**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS**
**STATE OF OREGON**
**for the**
**ENVIRONMENTAL QUALITY COMMISSION**

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| IN THE MATTER OF: | ) | **PROPOSED AND FINAL ORDER** |
| | ) | |
| **WINCHESTER WATER CONTROL DISTRICT** | ) | OAH Case No. 2024-ABC-06610 |
| | ) | Agency Case No. WQ/401-WR-2023-596 |

## HISTORY OF THE CASE

On October 26, 2023, the Department of Environmental Quality (DEQ) issued a Notice of Civil Penalty Assessment and Order (Notice) to Winchester Water Control District (WWCD/Respondent), assessing civil penalties for violations of the conditions of a 401 Water Quality Certification. On November 14, 2023, Respondent filed a Response to the Notice.

On June 27, 2024, DEQ issued a Notice of Civil Penalty Assessment and Order Amendment No. 1, combining two of the violations, removing the penalty assessed for one violation, and revising the total civil penalty.

On June 28, 2024, DEQ referred this matter and a related matter involving TerraFirma Foundation Repair, Inc., dba TerraFirma Foundation Systems (TerraFirma), to the Office of Administrative Hearings (OAH).[1] DEQ requested that the two matters be consolidated for hearing purposes due to common issues of fact and law. The OAH assigned Senior Administrative Law Judge (ALJ) Elizabeth Jarry to preside at the hearing.

On July 2, 2024, Respondent filed a Response to DEQ's Notice of Civil Penalty Assessment and Order Amendment No. 1 and Request for Hearing.

On July 30, 2024, WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watershed filed with DEQ an Amended Petition for Party Status in the matter involving Respondent. On August 9, 2024, Respondent filed a Response to the Amended Petition for Party Status.

On August 13, 2024, ALJ Jarry held a prehearing conference by telephone. Attorneys Dominic Carollo and Nolan Smith appeared for Respondent and TerraFirma. Environmental Law Specialist Erin Saylor appeared for DEQ. Attorneys Victoria White and Maura Fahey appeared for WaterWatch of Oregon. ALJ Jarry granted the unopposed consolidation request, set a hearing for April 15 to 18, 2025, and set various filing deadlines. On that same date, ALJ Jarry notified the parties that the OAH had reassigned the matter to ALJ Dove Gutman.

[1] The OAH assigned Case No. 2024-ABC-06612 to *In the Matter of TerraFirma Foundation Repair, Inc.*

On August 15, 2024, DEQ issued an Order Granting and Denying in Part WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watersheds' Petition for Party Status, granting the petitioners limited party status.

On August 16, 2024, DEQ filed a request to change the ALJ. On August 19, 2024, the OAH issued a Ruling on Request for Change of Administrative Law Judge, granting the request and reassigning the matter to ALJ Jarry.

On August 30, 2024, Respondent filed an Unopposed Motion to Amend the Hearing Schedule, requesting that the hearing be reset to April 1 to 4, 2025. On September 3, 2024, ALJ Jarry granted the request and reset the hearing.

On December 13, 2024, DEQ filed a Motion for Summary Determination with supporting documents, and Respondent and TerraFirma filed a Motion for Summary Determination with supporting documents. On January 10, 2025, DEQ filed a Response to Respondents' Motion for Summary Determination, and Respondent and TerraFirma filed a Response to DEQ's Motion for Summary Determination with supporting documents. On January 17, 2025, the Limited Parties filed a Brief in Support of DEQ's Motion for Summary Determination. On January 24, 2025, DEQ filed a Reply in Support of DEQ's Motion for Summary Determination, and Respondent and TerraFirma filed a Reply in Support of Motion for Summary Determination. On March 6, 2025, ALJ Jarry issued a Ruling on Motions for Summary Determination, granting the motions, in part.

On March 20, 2025, DEQ issued a Notice of Civil Penalty Assessment and Order Amendment No. 2 (Second Amended Notice) with amendments to the civil penalty assessment and minor changes to the alleged violations.

On March 21, 2025, Respondent requested a continuance of the hearing. Also on March 21, 2025, DEQ and the Limited Parties filed responses to the continuance request, opposing the request. On March 24, 2025, ALJ Jarry granted the request and set a prehearing conference for April 1, 2025.

On April 1, 2025, ALJ held a prehearing conference by telephone. Mr. Carollo and Mr. Smith represented Respondent and TerraFirma, Ms. Saylor represented DEQ, and attorneys Mike Sargetakis and Alexandria Dolezal represented the Limited Parties. ALJ Jarry reset the hearing for October 13 through 16, 2025, and set deadlines for the submission of exhibits, witness lists, and declarations.

On April 8, 2025, Respondent filed its Response to DEQ's Notice of Civil Penalty Assessment and Order Amendment No. 2 and Request for Hearing.

On October 13 and 14, 2025, ALJ Jarry held the hearing via videoconference. Ms. Saylor represented DEQ. Mr. Carollo and Mr. Smith represented Respondent and TerraFirma. Robert Kirschner, Ms. White, and Jim McCarthy appeared for the Limited Parties. DEQ called the following witnesses to testify: Haley Teach, DEQ 401 Water Quality Certification Program

Coordinator; Chance Plunk, DEQ TMDL[2] Specialist and former 401 Project Manager; Kirk Blaine, Oregon Senior Wild Fish Manager for the Wild Salmon Center; Holly Huchko, Oregon Department of Fish and Wildlife (ODFW) Endangered Species Act Specialist; Ryan Beckley, President and owner of TerraFirma and Board President for the WWCD; Rebecca Anthony, ODFW Water Quality and Mitigation Specialist; Greg Huchko, ODFW Umpqua Watershed District Manager; Gregory Apke, ODFW Fish Passage and Screens Program Manager; and Tony Janicek, Oregon Water Resources Department (OWRD) State Engineer for Water Resources and Dam Safety Program Manager. Respondent called the following witnesses to testify: Summer Baranko, Secretary and Board Member of the WWCD; and Mr. Beckley. The hearing record remained open for receipt of the parties' written closing arguments. On December 3, 2025, DEQ filed its Closing Brief, Respondent and TerraFirma filed Respondents' Closing Brief, and the Limited Parties filed their Post-Hearing Closing Brief.[3] On December 15, 2025, Respondent and TerraFirma filed an unopposed request to extend the deadline for filing reply briefs. ALJ Jarry granted the request. On January 9, 2026, the hearing record closed after receipt of DEQ's Closing Reply Brief and Respondents' Response to DEQ's Closing Brief.

## ISSUES

1. Whether Respondent violated Condition 2 of the 401 Water Quality Certification (WQC) by performing work that was inconsistent with the project description contained in the permit application materials.

2. Whether Respondent violated Condition 8 of the 401 WQC by failing to develop an erosion and sediment control plan, to implement erosion and sediment control measures to prevent or control the movement of soil into waters of the state, and to maintain an adequate supply of erosion and sediment control materials at the construction site.

3. Whether Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris (concrete) where they could enter waters of the state.

4. Whether Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris (tire mats) where they could enter waters of the state.

5. Whether Respondent violated Conditions 10 and 19 of the 401 WQC by operating equipment in the flowing channel of the river.

6. Whether Respondent violated Condition 11 of the 401 WQC by failing to report discharges of deleterious materials into waters of the state to OERS.

7. Whether Respondent violated Condition 15 of the 401 WQC by failing to remove all construction materials and temporary fill from below ordinary high water (OHW) before the

[2] Total Maximum Daily Load.

[3] DEQ's Order Granting and Denying in Part WaterWatch of Oregon, The Steamboaters, Native Fish Society, Oregon Wild, and Umpqua Watersheds' Petition for Party Status allowed the Limited Parties to file a 20-page written closing argument.

expiration of the in-water work window preferred by ODFW and approved by the U.S. Army Corps of Engineers (USACE).

8. Whether Respondent violated Condition 16 of the 401 WQC by failing to provide unobstructed fish passage from September 1, 2023, through September 5, 2023.

9. Whether Respondent violated Condition 17 of the 401 WQC by failing to fully isolate the in-water work area from the active flowing stream.

10. Whether Respondent should be assessed civil penalties for violations of Conditions 2, 8, 9 (concrete), 9 (tires), 10 and 19, 15, 16, and 17 of the 401 WQC, and, if so, in what amount. ORS 468.140(1) and OAR 340-012-0045.

## EVIDENTIARY RULINGS

Exhibits A1 through A49 and A51 through A53, offered by DEQ, were admitted into the record without objection. DEQ withdrew Exhibit A50.

Exhibits R1 through R6, R8 through R13, R15, R16, R19, R21 through R34, R38, R40, R43 through R66, R70 through R78, R80 through R83, R85 through R87, R89 through R94, R97 through R99, R103, R104, R112, R113, R117 through 120, R122, R125, R128, R129, R131, R134, R135, R137 through R140, R144 through R146, R158 through R161, R164, R168, R170 through R172, R176, and R179 through R191, offered by Respondent, were admitted into the record without objection. Exhibits R7, R14, R17, R18, R37, R41, R99, R136, R148 through R150, R153, R157, and R173, offered by Respondent, were admitted into the record over DEQ's objections. Exhibit R143, offered by Respondent, was not admitted into the record due to lack of relevancy. Respondent withdrew Exhibits R39 and R142.

## FINDINGS OF FACT

### *Background*

1. The Winchester Dam is located at river mile 7.0 of the North Umpqua River (river), in Douglas County, Oregon. Respondent, a group of private landowners residing on or near the reservoir upstream from the dam, owns and maintains the dam, which "consists of a rock-filled timber crib weir flanked by a concrete fish ladder on the north end and a concrete spillway-powerhouse structure on the south end." (Ex. R16 at 5, 8.)

2. The Winchester Dam is categorized as a High Hazard dam by OWRD, which "means that OWRD expects loss of human life to occur if the dam were to fail." (Ex. A32 at 2; test. of Janicek.)

3. The North Umpqua River is habitat to Endangered Species Act-listed salmonid species and other native migratory aquatic species. The river is designated Essential Salmonid Habitat by the Department of State Lands and as Essential Fish Habitat for Coho and Chinook salmon by the National Marine Fisheries Service (NMFS). (Ex. A1 at 13.) The Winchester

Dam's fish ladder is intended to permit native migratory fish to migrate past the dam. (Ex. A33 at 2.)

4. In 2021, Respondent started working with an engineering firm, DOWL, to design "repairs to address water flow between the fish ladder and the Winchester Dam, improve the dam structure and to repair a water underflow on the south end of the dam." (Ex. R145 at 4.)

5. On February 2, 2022, Respondent submitted a Joint Permit Application (JPA) to the USACE and DEQ for the repair project to the Winchester Dam. (Ex. R14.) On April 22, 2022, DEQ issued a letter of denial for the project due to Respondent's failure to submit all required documentation. (Ex. R15.)

6. On October 5, 2022, Respondent submitted another JPA to USACE and DEQ. (Ex. A1 at 4.)

7. On October 18, 2022, Respondent submitted an Oregon Fish Passage Permit Application to ODFW because the "proposed repairs to Winchester Dam involved the temporary dewatering and closing of the fish ladder at the dam, which would prevent or preclude upstream passage of migratory fish." (Ex. A33 at 2.)

8. On December 29, 2022, ODFW issued Fish Passage Authorization #PA-17-0138 to Respondent. (Ex. A33 at 5-9.) The authorization included the following conditions:

> * * * All in-water work, defined as work at or below the ordinary high water mark elevation of the project area(s) and includes but not limited to the dewatering and temporary water management activities, installation and removal of cofferdams, use of barges, pile driving, pile cutting, fill removal activities, dam repairs, concrete formwork, pouring and curing, rewatering, or other similar work, shall be completed during the July 7 to August 28 period, unless otherwise modified by ODFW.
>
> * * * Temporary closure of the fish ladder shall be limited to August 7th through August 28th unless other ODFW[-]approved temporary upstream passage accommodations are provided.

(*Id*. at 6.) ODFW determined that the "impacts to native migratory fish (NMF) species would be minimal during this period if terms and conditions of this and other permits were strictly adhered to." (*Id*. at 14.) Based on historical fish passage data, ODFW found that if a temporary block occurred after August 28, "the risk of harm to fishery resources would increase substantially for native spring Chinook salmon, summer steelhead trout, and ESA[-]listed Coho salmon, among other native species." (*Id*.)

9. On March 2, 2023, DEQ issued a 401 WQC to Respondent. On June 30, 2023, DEQ withdrew the 401 WQC to address potential water quality impacts in the event the dam gates were opened during the repair project. DEQ requested additional information from Respondent. (Test. of Teach; Ex. A1 at 4-5.)

***JPA submitted on July 7, 2023***

10. On July 7, 2023, Respondent submitted a revised JPA to USACE and DEQ. (Ex. A1.)

11. In a section describing the work below the ordinary high water mark (OHWM) of the river, the JPA included the following description of access roads to the work site:

> Construction access to the riverbed will be via previously disturbed areas on both banks of the river on the upstream side of the dam. There are existing gravel access roads on both sides of the dam leading to the riverbank. From the northern riverbank, access will be via existing fill material along the upstream portion of the dam fill prism. Some minor temporary grading may be necessary to transition from the upstream gravel roads to the instream work areas and may include importing temporary work area surfacing material (e.g. aggregate), as shown on Figure 6E.

(Ex. A1 at 9.) The JPA further provides:

> The temporary access road on the north bank will connect to the existing work platform on the upstream side of the dam. Vegetation removal, minor grading, and the installation of aggregate material to stabilize the road may be required, resulting in up to 1,380 SF of temporary impacts with 51 CY of fill and 51 CY of removal.

(*Id*. at 10.)

12. Figure 6E of the JPA shows the plan for a temporary access road between the gravel roadway and the work area upstream from the dam. The road runs along the existing dam infrastructure. (Ex. A1 at 39.)

13. In a section describing measures to be taken during construction to minimize the impact of removal and/or fill activities on waters and wetlands, the JPA provides, in part:

> For work areas below OHW of the North Umpqua River, equipment will be operated from existing adjacent areas above OHW, or from existing and proposed work platforms prepared with temporary aggregate surfaces. Temporary access roads will only require minor grading below OHW to transition from upland access roads to the existing work platform above the dam. The proposed temporary work platform below the dam will include the installation of geotextile fabric and aggregate that will be entirely removed once construction is complete. The contractor will clean and inspect all machinery when working near or below OHW to confirm that it is free of weeds, leaks, and grease. Erosion control measures are not anticipated as ground disturbance will be limited.

(Ex. A1 at 11.)

14. The JPA described temporary water management for the downstream construction as follows:

> Temporary isolation will be required for construction activities below the dam (Figure 6E, Attachment 2). It is anticipated that isolation will consist of sandbags, super-sacks, and plastic sheeting; however, other materials may be used depending on the contractor's temporary water management design. If required by site conditions, pumps equipped with a fish screen may be installed to pump water out of the isolation area to a temporary water quality facility placed in an upland area on the south bank. * * *

(Ex. A1 at 9.)

15. The JPA includes the following description of the impact of the work platform downstream of the dam:

> Below the dam between the temporary isolation barrier and the dam, a temporary aggregate work base will be installed resulting in 2,960 SF of impacts including 110 CY of fill and 110 CY of removal (Figure 6E, Attachment 2). All aggregate will be removed after construction activities are complete.

(Ex. A1 at 10.)

16. Figure 6E of the JPA, prepared by DOWL, indicates that the cofferdam made of sandbags and super sacks would be constructed downstream of the dam across the full length of the river. The crushed rock work platform would be exposed once the area was dewatered. (Ex. A1 at 39.)

17. Figures 4 and 5 of the JPA, prepared by DOWL, indicate that the project area downstream from the dam would be an area immediately adjacent to the dam. (Ex. A1 at 32-33.)

18. Attachment 8 of the JPA is a Gate Operation Supplement Information Memo, which includes the following description of best management practices that would be used to minimize downstream turbidity when the spill gates are open:

> Regarding BMPs to minimize turbidity, the slow rate of opening/drawdown is the primary measure to limit downstream turbidity. Another BMP is to install a 50' X 100' membrane secured to the bottom of the reservoir immediately upstream from the spill gates. The membrane would provide a barrier protecting against mobilization of sediments in those high velocity areas near the gates. The membrane would be installed using divers to lay it flat against the reservoir bottom. It would likely be keyed in 6-12" on the leading (upstream) edge. Sandbags would be placed along the leading edge with additional sandbags placed along the sides of the membrane as needed to secure it to the bottom of

> the reservoir. In total, it is estimated that this BMP would result in temporary fill of only 14 cubic yards of sandbags/membrane material. The membrane is anticipated to be removed as soon as the reservoir is refilled. The 7,500 square feet of reservoir bottom temporarily covered by the membrane will be returned to its previous condition upon removal.

(Ex. A1 at 48.)

19. Mr. Beckley, as the President of the WWCD, and James Stupfel, Senior Environmental Specialist with DOWL, signed the JPA certifying that they were "familiar with the information contained in the application, and, to the best of [their] knowledge and belief, this information is true complete and accurate." (Ex. A1 at 21.)

***401 WQC***

20. On July 18, 2023, DEQ issued a 401 WQC approval for "2018-505-1, Winchester Dam Repair Project," in which DEQ stated, "[a]s described in the application package received and reviewed by the Oregon Department of Environmental Quality * * *, the project qualifies for the expedited 401 Water Quality Certification * * *, subject to the conditions outlined below." (Ex. A2 at 2.) The 401 WQC general certification conditions provide, in part:

> 1) **Responsible parties**: This 401 WQC applies to the Applicant. The Applicant is responsible for the work of its contractors and sub-contractors, as well as any other entity that performs work related to this WQC.
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> * * * * *
>
> 2) **Work Authorized:** Work authorized by this 401 WQC is limited to the work described in the Permit Application and additional application materials (hereafter "the permit application materials"), unless otherwise authorized by DEQ. If the project is operated in a manner not consistent with the project description contained in the permit application materials, the Applicant is not in compliance with this 401 WQC and may be subject to enforcement.
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> * * * * *
>
> 7) Failure of any person or entity to comply with this Order may result in the issuance of civil penalties or other actions, whether administrative or judicial, to enforce its terms.
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> * * * * *
>
> 8) **Erosion and Sediment Control**: During construction, erosion control measures must be implemented to prevent or control movement of soil into waters of the state. The Applicant is required to develop and implement an effective erosion and sediment control plan. * * *.

In addition, the Applicant must:

a. Maintain an adequate supply of materials necessary to control erosion at the project construction site.

* * * * *

d. Use removable pads or mats to prevent soil compaction at all construction access point through, and staging areas in, riparian or wetland areas to prevent soil compaction, unless otherwise authorized by DEQ.

* * * * *

9) **Deleterious Waste Materials**: The Applicant is prohibited from placing biologically harmful materials and construction debris where they could enter waters of the state * * *. This includes, but is not limited to: * * * cement cured less than 24 hours; * * * tires * * *.

The following specific requirements apply:

a. Cure concrete, cement, or grout for at least 24 hours before any contact with flowing waters[.]

* * * * *

10) **Spill Prevention**: The Applicant must fuel, operate, maintain and store vehicles, and must store construction materials, in areas that will not disturb habitat directly or result in potential discharges.

* * * * *

11) **Spill & Incident Reporting**:

a. In the event that deleterious materials are discharged into state waters, or onto land with the potential to enter state waters, the discharge must be promptly reported to the Oregon Emergency Response Service (OERS * * *) within 24 hours.

* * * * *

15) **Fish protection/ Oregon Department of Fish and Wildlife timing**: The Applicant must perform in-water work only within the ODFW preferred time window as specified in the *Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources*, or as authorized otherwise under a

USACE permit and/or DSL removal/fill permit. Exceptions to the timing window must be recommended by ODFW, NMFS and/or the USFW as appropriate, and approved by DSL when applicable.

* * * * *

16) **Aquatic life movements**: Any activity that may disrupt the movement of aquatic life living in the water body, including those species that normally migrate through the area, is prohibited. The Applicant must provide unobstructed fish passage at all times during any authorized activity, unless otherwise approved in the approved application.

* * * * *

17) **Isolation of in-water work areas**: The Applicant must isolate in-water work areas from the active flowing stream, unless otherwise authorized as part of the approved application, or authorized by DEQ.

* * * * *

19) **Turbidity**: The Applicant must implement [Best Management Practices] to minimize turbidity during in-water work. * * *

* * * * *

d. **BMPs to Minimize In-stream Turbidity**: The Applicant must implement the following BMPs, unless accepted in writing by DEQ:

* * * * *

iv. Machinery may not be driven into the flowing channel, unless authorized in writing by DEQ[.]

(*Id*. at 2-5, 7-9; bold in original.)

21. The 401 WQC "is valid for the duration of the USACE Section 404 permit." (Ex. A2 at 2.)

22. An expedited 401 WQC cannot be modified. If a project requires changes, the applicant must submit an application for a new WQC. (Test. of Teach; Ex. A2 at 2.)

***USACE Authorization***

23. On July 26, 2023, USACE issued an authorization letter to Respondent, stating "[t]his letter verifies your project as depicted on the enclosed drawings * * * is authorized by Nationwide Permit (NWP) No. 3 Maintenance. (Ex. A3 at 1.) The enclosed drawings included

Figures 1, 2, 4, 5, 6, and 6A through 6F from the JPA. (*Id*. at 7-9, 11-18; *see* Ex. A1 at 29-30, 32-40.) The verification is valid until March 14, 2026. (Ex. A3 at 5.)

24. The authorization letter includes a list of construction-related activities that USACE authorized Respondent to complete, including the following:

> Temporary dewatering: Drawdown the reservoir pool to support dewatering efforts. Prior to drawdown, install a 50 foot by 100 foot liner immediately upstream of the dam gates in the area of the greatest water velocity through the gates. You will secure the liner to the river bottom utilizing sandbags at the leading edge of the liner, as well as additional sandbags down the sides of the liner. The liner will remain in place until the reservoir is refilled at the conclusion of the maintenance work. Prior to repair work, after the reservoir drawdown, temporarily discharge approximately 987 cubic yards of sandbags or super-sacks with plastic sheeting within 4,440 square feet of the North Umpqua River to isolate the dam. If required by site conditions, install pumps equipped with a fish screen to pump water out of the isolation area to a temporary water quality facility placed in an upland area on the south bank. Temporarily install straw wattles (rolls) in the dewatered area on the upstream side of the dam.

(Ex. A3 at 2.)

25. In the authorization letter, USACE advised, in part:

> In order for this authorization to be valid, you must ensure the work is performed in accordance with the enclosed Nationwide Permit 3 Terms and Conditions * * *; the Oregon Department of Environmental Quality * * * Section 401 Water Quality Certification Conditions * * *; and the following special conditions:
>
> * * * * *
>
> b. All in-water work shall be performed during the in-water work period of July 7, 2023 to 28 August 2023, with an in-water work period of August 7-28, 2023 for fish passage stoppage at the fish ladder.

(Ex. A3 at 2-3.)

26. USACE further advised:

> The Corps did not prepare a jurisdictional determination for this project. The Corps has treated the aquatic resource to be affected by this project as jurisdictional waters of the U.S. If you believe the Corps does not have jurisdiction over some or all of the aquatic resources at the project site, you may request an Approved Jurisdictional Determination (AJD). If one is requested, please be aware that we may require the submittal of additional information to complete the AJD and work authorized in this letter may not occur until the Corps

completes the AJD.

* * * * *

> Our verification of this NWP is based on the project description and construction methods provided in your permit application. If you propose changes to the project, you must submit revised plans to this office and receive our approval of the revisions prior to performing the work. Failure to comply with all terms and conditions of this NWP verification invalidates this authorization and could result in a violation of Section 404 of the Clean Water Act. You must also obtain all local, state, and other federal permits that apply to this project.

(Ex. A3 at 5-6.)

***Contractor for the Dam Repair Project***

27. In early March 2023, Respondent retained a law firm to provide advice regarding the process of seeking and selecting a general contractor to complete the dam repair project. Mr. Beckley, who is also the owner and operator of TerraFirma, recused himself from the selection process because he planned to submit a bid on behalf of TerraFirma. (Ex. R145 at 5-6; test. of Baranko.)

28. On March 23, 2023, Respondent held a public hearing to decide "whether to exempt the project from the public entity competitive bid requirement and pursue an alternative method of contracting the Project, that included consideration of criteria other than the bid amount." (Ex. R145 at 6.) The Board members unanimously supported an exemption from the competitive bid requirement. (*Id.*)

29. On March 24, 2023, Respondent published its request for proposals for the dam repair in the Daily Journal of Commerce, which is a newspaper of general circulation in Clackamas, Multnomah, and Washington counties. (Ex. R145 at 6.) The request for proposals required interested bidders to attend a pre-proposal meeting and project walk-through on March 30, 2023. The proposals were due by April 17, 2023. (Ex. A40 at 13.)

30. Thirteen prospective bidders attended the site visit, but only TerraFirma submitted a proposal. DOWL and Respondent's attorneys reviewed TerraFirma's proposal and deemed it acceptable. (Ex. R145 at 8-9.) TerraFirma charged Respondent for time and materials, and Mr. Beckley did not charge for his own time. (Ex. A46 at 2; test. of Beckley.)

31. TerraFirma has been in operation since 2005 and performs foundation repair, basement waterproofing, crawl space repair, earthquake retrofitting, wall stabilization, and concrete repair. (Ex. A41 at 3.)

32. In its agreement to provide services on the Winchester Dam repair, TerraFirma listed the following projects under the section "Relevant Project Experience": the installation of seven "HP450 Helical Piers to a depth of 48 feet at the bottom of a pump station" in 2020; installation

of 20 GMP Tiebacks, 11 PP288 Push Piers, and 40 ft of Shotcrete to shore existing commercial building" in 2018; and installation of "175 HP287 Helical Piers and 340 Pin Piles to lift, reinforce, and support existing three-story building" in 2021. (Ex. A41 at 4.) The pump station project was the only listed project that involved in-water work. During the 2023 dam repair, TerraFirma had 15 to 20 employees onsite, and very few, if any, of those employees had in-water work experience. (Test. of Beckley and Plunk.)

33. In 2018, Respondent hired Basco Logging to perform repairs to the dam. Basco Logging was owned by a member of the Board. In his capacity as Board President, Mr. Beckley oversaw dam repair work performed by Basco Logging. Basco Logging was subject to a DEQ enforcement action due to discharging concrete into the river during the repair project. (Test. of Beckley and Baranko.) Respondent paid part of the civil penalty assessed by DEQ against Basco Logging. (Test. of Baranko.)

34. Based on the 2018 repair project, Respondent anticipated incurring fines for the 2023 project. (Test. of Baranko.) In 2021, Respondent had approved up to $3,000,000 in bonds to pay for the repair project and to "pay fines, penalties, judgements, legal fees and other costs related to the Winchester Dam," among other things. (Ex. A53 at 1.)

***2023 Repair Project***

35. Prior to commencing repair work on the dam, TerraFirma installed a temporary bridge to access the work platform downstream of the dam, which involved discharging temporary fill material of approximately 128 square feet consisting of super sacks and gravel at the downstream side of the fish ladder. (Test. of Plunk; Exs. A8 at 1-2; A31 at 2.) The bridge was located below OHW and outside of the approved project area indicated in the JPA. (Test. of Plunk; Exs. A1 at 33, 39; A8 at 1-2; A31 at 2, 5.)

36. On August 4, 2023, Mr. Beckley sent an email to various agency representatives, including DEQ, in which he wrote, in part:

> It was brought to my attention that the plans submitted do not accurately reflect our construction access on the downstream side of the project. At one point we had considered utilizing cranes to perform work from an upstream access, but it was determined that there was no way to perform the work within the extremely accelerated timeline using that approach. I have been planning the temporary bridge installation access for several months, and I assume Brian Meunier failed to update the plans and the DOWL team during his departure.
>
> The impacts of this access are absolutely minimal and entirely temporary. We are utilizing an existing construction access road that has been used for other dam projects as well as ODOT and Douglas County projects. We have been granted an access permit by ODOT region 3. There [is] a small number of super sacks placed on a gravel bar and two small temporary concrete footings installed to support the bridge, and all will be removed when the project is completed. It is my understanding that all of you have either seen photos of the installed bridge or

> been to the site in person, so I will not send any more pictures unless you request them.

(Ex. A8 at 2.)

37. On August 7, 2023, TerraFirma commenced maintenance work on the dam. The in-water work area was not fully isolated from the active flowing stream. (Test. of Plunk.) Water continued to fill the in-water work area until at least August 15, 2023. (*See* Exs. A4 at 10-11; A12 at 2.)

38. Isolation of an in-water work area means that the work will be performed in dry conditions. Any water that enters the work area should be promptly removed to a water quality facility in an upland area to avoid discharging water from the work area into the water body. (Ex. A2 at 7; test. of Teach.) DEQ would not approve a temporary water quality facility located below OHW. (Ex. A9 at 1; test. of Teach.)

39. Also on August 7, 2023, workers operated a small excavator in the flowing channel of the river without proper containment. (Test of Plunk and Blaine; Exs. A4 at 6-7; A14 at 2-3; A52 at 1.) DEQ staff spoke to Mr. Beckley regarding the excavator, and Mr. Beckley indicated that he would remove the excavator from the water. DEQ also provided TerraFirma with a copy of the 401 WQC because no copy was at the worksite. (Test. of Plunk; Ex. A52 at 1.) Later that day, workers again operated the excavator in the river. (Test. of Plunk; Ex. A14 at 2-3.)

40. Driving an excavator in the river can stir up sediment, which can harm aquatic life and result in potential discharges of fuel and other fluids into the river. (Test. of Plunk.)

41. By August 8, 2023, workers had made an accessway between the gravel roadway and the upstream work area on the north bank of the river. (Test. of Plunk.) The accessway started farther upstream than the location of the temporary access road indicated in Figure 6E of the JPA, and it cut through a vegetated area that was outside the project area shown on Figures 4 and 5 of the JPA. (Ex. A1 at 32-33, 39.) The workers used an excavator to dig up a substantial amount of soil along the bank of the river without using any erosion and sediment controls, such silt fencing and straw waddles, to protect water quality. (Exs. A4 at 8-9; A52 at 2; test. of Plunk.) When DEQ staff spoke to Mr. Beckley about the excavation along the bank that day, Mr. Beckley indicated that they were digging out the old channel to the fish ladder and that someone was working on the design, so the work might not be described in the 401 WQC. In response to DEQ informing him that erosion and sediment controls were needed in the area, Mr. Beckley stated that there was no place to put perimeter controls because the water line kept moving and workers were attempting to salvage fish on the perimeter. (Test. of Plunk; Ex. A52 at 2.)

42. The costs for silt fencing and straw waddle for erosion and sediment control would have been $166. (Ex. A36 at 5, 11.) Based on the avoidance of that cost, the Environmental Protection Agency's (EPA) BEN computer model determined that Respondent's estimated economic benefit was $167. (*Id.*)

43. Erosion and sediment control measures help ensure that pollution will not enter the waterway. Erosion and sediment control plans identify such things as location of the construction entrance, staging area, stockpile area, concrete washout areas, baker tank locations (to store contaminated water), silt fences and construction fencing, dewatering plan, fish screens, in-water isolation measures, and ground and vegetation destabilizations measures. (Test. of Teach.)

44. Throughout the dam repair project, there were minimal erosion controls used on the work site. There was no supply of sediment fencing or straw waddles at the construction site. (Test. of Plunk.)

45. TerraFirma did not install a sediment membrane immediately upstream from the spill gates. (Test. of Plunk and Beckley.)

46. On August 8, 2023, TerraFirma used tire mats to construct a temporary access road downstream of the dam below OHW. (Test. of Plunk; Ex. A38 at 3, 6.) The mats were comprised of "heavy truck tire casings, bound with reinforcing cables." (Ex. R75 at 6.) TerraFirma also began constructing a cofferdam with super sacks and placed a work platform made of tire mats directly on top of the cofferdam. (Test. of Plunk; Ex. A4 at 10-11.)

47. A cofferdam is a temporary structure built within or across a waterbody to create a dry work area isolated from the surrounding area. (Test. of Plunk.) Isolation of in-water work areas means that the area should be dry and any water that enters the area should be pumped out. (Test. of Teach.)

48. During the repair project, portions of the tire mats on the work platform were in contact with the river. (Test. of Plunk; Exs. A4 at 10-11, 13; A12 at 2-3; A15 at 1; A16 at 1; A25 at 1; A26 at 1.) For much of the project, TerraFirma left a section of unused tire mats in the river near the work platform. (Exs. A4 at 11; A16 at 1; A25 at 1; A51 at 1; test. of Blaine.)

49. On August 10, 2023, workers were unable to pump out water from the work area due to issues with the pump. (Ex. A38 at 12.) TerraFirma asked a DOWL representative if they "could use the concrete wall concrete mixture for the first part of the concrete sill since the first part of the sill doesn't have much water." (*Id.*) DOWL advised that TerraFirma could use the mixture if they were properly managing the water and accepted "the risk of the concrete getting into the water." (*Id.*)

50. On August 11, 2023, TerraFirma performed work on the dam, including drilling and installing tiebacks and placing formwork and rebar for the concrete pour. TerraFirma indicated to a DOWL representative that it planned to spend the afternoon working on the cofferdam. (Ex. A38 at 15.)

51. In a letter dated August 11, 2023, USACE informed Respondent that it had engaged in the following unauthorized work:

> You have discharged temporary fill material (to include super sacks and gravel)

> outside the authorized project footprint * * * at the downstream area of the fish ladder as part of an effort to install a bridge for access to the downstream portion of the dam. The discharge appears to impact an area of the river, approximately 128 square feet in size[.]

(Ex. R10 at 1.) The letter further stated:

> At this time, we have determined not to take any legal action with regards to the temporary discharge of fill material to access the downstream area of the dam. Though the fill is below the OHWM, the fill is minimal in size, contained, outside of flowing water, and temporary. You are to remove all discharged material at the conclusion of the maintenance and within the in-water work window. Per Special Condition a of your NWP verification letter, you are required to submit an as-built report upon completion of the authorized work. As a part of this submittal, please include documentation of the removal of this unauthorized material. If you do not, the Corps will reevaluate the need to take action[.]

(*Id*. at 2.)

52. On August 12, 2023, between approximately 5:30 a.m. and 8:30 a.m., workers poured concrete into forms for the wall of the dam and a sill. (Ex. A38 at 18.) At or about 6:30 a.m., water flowed under the dam and across the top of the newly poured concrete sill, and "[r]esidue was flowing into the contained water section." (*Id*.) TerraFirma pumped the water from the work area into a baker tank. That afternoon, TerraFirma continued to work on the coffer dam. (*Id*.)

53. On August 13, 2023, TerraFirma worked on the temporary access road downstream of the dam using large rocks with tire mats placed on top. Once the rocks were in place, workers worked on the coffer dam. (Ex. A38 at 21.)

54. On August 14, 2023, TerraFirma pumped water from an isolated area of the dam directly into the river, causing bubbles to form in the river. (Ex. A38 at 24.)

55. On August 15, 2023, TerraFirma constructed a temporary settlement pond downstream of the dam below the OHWM as an alternative to the Baker tank for dewatering the work area. (Test. of Plunk; Exs. A4 at 11-12; A16 at 3; A38 at 27.) At 1:00 p.m. on that date, the work area still was not dewatered. (Ex. A38 at 27-28.) The work area was not properly contained, and turbid water from the work area reached the river. (Test. of Plunk; Ex. A12 at 2-3.) Workers pumped water from the work area to the settlement pond, which leaked and discharged water into the river. (Ex. R31 at 1-2; test. of Plunk.) Dewatering hoses also ran from the work area directly into the river. (Test. of Plunk.)

56. On August 15, 2023, DEQ sent Respondent an email regarding its field observations that required "immediate attention." (Ex. R75 at 3.) The email included the following statement:

> The work area on the downstream side of the dam was proposed as a "crushed rock work platform" however a series of woven mats constructed of used car tires has been deployed instead. Tires are considered a deleterious waste material per Condition #9 of your 401 WQC and must be removed from areas where they currently are or could enter waters. Please explain why this change was made and which agencies have authorized this modification.

(*Id*. at 6.) On August 16, 2023, Respondent responded to DEQ's email. (*Id*. at 2-3.) Regarding the tire mats, Respondent stated as follows:

> I am unclear as to why you were not aware of this, it has been part of our coffer design from the beginning. We submitted for crushed rock in super sacks, with the blast mats * * * as a running surface to prevent the sacks from being damaged and spilling material that could not be recovered. I'm sorry if you did not recognize the vocabulary, but nobody else questioned it and it's the common terminology in construction. Because of the extremely uneven bedrock (depths vary from 0-11' and with adverse angles) we have utilized some large rip rap to stabilize the work platform, but will continue to utilize the super sacks, sand bags and liner materials to complete the isolation.

(*Id*. at 6.)

57. On August 15, 2023, Melanie O'Meara, USACE, emailed DEQ to inquire about the tire mats. (Ex. R60 at 4-5.) Ms. O'Meara noted, "the portion [of the tire mats] that is near the constructed bridge is well above the water so last week during my site visit I did not have any concerns." (*Id*. at 5.) She further wrote:

> The [remaining] installed mats, reported to us yesterday/today, appear to be within the authorized dewatering area and appear to be replacing what was to be a gravel access road. From a Clean Water Act Section 404 standpoint, I am initially not concerned as I do not see a substantive expansion of the temporary impacts footprint, but rather a change in material. * * * All that said, I would like your input based on the material and potential impacts to water quality and species. Would this be a potential violation of the * * * DEQ Section 401 WQC? * * *.

(*Id*.)

58. On August 16, 2023, TerraFirma directed workers to pump water from the work area directly into the river. A DOWL representative recommended against pumping water into the river, and a TerraFirma representative acknowledged that he was aware of DOWL's recommendation. (Ex. A38 at 30.) TerraFirma continued to work on the cofferdam. (*Id*. at 31.)

59. After TerraFirma completed the construction of the cofferdam, water continued to flow through the dam face into the in-water work area. (Test. of Plunk and Beckley.) The uneven riverbed also made it difficult to fully isolate the work area from the river, and at times, water infiltrated the work area from the downstream side of the cofferdam. During nonwork

hours, water filled the work area. Workers pumped out the water each morning. (Test. of Beckley.)

60. On August 19, 2023, a DOWL representative notified TerraFirma that pumping water from the work area into a silt sack in the river was not allowed under the plan and permit. DOWL confirmed that all water should be pumped and treated in an upland location. (Ex. A38 at 39.)

61. On August 21, 2023, workers poured concrete from approximately 6:10 a.m. to 8:00 a.m., placing 42 cubic yards of the sill footing. Water continued to flow through the dam face and over the freshly poured concrete. During the pour, water was pumped into the settlement pond without a silt sack being used. Workers later added a silt sack, but it slipped off. (Exs. A13 at 1; A38 at 45.) The water leaked out the side of the settlement pond and flowed down the bedrock into the river, causing plumes in the river. (Exs. A14 at 5-7; A16-A19.) On the same date, Mr. Blaine reported to the Oregon Emergency Response System (OERS) that concrete-contaminated water had discharged into the river. (Ex. A14 at 7; test. of Plunk.)

62. On August 21, 2023, Mr. Beckley emailed DEQ and other agencies regarding the concrete pour that occurred that morning. He reported the following:

> This morning we had a concrete pour scheduled for 6AM, placing (42) cubic yards of the sill footing. As I reported previously, we are unable to completely stop the small amount of water that is flowing through the dam face and as a result water was present during the pour, although it was effectively contained. We used a variety of methods including piping, lining and sandbags to concentrate and contain the water away from the concrete, and all water was pumped into containment.
>
> At approximately 7:00AM I discovered a "silt sock" in [our] final containment structure had slipped off the discharge pipe, and the turbidity of our discharge was above allowable limits (27 over baseline of 2.7). I would note that the volume of water was very low, and that measurements taken at 20' downstream and 100' downstream have been at baseline (2.7) the entire time. We also detected a slightly elevated PH in our primary containment tank (10.0 over the baseline of 5.7 in the stagnate channel below the fish ladder[)]. We immediately stopped pumping out of the Frack tank, repaired the silt sock and added bio bags and filter booms.
>
> I contacted Andy Ablee, Roseburg WTP manager and he reported that the PH baseline at their intake was between 7.4 and 8.7 over the past 12 hours. * * *.

(Ex. A13 at 1-2.)

63. Respondent believed the reporting requirement in the 401 WQC was satisfied because a private individual submitted a report to OERS and Respondent informed DEQ of the discharge. (Ex. R146 at 10.)

64. On August 22, 2023, water continued to seep through the dam onto the freshly poured concrete, and the work area was not fully dewatered. The water from the work area was pumped into the settlement pond, where a silt sack reached capacity and the system discharged "water with extremely high turbidity" down the bedrock and into the river. (Test. of Plunk; Exs. R26 at 1-2; A4 at 11-12; A9 at 1; A10 at 1.) No OERS report was made for a discharge of concrete-contaminated water on August 22, 2023. (Test. of Plunk.)

65. On August 23, 2023, Respondent submitted a request to ODFW for an extension of the in-water work window to August 31, 2023. (Ex. A33 at 3.)

66. On August 24, 2023, ODFW authorized an extension of the in-water work window to August 31, 2023, for removal of all "[m]aterials used to temporarily fill waters of this state" and until September 1, 2023, for removal of "[t]he temporary bridge access structure and all materials used in association with this structure." (Ex. A33 at 12.) ODFW did not extend the August 28, 2023, deadline regarding temporary block of fish passage established in Fish Passage Authorization #PA-17-0138 "because historical fish passage data indicated the risk of harm to fishery resources would increase substantially for native spring Chinook salmon, summer steelhead, and ESA-listed Coho salmon, among other species." (*Id*. at 3.) ODFW indicated that the "In-water Work Extension Authorization does not abrogate previous ODFW authorizations for this project[.]" (*Id*. at 12.)

67. On August 24, 2023, workers poured concrete at the site. (Ex. A38 at 54.) TerraFirma used "a natural rock pool as a temporary basin to put some of the water from the concrete pour area." (*Id*. at 54, 56.) The water appeared gray, and a DOWL representative recommended that TerraFirma transfer it to a lined basin. "[D]irty water" containing cement particles was also being pumped into the settlement pond, where it leaked out and flowed into the river. (*Id*.; Ex. A4 at 16.)

68. On August 25, 2023, USACE granted Respondent an extension of the in-water work window. (Ex. A29.) In the approval letter, USACE provided the following "update to special condition b in the original verification letter":

> b. <u>In-water Work Window</u>: All in-water work, to include the drawdown and refill of the reservoir, shall be performed during the in-water work period of July 7, 2023 to September 1, 2023, with an in-water work period of August 7, 2023 to August 31, 2023 for fish passage stoppage at the fish ladder. Exceptions to these time periods require case-specific approval from the Corps.

(*Id*. at 1; emphasis in original.)

69. On August 25 and 26, 2023, the silt sack in the settlement pond "blew." (Ex. A38 at 58, 61.) A DOWL representative did not observe any silt or water entering the river on those dates. (*Id*.)

70. On August 25, 2023, Ms. O'Meara exchanged an email with Mr. Beckly, in which

she wrote, "The water currently around the concrete and flowing into the concrete area is contained in that you pump it to your treatment – that's a-okay as I (and the other agencies) realize there's no way to keep the area completely dry." (Ex. R25 at 1.)

71. On August 30, 2023, Respondent submitted a second request for an extension of the in-water work window. (Ex. A33 at 14.)

72. On September 1, 2023, NMFS provided the following opinion regarding the request to extend the in-water work window to September 6, 2023:

> Based on the in-water work window extension request from WWCD, the new information of salmonid presence at the dam, the best available data of adult coho salmon spawner abundance at Winchester Dam, current environmental conditions, and the timing of adult OC coho salmon spawner migration NMFS is reasonably certain that the proposed in-water work window extension to extend in-water work to September 6, 2023, will increase the risk of take from harm and harassment of OC coho salmon in the action area that was not analyzed in the biological opinion issued on July 20, 2023, for this project. Harm and harassment to a small number of adult OC coho salmon will likely occur in the form of short-term delay in migration to spawning grounds and direct injury from physical interactions with dam infrastructure in attempting to migrate through the southern spill gates. This impact will abate when fish passage is restored at the end of the extension period. The impact that this harm or harassment of a small number of individuals will have at the North Umpqua population scale of OC coho salmon is negligible because the percentage of the total spawners exposed to harm or harassment is likely within the range of the percentage of the total spawner abundances described above. Therefore, the effects of the take of the small number of individual adult OC coho salmon spawners at the population scale are not meaningful and will not appreciably reduce the likelihood of persistence or sustainability of the population or the OC coho salmon ESU.

(Ex. R59 at 5-6.)

73. On September 1, 2023, ODFW conditionally approved the extension request through 5:00 p.m. on September 6, 2023. (Ex. A33 at 14-15.) In the authorization letter, ODFW informed Respondent of the following:

> Many of the spring Chinook currently delayed below the dam only have two weeks to migrate as far upstream as Soda Springs to spawn. The upstream migration of these fish is delayed as a direct result of your project not being completed on time. In addition, summer steelhead will be below critical abundance again this year, a level below which ODFW has significant concerns about the long-term viability of a population. ODFW has closed the North Umpqua River to recreational angling and released previously collected hatchery broodstock in efforts to conserve the population. Your project delay is now negatively affecting this population.

(*Id*. at 14.) ODFW's authorization was subject to various terms and conditions including, in part:

> 2) WWCD shall provide upstream fish passage during this period. As indicated above, fish passage is not currently adequate, and this must be remedied immediately.
>
> 3) Materials used to temporarily fill waters of this state shall be permanently removed from waters of the state and prior to completion of the project by 11:59 PM on September 3, 2023. This includes but is not limited to all temporary fill used for the construction road above [the] dam and temporary boulders placed below the dam. As outlined in your [in-water work extension request], "*Temporary work surfacing, aggregate, and boulders will be removed and hauled off-site and then the isolation measures (plastic sheeting, sandbags, supersacks) will be removed. Demobilization of the temporary in-water components is expected to take place 9/1-9/3".* Failure to remove these materials may result in an impediment to fish passage.
>
> 4) The temporary bridge access structure and all materials used in association with this structure shall be permanently removed from waters of the state. As outlined in your IWWE, *"bridge removal is expected to take place by 9/4".*

(*Id*. at 15; emphasis in original.)

74. On September 1, 2023, USACE also granted the extension of the in-water work window. (Ex. A30.) In the approval letter, USACE provided the following "update to special condition b in the original verification letter":

> b. <u>In-water Work Window</u>: All in-water work, to include the refilling of the reservoir and removal of temporary fill material, shall be performed during the in-water work period of July 7, 2023 to 5:00 PM, Pacific Time on September 6, 2023. Exceptions to this time period require case-specific approval from the Corps.

(*Id*. at 1; emphasis in original.) The letter further provided: "All other terms and conditions of the original NWP verification letter remain in full force and effect." (*Id*.)

75. During the period August 28, 2023, through September 1, 2023, ODFW staff observed more than 100 unsuccessful fish passage attempts, including 20 unsuccessful fish passage attempts in 23 minutes on September 1, 2023. (Exs. A33 at 4; A34 at 4, 6.) On September 3, 2023, ODFW staff observed several fish jumping at the spill gates without passing through. (Ex. A34 at 6-7.) Some fish hit the concrete structures around the spill gates or landed on the shallow bedrock at the base of the spillway as they unsuccessfully attempted to pass. Such impact could have caused abrasions and risk of bacterial infections or possibly death from the impact. (*Id*. at 4.)

76. On September 3, 2023, workers used heavy machinery to remove the tire mats and large boulders from the work site downstream of the dam during heavy rain. Water and debris fell off the mats and into the river, and several boulders dropped into the water, which the workers did not retrieve. (Test. of H. Huchko; Exs. A26 at 1-2; A28 at 1.)

77. TerraFirma restored passage through the fish ladder on September 5, 2023. (Exs. A33 at 4; A34 at 4.)

78. The failure to restore fish passage as scheduled "prevented and/or delayed" migration of native migratory fish populations due to insufficient passage through the spillway gates. (Ex. A33 at 14.) The delay in passage and the "repeated burst swimming events" cause "increased stress and energy expenditure" in the fish, which negatively affect their spawning success. (*Id.*; Ex. A34 at 4.)

79. After 5:00 p.m. on September 6, 2023, construction-related materials and temporary fill remained below the OHWM, including super sacks, lumber, gravel fill, part of a concrete footing for the temporary bridge, an excavator scoop, a cooler, and a small pump. (Test. of H. Huchko; Exs. A4 at 17; A27 at 1-5; A28 at 1.) On September 7, 2023, super sacks, sandbags, and other temporary fill material remained in the same area below the OHWM. (Ex. A28 at 1.)

80. In October 2023, DOWL submitted a Condition Assessment to OWRD on behalf of Respondent, concluding, "Overall, the timber dam elements are in poor condition, especially in the central and southern regions due to the heavy deterioration evident in the timber posts and leakage through the dam face lagging in many areas[.]" (Ex. A32 at 2, 8.)

81. Also in October 2023, DOWL submitted a Completion Report to OWRD on behalf of Respondent. (Ex. A32 at 2, 74-225.) In the report, DOWL indicated that several planned work items were deferred during the 2023 repair project that will need to be completed in the future, including construction phase testing of anchors, filling voids behind the dam face and between the new concrete fish ladder wall and existing timber dam face, and South Power Building leak mitigation. (*Id*. at 79-80.) DOWL also indicated as follows:

> Based on the current condition of timber facing elements, installation of new facing on the entire length of the timber dam will be required. The timing for installation of new facing is based on the effectiveness of deferred work related to leak mitigation and the rate of timber decay.

(*Id*. at 80.)

82. In a letter dated November 14, 2023, USACE informed Respondent that the use of tire mats constituted "a failure to comply with the authorized project description and plans." (Ex. A31 at 2.)

83. On December 12, 2023, OWRD sent a Notification of Potentially Unsafe Dam to Respondent, requiring correction actions. OWRD found the following unsafe conditions resulting from the 2023 repair project: the failure to test the tieback anchors to meet the proof-

testing acceptance criteria established by the engineering firm that designed the tieback anchors; and the failure to install the horizontal whaler support according to the approved design. (Ex. A32 at 1-2.)

84. On March 7, 2024, OWRD issued a Proposed Final Order to Respondent, finding that the Winchester Dam is Potentially Unsafe and prescribing the proof-testing of the tieback anchors as a corrective action. (Ex. A32 at 3.)

85. Based on the history of repairs completed to the Winchester Dam and the information in the Condition Assessment and Project Completion Report, OWRD determined the following:

> [I]t is likely that all or part of the timber facing and all or part of the cap on the upstream face of the dam will need to be replaced at some point in the future. It is also likely that any voids within or underneath the dam, whether existing or future, will need to be repaired.

(Ex. A32 at 3.)

## CONCLUSIONS OF LAW

1. Respondent violated Condition 2 of the 401 WQC by performing work that was inconsistent with the project description contained in the permit application materials.

2. Respondent violated Condition 8 of the 401 WQC by failing to develop an erosion and sediment control plan, failing to implement erosion and sediment control measures to prevent or control the movement of soil into waters of the state, and failing to maintain an adequate supply of erosion and sediment control materials at the construction site.

3. Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris (concrete) where they could enter waters of the state.

4. Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris (tire mats) where they could enter waters of the state.

5. Respondent violated Conditions 10 and 19 of the 401 WQC by operating equipment in the flowing channel of the river.

6. Respondent violated Condition 11 of the 401 WQC by failing to report discharges of deleterious materials into waters of the state to OERS.

7. Respondent violated Condition 15 of the 401 WQC by failing to remove all construction materials and temporary fill from below OHW before the expiration of the in-water work window preferred by ODFW and approved by USACE.

8. Respondent violated Condition 16 of the 401 WQC by failing to provide unobstructed

fish passage from September 1, 2023, through September 5, 2023.

9. Respondent violated Condition 17 of the 401 WQC by failing to fully isolate the in-water work area from the active flowing stream.

10. Respondent should be assessed civil penalties in the total amount of $77,767 for violations of Conditions 2, 8, 9 (concrete), 9 (tires), 10 and 19, 15, 16, and 17 of the 401 WQC.

## OPINION

Pursuant to Section 401 of the Clean Water Act, an applicant for a federal license to engage in activity, including construction, that may result in a discharge of a pollutant in navigable waters must obtain a water quality certification from the relevant state or interstate agency "that any such discharge will comply with the applicable provisions" of the Act. 33 USC § 1341(a)(1). A Section 401 certification (*i.e.*, 401 WQC) attests that the activity will comply with the applicable laws, including state water quality standards and "any other appropriate requirement of State law set forth in such certification." *Id*.(a)(1), (d). The conditions in a 401 certification become conditions of the federal license or permit. *See Id*.(d).

In July 2023, DEQ issued a 401 WQC to Respondent for the Winchester Dam repair project. In the Second Amended Notice, DEQ proposes to assess Respondent civil penalties in the total amount of $78,567 based on allegations that Respondent violated multiple conditions of the 401 WQC. As the proponent of the allegations, DEQ has the burden to establish, by a preponderance of the evidence, that the allegations are correct and that it is entitled to assess the proposed civil penalties. OAR 340-011-0545(1) (general rule that the burden of proof is on the proponent of the fact or position). OAR 340-011-0545(2) ("All findings in a * * * order must be based on a preponderance of evidence in the record unless another standard is specifically required by statute or rule."). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp*., 303 Or 390, 402 (1987).

The United States District Court for the District of Oregon Courts addressed the standards for interpreting a 401 WQC, in relevant part, as follows:

> The Court interprets the Certification "like any other contract." * * * The Certification "must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." * * * The terms of the Certification must "be given their ordinary meaning." * * * The Court must also "give effect to every word or term . . . and reject none as meaningless or surplusage." * * * An interpretation that "would create an unreasonable result" must "be rejected." * * *.
>
> "If the language of the [Certification], considered in light of the structure of the [Certification] as a whole, is plain and capable of legal construction, the language alone must determine the [Certification's] meaning." * * * If the Certification's text is ambiguous, "we may turn to extrinsic evidence to interpret its terms." * *

> * "The fact that the parties dispute [the Certification's] meaning does not establish that [it] is ambiguous; it is only ambiguous if reasonable people could find its terms susceptible to more than one interpretation." * * *.

*Deschutes River Alliance v. Portland General Electric*, 331 FSupp 3d 1187, 1198-1199 (D Or 2018) (*rev'd on other grounds*) (citations omitted).

**1. Violation of Condition 2**

DEQ alleges that "Respondent violated Condition 2 of the 401 WQC by performing work that was inconsistent with the project description contained in the permit applications materials." Second Amended Notice at 7. More specifically, DEQ contends:

> * * * Respondent conducted removal/fill activities along the north bank of the North Umpqua River both upstream and downstream of the dam outside the work areas described in the JPA and indicated on Figure 6E; failed to install a membrane liner at the dam gates during the drawdown; and used tire mats that were not described in the JPA as part of the temporary access road and work platform below the dam.

*Id*.

Condition 2 of the 401 WQC provides, in part: "Work authorized by this 401 WQC is limited to the work described in the Permit Application and additional application materials (hereafter "the permit application materials"), unless otherwise authorized by DEQ." Exhibit A2 at 2.

***Removal/Fill Activities Upstream of the Dam***

The work area at issue upstream of the dam is shown on the lefthand side of Figure 6E of the JPA:

Exhibit A1 at 39 (relevant portion shown). The temporary access road appears in green, running

right alongside a rectangular area. Figure 4 of the JPA outlines the project area, shown in relevant part:

*Id*. at 32 (arrows added). The yellow arrow points to the rectangular area outlined in the top left of Figure 6E, with the narrow unvegetated strip of land immediately to the right of the rectangle corresponding to the proposed location of the temporary access road. The white arrow points to the area in which Respondent conducted removal/fill activities along the north bank of the river upstream from the dam.

Figure 5 of the JPA includes an outline of the rectangular area from Figure 6E and a delineation of the project area that is consistent with Figure 4:

*Id*. at 33 (relevant portion included). The OHWM is delineated by the black line marked through with Zs.

The JPA includes written descriptions of the project areas and provides, in part:

> Construction access to the riverbed will be via previously disturbed areas on both banks of the river on the upstream side of the dam. There are existing gravel access roads on both sides of the dam leading to the riverbank. From the northern riverbank, access will be via existing fill material along the upstream portion of the dam fill prism. Some minor temporary grading may be necessary to transition from the upstream gravel roads to the instream work areas and may include importing temporary work area surfacing material (e.g. aggregate), as shown on Figure 6E.

*Id*. at 9. Additionally, the JPA provides:

> The temporary access road on the north bank will connect to the existing work platform on the upstream side of the dam. Vegetation removal, minor grading, and the installation of aggregate material to stabilize the road may be required, resulting in up to 1,380 SF of temporary impacts with 51 CY of fill and 51 CY of removal.

*Id*. at 10. In a section describing measures to be taken during construction to minimize the impact of removal and/or fill activities on waters and wetlands, the JPA states the following:

> For work areas below OHWM of the North Umpqua River, equipment will be operated from existing adjacent areas above OHWM, or from existing and proposed work platforms prepared with temporary aggregate surfaces. Temporary access roads will only require minor grading below OHWM to transition from upland access roads to the existing work platform above the dam.

*Id*. at 11.

Respondent contends that it complied with the project description in the JPA by using access roads upstream of the dam that had been used in past repair projects. Mr. Beckley testified at hearing that an access road to the right of the vegetated area in which it conducted removal fill activities (*see* the area on Figure 4 above noted by the white arrow) was used during past dam repair projects, as shown in Exhibits R99 and R119 (photographs of prior construction projects). Respondent asserts that DOWL's figures were inaccurate and the descriptions in the JPA of the use of "previously disturbed areas on both banks of the river" and "existing gravel roads on both sides of the dam" provide support for the intent to utilize that vegetated area upstream of the dam. Respondent's Closing brief at 32 (quoting Exhibit A1 at 9.) Furthermore, Respondent argues that due to the this "discrepancy" between the project description and the maps, the "intent" of the JPA controls. *Id*. at 33.

The delineated project area shown in Figures 4, 5, and 6E and the written description of the project in the JPA do not conflict. When reviewed together, the project area is unambiguous. Although Respondent asserts that DOWL made errors in the figures, those figures are consistent with each other in terms of the project area. Additionally, the written description is consistent with the approved project area, which indicates that "[t]emporary access roads will only require *minor* grading below OHWM to transition from upland access roads to the existing work platform above the dam" and "[e]rosion control measures are not anticipated as ground disturbance will be limited." Exhibit A1 at 11; emphasis added. Although prior projects may have used the area in which Respondent conducted removal/fill activities along the bank of the river, that area required much more than "minor" grading and the ground disturbance was not "limited." Instead, workers used an excavator to dig soil up to the edge of the river, and the level of ground disturbance required erosion and sediment control measures, which were not in place. Accordingly, DEQ established that Respondent conducted removal/fill activities along the north bank of the river upstream the dam outside the work areas described in the JPA. Respondent therefore violated Condition 2 of the 401 WQC by performing work that was inconsistent with the project description contained in the permit applications materials

***Removal/Fill Activities Downstream of the Dam***

DEQ contends that Respondent discharged temporary fill material, including super sacks and gravel, outside of the work area downstream of the dam described in the JPA and indicated on Figure 6E. The record establishes that Respondent discharged temporary fill material in an area of approximately 128 square feet when installing a bridge below the OHWM.

Respondent concedes that the JPA does not include the bridge but contends that the "parties must have had actual knowledge that access to that downstream work platform would be accomplished *somehow*." Respondent's Closing Brief at 34; emphasis in original. Respondent also contends that "even if the use of the bridge was initially a violation of Condition 2 of the 401 WQC, "USACE approved TerraFirma's use of the bridge" in its letter dated August 11, 2023, and therefore, "the bridge became an authorized element of the project" as of August 11, 2023. *Id*.

DEQ established that the fill material discharged for purposes of constructing the bridge downstream of the dam was a violation of Condition 2. That work was not described in the JPA or indicated on Figure 6E. In the August 11, 2023, letter, USACE decided against taking legal action regarding the temporary discharge of fill material and directed Respondent "to remove all discharged material at the conclusion of the maintenance and within the in-water work window." Exhibit R10 at 2. The letter does not indicate that USACE made the bridge an authorized component of the dam repair project. Because this work was not described in the JPA or indicated on Figure 6E, DEQ established that the discharge of temporary fill material associated with the bridge downstream of the dam violated Condition 2 of the 401 WQC.

***Membrane Liner***

DEQ asserts that Respondent failed to install a sediment membrane at the dam's spill gates, as indicated in Attachment 8 of the JPA. Attachment 8 of the JPA is a Gate Operation

Supplement Information Memo, which includes a description of best management practices that would be used to minimize downstream turbidity when the spill gates were opened. One of those best management practices was the installation of the membrane to act as a barrier "protecting against mobilization of sediments in those high velocity areas near the gates." Exhibit A1 at 48. USACE's July 26, 2023, authorization letter confirmed the plan to "install a 50 foot by 100 foot liner immediately upstream of the dam gates in the area of the greatest water velocity through the gates" that would "remain in place until the reservoir is refilled at the conclusion of the maintenance work." Exhibit A3 at 2. There is no dispute that Respondent did not install the sediment membrane.

Respondent argues that the sediment membrane requirement was invalid because DEQ failed to follow the procedural requirements in OAR 340-048-0050 when DEQ rescinded the March 2, 2023 approval of the JPA submitted by Respondent on February 2, 2022. OAR 340-048-0050(4) provides certification holders with the opportunity to request a hearing if dissatisfied with a modification or revocation of a 401 WQC. But rather than requesting a hearing regarding the revocation or withdrawal of the 401 WQC, Respondent filed a revised JPA on July 7, 2023, which is the JPA on which DEQ based the 401 WQC at issue. Accordingly, the sediment membrane requirement was valid, and Respondent violated Condition 2 of the 401 WQC by failing to install it.

***Tire Mats***

DEQ contends that Respondent violated Condition 2 of the JPA by constructing a temporary access road constructed with tire mats and a temporary work platform using tire mats downstream of the dam.

Respondent asserts that the use of tire mats was authorized in Condition 8(e) of the 401 WQC, which requires the "[u]se removable pads or mats to prevent soil compaction at all construction access points through, and staging areas in, riparian or wetland areas to prevent soil compaction, unless otherwise authorized by DEQ." Exhibit A2 at 4. Additionally, Respondent asserts that the use of tire mats was in accordance with Condition (A)(3)(c) of Nationwide Permit 3, issued by USACME, which authorized "temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the maintenance activity." Exhibit R9 at 20.

Condition 8 of the 401 WQC cannot be read in isolation. Condition 9 prohibited Respondent "from placing biologically harmful materials and construction debris where they could enter waters of the state[.]" Exhibit A2 at 5. Tires are included in the list of deleterious material. *See id*. Accordingly, mats placed in locations where they could enter waters of the state could not be made from tires. Condition (A)(3)(c) of Nationwide Permit 3 does not authorize Respondent to disregard the conditions in the 401 WQC. To the contrary, in the authorization letter dated July 26, 2023, USACE specifically required Respondent to ensure the work was performed in accordance with the 401 WQC. *See* Exhibit A3 at 2.

Regardless, the work was inconsistent with the project description in the JPA, which provides, in part:

> For work areas below OHWM of the North Umpqua River, equipment will be operated from existing adjacent areas above OHWM, or from existing and proposed work platforms prepared with temporary aggregate surfaces. Temporary access roads will only require minor grading below OHWM to transition from upland access roads to the existing work platform above the dam. The proposed temporary work platform below the dam will include the installation of geotextile fabric and aggregate that will be entirely removed once construction is complete.

Exhibit A1 at 11. Figure 6E of the JPA indicates that the work platform on the downstream side of the dam would be constructed of an aggregate base, a stable sandbag foundation, and super sacks. The JPA does not propose the construction of a temporary access road constructed with tire mats below the dam, nor does it propose the use of tire mats on the work platform. Accordingly, DEQ established that Respondent violated Condition 2 of the 401 WQC by using tire mats to construct a temporary access road and the work platform downstream of the dam.

**2. Violation of Condition 8**

DEQ alleges the following:

> Respondent violated Condition 8 of the 401 WQC by failing to develop an erosion and sediment control plan, failing to implement erosion and sediment control measures to prevent or control the movement of soil into waters of the state, and failing to maintain an adequate supply of erosion and sediment control materials at the construction site[.]

Second Amended Notice at 7.

Respondent asserts that "an unwritten erosion and sediment control plan developed" as the dam repair project progressed. Respondent's Closing Brief at 41. Additionally, Respondent contends that it maintained an adequate supply of erosion and sediment controls at the construction site and that DEQ "overlooked the controls that were present." *Id*. at 42.

The JPA indicated that "[e]rosion control measures are not anticipated as ground disturbance will be limited." Exhibit A1 at 11. However, as previously discussed, Respondent conducted removal/fill activities upstream of the dam that were outside of the approved work area and were not described in the JPA. Those removal/fill activities resulted in significant ground disturbance up to the river's edge, but Respondent did not install any erosion and sediment controls in the location. On August 8, 2023, DEQ informed Mr. Beckley that erosion and sediment controls needed to be in place, and Mr. Beckley contended that there was nowhere to put them because the water line kept moving and workers were attempting to salvage fish on the perimeter. Despite Respondent's contention that there was an unwritten erosion and control plan, the failure to use any erosion and sediment controls in the upstream work area demonstrates that, more likely than not, Respondent did not have an erosion and settlement control plan.

With respect to the adequacy of any erosion and sediment controls at the site, Mr. Plunk's

observations and assessment of the supplies, given his experience as a former 401 Project Manager,[4] were persuasive. Despite asserting that an adequate supply of erosion and sediment controls were onsite but somehow overlooked during the DEQ inspections, Respondent did not make use of those supposed erosion and sediment controls where most needed – upstream of the dam. Because the project as planned in the JPA included only limited ground disturbance, the preponderance of the evidence shows that Respondent maintained only minimal erosion and sediment controls at the site.

For the reasons discussed, DEQ established that Respondent violated Condition 8 of the 401 WQC.

**3. Violation of Condition 9 – Concrete-Contaminated Water**

DEQ alleges that "Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris where they could enter waters of the state." Second Amended Notice at 7-8. More specifically, DEQ contends that "Respondent discharged concrete[-]contaminated water into the river and allowed concrete that had cured for less than 24 hours to come into contact with flowing waters" on August 21 and 22, 2023. *Id*. at 5, 8.

Condition 9 of the 401 WQC prohibited Respondent "from placing biologically harmful materials and construction debris where they could enter waters of the state[.]" Exhibit A2 at 5. The list of deleterious waste material in Condition 9 includes "cement cured less than 24 hours." *Id*. Condition 9 further specifies that concrete, cement, or grout must cure "for at least 24 hours before any contact with flowing waters[.]" *Id*.

Respondent asserts that to establish a violation of Condition 9, DEQ must prove that Respondent discharged concrete-contaminated water into the river and there is no evidence that such a discharge occurred. However, to establish the violation of Condition 9, DEQ only needs to establish that Respondent placed deleterious waste material where it *could* enter the river. *See* Second Amended Notice at 7-8. Additionally, Respondent asserts that it pumped any concrete-contaminated water to an upland area for treatment and that DOWL was satisfied with its containment facilities. The preponderance of evidence establishes that Respondent did not build a water containment facility in the upland area on the south bank described in the JPA. *See* Exhibit A1 at 9. Instead, Respondent constructed a temporary water quality facility downstream of the dam on the north bank of the river below the OHWM.

On August 21, 2023, a concrete pour occurred from 6:10 a.m. to 8:00 a.m. Water continually seeped through the dam face and over the uncured concrete. That water was pumped from the work area into the settlement pond without a silt sack in place. Although TerraFirma later added a silt sack, it slipped off. The water leaked out of the settlement pond and flowed down the bedrock into the river. The resulting plumes in the river show the contamination of that discharge, and Mr. Beckley acknowledged in an email to DEQ that "the turbidity of our discharge was above allowable limits" after the silt sock slipped off the discharge pipe. Exhibit A13 at 1. DEQ established, more likely than not, that Respondent discharged water

[4] *See* testimony of Plunk.

contaminated by concrete that had cured for less than 24 hours into the river on August 21, 2023.

When work resumed in the morning on August 22, 2023, the work area would have been filled with water, as happened during non-work hours,[5] and that water would have flowed through the dam face and over the freshly poured concrete throughout the night. Workers pumped the water from the work area into the settlement pond, where a silt sack reached capacity and the system discharged "water with extremely high turbidity" down the bedrock and into the river. Exhibit R26 at 2. The evidence shows, more likely than not, that Respondent discharged water contaminated by concrete that had cured for less than 24 hours into the river on August 22, 2023.

For the reasons discussed, DEQ established that, with respect to concrete-contaminated water, Respondent violated Condition 9 of the 401 WQC by placing biologically harmful materials and construction debris where they could enter the waters of the state.

**4. Violation of Condition 9 – Tire Mats**

DEQ alleges that Respondent violated Condition 9 of the 401 WQC by using "mats made of tires to create a temporary access road and work platform downstream of the dam." Second Amended Notice at 8. Tires are included in the list of deleterious waste materials under Condition 9.

Respondent argues that DEQ failed to establish that it violated Condition 9 with respect to the use of tire mats. Respondent again asserts that the certification authorized the use of the mats with respect to erosion and control measures. However, as previously discussed, Condition 9 of the 401 WQC prohibited the placement of tires, including in mat form, where they could enter waters of the state. Additionally, Respondent asserts that the tire mats did not enter the river because they were used within the contained work area and elevated from the water's surface.

Despite Respondent's assertions, the evidence establishes that Respondent placed tire mats where they could enter waters of the state. The tire mats were placed below the OHWM, which is a location where the mats could enter the river. Furthermore, the tire mats on the work platform were near and, in places, in contact with the river. *See* Exhibits A4 at 10-11, 13; A12 at 2-3; A15 at 1; A16 at 1; A25 at 1; A26 at 1. During much of the repair work, TerraFirma left an unused section of the tire mats sitting in the river near the work platform. *See* Exhibits A4 at 11; A16 at 1; A25 at 1; A51 at 1. Accordingly, DEQ established that Respondent violated Condition 9 of the 401 WQC with respect to the tire mats.

**5. Violation of Conditions 10 and 19**

DEQ alleges that "Respondent violated Conditions 10 and 19 of the 401 WQC by operating equipment in the flowing channel of the river." Second Amended Notice at 8. In the Ruling on Motions for Summary Determination, issued on March 6, 2025, the ALJ found DEQ established that Respondent violated Condition 19 of the 401 WQC by operating equipment in

[5] The evidence establishes that this was a nightly occurrence.

the flowing channel of the river on August 7, 2023.

The evidence also establishes that Respondent operated the excavator in an area that directly disturbed aquatic habitat. Respondent did not dispute this allegation. Accordingly, Respondent violated Condition 10.

**6. Violation of Condition 11**

In the Second Amended Notice, DEQ charged Respondent with violating "Condition 11 of the 401 WQC by failing to report discharges of deleterious materials into waters of the state to OERS." Second Amended Notice at 8. More specifically, DEQ asserts that Respondent failed to report the August 21 and 22, 2023 discharges of concrete-contaminated water within 24 hours.

Condition 11 of the 401 WQC provides, in part: "In the event that deleterious materials are discharged into state waters, or onto land with the potential to enter state waters, the discharge must be promptly reported to the Oregon Emergency Response Service (OERS * * *) within 24 hours." Exhibit A2 at 5.

Respondent contends that there was never a discharge to report, so there was no violation of Condition 11. However, as previously discussed, the preponderance of the evidence establishes that Respondent discharged concrete-contaminated water into the river on August 21, 2023, and August 22, 2023. On August 21, 2023, the settlement pond leaked contaminated water into the river, causing a plume to appear. Mr. Blaine reported the discharge to OERS within 24 hours, and Respondent was aware of the report. On August 22, 2023, a silt sack failed in the settlement pond and water with "extremely high turbidity" leaked into the river. Exhibit R26 at 2. OERS did not receive a report of that discharge.

As discussed in the Ruling on Motions for Summary Determination, Condition 11 does not specifically require that the applicant report a discharge to OERS, which is unlike other conditions of the 401 WQC that specifically require the "Applicant" to take some kind of action.[6] Instead, Condition 11 merely requires that the discharge be reported to OERS within 24 hours. Respondent was responsible for strictly adhering to the conditions of the 401 WQC, but nothing in the language of Condition 11 indicates that the condition was not satisfied by Mr. Blaine's timely report when Respondent was aware of it. DEQ did not establish that Respondent violated Condition 11 by failing to file a report with OERS for the discharge on August 21, 2023.

In terms of the discharge on August 22, 2023, the evidence establishes that no report to OERS was made. Accordingly, DEQ established that Respondent violated Condition 11 of the 401 WQC for that discharge.

[6] For instance, Condition 14 requires "[t]he Applicant" to notify the Environmental Cleanup Section of DEQ "[i]f contaminated soil or groundwater is encountered[.]" Exhibit A2 at 6.

**7. Violation of Condition 15**

DEQ charged Respondent with violating "Condition 15 of the 401 WQC by failing to remove all construction materials and temporary fill from below OHWM before the expiration of the in-water work window preferred by ODFW and approved by USACE[.]" Second Amended Notice at 8. More specifically, DEQ alleged that USACE authorized an extension of the in-water work window to 5:00 p.m. Pacific Time on September 6, 2023, and that Respondent left materials below OHWM after that deadline.

Respondent asserts that DEQ failed to establish that it left construction materials and temporary fill below the OHWM after the expiration of the in-water work window because "there is nothing in the record" to establish that the OHWM referenced in Condition 15 of the 401 WQC is the OHWM depicted in Figure 5 of the JPA. Respondents' Closing Brief at 58. In short, Respondent argues that DEQ failed to show that the OHWM delineated in its own application materials is the "*actual* OHWM." *Id*.

Respondent hired DOWL to design the repairs to the dam, and DOWL prepared Figure 5 of the JPA, which delineates the OHWM on a map of the project area. Respondent and DOWL certified that the information contained in the JPA was "true, complete and accurate." Exhibit A1 at 21. In the 401 WQC, DEQ made clear that the dam repair project was approved "[a]s described in the application package" and the "[w]ork authorized by this 401 WQC is limited to the work described" therein. Exhibit A2 at 2. Respondent's assertion that there is no evidence that Condition 15 of the 401 WQC references the OHWM depicted in Figure 5 of the JPA is without merit. The application materials do not contain any other delineation of the OHWM for purposes of determining the in-water work area.

Furthermore, in the authorization letter for NWP No. 3 Maintenance, issued on July 26, 2023, USACE verified the dam repair project as depicted on the enclosed drawings, which included Figure 5 of the JPA. *See* Exhibit A3 at 1, 33. USACE advised Respondent that USACE had not prepared a jurisdictional determination for the project and that Respondent could request an "Approved Jurisdictional Determination" if Respondent believed USACE did not have "jurisdiction over some or all of the aquatic resources at the project site[.]" *Id*. at 5. Pursuant to 33 CFR § 325.9, the USACE is "authorized to determine the area defined by the terms 'navigable waters of the United States' and 'waters of the United States[.]" If a permit applicant disagrees with an approved jurisdictional determination, the applicant has the right to file an administrative appeal pursuant to 33 CFR § 331. Respondent does not assert, nor does the record show, that Respondent requested a jurisdictional determination. Instead, the record establishes that Respondent relied on the depiction of the OHWM in Figure 5 of the JPA when describing the proposed in-water work. Respondent did not cite any law or rule that requires DEQ to conduct its own jurisdictional determination when reviewing a JPA for purposes of issuing a 401 WQC.

Condition 15 of the 401 WQC required that Respondent "perform in-water work only within the ODFW preferred time window as specified in the *Oregon Guidelines for Timing of In-Water Work to Protect Fish and Wildlife Resources*, or as authorized otherwise under a USACE permit and/or DSL removal/fill permit." Exhibit A2 at 7. On December 29, 2022, ODFW issued

a fish passage authorization to Respondent, which specified that "[a]ll in-water work, defined as work at or below the ordinary high water mark elevation of the project area(s) and includes but not limited to * * * fill removal activities * * * shall be completed during the July 7 to August 28 period, unless otherwise modified by ODFW." Exhibit A33 at 6. USACE's July 26, 2023, authorization letter included the same in-water work period. *See* Exhibit A3 at 3. Respondent requested two extensions of the in-water work window from ODFW and USACE. ODFW approved the second extension request through 5:00 p.m. on September 6, 2023. USACE also granted the second extension request and required "[a]ll in-water work, to include the refilling of the reservoir and removal of temporary fill material, shall be performed during the in-water work period of July 7, 2023 to 5:00 PM, Pacific Time on September 6, 2023." Exhibit A30 at 1.

DEQ established that Respondent failed to remove all construction materials and temporary fill from below the OHWM before the expiration of the in-water work window of 5:00 p.m. on September 6, 2023, which was the window preferred by ODFW and approved by USACE. Respondent left construction-related materials and temporary fill, including super sacks, lumber, gravel fill, part of a concrete footing for the temporary bridge, an excavator scoop, a cooler, boulders, and a small pump, below the OHWM. The testimony of Holly Huchko and a comparison of the photographs in the record to the corresponding location on Figure 5 of the JPA establish that more likely than not the materials were below the OHWM. *See* Exhibits A27 and A1 at 33. Accordingly, Respondent violated Condition 15 of the 401 WQC.

**8. Violation of Condition 16**

DEQ charged Respondent with violating "Condition 16 of the 401 WQC by failing to provide unobstructed fish passage from September 1, 2023 through September 5, 2023[.]" Second Amended Notice at 8-9. In the Ruling on Motions for Summary Determination, DEQ received a favorable ruling on this issue.

Condition 16 of the 401 WQC required Respondent to "provide unobstructed fish passage at all times during any authorized activity, unless otherwise approved in the approved application." Exhibit A2 at 7. On August 25, 2023, USACE granted Respondent an extension of the in-water work window, including "an in-water work period of August 7, 2023 to August 31, 2023 for fish passage stoppage at the fish ladder." Exhibit A29 at 1. Respondent did not restore passage through the fish ladder until September 5, 2023. By failing to restore fish passage at the fish ladder as required on August 31, 2023, Respondent did not provide unobstructed fish passage during the period September 1, 2023, to September 5, 2023. Accordingly, Respondent violated Condition 16 of the 401 WQC.

**9. Violation of Condition 17**

DEQ asserts that Respondent violated "Condition 17 of the 401 WQC by failing to fully isolate the in-water work area from the active flowing stream[.]" Second Amended Notice at 8. Respondent disputes the allegation.

First, Respondent asserts that TerraFirma constructed an effective cofferdam per the JPA's design and that any water that seeped through the dam into the work area remained

isolated from the river. Second, Respondent asserts that DOWL approved TerraFirma's dewatering methods, and those methods were effective. Finally, Respondent asserts that a USACE representative found that the "seepage was 'a-okay' because the in-water work area was properly isolated, with any potentially contaminated water being pumped into the containment facilities." Respondent's Closing Brief at 55.

In the JPA, Respondent indicated that a cofferdam would be constructed of sandbags and super sacks downstream of the dam, spanning the full length of the river. DEQ established that TerraFirma began in-water work before the work area was completely isolated from the flowing stream. *See* Exhibit A4 at 10-11 (photographs of the work area full of water and cloudy water on both sides of the work platform on August 13 and 15, 2023). After TerraFirma fully constructed the cofferdam, water seeped through the dam face and water from the downstream side would sometimes infiltrate the work area. The water filled the work area during nonwork hours, and workers pumped out the water each morning. The JPA indicated that the work area inside the cofferdam would be dewatered using a sump pump, which would pump the water from the isolation area into "a temporary water quality facility placed in an upland area on the south bank." Exhibit A1 at 9. Instead of following that plan, TerraFirma pumped the water from the isolation area directly into the river or into the settlement pond constructed below the OHWM, which would sometimes leak into the river.

The preponderance of the evidence establishes that Respondent never fully isolated the in-water work area from the active flowing stream. Water infiltrated the work area before and after the cofferdam was completed. Water continually flowed through the dam face, and once the cofferdam was in place, water downstream of the cofferdam sometimes infiltrated the work area. Despite Respondent's contention to the contrary, Respondent's dewatering methods were ineffective to isolate the in-water work area from the river. Instead of pumping the water to an upland area for treatment, as the JPA proposed, Respondent either pumped the water from the work area directly into the river or into a settling pond located below the OHWM, which leaked multiple times into the river. Accordingly, Respondent violated Condition 17 of the 401 WQC.

**10. Assessment of Civil Penalties**

Pursuant to its authority granted under ORS 468.140(1),[7] DEQ proposes assessing civil penalties for Respondent's violations of the conditions of the 401 WQC, except for the violation

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[7] ORS 468.140(1) provides, in pertinent part:

> In addition to any other penalty provided by law, any person who violates any of the following shall incur a civil penalty for each day of violation in the amount prescribed by the schedule adopted under ORS 468.130:
>
> * * * * *
>
> (c) Any rule or standard or order of the Environmental Quality Commission adopted or issued pursuant to ORS 448.305, 454.010 to 454.040, 454.205 to 454.255, 454.505 to 454.535, 454.605 to 454.755 and 783.625 to 783.640 and ORS chapter 467 and ORS chapters 468, 468A and 468B.

of Condition 11. DEQ determines the amount of the civil penalty for violations pursuant OAR 340-012-0045, which provides:

> DEQ may assess a civil penalty for any violation, in addition to any other liability, duty, or other penalty provided by law. Except for civil penalties assessed under either OAR 340-012-0155 or OAR 340-012-0160, DEQ determines the amount of the civil penalty using the following formula: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.
>
> (1) BP is the base penalty and is determined by the following procedure:
>
> (a) The classification of each violation is determined according to OAR 340-012-0053 to 340-012-0099.
>
> (b) The magnitude of the violation is determined according to OAR 340-012-0130 and 340-012-0135.
>
> (c) The appropriate base penalty (BP) for each violation is determined by applying the classification and magnitude of each violation to the matrices in OAR 340-012-0140.
>
> (2) The base penalty is adjusted by the application of aggravating or mitigating factors set forth in OAR 340-012-0145.
>
> (3) The appropriate economic benefit (EB) is determined as set forth in OAR 340-012-0150.

**<u>Base Penalty</u>**

*Classification*

In the Second Amended Notice, DEQ assigned Class I to each of the violations for which it seeks a civil penalty. OAR 340-012-0053(1) provides:

> Class I:
>
> (a) Violating a requirement or condition of a commission or department order, consent order, agreement, consent judgment (formerly called judicial consent decree) or compliance schedule contained in a permit or permit attachment[.]

This matter involves violations of the conditions of a 401 WQC, which is a department order. Therefore, each violation is appropriately designated as a Class I violation.

*Magnitude*

OAR 340-012-0130 titled, Determination of Violation of Magnitude, provides:

> (1) The appropriate magnitude of each civil penalty is determined by first applying the selected magnitude in OAR 340-012-0135. If none is applicable, the magnitude is moderate unless evidence shows that the magnitude is major under paragraph (3) or minor under paragraph (4).
>
> (2) The person against whom the violation is alleged has the opportunity and the burden to prove that a magnitude under paragraph (1), (3) or (4) of this rule is more probable than the alleged magnitude, regardless of whether the magnitude is alleged under OAR 340-012-0130 or 340-012-0135.
>
> (3) The magnitude of the violation is major if DEQ finds that the violation had a significant adverse impact on human health or the environment. In making this finding, DEQ will consider all reasonably available information, including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or orders; the extent of actual effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation. In making this finding, DEQ may consider any single factor to be conclusive.
>
> (4) The magnitude of the violation is minor if DEQ finds that the violation had no more than a de minimis adverse impact on human health or the environment, and posed no more than a de minimis threat to human health or the environment. In making this finding, DEQ will consider all reasonably available information including, but not limited to: the degree of deviation from applicable statutes or commission and DEQ rules, standards, permits or orders; the extent of actual or threatened effects of the violation; the concentration, volume, or toxicity of the materials involved; and the duration of the violation.

Because there is no applicable magnitude for violations of the conditions of a 401 WQC in OAR 340-012-0135, the magnitude of each violation is moderate unless evidence indicates that the violation is major or minor. In the Second Amended Notice, DEQ assigned a moderate magnitude to the violations of Conditions 2, 8, 9 (concrete), 9 (tires), 10 and 19, 15, and 17 of the 401 WQC because "the information reasonably available to DEQ does not indicate a minor or major magnitude." Second Amended Exhibits 1 through 7 at 1.

For the violation of Condition 16 of the 401 WQC, DEQ assigned a magnitude of major, contending that "the violation had a significant adverse impact on the environment." Second Amended Exhibit 8 at 1. More specifically, DEQ alleges:

ODFW documented numerous attempts by migrating salmonids to access the non-

> functioning fish ladder. The lack of passage posed a significant delay to the migration of multiple fish species, including spring Chinook salmon, summer steelhead trout, and Endangered Species Act (ESA) listed coho salmon. Multiple fish were observed hitting the concrete structures around the spillway, which put the fish at risk of physical injury and infection. Additionally, the delayed passage and repeated burst swimming events associated with multiple thwarted passage attempts are known to increase stress and energy expenditures for the fish, both of which are known to impact spawning success.

*Id*.

Respondent's violation of Condition 16 of the 401 WQC involves the failure to provide unobstructed fish passage from September 1, 2023, through September 5, 2023. In determining whether this violation had a significant adverse impact on the environment, DEQ can consider "all reasonably available information, including, but not limited to: the degree of deviation from * * * DEQ * * * orders; the extent of actual effects of the violation; * * * and the duration of the violation." OAR 340-012-0130(3). Furthermore, under the administrative rule, "DEQ may consider any single factor to be conclusive." *Id*.

DEQ provided evidence of the significant adverse impacts Respondent's violation had on the environment, including the inability of fish to pass above the dam; the delay to the migration of fish species, including spring Chinook and summer steelhead; the potential for fish being injured or killed from impacts on the concrete structures around the spillway gates or on the bedrock below; and the detriment to spawning success caused by the increased stress and energy from repeated burst swimming events. Based on those factors, DEQ determined that the assignment of a major magnitude to this violation is appropriate.

Pursuant to OAR 340-012-0130(2), Respondent "has the opportunity and the burden to prove that a magnitude under paragraph (1), (3) or (4) of this rule is more probable than the alleged magnitude[.]" Respondent contends that the delay in restoring fish passage had a negligible impact, relying on the September 1, 2023 opinion by the NMFS regarding the impacts of an extension of the in-water work window to September 6, 2023, on adult coho salmon. That opinion noted that "[h]arm and harassment to a small number of adult OC coho salmon will likely occur in the form of short-term delay in migration to spawning grounds and direct injury from physical interactions with dam infrastructure in attempting to migrate through the southern spill gates." Exhibit R59 at 5. NMFS concluded that the "harm or harassment of a small number of individuals will have at the North Umpqua population scale of OC coho salmon is negligible because the percentage of the total spawners exposed to harm or harassment is likely within the range of the percentage of the total spawner abundances[.]" *Id*. The NMFS opinion, however, did not assess the impact of the failure to provide unobstructed fish passage for all "aquatic life living in the water body." Exhibit A2 at 7. Respondent failed to show that it is more probable that the violation had no more than a de minimis adverse impact on the environment to support the assignment of a lesser magnitude.

*Base Penalty*

Pursuant to OAR 340-012-0140(1),[8] "the base penalty (BP) is determined by applying the class and magnitude of the violation to the matrices set forth in this section." The $3,000 penalty matrix applies to any violation of a 401 WQC for a project authorized under a Tier I dredge and fill project under OAR 340-048-0055(3)(a). *See* OAR 340-012-0140(4)(a)(H).

OAR 340-012-0140(4) provides, in pertinent part:

> $3,000 Penalty Matrix:
>
> * * * * *
>
> (b) The base penalty values for the $3,000 penalty matrix are as follows:
>
> (A) Class I:
>
> (i) Major — $3,000;
>
> (ii) Moderate — $1,500[.]

For the moderate Class I violations of Conditions 2, 8, 9 (concrete), 9 (tires), 10 and 19, 17, and 15, the base penalty is $1,500. For the major Class I violation of Condition 16, the base penalty is $3,000. For all the violations, DEQ seeks to increase the base penalty to the base penalty derived under the next highest penalty matrix. OAR 340-012-0160(1) provides, in pertinent part:

> DEQ has the discretion to increase a base penalty determined under OAR 340-012-0140 to that derived using the next highest penalty matrix. Factors that may be taken into consideration in increasing a base penalty include the respondent's compliance history, the likelihood of future violations, the degree of environmental or human health impact, the deterrence impact and other similar factors.

In the Second Amended Notice, DEQ explained its decision to increase the base penalty as follows:

> Respondent's actions throughout the project showed a general disregard for the requirements of the 401 WQC and the importance of minimizing water quality impacts. Additionally, the contractor Respondent hired to complete the repair work was owned by one of Respondent's board members and was inexperienced with respect to complex, in-water dam repair work. The dam, which is categorized by OWRD as a "high hazard" dam, is an aging facility that has experienced structural decline in the last decade. Future repair projects on the dam

[8] OAR 340-012-0140 has been amended multiple times since the violations at issue occurred; however, the pertinent sections of the rule remain unchanged.

> will be necessary. For these reasons, and to deter likely future violations, "BP" is $4,000 pursuant to the matrix found in OAR 340-012-0140(3)(b)(A)(ii).

Second Amended Exhibits 1 through 8 at 1.

Respondent disputes that its actions demonstrated a general disregard for the requirements of the 401 WQC. Respondent argues that it did not exercise control over the means and methods used by TerraFirma and asserts that TerraFirma sought to carry out the intent of the 401 WQC. Respondent's assertions are not persuasive. As the applicant of the 401 WQC, Respondent was "responsible for the work of its contractors and sub-contractors[.]" Exhibit A2 at 3. Moreover, Mr. Beckley, who signed the JPA as Board President, was involved throughout the repair project, and while he may have been excluded from the process to hire a contractor, the evidence shows that he was the point of contact for Respondent for the repair project. Therefore, Respondent was responsible for the actions of TerraFirma.

The evidence shows that Respondent, through TerraFirma, displayed a general disregard of the requirements of the 401 WQC. For instance, on the day that repair work commenced, TerraFirma operated machinery in the river in clear violation of the 401 WQC. DEQ discussed the violation with TerraFirma and provided a copy of the 401 WQC because there was no copy at the work site.[9] Regardless, TerraFirma again operated machinery in the river later that day. TerraFirma also disregarded the plans submitted in the JPA, such as the approved project areas, the location of the temporary water quality facility, the materials with which to construct the work platform downstream of the dam, and the installation of the sediment membrane. The failure to closely review and adhere to the conditions and requirements of the 401 WQC demonstrates a general disregard.

Respondent disputes that TerraFirma was inexperienced with complex, in-water dam repair work. The evidence in the record, however, establishes that TerraFirma did not possess that experience. TerraFirma's background was in foundation repair, basement waterproofing, crawl space repair, earthquake retrofitting, wall stabilization, and concrete repair. Although some of the skills involved in those types of construction work were likely applicable to the repair project, TerraFirma did not have a background with in-water projects with respect to dams or otherwise. Respondent asserts that dam repair projects are "exceedingly rare," based on Ms. Teach's testimony that she has not reviewed other dam repair projects, and that there are likely few if any contractors sufficiently experienced with in-water dam repair work. Respondent's Closing Brief at 23. This argument ignores Ms. Teach's testimony that most dam repair projects are related to hydroelectric projects, which are reviewed through a different program and are not under her purview. Although, Respondent made some effort to solicit bids for the repair project, it selected TerraFirma as the sole bidder who offered a low cost. Considering that the USACE permit and the 401 WQC were valid until March 2026, Respondent could have taken more time to solicit additional bids. Furthermore, Respondent previously selected a contractor who was owned by a Board member to perform repairs to the dam that resulted in DEQ assessing civil penalties against the contractor. This shows a pattern of Respondent choosing expediency and

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[9] Condition 3 of the 401 WQC requires a copy of the 401 WQC to be kept at the job site and readily available for reference. *See* Exhibit A3 at 3. DEQ did not charge Respondent with a violation of that condition.

low cost over qualifications and experience when selecting a contractor for the 2023 repair project.

The Winchester Dam, which is categorized as a high hazard dam by OWRD, will likely need future repairs. DEQ reasonably seeks to achieve a greater deterrent effect during future repairs to the dam by increasing the base penalty. In view of Respondent's history of hiring contractors inexperienced with complex in-water work and its general disregard for the requirements of the 401 WQC during the 2023 repair work, an increase in the base penalty is appropriate pursuant to OAR 340-012-0160(1).

OAR 340-012-0140(3) provides, in pertinent part:

> $8,000 Penalty Matrix:
>
> * * * * *
>
> (b) The base penalty values for the $8,000 penalty matrix are as follows:
>
> (A) Class I:
>
> (i) Major — $8,000.
>
> (ii) Moderate — $4,000.

The base penalty for the violations of Conditions 2, 8, 9 (concrete), 9 (tires), 10 and 19, 15, and 17 is increased from $1,500 to $4,000. The base penalty for the violation of Condition 16 is increased from $3,000 to $8,000.

**<u>Aggravating and Mitigating Factors</u>**

OAR 340-012-0145 defines the aggravating and mitigating factors that are applicable to the civil penalty formula. Each of those factors is addressed below.

*Prior Significant Actions*

OAR 340-012-0145(2) provides, in pertinent part:

> "P" is whether the respondent has any prior significant actions (PSAs). A violation becomes a PSA on the date the first formal enforcement action (FEA) in which it is cited is issued.
>
> (a) Except as otherwise provided in this section, the values for "P" and the finding that supports each are as follows:
>
> (A) 0 if no PSAs or there is insufficient information on which to base a finding under this section.

DEQ does not allege that Respondent has any prior significant actions. Pursuant to OAR 340-012-0145(2)(a)(A), the value of "P" is 0 for all violations.

*History of Correcting Significant Actions*

OAR 340-012-0145(3) provides, in pertinent part:

> "H" is the respondent's history of correcting PSAs. The values for "H" and the finding that supports each are as follows:
>
> * * * * *
>
> (c) 0 if there is no prior history or if there is insufficient information on which to base a finding under paragraphs (3)(a) or (b).

DEQ does not allege that Respondent has any prior significant actions. Pursuant to OAR 340-012-0145(3)(c), the value of "H" is 0 for all violations.

*Number of Occurrences of the Violation*

OAR 340-012-0145(4) provides, in pertinent part:

> "O" is whether the violation was repeated or ongoing. A violation can be repeated independently on the same day, thus multiple occurrences may occur within one day. Each repeated occurrence of the same violation and each day of a violation with a duration of more than one day is a separate occurrence when determining the "O" factor. Each separate violation is also a separate occurrence when determining the "O" factor. The values for "O" and the finding that supports each are as follows:
>
> (a) 0 if there was only one occurrence of the violation, or if there is insufficient information on which to base a finding under paragraphs (4)(b) through (4)(d).
>
> (b) 2 if there were more than one but less than seven occurrences of the violation.
>
> (c) 3 if there were from seven to 28 occurrences of the violation.
>
> (d) 4 if there were more than 28 occurrences of the violation.
>
> (e) DEQ may, at its discretion, assess separate penalties for each occurrence of a violation. If DEQ does so, the O factor for each affected violation will be set at 0. If DEQ assesses one penalty for multiple occurrences, the penalty will be based on the highest classification and

magnitude applicable to any of the occurrences.

For the violation of Condition 2 of the 401 WQC, DEQ proposes a value of 4 for "O," alleging that Respondent performed work that was inconsistent with the project description included in the JPA from at least August 8, 2023, through September 3, 2023. DEQ established that Respondent performed work outside of the scope of the project area during that time period by conducting removal/fill activities outside the approved project area, using tire mats on a temporary access road and the work platform, and failing to install a sediment membrane. The violation occurred each date that the work was inconsistent with the project description in the JPA, which was 27 days.[10] Therefore, the value for "O" is 3, pursuant to OAR 340-012-0145(4)(c).

For the violation of Condition 8 of the 401 WQC, DEQ proposes a value of 4 for "O," alleging that there were more than 28 occurrences of the violation. DEQ established that, more likely than not, Respondent did not have an erosion and sediment control plan or sufficient erosion and sediment controls on site and in place from August 7, 2023, when work commenced, through September 6, 2023, when in-water work ceased. Therefore, the value of "O" is therefore 4, pursuant to OAR 340-012-0145(4)(d).

For the violation of Condition 9 of the 401 WQC related to uncured concrete, DEQ proposes a value of 2 for "O," alleging that there was more than one but less than seven occurrences of the violation for discharging concrete-contaminated water into the river. DEQ established that Respondent discharged concrete-contaminated water into the river on August 21 and 22, 2023. Therefore, the value for "O" is 2, pursuant to OAR 340-012-0145(4)(b).

For the violation of Condition 9 of the 401 WQC related to the tire mats, DEQ proposes a value of 4 for "O," alleging that there were more than 28 occurrences of the violation from August 8, 2023, when workers placed the mats, through September 3, 2023, when workers removed the mats. As previously discussed, the tire mats were placed in locations where they did or could enter the river. Accordingly, the violation occurred each date that the mats were in place, which is a total of 27 occurrences. Therefore, the value for "O" is 3, pursuant to OAR 340-012-0145(4)(c).

For the violation of Conditions 10 and 19 of the 401 WQC, DEQ proposes a value of 0 for "O," because there was at least one occurrence of the violation on August 7, 2023. DEQ established the occurrence. Therefore, the value of "O" is 0, pursuant to OAR 340-012-0145(4)(a).

For the violation of Condition 15 of the 401 WQC, DEQ proposes a value of 0 for "O," asserting that there is insufficient information on which to base a finding under OAR 340-012-0145(4)(b) through (4)(d). Respondent does not dispute the assertion. Therefore, the value of "O" is 0, pursuant to OAR 340-012-0145(4)(a).

For the violation of Condition 16 of the 401 WQC, DEQ proposes a value of 2 for "O,"

[10] For this violation and the violation of Condition 9 of the 401 WQC (tire mats), DEQ miscalculated the number of days in the Second Amended Notice.

alleging that there was more than one but less than seven occurrences of the violation for failing to provide unobstructed fish passage when required on August 31, 2023. Respondent restored unobstructed fish passage five days later on September 5, 2023. Therefore, the value of "O" is 2, pursuant to OAR 340-012-0145(4)(b).

For the violation of Condition 17 of the 401 WQC, DEQ proposes a value of 4 for "O," alleging that there were more than 28 occurrences of the violation for performing work without isolating the work area from August 7, 2023, when work on the dam commenced, to September 6, 2023, when in-water work ceased. As previously discussed, the downstream work area was never properly isolated, so DEQ established that, more likely than not, the violation occurred daily. However, DEQ failed to show that the violation occurred through September 6, 2023. Respondent dismantled the work platform on September 3, 2023, and there is insufficient evidence that Respondent continued to perform work after that date in an area that should have been isolated. Accordingly, Respondent violated Condition 17 from August 7, 2023, to September 3, 2023, which is a total of 28 occurrences. Therefore, the value of "O" is 3, pursuant to OAR 340-012-0145(4)(c).

*Mental State*

OAR 340-012-0145(5) provides, in pertinent part:

> "M" is the mental state of the respondent. For any violation where the findings support more than one mental state, the mental state with the highest value will apply. The values for "M" and the finding that supports each are as follows:
>
> (a) 0 if there is insufficient information on which to base a finding under paragraphs (5)(b) through (5)(d).
>
> (b) 2 if the respondent had constructive knowledge (reasonably should have known) of the requirement.
>
> (c) 4 if the respondent's conduct was negligent.
>
> (d) 8 if the respondent's conduct was reckless or the respondent acted or failed to act intentionally with actual knowledge of the requirement.
>
> (e) 10 if respondent acted flagrantly.

OAR 340-012-0030 provides, in pertinent part:

> (11) "Flagrant" or "flagrantly" means the respondent had actual knowledge that the conduct was unlawful and consciously set out to commit the violation.
>
> (13) "Intentional" means the respondent acted with a conscious objective

> to cause the result of the conduct.
>
> * * * * *
>
> (15) "Negligence" or "Negligent" means the respondent failed to take reasonable care to avoid a foreseeable risk of conduct constituting or resulting in a violation.
>
> * * * * *
>
> (20) "Reckless" or "Recklessly" means the respondent consciously disregarded a substantial and unjustifiable risk that the result would occur or that the circumstance existed. The risk must be of such a nature and degree that disregarding that risk constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

Respondent contends that the mental state of TerraFirma cannot be attributed to Respondent because TerraFirma was "responsible for the construction means, method, [and] schedule during the project." Respondent's Closing Brief at 13. Respondent, however, disregards Condition 1 of the 401 WQC, which specifically provides, "This 401 WQC applies to the Applicant. The Applicant is responsible for the work of its contractors and sub-contractors, as well as any other entity that performs work related to this WQC." Exhibit A2 at 2. Respondent cannot shield itself from responsibility with regard to this factor by claiming lack of control over the project.

DEQ contends that Respondent's conduct was reckless with respect to the violation of Condition 2 of the 401 WQC. By August 4, 2023, Mr. Beckley was aware that the temporary bridge on the downstream side of the dam was inconsistent with the project description in the JPA. *See* Exhibit A8 at 2. On August 15, 2023, DEQ informed Mr. Beckley that the use of the tire mats also did not conform with the project description. Nonetheless, Respondent failed to correct the violations. DEQ established that Respondent consciously disregarded a substantial and unjustifiable risk that a violation of Condition 2 would occur. The deviations from the project description were substantial and constituted a gross deviation from the standard of care a reasonable person would observe in that situation. Respondent's mental state for this violation was reckless, and the value of "M" is 8 pursuant to OAR 340-012-0145(5)(d).

DEQ contends that Respondent's conduct was also reckless with respect to the violation of Condition 8 of the 401 WQC, which required Respondent to develop an erosion and sediment control plan and maintain an adequate supply of erosion control supplies at the work site. On August 8, 2023, DEQ informed Respondent that the work on the bank of the river upstream of the dam, which was outside of the approved project area, required erosion and sediment controls. Despite that knowledge, Respondent took no action and did not develop an erosion and sediment control plan. DEQ established that Respondent consciously disregarded a substantial and unjustifiable risk that a violation of Condition 8 would occur. The removal/fill work near the river's edge was significant, and Respondent's disregard of the risk of violation constituted a gross deviation from the standard of care a reasonable person would observe in that situation.

Respondent's mental state for this violation was reckless, and the value of "M" is 8 pursuant to OAR 340-012-0145(5)(d).

DEQ contends that Respondent's conduct was also reckless with respect to the violation of Condition 9 of the 401 WQC, pertaining to concrete. The record established that Respondent poured concrete before the work area was fully isolated. Furthermore, Respondent discharged the concrete-contaminated water to a temporary settlement basin constructed below the OHWM rather than to an upland water quality facility on the south bank of the river, as was described in the JPA. The settlement basin leaked more than once, causing the contaminated water to flow into the river. DEQ established that Respondent consciously disregarded a substantial and unjustifiable risk that a violation of Condition 8 would occur. Respondent's disregard of the risk of the violation constituted a gross deviation from the standard of care a reasonable person would observe in that situation. Respondent's mental state for this violation was reckless, and the value of "M" is 8 pursuant to OAR 340-012-0145(5)(d).

DEQ contends that Respondent's conduct was flagrant with respect to the violation of Condition 9 of the 401 WQC, pertaining to tires. On August 15, 2023, DEQ notified Respondent that tires were deleterious waste material under Condition 9 and that the mats "must be removed from areas where they currently are or could enter waters." Exhibit R75 at 6. Nonetheless, Respondent did not remove the tire mats until September 3, 2023. DEQ established that Respondent had actual knowledge that the conduct was in violation of Condition 9, and therefore, Respondent consciously committed the violation. Respondent's mental state for this violation was flagrant, and the value of "M" is 10 pursuant to OAR 340-012-0145(5)(e).

DEQ contends that Respondent's conduct was reckless with respect to the violation of Conditions 10 and 19 of the 401 WQC. Respondent operated equipment in the flowing channel of the river. The record supports a determination that Respondent consciously disregarded a substantial and unjustifiable risk that a violation of Condition 10 and 19 would occur via such conduct. Respondent's mental state for this violation was reckless, and the value of "M" is 8 pursuant to OAR 340-012-0145(5)(d).

DEQ contends that Respondent's conduct was flagrant with respect to the violation of Condition 15 of the 401 WQC. Respondent requested extensions of the in-water work window from USACE and ODFW, and the final extension request was approved through September 6, 2023. USACE and ODFW notified Respondent of the requirement to remove all materials from below the OHWM by 5:00 p.m. on September 6, 2023. Despite that notification, Respondent left construction debris and temporary fill material in place after the deadline. DEQ established that Respondent had actual knowledge that the conduct was in violation of Condition 15 and consciously continued to commit the violation. Respondent's mental state for this violation was therefore flagrant, and the value of "M" is 10 pursuant to OAR 340-012-0145(5)(e).

DEQ contends that Respondent's conduct was flagrant with respect to the violation of Condition 16 of the 401 WQC. On August 25, 2023, USACE granted Respondent an extension of the in-water work window, which included an in-water work period of August 7, 2023, to August 31, 2023, for fish passage stoppage at the fish ladder. *See* Exhibit A29 at 1. DEQ established that Respondent had actual knowledge that the failure to restore fish passage by

August 31, 2023, violated this requirement and that Respondent consciously committed the violation. As a result, Respondent's mental state for this violation was flagrant, and the value of "M" is 10 pursuant to OAR 340-012-0145(5)(e).

DEQ contends that Respondent's conduct was reckless with respect to the violation of Condition 17 of the 401 WQC. The record established that Respondent started work on the dam project prior to fully isolating the in-water work area from the active flowing stream. Moreover, water continuously infiltrated the work area after the cofferdam was in place, including via seepage through the dam and downstream through the cofferdam. Respondent's dewatering methods were ineffective and inconsistent with the water management plans in the JPA. Rather than pumping water from the in-water work area to an upland water quality facility, as was clearly described in the JPA, Respondent pumped water directly into the river or into a settlement pond that Respondent constructed below the OHWM. On multiple occasions, the settlement pond leaked water into the river. DEQ established that Respondent consciously disregarded a substantial and unjustifiable risk that a violation of Condition 17 would occur. Respondent's disregard of the risk of the violation constituted a gross deviation from the standard of care a reasonable person would observe in that situation. Respondent's mental state for this violation was therefore reckless, and the value of "M" is 8 pursuant to OAR 340-012-0145(5)(d).

*Efforts to Correct or Mitigate Violation*

OAR 340-012-0145(6) provides, in pertinent part:

> "C" is the respondent's efforts to correct or mitigate the violation. The values for "C" and the finding that supports each are as follows:
>
> (a) -5 if the respondent made extraordinary efforts to correct the violation or to minimize the effects of the violation, and made extraordinary efforts to ensure the violation would not be repeated.
>
> (b) -4 if the respondent made extraordinary efforts to ensure that the violation would not be repeated.
>
> (c) -3 if the respondent made reasonable efforts to correct the violation, or took reasonable affirmative efforts to minimize the effects of the violation.
>
> (d) -2 if the respondent eventually made some efforts to correct the violation, or to minimize the effects of the violation.
>
> (e) -1 if the respondent made reasonable efforts to ensure that the violation would not be repeated.
>
> (f) 0 if there is insufficient information to make a finding under paragraphs (6)(a) through (6)(e), or (6)(g) or if the violation or the

effects of the violation could not be corrected or minimized.

(g) 2 if the respondent did not address the violation as described in paragraphs (6)(a) through (6)(e) and the facts do not support a finding under paragraph (6)(f).

For the violation of Condition 2 of the 401 WQC, DEQ found there was insufficient information to make a finding under OAR 340-012-0145(6)(a) through (6)(e) or (6)(g). Respondent does not contest this determination. Therefore, the value of "C" is 0 for this violation, pursuant to OAR 340-012-0145(6)(f).

For the violation of Condition 8 of the WQC, DEQ proposes a "C" value of 2. On August 8, 2023, DEQ informed Respondent of the need for erosion and sediment controls for the work Respondent performed on the bank of the river upstream from the dam. Respondent did not address the violation by putting any erosion and sediment controls in place or developing an erosion and sediment control plan. Therefore, the value of "C" is 2 for this violation, pursuant to OAR 340-012-0145(6)(g).

For the violations of Condition 9 of the WQC related to the discharge of concrete-contaminated water DEQ proposes a "C" value of 0. The evidence establishes that Respondent discharged concrete-contaminated water into the river on August 21 and 22, 2023, and the effects of such conduct could not be corrected or minimized. Therefore, the appropriate value of "C" is 0, pursuant to OAR 340-012-0145(6)(f).

For the violation of Condition 9 of the 401 WQC related to the tire mats, DEQ proposes a "C" value of 2. On August 15, 2023, DEQ informed Respondent that the tire mats were deleterious waste material per Condition 9 and needed to be removed. Respondent nonetheless failed to address the violation and left the tire mats in place. The value of "C" is therefore 2 for this violation, pursuant to OAR 340-012-0145(6)(g).

For the violation of Conditions 10 and 19 of the 401 WQC, DEQ proposes a "C" value of 0. Respondent operated equipment in the flowing channel of the river on August 7, 2023, and the effects of the violation could not be corrected or minimized. Therefore, the value of "C" is 0 for this violation, pursuant to OAR 340-012-0145(6)(f).

For the violation of Condition 15 of the 401 WQC, DEQ proposes a "C" value of 0. Respondent failed to remove all construction materials and temporary fill from below the OHWM before the expiration of the in-water work window, and the effects of the violation could not be corrected or minimized. Therefore, the value of "C" is 0 for this violation, pursuant to pursuant to OAR 340-012-0145(6)(f).

For the violation of Condition 16 of the 401 WQC, DEQ proposes a "C" value of 0. Respondent failed to provide unobstructed fish passage between September 1, 2023, and September 5, 2023, and the effects of the violation could not be corrected or minimized. Therefore, the value of "C" is 0 for this violation, pursuant to OAR 340-012-0145(6)(f).

For the violation of Condition 17 of the 401 WQC, DEQ found there was insufficient information to make a finding under OAR 340-012-0145(6)(a) through (6)(e) or (6)(g). Respondent does not contest this determination. Therefore, the value of "C" is 0 for this violation, pursuant to OAR 340-012-0145(6)(f).

**Economic Benefit**

OAR 340-012-0150 provides, in relevant part:

> (1) The Economic Benefit (EB) is the approximate dollar value of the benefit gained and the costs avoided or delayed (without duplication) as a result of the respondent's noncompliance. Except as provided in (3), the EB will be determined using the U.S. Environmental Protection Agency's BEN computer model. DEQ may make, for use in the model, a reasonable estimate of the benefits gained and the costs avoided or delayed by the respondent.
>
> * * * * *
>
> (4) DEQ need not calculate EB if DEQ makes a reasonable determination that the EB is de minimis or if there is insufficient information on which to make an estimate under this rule.

For the violations of Condition 2, 9 (concrete), 9 (tire mats), 10 and 19, 15, 16, 17 DEQ found there is insufficient information with which to make an estimate under OAR 340-012-0150. Respondent does not dispute that determination. Pursuant to OAR 340-012-0150(4), "EB" is 0 for those violations.

The record establishes that for the violation of Condition 8 of the 401 WQC, Respondent avoided a cost of $166 to install erosion and sediment controls. After applying the BEN computer model, the avoided cost results in an "EB" value of $167.

**Assessed Civil Penalties**

The values for each of the factors discussed above are entered into the following formula to determine the amount of the civil penalty for each established violation: BP + [(0.1 x BP) x (P + H + O + M + C)] + EB.

The civil penalty for the violation of Condition 2 of the 401 WQC is $8,400 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 3 O + 8 M + 0 C)] + $0 EB).

The civil penalty for the violation of Condition 8 of the 401 WQC is $9,767 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 4 O + 8 M + 2 C)] + $167 EB).

The civil penalty for the violation of Condition 9 of the 401 WQC, pertaining to concrete, is $8,000 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 2 O + 8 M + 0 C)] + 0 EB).

The civil penalty for the violation of Condition 9 of the 401 WQC, pertaining to tires, is $10,000 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 3 O + 10 M + 2 C)] + 0 EB).

The civil penalty for the violation of Conditions 10 and 19 of the 401 WQC is $7,200 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 0 O + 8 M + 0 C)] + 0 EB).

The civil penalty for the violation of Condition 15 of the 401 WQC is $8,000 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 0 O + 10 M + 0 C)] + 0 EB).

The civil penalty for the violation of Condition 16 of the 401 WQC is $17,600 ($8,000 BP + [(0.1 x $8,000 BP) x (0 P + 0 H + 2 O + 10 M + 0 C)] + 0 EB).

The civil penalty for the violation of Condition 17 of the 401 WQC is $8,800 ($4,000 BP + [(0.1 x $4,000 BP) x (0 P + 0 H + 3 O + 8 M + 0 C)] + 0 EB).

Pursuant to ORS 468.135 and ORS 183.745(2), the civil penalties are due and payable within 10 days after the order becomes final.

## ORDER

Winchester Water Control District is ordered to pay civil penalties in the total amount of $77,767 for violating conditions of the 401 WQC, issued on July 18, 2023.

The civil penalties are due and payable within 10 days after the order becomes final.

Elizabeth Jarry
Senior Administrative Law Judge
Office of Administrative Hearings

## APPEAL RIGHTS

If you are not satisfied with this decision, you have the right to have the decision reviewed by the Oregon Environmental Quality Commission (Commission). To have the decision reviewed, you must file a "Petition for Review" within 30 days of the date this order is served on you. Service, as defined in Oregon Administrative Rule (OAR) 340-011-0525, means the date that the decision is **mailed** to you, and not the date that you receive it.

The Petition for Review must comply with OAR 340-011-0575 and must be **received** by the Commission within 30 days of the date the Proposed and Final Order was mailed to you. You should mail your Petition for Review to:

Environmental Quality Commission
c/o Leah Feldon, Director, DEQ

700 NE Multnomah Street, Suite 600
Portland, OR 97232

You may also fax your Petition for Review to (503) 229-6762 (the Director's Office).

Within 30 days of filing the Petition for Review, you must also file exceptions and a brief as provided in OAR 340-011-0575. The exceptions and brief must be **received** by the Commission within 30 days from the date the Commission received your Petition for Review. If you file a Petition but not a brief with exceptions, the Environmental Quality Commission may dismiss your Petition for Review.

If the Petition, exceptions and brief are filed in a timely manner, the Commission will set the matter for oral argument and notify you of the time and place of the Commission's meeting. The requirements for filing a petition, exceptions and briefs are set out in OAR 340-011-0575.

Unless you timely file a Petition for Review as set forth above, this Proposed Order becomes the Final Order of the Commission 30 days from the date this Proposed Order is mailed to you. If you wish to appeal the Final Order, you have 60 days from the date the Proposed Order becomes the Final Order to file a petition for review with the Oregon Court of Appeals. *See* ORS 183.480 et. seq.

## SERVICEMEMBERS' CIVIL RELIEF ACT

Unless otherwise stated in this order, the Office of Administrative Hearings 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 March 6, 2026, I mailed the foregoing PROPOSED AND FINAL ORDER issued on this date in OAH Case No. 2024-ABC-06610.

By: First Class Mail

The Steamboaters
PO Box 396
Idleyld Park OR 97447

Native Fish Society
813 7th St. Suite 200A
Oregon City OR 97045

Oregon Wild
5825 North Greeley Ave.
Portland OR 97217

Umpqua Watersheds
PO Box 1001
Roseburg OR 97470

By: Electronic and Certified Mail

Waterwatch Of Oregon
Victoria White
213 SW Ash St. Suite 208
Portland OR 97204
Email: tory@waterwatch.org

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

Robert Kirschner
Crag Law Center
3141 E Burnside St
Portland OR 97214
Email: rob@crag.org

By: Electronic Mail

Winchester Water Control District
c/o Ryan Beckley
P.o. Box 661
Winchester OR 97495
Email: RBeckley@terrafirmafs.com

Erin Saylor, Agency Representative
Department of Environmental Quality
700 NE Multnomah Street Suite 600
Portland OR 97232
Email: Erin.Saylor@deq.oregon.gov

Diane Lloyd, Assistant Attorney General
Department of Justice
100 SW Market Street
Portland OR 97201
Email: diane.lloyd@doj.oregon.gov

Anesia N Valihov *for* Lucy M Garcia
Hearing Coordinator