

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

IN THE MATTER OF:) **FINAL ORDER**
)
WINCHESTER WATER CONTROL) OAH Case No. 2024-ABC-06772
DISTRICT)
)

On December 18, 2025, Administrative Law Judge (“ALJ”) Schmidt issued a Proposed Order concluding that Respondent Winchester Water Control District executed “construction” on Winchester Dam during the repairs it completed in August and September of 2023, and the Oregon Fish and Wildlife Commission and Department of Fish and Wildlife (individually, “Commission,” and “Department,” respectively, and collectively “ODFW”) may require that Respondent install Department-approved fish passage at Winchester Dam, but may not require Respondent to construct a fish counting window, a fish counting facility, or pit tag arrays. In addition, ALJ Schmidt proposed that ODFW issue the order requiring criteria-compliant fish passage within the prescribed timeline¹ (collectively referred to herein as “the Proposed Order”).

The Proposed Order stated that any party to the proceeding that disagreed with the recommended action of the Proposed Order could file exceptions to the Proposed Order no later than 14 days after the order was served.

Timely exceptions were filed by Respondent on December 30, 2025.² In that filing, Respondent requested “[a]n opportunity to present argument to the Oregon Fish and Wildlife Commission during its contemplation of the Proposed Order.” ODFW interprets the ALJ’s language in the Proposed Order “Appeals Procedure” section to satisfy the requirements of ORS 183.460 and OAR 137-003-0645(5) as that section set out where and when, and in what form, exceptions and argument may be made for consideration by the Commission. However, to avoid any confusion or issue, ODFW notified Respondent in writing that it could present further written argument to the Commission if received by February 5, 2026. This written submission was received by mail on February 5, 2026 (“argument”).

After review and consideration of the entirety of the record in this proceeding, including without limitation Respondent’s exceptions and argument, the Commission, at a meeting in Eugene on February 20, 2026, denied every exception except those that are expressly responded to below, and regardless of whether an exception was specifically discussed herein or not, and voted to issue a Final Order, which adopted and incorporated by reference the attached proposed order issued by ALJ Schmidt on December 18, 2025, except as modified as follows:

¹ Four dates in that portion of the Proposed Order are modified because of a typo that was included in the Department’s proposed order that was carried through into the ALJ’s Proposed Order; however, in all instances the dates align with the specified number of months set forth in the Department’s proposed order that was affirmed by the ALJ.

² No other party filed exceptions to the Proposed Order.

ATTACHMENT 2 – Department’s DRAFT Final Order

The “History of the Case” section in the Proposed Order is adopted in its entirety, with the inclusion of the four paragraphs immediately above that describe the filing of exceptions, argument, and the Commission’s consideration of the exceptions and argument, and issuance of the final order.

The “Findings of Fact” section and “Opinion” section in the Proposed Order are modified only as expressly provided herein in response to the following exceptions (any additions to the text of the Proposed Order to be reflected in the Commission’s Final Order are shown in **bold underline**):

Exception No. 1: Respondent took exception to alleged “omission of findings of fact and conclusions of law concerning what constitutes part of the ‘Winchester Dam,’ whether the faces of the various structures comprising the Dam must be taken into consideration when evaluating the Dam’s upstream surface area” RESPONDENT’S EXCEPTIONS TO PROPOSED ORDER, at 2 (¶1). Similar contentions are raised in Exceptions Nos. 18 and 26 that may also be addressed by the following explanation.

Disposition: To address the exception, ODFW provides the following explanation to clarify its reasoning in the Final Order as to why the following facts led it to make the conclusion it did regarding what constituted the area of the upstream face of Winchester dam (and its associated square foot calculation).

Finding of Fact No. 14 provided a shore to shore measurement of what constituted the upstream face of Winchester dam, which provided the length calculation. Finding of Fact No. 70 further separated into sections this upstream face and provided corresponding square foot measurements, which demonstrate that the upstream face was approximately 13.8 feet in width. Finding of Fact No. 15 describes this width measurement along the timber cap portion of the dam as “clad with plywood boards configured in a peaked shape that comes to a crest,” and that “[u]pstream of the UHMW-covered timber cap, the Dam has no cladding and consists entirely of infill materials.” Finding of Fact No. 70 elaborates that “[w]hen the upstream side of the Dam was fully dewatered, the impoundment came approximately as high as the bottom of the upstream leading edge of the Dam’s timber cap (*i.e.*, the lowest elevation of manmade materials, upstream of which the Dam is entirely composed of infill materials).” Lastly, Finding of Fact No. 78 states:

Department interprets the phrase ‘natural ground gradeline that is used to impound water’ in OAR 635-412-0005(10)(b)(A)(ii) to mean the point above which no water is impounded by an artificial obstruction during run-of-the-river conditions. (Test. of Watts, Apke.) Under this interpretation, the total upstream surface area of the Dam measured above the natural ground gradeline that is used to impound water is 7,194.5 sf, as follows: 2,668.2 sf of upstream face on the timber cap section; 2,738.8 sf of upstream face on the concrete cap section; and 1,787.5 sf on the upstream face of concrete Spill Gate section of the Dam (from the south end of the timber dam to the south bank of the North Umpqua River). (Exs. A12 at 16, A13 at 1, A16 at 1; test. of Watts.) The replacement of all but approximately 270 sf of UHMW sheeting on the upstream surface of the timber cap represented a replacement of approximately 2,398.2 sf of the upstream

ATTACHMENT 2 – Department’s DRAFT Final Order

surface area of the Dam (2,668.2 sf total area of upstream face at timber cap – 270 sf not replaced).

Page 43 of the Proposed Order is amended as follows to clarify why these facts above support the Commission’s conclusion regarding what qualifies as falling within “the area of the upstream * * * face of the dam (measured above the natural ground gradeline that is used to impound water),” as used in OAR 635-412-0005(10)(b)(A)(ii):

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

In sum, with respect to Winchester dam, what constituted “the area of the upstream * * * face of the dam (measured above the natural ground gradeline that is used to impound water),” as used in OAR 635-412-0005(10)(b)(A)(ii), includes only the shore to shore length of the timber cap, concrete cap, and spillgate section of the dam, by the width from the crest of those sections to the lowest elevation of manmade materials because when the upstream side of Winchester dam was fully dewatered, the impoundment came approximately as high as the bottom of the upstream leading edge of the timber and concrete cap sections, upstream of which the dam is entirely composed of infill materials. This area constitutes the area of the upstream face of the Winchester dam as that phrase is used in OAR 635-412-0005(10)(b)(A)(ii).

Exception No. 34: Respondent took exception to alleged “omission of findings of fact and conclusions of law regarding the lack of evidence supporting the proposed order’s requirements for regulated [water surface elevation (WSE)],” stating that while ODFW’s Proposed Order “requires a modification to the spillway to maintain a regulated WSE, there was

ATTACHMENT 2 – Department’s DRAFT Final Order

no evidence presented in support of this requirement” RESPONDENT’S EXCEPTIONS TO PROPOSED ORDER, at 20 (¶34). Further, Respondent asserted that “ODFW even represented that it was putting forth no evidence regarding the elevation of the reservoir at Winchester dam.” *Id.*

Disposition: To address this exception, ODFW identified the following evidence in the record that refutes Respondent’s contentions. Specifically, evidence was presented at hearing to support the ODFW’s Proposed Order’s requirement for spillway to be modified to maintain regulated water surface elevation above Winchester dam. Specifically, Mr. Watts’ testified at hearing that it was his professional judgment that modifying the spillway to allow different downstream passage, as compared to the current configuration, is necessary to satisfy Oregon’s design criteria. Hrg. Tr. at 202-205 (Mr. Watts) (explaining that currently fish because “[t]here’s very little water that goes down the fishway * * * typically come across the top of the dam. So part of the proposed order is to modify the spill conditions so that fish, the ones that don’t go down the fish ladder, I mean, because we’ll be taking significantly more water down the fish ladder, would go through a safer version of the spillway and not cascade necessary [sic] onto the rocks below”). Mr. Watts’ testimony included confirmation that it was correct that modifying the spillway to allow different downstream passages is necessary to satisfy Oregon’s fish passage design criteria. Hrg. Tr. at 205 (Question of Limited Party Counsel: “Okay. And so for Winchester Dam in particular, is it – is it your professional judgment that modifying the spillway to allow different downstream passages is necessary to satisfy Oregon’s design criteria?” Mr. Watts’ response: “Correct.”).

Mr. Watts’ testimony constitutes evidence in the record supporting the downstream fish passage requirement to modify the spillway to maintain regulated water surface elevation (WSE) above the dam to ensure compliance with Oregon’s fish passage criteria OAR 635-412-0035(2)(m)(B) and (C). Mr. Watts’ testimony reflects he did not take into account any assumption about the Respondent’s water right in the Proposed Order’s design plans and specifications. Hrg. Tr. at 246-247. The Proposed Order specifies only that the spillway be modified to maintain regulated water surface elevation – whatever that regulated water surface elevation is.

The Proposed Order on page 31 (Finding of Fact No. 79) is amended to reflect this testimony in the record as follows:

- 79.** The Dam does not meet Oregon design standards for fish passage and would require significant changes to meet Oregon standards, including the following: relocation of the fish ladder entrance to a location in closer proximity to the thalweg³ of the North Umpqua River (nearer the south bank of the river); increase in attraction flow through the fish ladder to at least 473 cubic feet per second (cfs); reduction of continued false attraction flows over and through the Dam; sufficient pool size to prevent fish injury; **modification of spillway to maintain regulated water surface elevation above the dam;** and water surface elevation differentials no greater than 6 inches. (Exs. A12 at

³ The thalweg of a river is “the line following the lowest part of a valley whether under water or not.” *Webster’s* at 2367.

ATTACHMENT 2 – Department’s DRAFT Final Order

18-24, A19 at 42-43, 48-54, A27 at 13-15, A31 at 5-6; test. of Watts, Leonetti.) (**Hrg. Tr. at 202-205 (Mr. Watts).**)

In addition, the Proposed Order on page 54 is amended to reflect the applicable law that supports this testimony in the record. The fish passage design criteria that establishes this downstream fish passage requirement is set forth in OAR 635-412-0035(2)(m) (“(B) Plunging flow moving past an artificial obstruction via spillways, outlet pipes, or some other means which may contain fish shall: (i) At all flows, fall into a receiving pool of sufficient depth, depending on impact velocity and quantity of flow, to ensure that fish shall not impact the stream bottom or other solid features; and (ii) Have a maximum impact velocity into a receiving pool, including vertical and horizontal velocity components, less than 25 feet per second; and (C) Water depth over spillways or other artificial obstructions shall be greater than 4 inches during all flows.”).

Accordingly, the Proposed Order is amended to add the following language identifying that OAR 635-412-0035(2)(m)(B) and (C) require the spillway to maintain regulated water surface elevation above the dam to ensure fish do not impact the river bottom and the water depth over the spillway is greater than 4 inches during all flows as follows:

Some of these elements are directly controlled by OAR 635-412-0035 and the Department’s other rules. Adequate passage for lamprey and other migratory fish is already required by OAR 635-412-0035(7). OAR 635-412-0035(2)(b) mandates adequate attraction flow, which, as explained by OAR 635-412-0005(5), can require the installation of an AWS. OAR 635-412-0035(2)(d) specifies a maximum six-inch water surface elevation differential where fish other than adult salmon or steelhead require passage. **OAR 635-412-0035(2)(m)(B) and (C) require the spillway to maintain regulated water surface elevation above the dam to ensure fish do not impact the river bottom and the water depth over the spillway is greater than 4 inches during all flows.** The design and screening of a dam’s AWS are governed by OAR 635-412-0035(1)(j)(H) and OAR 635-412-0035(7)(c)(E) and (F). The requirement of “[d]etailed de-watering, work area isolation, and fish rescue and salvage plans” is consistent with OAR 635-412-0035(10). As such, most of the design requirements come directly from the Department’s fish passage standards and are thus enforceable components of the Notice.

Lastly, the “Order” section in the Proposed Order is adopted, with only five modifications as follows – four of which result from one typo in the agency’s proposed order that was repeated by the ALJ. The first modification to the “Order” section in the Proposed Order is amended to reflect the issuance of the order by the Commission: a change from “I propose the Oregon Department of Fish and Wildlife issue the following order” to “The Commission issues the following order: * * *.”

Second, the ALJ adopted the agency’s proposed order’s time period of 29 months for project implementation/ construction in Section 3 of the “Order” section in the Proposed Order, and yet identified “July 1, 2027 to December 31, 2029” as the time span; however, “December 1, 2029,” and not December 31, 2029, represents 29 months from July 1, 2027. Accordingly, “December 31, 2029” is modified to “December 1, 2029” to correct that typo.

ATTACHMENT 2 – Department’s DRAFT Final Order

Third, Section 3.a.ix of the “Order” section in the Proposed Order states “Project completion December 31, 2028,” which was again a typo in agency’s proposed order that was repeated by the ALJ, as the project completion date based upon the time span set forth above is “December 2, 2029.” This Final Order corrects that typo.

Fourth, in Section 4 of the “Order” section in the Proposed Order, because of the aforementioned typo, the time span commences at January 1, 2030, whereas it should commence “December 2, 2029”; therefore, this start date for Post-Project Installation Certificate and Long-term Monitoring & Reporting is modified to correctly state “December 2, 2029.” Fifth, given that the specified time span of “10 years or to be determined” starts from December 2, 2029, and goes until “December 2, 2039” – the end of the indicated time span is corrected to reflect that date.⁴ To ensure clarity, this Order is repeated immediately below with these corrections (again, any changes are identified in **bold underline**).

ORDER

The Commission issues the following order:

Pursuant to ORS 509.625(3)(b)(A), the Winchester Water Control District must install fish passage at Winchester Dam consistent with the following timeline and applicable criteria set forth in OAR 635-412-0035(1), (2), (7), and (10) to accommodate passage of native migratory fish and their corresponding migratory timing identified in Exhibit F (List of Native Migratory Species) of the Notice of Non-Compliance; Proposed Order; and Opportunity for Contested Case Hearing issued on September 17, 2024, except as amended by prior written authorization of the Department.

1. January 1, 2026 to December 31, 2026 (12 Months)

a. Project Engineering Design Plans Development and Completion:

i. Upstream passage requirements:

1. Vertical slot (possible dual slot) fishway configuration;
2. Six-inch pool to pool Water Surface Elevation (WSE) differential;
3. Provisions to ensure adequate lamprey passage as well as all other native migratory fish;
4. Screened auxiliary water system (AWS);
5. Criteria attraction flow; and
6. Develop detailed construction sequencing and other plans consistent with requirements set forth below.

ii. Downstream passage requirements:

1. Modify spillway to maintain regulated WSE above the dam,

⁴ The “Issues” and “Evidentiary Rulings” and the “Conclusions of Law sections are adopted unchanged.

ATTACHMENT 2 – Department’s DRAFT Final Order

- a. Modeled flows and design to compliment passage at fishway; and
- b. Screen fishway AWS designed to current NMFS guidelines.
- iii. Detailed de-watering, work area isolation, and fish rescue and salvage plans; and
- iv. Design related to the permanent abandonment of the North Bank Fishway.
- b. Interagency Coordination:
 - i. Frequent check-ins with the Department: kickoff, preliminary, 30%, 60%, 90% and 100% final design intervals; and
 - ii. Include local, county, state and federal regulatory agencies in design development and review.
- c. Final Engineering Design Plans and Specifications:
 - i. 100% engineered stamped design plan set & specifications.

2. January 1, 2027 to June 30, 2027 (6 months)

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

3. July 1, 2027 to December 1, 2029 (29 Months)

- a. Project Implementation/Construction:
 - i. Appropriate agency notification in advance of project commencement;
 - ii. Frequent coordination, site inspections and schedule updates;
 - iii. In-water work shall be complete during Department-approved in-water work periods;
 - iv. Isolate work site as required for anticipated high water events during multiyear construction phases;
 - v. Maintain temporary fish passage;

ATTACHMENT 2 – Department’s DRAFT Final Order

- vi. Detailed fish rescue and salvage plan based on regulatory agency input and approval, including:
 - 1. Adequately staffed and managed fish salvage and relocation operations; and
 - 2. Use of temporary water management and work area isolation to avoid harm to applicable species.
- vii. Construct new fishway and AWS (2028 – 2029 in-water work windows);
- viii. Permanently abandon existing North Bank Fishway and related infrastructure (2029 in-water work window); and
- ix. Project completion **December 1, 2029**.

4. December 2, 2029, to December 31, 2040 (10 years or to be determined)

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

5. Winchester Water Control District Long-term Ownership, Maintenance, and Operation of Fishway

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

DATED this 20th day of February, 2026.

By:

Mary Wahl
Chair, Oregon Fish and Wildlife Commission

RIGHT OF JUDICIAL REVIEW

You have the right to appeal this Final Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Final Order was served on you unless otherwise provided by statute. If this Final Order was personally delivered to you, the day of service is the day you received it. If this Final Order was mailed to you, the date of service is the day it was mailed, not the day you received it. If a petition for judicial review is not filed within the 60-day time period, you will lose the right to appeal.