to undertake the repair project, with the goal of

[15] Given this analysis, this Order does not reach a conclusion on whether, if the work performed on the Dam had been specifically described in the FPPA, the Department could still apply the rule that came into effect in January 2023.

being able to retroactively apply the new version of the rule and compel Respondent to update fish passage at the Dam. To bolster this estoppel argument, Respondent sought to show that the Department delayed the project and the issuance of the FPA, and thus that the Department has consistently tried to place the project under the 2023 rule (Respondent even intimated that the 2023 rule was targeted specifically at the Dam). As the proponent of the estoppel argument, Respondent bore the burden of proving the elements of estoppel by a preponderance of the evidence. Respondent failed to do so.

To begin with, the evidence showed no persuasive connection between the Department's actions and Respondent's decision to postpone the project to 2023 rather than complete it in 2022 as originally planned. Moreover, although the evidence showed Respondent's frustration that the FPPA remained unapproved as the new rule's effective date loomed, the evidence was not persuasive that this was the result of a concerted strategy of delay by the Department. The FPPA was filed on October 18, 2022, for work to be performed in August and September of 2023, and the Department issued the FPA in December, before the effective date of the new rules and well in advance of the project date. More importantly, as explained above, the evidence did not establish that the FPPA revealed, or that the Department otherwise knew or should have known, the extent of the surface repairs that would be completed during the project. Indeed, even Respondent was unaware of the full extent that UHMW sheeting would need to be replaced until dewatering. As such, the Department's communications regarding the applicability of the earlier version of the rule were not "made with the knowledge of the facts" regarding the extent of surface repairs, as required for equitable estoppel. *Wilkinson* at 102. Given the dearth of evidence of the alleged animus from the Department, Respondent also failed to establish that the Department intended by its invocation of the earlier rule to induce Respondent to undertake the repair project as a whole or the large-scale replacement of UHMW sheeting in particular. Therefore, Respondent failed to make out all the required elements of an estoppel defense.

Moreover, once the new rule was in effect, the Department was bound to enforce it. Any misrepresentations by Department staff could not change the Department's enforcement mandate under the applicable laws and rules. As such, to the extent that the FPA and Dr. Clements arguably communicated a position at odds with the Department's later enforcement decision, the doctrine of equitable estoppel still could not apply here given the limited utility of that doctrine against administrative agencies under Oregon law.

Design Parameters Imposed by the Department

Finally, Respondent argues that, even if the Department established that it triggered the Department's enforcement powers under ORS 509.625(3)(b)(A), the specific conditions set by the Department in the Notice exceed the Department's authority. Respondent argues that, in the context of the broader fish passage laws, the language of ORS 509.625(3)(b)(A) does not give the Department the power to impose a specific design upon Respondent.[16]

Respondent points to the language of ORS 509.620, which differs in important respects from the enforcement mechanisms permitted in ORS 509.625 and applied here. ORS 509.620,

[16] Respondent does not specifically challenge the timeline set by the Department and provided no evidence that the required timeline is unreasonable.

entitled "Condemning inadequate or nonfunctioning fish passage; requiring new fish passage," states as follows:

> If, in the judgment of the [Department], fish passage is not functioning as intended or is inadequate, as constructed under ORS 509.585, the State Fish and Wildlife Commission may condemn the fish passage and order new fish passage installed *in accordance with plans and specifications determined by the department*.

(Emphasis added.)

By contrast, ORS 509.625(3)(b) only states that the Department "may order installation of fish passage or alternatives to fish passage without regard to funding sources." It thus does not explicitly permit the Department to impose specific "plans" or "specifications." Respondent argues that, under ORS 509.625(3)(b), the Department may therefore only subject Respondent to a fish passage review process, during which Respondent would be permitted to develop fish passage that, while conforming to the Department's fish passage standards as set forth in OAR 635-412-0035, would not necessarily have to implement a specific design dictated by the Department.

OAR 635-412-0035 states as follows in relevant part:

> (1) General requirements for fish passage are:
>
> (a) Unless the owner or operator of an artificial obstruction chooses to provide year-round fish passage for all native migratory fish and life history stages, the Department shall determine:
>
> (A) The native migratory fish that are currently or were historically present at the site that must be provided fish passage;
>
> (B) The life history stages the required fish passage must accommodate; and
>
> (C) The periods of the year and any conditions relevant to when fish passage shall be provided for such life history stages and native migratory fish.
>
> (b) The person submitting the fish passage plan to the Department for approval shall submit all information necessary for the Department to efficiently evaluate whether the design will meet fish passage criteria including a description of how climate change impacts have been incorporated into the final design;
>
> (c) If site-specific circumstances indicate that the fish passage criteria are not adequate to provide fish passage at the artificial obstruction, the Department may require in writing that additional fish passage criteria be met;

* * * * *

(e) All fish passage structures shall be designed considering their upstream and downstream connection and prevent undesirable impacts to fish passage, including but not limited to scour and headcuts;

* * * * *

(2) Requirements for fish passage at dams and other artificial obstructions which create a discontinuity between upstream and downstream water surface or streambed elevations are:

(a) Fishways shall provide fish passage at all flows within the design streamflow range and should be analyzed using estimates for the projected life expectancy of the structure;

(b) The fishway entrance shall be located and adequate attraction flow shall be provided at one or more points where fish can easily locate and enter the fishway;

* * * * *

(d) At any point entering, within, or exiting the fishway where fish are required to jump to move upstream, the maximum difference between the upstream and downstream water surface elevations shall be 6 inches, except it shall be 12 inches if only adult salmon or steelhead require fish passage;

(e) In fishway locations through which fish must swim, water depths shall be a minimum of 6 inches where only juveniles require passage and 12 inches where adults require passage, except:

(A) Baffled-chute fishways, including but not limited to Alaska steeppasses and denils, shall have a minimum flow depth of 2 feet throughout the length of the fishway; and

(B) Water depths shall be a minimum of 2 feet within jump pools which shall be located downstream of any point entering, within, or exiting the fishway where fish are required to jump to move upstream.

(f) All fishway locations through which fish must swim shall be at least 12 inches wide, except vertical slot weir width may be 6 inches where the Department has determined the artificial obstruction is required to provide fish passage only for juvenile native migratory fish;

* * * * *

(j) The fishway shall:

* * * * *

(H) Have fishway components which are not detailed in OAR 635-412-0035(2), including but not limited to auxiliary water systems, designed considering the most recent National Marine Fisheries Service or U.S. Fish and Wildlife Service fish passage criteria and guidelines;

(I) Meet the species-specific requirements in OAR 635-412-0035(7) if any of those native migratory fish require fish passage;

* * * * *

(C) All fishway entrances or flow outlets shall be designed to provide passage or be designed to only be used during a period(s) defined by the Department.

(D) Fish passage plans for hybrid fishways that may combine features of several established fishway types shall have criteria established by the Department on a case-by-case basis and shall clearly demonstrate how water depths, water velocities, water surface jump height differentials or energy dissipation provides hydraulic conditions that achieves fish passage;

(m) For downstream fish passage:

(A) Fish passage structures shall have an open water surface, except a submerged or enclosed conduit or orifice may be used if:

(i) Acceptable guidance or collection mechanisms are used and kept free from debris;

(ii) Water depth is greater than 4 inches during all flows;

(iii) Water velocity is greater than 2 feet per second during all flows;

(iv) Water is not pumped;

(v) Conduits have smooth surfaces and avoid rapid changes in direction to preclude fish impact and injury; and

(vi) Conduits are at least 10 inches wide.

(B) Plunging flow moving past an artificial obstruction via spillways, outlet pipes, or some other means which may contain fish shall:

(i) At all flows, fall into a receiving pool of sufficient depth, depending on

impact velocity and quantity of flow, to ensure that fish shall not impact the stream bottom or other solid features; and

(ii) Have a maximum impact velocity into a receiving pool, including vertical and horizontal velocity components, less than 25 feet per second; and

(C) Water depth over spillways or other artificial obstructions shall be greater than 4 inches during all flows.

(D) Fish screening and bypass devices installed to protect downstream migrating fish should be constructed to Department specifications and must meet Department criteria when installation is required.

* * * * *

(7) Additional requirements for specific native migratory fish are:

(a) *Acipenser* species (sturgeon):

(A) The fish passage structure shall not require fish to jump when entering, within, or exiting the structure;

(B) The fish passage structure, including trash racks, shall be sized to accommodate the largest individual expected to require fish passage;

(C) Non-volitional transport within a watered container may only be allowed with Department approval; and

(D) Turning pools within the fish passage structure must be designed to allow for fish passage of a native migratory species at least 2 body lengths of the largest individual native migratory species currently or historically in the waters affected by the artificial obstruction.

(b) *Catostomus*, *Chasmistes*, *and Deltistes* species (suckers):

(A) The fish passage structure shall not require fish to jump when entering, within, or exiting the structure;

(B) Fishways shall:

(i) Have a maximum water velocity of 4 feet per second;

(ii) Have a minimum water depth of 12 inches;

(iii) Maximize downstream flow between pools to avoid back eddies;

(iv) Have curved walls within turning pools; and

(v) Have a slope less than 4 percent.

(c) *Entosphenus* and *Lampetra* species (lamprey):

(A) Fishways and associated structures (e.g., dams and spillways) shall have 4 to 6 inch smooth rounded radii edge surfaces (floors, aprons, walls, and weir crests) over which *Entosphenus* and *Lampetra* species may pass;

(B) Fishways shall not have water surface to water surface jumps or overhanging surfaces unless fishway surfaces have a 4 to 6 inch smooth rounded radii (floors, walls and weir crests) over which *Entosphenus* and *Lampetra* species may pass;

* * * * *

(D) Denil fishways shall not be used unless an alternative passage route is provided;

(E) Traps, picketed leads, picket weirs, auxiliary water supply grating or any other fishway grating shall have a spacing of less than 0.7 inches to preclude lamprey passage, or greater than 1.0 inch to allow lamprey to pass through;

(F) Fishway wall diffusers for auxiliary water supply shall be located at least 6 inches above finish floor of fishway pool;

(G) Auxiliary water floor diffusers shall be avoided if possible, but if necessary shall be located to provide at least 12 inches width of continuous smooth floor passage route along fishway floor;

* * * * *

(d) *Oncorhynchus* species (trout and salmon): fish passage structures for *Oncorhynchus keta* (chum) shall not require fish to jump when entering, within, or exiting the structure.

(e) *Ptychocheilus* species (pikeminnow): fish passage structures shall meet the requirements of OAR 635-412-0035(7)(a).

(f) If more than one native migratory fish species requires passage at a site and the requirements for the different species are mutually exclusive, the Department shall determine the required passage criteria.

* * * * *

(10) Requirements for fish passage during construction of fish passage structures and periods when temporary artificial obstructions are in place are:

(a) All fish passage structures shall be constructed and temporary artificial obstructions shall be in place only during the Department approved site-specific in-water work period;

(b) At times indicated by the Department as per OAR 635-412-0035(1)(a), downstream fish passage shall be provided and:

(A) The outfall of a stream flow bypass system shall be placed to provide safe reentry of fish into the stream channel; and

(B) If downstream fish passage during construction is not required and stream flow is pumped around the site, the site shall meet Department screening or bypass requirements.

(c) At times indicated by the Department as per OAR 635-412-0035(1)(a), upstream fish passage shall be provided and shall be based on the wetted-width or flows of the stream during the period of construction or temporary obstruction;

(d) In-stream construction sites shall be isolated from stream flow and fish;

(e) Prior to in-stream construction activities, all fish shall be safely collected, removed from the construction site or de-watered reach, and placed in the flowing stream outside of the areas of project impacts by an authorized person with an ODFW Fish Rescue Salvage Authorization issued by and following the guidance of the Department; and

(f) After construction, the construction site shall be re-watered slowly and in a controlled manner to prevent loss of downstream surface water as the construction site's streambed absorbs water.

As acknowledged by Respondent, there can be no doubt that the above rules would apply to a newly constructed fish passage mandated under ORS 509.625(3)(b). After all, ORS 509.625(3)(b) is an enforcement mechanism to ensure adequate fish passage. The above rule sets the criteria for adequate fish passage, in accordance with ORS 509.585(7)(c). Therefore, to function as intended, a notice issued under ORS 509.625(3)(b) would impose the requirements necessary to provide adequate fish passage under OAR 635-412-0035.

Notably, OAR 635-412-0035 makes clear that site-specific conditions, such as the varieties of fish species present, can affect what constitutes adequate fish passage in a given location. It also reserves to the Department the authority to reject a given fish passage design where site conditions render that design inadequate. *See, e.g.*, OAR 635-412-0035(1)(b) – (c). Given the enforcement regime under which ORS 509.625(3)(b) and the authority of the

Department to dictate site-specific requirements under OAR 635-412-0035, it stands to reason that a notice under OAR 509.625(3)(b) can specify design elements where the site conditions necessitate those design elements to ensure adequate fish passage.

In the Notice, the Department imposed limited specifications on Respondent's design of fish passage, as follows:

> 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 [native migratory fish species] 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[.]

Exhibit A1 at 14-15. Some of these elements are directly controlled by OAR 635-412-0035 and the Department's other rules. Adequate passage for lamprey and other migratory fish is already required by OAR 635-412-0035(7). OAR 635-412-0035(2)(b) mandates adequate attraction flow, which, as explained by OAR 635-412-0005(5), can require the installation of an AWS. OAR 635-412-0035(2)(d) specifies a maximum six-inch water surface elevation differential where fish other than adult salmon or steelhead require passage. The design and screening of a dam's AWS are governed by OAR 635-412-0035(1)(j)(H) and OAR 635-412-0035(7)(c)(E) and (F). The requirement of "[d]etailed de-watering, work area isolation, and fish rescue and salvage plans" is consistent with OAR 635-412-0035(10). As such, most of the design requirements come directly from the Department's fish passage standards and are thus enforceable components of the Notice.

The Notice also included design requirements that, while not explicitly governed by the Department's criteria in OAR 635-412-0035, were nevertheless proven to be necessary for

adequate fish passage given site-specific conditions. Specifically, the abandonment of the current Fishway and the use of a vertical slot (or dual slot) design are necessary for adequate fish passage. Adequate fish passage can only be accomplished by moving the fish ladder closer to the thalweg of the North Umpqua River, which is south of the Fishway's current location. Moreover, the Dam experiences variable water levels throughout the year and must accommodate a wide variety of migratory fish. Because the vertical slot/dual slot design provides the most consistent fish passage over varying water levels and fish species, it is the design best suited to the site-specific conditions at the Dam. Under ORS 509.625(3)(b) and the Department's discretion over site-specific conditions in OAR 635-412-0035(1)(b) – (c), the Department may impose these basic design parameters upon Respondent.

Regarding the fish counting window, fish counting facility, and pit tag arrays mandated by the Notice, the evidence was not persuasive to establish that the Department can mandate their inclusion in fish passage installation at the Dam. Granted, OAR 635-412-0035(1)(g) states that the Department "may require monitoring and reporting to determine if a fish passage structure meets applicable criteria and is providing fish passage as intended and designed." However, there is no provision within OAR 635-412-0035 regarding the ability of the Department to mandate specific facilities for this purpose. Moreover, there was no evidence that the required structures are necessary for monitoring or reporting fish passage at the Dam.[17] Therefore, while the Department may require monitoring and reporting, it may not require Respondent to include a fish counting window, fish counting facility, or pit tag arrays in its installation of fish passage.

The outcome of this matter is unquestionably onerous to Respondent, especially given its recent efforts to shore up the Dam and assuage OWRD's structural concerns. However, this outcome is consistent with the law imposed by the Oregon legislature, the authority delegated to the Department, and the underlying policy concerns that animated both to prioritize fish passage over the financial concerns of entities such as Respondent.

ORDER

I propose the Oregon Department of Fish and Wildlife issue the following order:

Pursuant to ORS 509.625(3)(b)(A), the Winchester Water Control District 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 native migratory fish and their corresponding migratory timing identified in Exhibit F (List of Native Migratory Species) of the Notice of Non-Compliance; Proposed Order; and Opportunity for Contested Case Hearing issued on September 17, 2024, except as amended by prior written authorization of the Department:

1. **January 1, 2026 to December 31, 2026 (12 Months)**
    a. Project Engineering Design Plans Development and Completion:

[17] Indeed, Mr. Apke testified that the Department had exceeded its statutory authority in mandating these facilities in the Notice.

i. Upstream passage requirements:
    1. Vertical slot (possible dual slot) fishway configuration;
    2. Six-inch pool to pool Water Surface Elevation (WSE) differential;
    3. Provisions to ensure adequate lamprey passage as well as all other native migratory fish;
    4. Screened auxiliary water system (AWS);
    5. Criteria attraction flow; and
    6. Develop detailed construction sequencing and other plans consistent with requirements set forth below.
ii. Downstream passage requirements:
    1. Modify spillway to maintain regulated WSE above the dam,
        a. Modeled flows and design to compliment passage at fishway; and
        b. Screen fishway AWS designed to current NMFS guidelines.
iii. Detailed de-watering, work area isolation, and fish rescue and salvage plans; and
iv. Design related to the permanent abandonment of the North Bank Fishway.

b. Interagency Coordination:
    i. Frequent check-ins with the Department: kickoff, preliminary, 30%, 60%, 90% and 100% final design intervals; and
    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, 2027 to June 30, 2027 (6 months)

a. Permit Submission and Acquisition:
    i. Department 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);
    ix. FEMA Floodway Permit; and

x. Any other applicable federal or state permit(s) required.

3. **July 1, 2027 to December 31, 2029 (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 Department-approved in-water work periods;
        iv. Isolate work site as required for anticipated high water events during multiyear 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); and
        ix. Project completion December 31, 2028.
4. **January 1, 2030, to December 31, 2040 (10 years or to be determined)**
    a. Post-Project Installation Certification and Long-term Monitoring & Reporting.
5. **Winchester Water Control District Long-term Ownership, Maintenance, and Operation of Fishway**
    a. ORS 509.610 requires Winchester Water Control District to maintain and operate fish passage in such repair so as to provide adequate fish passage of native migratory fish species at all times, including without limitation monitoring and evaluating ongoing effectiveness of fish passage.

Bradley A. Schmidt
Senior Administrative Law Judge
Office of Administrative Hearings

APPEALS PROCEDURE

Pursuant to ORS 183.460 and OAR 137-003-0650, the Oregon Department of Fish and Wildlife or any party to the hearing that disagrees with the recommended action of the Proposed Order may file exceptions. Exceptions must be in writing and must identify the Findings of Fact or Conclusions of Law with which the party or agency takes exception. To be timely, exceptions to the Proposed Order must be received by the Oregon Fish and Wildlife Commission on or before

the 14th day after the Proposed Order was served (postmarked). Written exception may be mailed, faxed, or hand-delivered to the Oregon Fish and Wildlife Commission.

Mail Exceptions to: Oregon Fish and Wildlife Commission
Administrative Services Division
4034 Fairview Industrial Drive SE
Salem, Oregon 97302

If exceptions to the Proposed Order are timely received, the Oregon Fish and Wildlife Commission will: consider the exceptions, review the record, and issue a Final Order. The Oregon Fish and Wildlife Commission will not consider any evidence that was not a part of the original hearing record.

If no exceptions to the Proposed Order are received, the Oregon Fish and Wildlife Commission will review the Proposed Order as to Findings of Fact and Conclusions of Law and issue a Final Order either affirming the Proposed Order or modifying it.

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 servicemember is a party to this proceeding and did not appear for a hearing that convened during the servicemember's period of service or within 90 days after their termination of service, the servicemember should immediately contact the agency to address any rights they may have under the SCRA.

CERTIFICATE OF MAILING

On December 18, 2025, I mailed the foregoing PROPOSED ORDER issued on this date in OAH Case No. 2024-ABC-06772**.**

By: Electronic Mail

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