Oregon
Kate Brown, Governor

Department of Agriculture
Administrative Services
635 Capitol St NE Ste 100
Salem, OR 97301-2532

PESTICIDES PROGRAM
TEL: 503-986-4635

CERTIFIED MAIL

July 15, 2016

CT Corporation System, registered agent for
Trees, Inc.
388 State St. Suite 420
Salem, OR 97301

Re: **NOTICE OF IMPOSITION OF CIVIL PENALTY and PROPOSED/FINAL ORDER, ODA PESTICIDES CASE NO. 160045**

This is a Notice of Imposition of Civil Penalty and Proposed/Final Order that is based on a pesticide investigation conducted by the Pesticides Program of the Oregon Department of Agriculture. This NOTICE addresses violation of Oregon Revised Statutes (ORS) Chapter 634. The action is taken pursuant to statutory and regulatory provisions including but not limited to ORS Chapter 183, ORS 634.900 *et seq.*, Oregon Administrative Rules (OAR) Chapter 137, Division 3, and OAR 603-057-0500 *et seq.*

Also enclosed is information on contested case rights and procedures. This information is provided for your consideration should you select to contest the NOTICE and request an administrative hearing of this matter.

Read all of the NOTICE carefully.

If you request a hearing in this matter, your request for hearing must be made in writing to the Oregon Department of Agriculture so that it is received by the Department within ten business days of the date that you receive the NOTICE. If you do not request a hearing this NOTICE will become the Final Order, and the Final Order shall constitute a judgment.

Important Note: The Department is also issuing a separate proposed enforcement action to your employee Duane Kirkman. That proposed action is specific to Mr. Kirkman. Your request for a hearing would be separate from and have no bearing on Mr. Kirkman's response to his enforcement action, although hearing processes could be combined if both parties request hearings.

Dale L. Mitchell

DALE L. MITCHELL
PESTICIDES COMPLIANCE PROGRAM MANAGER
OREGON DEPARTMENT OF AGRICULTURE

Encl: Notice of Contested Case Rights and Procedures

STATE OF OREGON
DEPARTMENT OF AGRICULTURE

Before The Director of The Department of Agriculture

In the Matter of:	)	NOTICE OF IMPOSITION OF CIVIL PENALTY and
	)	PROPOSED/FINAL ORDER,
Trees, Inc.	)	for Violation of the State Pesticide Control Act,
an agricultural grower	)	ODA Pesticides Case No. 160045

The Director of the Oregon Department of Agriculture (ODA or the Department) hereby assesses a civil penalty in the amount of $407.00, against Trees, Inc. as authorized by statutory and regulatory provisions including, but not limited to, ORS 634.900 to ORS 634.915 and OAR 603-057-0500 to 603-057-0532. The findings and conclusions on which this determination is based, and the criteria used to calculate the penalty, are set out below.

I. APPLICABLE LAW

1. The applicable law includes the following: Oregon Revised Statutes (ORS) Chapters 60 (corporations), 183 (administrative law), 561 (agriculture), and 634 (pesticides); Oregon Administrative Rules (OAR) Chapter 137, Division 3 (contested case procedures); and OAR Chapter 603, Division 57 (pesticide control).

2. Oregon's pesticide control law is known as the State Pesticide Control Act and is codified in ORS Chapter 634.

3. ORS 634.006(8) states: "Pesticide' includes: ...
   (a) 'Defoliant' which means any substance or mixture of substances intended for causing the leaves or foliage to drop from a plant with or without causing abscission;
   (b) 'Desiccant' which means any substance or mixture of substances intended for artificially accelerating the drying of plant tissue;
   (c) 'Fungicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus;
   (d) 'Herbicide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed;
   (e) 'Insecticide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any insects which may be present in any environment whatsoever;
   (f) 'Nematocide' which means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating nematodes;
   (g) 'Plant regulator' which means any substance or mixture of substances intended, through physiological action, to accelerate or retard the rate of growth or rate of maturation or to otherwise alter the behavior of ornamental or crop plants or the produce thereof, but shall not include substances to the extent that they are intended as plant nutrients, trace elements, nutritional chemicals, plant inoculants or soil amendments; or
   (h) Any substance, or mixture of substances intended to be used for defoliating plants or for preventing, destroying, repelling or mitigating all insects, plant fungi, weeds, rodents, predatory animals or any other form of plant or animal life which is, or which the department may declare to be a pest, which may infest or be detrimental to vegetation, humans, animals, or be present in any environment thereof."

4. ORS 634.006(13) states: "Pesticide operator' means a person who owns or operates a business engaged in the application of pesticides upon the land or property of another."

5. ORS 634.006(9) states: "Pesticide applicator' or 'applicator' means an individual who:
(a) Is spraying or applying pesticides for others;
(b) Is authorized to work for and is employed by a pesticide operator; and
(c) Is in direct charge of or supervises the spraying or other application of pesticides or operates, uses, drives or physically directs propulsion of equipment, apparatus or machinery during the spraying or other application of pesticides, either on the ground or, if certified under ORS 634.128, by aircraft."

6. ORS Chapter 634 authorizes the Oregon Department of Agriculture to issue pesticide licenses, including licenses for operators and applicators. ORS 634.057, 634.116, and 634.122.

7. The Department has responsibility and authority for the Pesticide Program and may make any rule necessary for enforcement of program requirements. ORS 561.020; ORS 561.190; ORS Chapter 634.

8. Oregon Administrative Rules (OAR) Chapter 603 Division 057 is entitled Pesticide Control and implements provisions of the State Pesticide Control Act, ORS Chapter 634.

9. ORS 634.372(2) states "A person may not: ... As a pesticide applicator or operator, intentionally or willfully apply or use a worthless pesticide or any pesticide inconsistent with its labeling, or as a pesticide consultant or dealer, recommend or distribute such pesticides."

10. ORS 561.190 states: "The State Department of Agriculture is authorized and directed to make any and all rules and regulations necessary for the administration or enforcement of any law with the administration or enforcement of which the department is charged, and not inconsistent with the authority with which the department is vested or with any such law. Such rules and regulations shall be compiled and printed in pamphlet form for distribution. The violation of any rule or regulation made by the department pursuant to this section shall be a violation of the law to which such rule or regulation applies and shall be punishable in the manner provided for violations of such law."

11. ORS 634.900 *et seq.* authorizes ODA to impose civil penalties for violations of provisions of ORS Chapter 634. ORS 634.375 states: "The State Department of Agriculture may suspend, revoke or refuse to renew a license, certificate or other authorization issued to a person under this chapter if the person fails to pay a civil penalty under ORS 634.900 on or before 90 days after the date that the order imposing the civil penalty becomes final by operation of law or on appeal."

12. OAR 603-057-0500 *et seq.* provides formulae for calculating the civil penalties authorized by ORS 634.900. OAR 603-057-0502(7) states "Civil penalties shall be due and payable ten (10) business days after the order becomes final by operation of law or on appeal. A person may pay a civil penalty before an order becomes final. Payment of a civil penalty before an order becomes final is an admission by the person of all of the allegations in the Notice of Imposition of Civil Penalty."

13. ORS Chapter 60 regulates corporations transacting business in Oregon.

II. FINDINGS OF FACT
ODA Pesticides Case No. 160045

1. This Notice is the result of a pesticide use investigation conducted by the Department in response to a compliant about drift or off-site deposition, and improper use of pesticides applied to trees in

the right of way in Josephine County, Oregon in July of 2015. The persons in contact with the Department regarding this matter included Steve Stevens (Mr. Stevens), Donald McElroy (Mr. McElroy), Josh Hooley (Mr. Hooley), and Duane Kirkman (Mr. Kirkman).

2. Trees, Inc. is a National business corporation with a principal place of business at 708 Blair Mill Road, Willow Grove, Pennsylvania. The company has an Oregon branch located at 1420 Williams Highway, Grants Pass, Josephine County, Oregon. Steve Stevens is the Area Supervisor located at the Oregon branch. Trees, Inc. is a tree service provider for utilities and municipalities. This service includes applying pesticides to right of way areas.

3. Trees, Inc. is licensed by ODA as a Commercial Pesticide Operator, license number AG-L0001136CPO. This license was issued in August of 1987. Mr. Kirkman is licensed by ODA as a Commercial Pesticide Applicator, license number AG-L1009700CPA. This license was issued in July of 2009.

4. During 2015, Trees, Inc. used or employed various agents or employees, some of them as pesticide applicators. These persons included Mr. Kirkman.

5. On or about July 16 and 17, 2015, in his capacity as an agent or employee of Trees, Inc., Mr. Kirkman used a ground sprayer to intentionally apply a pesticide product to a right of way on the north side of Southside Road, Grants Pass, Josephine County, Oregon, approximately located at 1804 Southside Road, Grants Pass, Josephine County, Oregon. The treated portion of the right of way was located within 10 feet from Iron Creek, which held flowing water during the application. The pesticide product applied here was:

Garlon 4 Ultra Specialty Herbicide, EPA Reg. No. 62719-527, Dow AgroSciences LLC, Indianapolis, Indiana (active ingredient triclopyr)

The treated area may be referred to herein as the right of way. This pesticide application may be referred to as the July application.

6. The Garlon 4 label states, under **Environmental Hazards**:

> This pesticide is toxic to fish. Do not apply directly to water, to areas where surface water is present, or to intertidal areas below the mean high water mark. Do not contaminate water when cleansing equipment or disposing of equipment washwaters.
>
> This chemical has properties and characteristics associated with chemical detected in groundwater. The use of this chemical in areas where soils are permeable, particularly where the water table is shallow, may result in groundwater contamination.

And under **Avoid Injurious Spray Drift**:

> Make applications only when there is little or no hazard from spray drift. Small quantities of spray, which may not be visible, may seriously injure susceptible plants. Do not spray when wind is blowing toward susceptible crops or ornamental plants that are near enough to be injured. It is suggested that a continuous smoke column at or near the spray site or a smoke generator on the spray equipment be used to detect air movement, lapse conditions, or temperature inversions (stable air). If the smoke layers or indicates a potential of hazardous spray drift, do not spray.

And under **Ground Equipment**:

> To aid in reducing spray drift potential when making ground applications near susceptible crops or other desirable broadleaf plants, Garlon 4 Ultra should be used in thickened (high viscosity) spray

mixtures using an agriculturally labeled drift control additive, high viscosity invert system, or equivalent as directed by the manufacturer. When using a spray thickening or inverting additive, follow all use directions and precautions on the product label. With ground equipment, spray drift can be reduced by keeping the spray boom as low as possible; by applying 20 gallons or more of spray per acre; by keeping the operating spray pressures at the lower end of the manufacturer's recommended pressures for the specific nozzle type used (low pressure nozzles are available from spray equipment manufacturers); and by spraying when wind velocity is low. Do not apply with nozzles that produce a fine droplet spray. Select nozzles and pressures which provide adequate plant coverage, but minimize the production of fine spray particles.

And under **High Volume Leaf-Stem Treatment**:

To minimize spray drift, keep sprays no higher than brush tops and keep spray pressures low enough to provide coarse spray droplets. An agriculturally labeled thickening agent may be used to reduce spray drift.

7. Mark Gattey (Mr. Gattey) owns property at 1720 Southside Road, Grants Pass, Josephine County, Oregon. On July 21, 2015, Mark Gattey submitted an online complaint to the Oregon Department of Environmental Quality (DEQ), which was forwarded to ODA, alleging that Trees, Inc. sprayed the west side of his property with pesticides which it allowed to drift from the application site and into Iron Creek. This property may be referred to herein as the Gattey property.

8. On July 22, 2015 ODA traveled to the Gattey property and met with Mr. Gattey, his two sons Mattias and Sebastian Gattey, his neighbor Wayne Brown, the Code Enforcement Administrator for Josephine County, Jeff Page, and Jeff Duewel, a reporter for the Daily Courier. While onsite, ODA viewed the right of way, noted the location and condition of Iron Creek, and collected the following samples in the order listed:

Sample #	Description
160045-1	Vegetation, leaves from east side of upper embankment, N of Southside Road, near Iron Creek
160045-2	Vegetation, leaves from west side of upper embankment, N of Southside Road, near Iron Creek
160045-3	Vegetation, leaves from bush overhanging Iron Creek on west side of Gattey property, N of Southside Road
160045-4	Vegetation, leaves from trees, bush immediately east of Iron Creek, N of Southside Road

The samples were secured and delivered to ODA Laboratory Services, Portland, Oregon (the ODA lab), which subsequently analyzed them for triclopyr.

9. On July 24, 2015, ODA contacted Trees, Inc. During this and subsequent communications, Mr. Kirkman, Mr. Stevens, Mr. Hooley, and Mr. McElroy described the July 2015 application. A record for the application was also provided.

10. On February 3, 2016, the ODA lab issued the following results of its analyses of the samples. All analyses results are given in parts per million (ppm). The Method Reporting Limit (MRL) for all analyses is 0.010 ppm.

Sample #	Description	Detected triclopyr
160045-1	Leaves from east side of upper embankment near Southside Road	18 ppm

160045-2	Leaves from west side of upper embankment near Southside Road	89 ppm
160045-3	Leaves from bush overhanging creek on west side of Gattey property	0.016 ppm
160045-4	Leaves from trees, bush next to creek on east side of Iron Creek	0.012 ppm

11. On April 14, 2016, ODA was told by Bill Meyers, DEQ, that while investigating the environmental quality issues of this matter, he was told by Oregon Department of Fish and Wildlife (ODFW) that Iron Creek is a fish bearing creek which has been designated as Essential Salmon Habitat. This was verified by ODA on the ODFW website.

12. ODA considered possible sources of the detected triclopyr. Based on symptom locations and gradients of symptoms and detections, as well as witness observations, the July application was the only likely source of the detected triclopyr.

III. ULTIMATE FINDINGS OF FACT

1. Trees, Inc. is a tree service provider for utilities and municipalities, which has a branch in Grants Pass, Oregon. Its agents or employees have included Duane Kirkman.

2. During July of 2015, Trees, Inc. and Mr. Kirkman intentionally applied a pesticide to a right of way in Josephine County, Oregon.

3. During the July application Trees, Inc. was licensed by ODA as a Commercial Pesticide Operator. Mr. Kirkman was also licensed at the time by ODA as a Commercial Pesticide Applicator.

4. The product label prohibits applying the product near surface water. It also cautions against or prohibits use of the product in conditions that could be conducive to drift. Trees, Inc. and Mr. Kirkman did not read or comply with the product labels closely enough to be sure that application conditions remained consistent with these label provisions.

5. Subsequent to the July application, samples were taken from vegetation immediately adjacent to Iron Creek. The active ingredient of the pesticide applied, triclopyr, was then detected in all of the samples collected, indicating that some spray was deposited into the creek, which has been designated as Essential Salmon Habitat.

6. The Department investigated possible sources of the detected pesticides, and found that the July application was the only likely source.

These ultimate findings of fact are based on the findings of fact.

IV. CONCLUSION OF LAW

The Oregon Department of Agriculture determines that Trees, Inc. violated Oregon Revised Statutes (ORS) Chapter 634 as follows:

VIOLATION NO. 1

Trees, Inc. violated **ORS 634.372(2),** which states **A person may not: ... As a pesticide applicator or operator, intentionally or willfully apply or use a worthless pesticide or any pesticide inconsistent with its labeling, or as a pesticide consultant or dealer, recommend or distribute such pesticides.** On or about July 16 and 17, 2015 Trees, Inc., through agent or employee Duane Kirkman, used a ground sprayer to intentionally apply a pesticide to a roadside right of way area next to a creek in Josephine County, Oregon, approximately located at 1804 Southside Road, Grants Pass, Josephine County, Oregon.

The pesticide Mr. Kirkman applied here was Garlon 4 Ultra Specialty Herbicide, EPA Reg. 62719-527 (a.i. triclopyr).

The Garlon 4 Ultra label prohibits application near surface water, and prescribes avoiding spray drift from the application site. Trees, Inc. and Mr. Kirkman did not read or comply with the product label closely enough to be sure that application conditions remained consistent with these label provisions.

Subsequent to the July application, ODA received a complaint alleging spray drift from the July application into Iron Creek, and the active ingredient, triclopyr, was then detected off of the treatment site, in vegetation immediately adjacent to Iron Creek, indicating that some spray was deposited into the creek.

Applying this product without taking care to ensure that spray conditions remained suitable, and where some of the material was deposited onto nearby plants and Iron Creek was a pesticide application inconsistent with the label by a licensed applicator, in violation of ORS 634.372(2).

This conclusion is based on the findings of fact and ultimate findings of fact.

V. PENALTY

The penalty for Violation No. 1 is $407.00. The penalty is determined using the criteria in OAR 603-057-0525 to 603-057-0530.

$$NB + [(0.1 \times NB) (P+H+R+C)]$$
$$\$370 + [(\$37) (0+0+3-2)] = \$407.00$$
$$\$407.00 \times 1 \text{ violation} = \$407.00$$

1. N, the number of related violations within a period of three years prior to and including the date of the current violative act, is 1; OAR 603-057-0530(1)(a).

2. B, the base penalty is $370.00; OAR 603-057-0530(1)(b). The base penalty was determined as follows:

   a. The MAGNITUDE is CATEGORY I (MAJOR) under OAR 603-057-0525(2)(a)(B).

   b. The GRAVITY is HIGH LEVEL because the pesticide was applied in a manner that resulted in the contamination of surface water; OAR 603-057-0525(3)(a)(B)(ii).

3. P, the past occurrence of unrelated violations is 0 (zero) because there are no prior violations; OAR 603-057-0530(1)(c)(A).

4. H, the history of taking steps to correct a violation is 0 (zero) because there is insufficient information on which to base a finding; OAR 603-057-0530(1)(d)(B).

5. R, preventability of the violation and the presence of negligence or misconduct is 3 because the actions by Trees, Inc. determined to be violative were reasonably avoidable; OAR 603-057-0530(1)(e)(C). At the time of the pesticide application activity, Trees, Inc. had been a licensed Commercial Pesticide Operator since 1987. During this period, Trees, Inc. used or employed numerous licensed Commercial Pesticide Applicators or Pesticide Trainees during pesticide application activities. Based on this license history, and license status, Trees, Inc. should have been aware of the need to follow pesticide product labels closely.

6. C, cooperativeness is –2 (negative 2); OAR 603-057-0530(1)(f)(A). Trees, Inc. and its representatives were cooperative and readily provided information to the Department.

Any final order regarding this Notice of Imposition of Civil Penalty will become a part of Trees, Inc.'s history for a period of three years. Any future violations of ORS Chapter 634 or OAR Chapter 603, Division 057 within the next three years will subject Trees, Inc. to additional enforcement actions including, but not limited to, civil penalties, product seizure, or license revocation.

VI. RIGHT TO A HEARING

You are entitled to a contested case hearing as provided by statues and rules including, but not limited to: ORS Chapter 183, including 183.413 to 183.470, and ORS 183.745; OAR Chapter 137, Division 3, including OAR 137-003-0501 to 137-003-0700; ORS 634.905; and OAR Chapter 603, Division 57. **The request for a hearing must be made in writing to the Department within ten business days of the date that you receive the NOTICE;** OAR 603-057-0510(4)(f). The request should be made to the attention of:

Andrea Sonnen
Pesticides Program, Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532

If you make a timely request for a hearing you will be notified of the date, time and place of such hearing. You will also be given information on the procedures, right of representation and other rights of parties relating to the conduct of the hearing before commencement of the hearing. An administrative law judge from the Office of Administrative Hearings will preside at any hearing. The Director of the Department has authority to issue the final order.

If the recipient of the enforcement notice is a corporation, partnership, limited liability company, unincorporated association, trust, or other entity that is not a natural person or individual, it must be represented in the contested case process by an attorney unless otherwise authorized by law. Furthermore, the attorney representing such a corporation or other entity must ratify the request for hearing, in writing, within 28 days of the date that the request is received by the agency; OAR 137-003-0550. This provision does not, however, require any entity to be represented by an attorney at any informal conference. Individuals may but are not required to be represented by counsel. The state will not provide legal counsel in administrative cases such as this, but private legal aid organizations may be able to assist a person with limited financial resources.

VII. FINAL ORDER

If you do not make a timely request for a hearing, you will waive your right to request a hearing and this order will become final and effective 10 (ten) business days after it is served on you; OAR 137-003-0672(2).

If you request a hearing but later fail to appear at the hearing, withdraw the request for a hearing, or notify the agency or administrative law judge that you will not appear at the hearing and it is not rescheduled, you will waive your right to a hearing and this order will become final; OAR 137-003-0672(3). In these circumstances, the Department will mail you a notice stating when this order became final.

The Department has designated the relevant portions of its files on the subject of this matter, including all materials that you have submitted relating to this matter, as the record in this case for the purpose of proving a *prima facie* case upon default.

If this order becomes final, the Department will issue a judgment against you and a civil penalty in the amount set out in this Notice will become due and payable 70 (seventy) days after the order becomes final.

ORS 183.745. Your check or money order should be made payable to the Oregon Department of Agriculture and sent to:

Oregon Department of Agriculture
635 Capitol Street NE
Salem, Oregon 97301-2532

When any final order regarding this Notice becomes final you will have the right to appeal the 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 date this order becomes final. If you do not file a petition for judicial review within this time period you will lose your right to appeal.

DATED this 15th day of July, 2016

KATY COBA
DIRECTOR
OREGON DEPT. OF AGRICULTURE

NOTE: Copies of the Department's investigation report will be provided upon request. The request must be made in writing. There may be a monetary charge for some reports. The written request should be made to: Oregon Department of Agriculture, Pesticides Program, ATTN: Andrea Sonnen, 635 Capitol Street NE, Salem, Oregon 97301-2532.

NOTICE TO ACTIVE DUTY SERVICEMEMBERS: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.

Trees, Inc.

Oregon Department of Agriculture, Pesticides Case No. 160045

Notice of Contested Case Rights and Procedures

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

1. **Time and place of hearing**. The time and place of hearing is or will be set forth in the Notice of Hearing issued by the Administrative Law Judge (ALJ) after the prehearing conference.

2. **Issues to be considered at hearing.** The issues to be considered at hearing are those set forth in the notice issued by the Oregon Department of Agriculture (ODA), entitled Notice of Imposition of Civil Penalty and Proposed/Final Order (NICP), and dated July 15, 2016, and those issues related thereto that are properly before the presiding officer to this proceeding.

3. **Law that applies.** The matter set for hearing is a contested case. The hearing will be conducted as provided in Chapter 183 and 634 of the Oregon Revised Statutes (ORS); the administrative rules of the ODA, OAR 603-057-0500 through 603-057-0515, and the Attorney General's Office of Administrative Hearing Rules, OAR 137-003-0501 to 137-003-0700. Other laws involved include: ORS Chapters 561, 570, and 616; additional rules of the ODA, OAR 603-057; Title 7, Chapter 6, Subchapter II of the United States Code; and Title 40, Parts 152, 156, and 180 of the Code of Federal Regulations.

4. **Right to attorney.** You may be represented by an attorney at the hearing. Most persons are represented by counsel for hearings involving ORS 634. You are not required to be represented by counsel, unless you are a corporation, LLC, partnership, etc., in which case you are required to be represented by an attorney at the hearing, and more immediately, your request for a hearing must be ratified by an attorney within 28 days of the agency's receipt of the request, OAR 137-003-0550. If you are not represented at the hearing and during the hearing you determine that representation by an attorney is necessary, you may request a recess to allow you an opportunity to secure the services of an attorney. The hearing ALJ will decide whether to grant such a request. The ODA will be represented by an attorney. Legal aid organizations may be able to assist a party with limited financial resources.

5. **Administrative Law Judge.** The person presiding at the hearing is known as the administrative law judge (ALJ). The ALJ will rule on all matters that arise at the hearing, subject to agency consideration of matters transmitted for agency decision under OAR 137-003-0635 or matters subject to agency review under OAR 137-003-0640 or OAR 137-003-0570. The ALJ will be assigned by the Chief ALJ from the Office of Administrative Hearings (OAH). The OAH consists of employees of, and independent contractors with, the Chief ALJ. The ALJ does not have the authority to make the final decision in the case. The final determination will be made by the Director of the ODA.

6. **Discovery.** If the agency or the ALJ authorizes discovery, the agency or the ALJ shall control the methods, timing and extent of discovery. Discovery is permitted in this proceeding. Discovery is permitted as provided in OAR 137-003-0570, OAR 137-003-0572, and OAR 137-003-0573.

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

8. **Order of evidence.** A hearing is similar to a court proceeding but is less formal. Its general purpose is to determine the facts and whether the ODA's proposed action is appropriate. The order of presentation of evidence is normally as follows:
   a. Testimony of witnesses and other evidence of the ODA in support of its proposed action.
   b. Testimony of your witnesses and your other evidence.
   c. Rebuttal evidence by the ODA and by you.

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

10. **Admissible evidence.** Relevant evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs is admissible and will be received. Hearsay evidence is not automatically excluded. Rather, the fact that it is hearsay generally affects how much reliance the ALJ and the Director of the ODA will place on it in reaching a decision.

There are four kinds of evidence:

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

b. Testimony of witnesses. Testimony of witnesses, including you, who have knowledge of the facts may be received in evidence.

c. Writings. Written documents including letters, maps, diagrams and other written material may be received in evidence.

d. Experiments, demonstrations and similar means used to prove a fact. The results of experiments and demonstrations may be received in evidence.

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

a. The evidence is unreliable;

b. The evidence is irrelevant or immaterial and has no tendency to prove or disprove any issue involved in the case;

c. The evidence is unduly repetitious and duplicates evidence already received.

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

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

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

15. **Final Order.** The agency will render the final order in this case. The agency may modify the proposed order issued by the ALJ. If the agency modifies the proposed order in any substantial manner, the agency in its order will identify the modifications and will provide an explanation as to why the agency made the modifications. The agency may modify a proposed finding of "historical" fact only if the proposed finding is not supported by a preponderance of the evidence in the record.

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

17. **Notice to Active Duty Servicemembers.** Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500, or the nearest United States Armed Forces Legal Assistance Office through http://legalassistance.law.af.mil.