



THE DEFEND THEM ALL FOUNDATION

Oregon Department of State Lands
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Salem, Oregon 97301-1279

April 30, 2021

Comments regarding the Willamette Water Supply Program's request for a major modification permit

The Defend Them All Foundation (DTA) submits the following comments on the Willamette Water Supply Program's request for a major modification to USACE permit #NWP-2015-0041 and DSL permit #60102-RF submitted by the Tualatin Valley Water District. DTA is an Oregon based 501(c)(3) non-profit organization dedicated to improving the legal protection of animals and their habitats. Given this mission, DTA is concerned about the ecological impacts of the proposed modifications.

The Endangered Species Act (ESA) was enacted with an intent to provide for the conservation of endangered and threatened wildlife and plants, and their habitats. In furtherance of this purpose, Federal agencies are required to "ensure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined ... to be critical." 16 U.S.C. § 1536(a)(2).

Agency "actions" include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," including the granting of permits that may affect land, water, or air. 50 C.F.R. § 402.02. An "action area" is defined to encompass "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id.

After the issuance of a Biological Opinion and "where discretionary Federal involvement or control over the action has been retained or is authorized by law," the agency must reinitiate formal consultation if "the identified action is subsequently modified in a manner that causes an effect to the listed species ... that was not considered in the biological opinion, or if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16.

Relying on the Biological Opinion issued in 2018, the applicant asserts that the proposed modifications provide environmental and seismic resilience advantages. However,



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the proposed modifications - including among other changes an entirely new route - are significantly different than the previously permitted project. The impacts of such changes have not been evaluated in a manner sufficient to understand the potential impacts of the project on listed species as required by the ESA.

Considering the volume and nature of the proposed work, the inherent risks of manipulating soils and aquatic resources, and the increasing concerns over the well-being of treasured flora and fauna, a thorough analysis to ensure that proposed activities will not jeopardize any endangered or threatened species nor result in adverse modification of critical habitat is essential. Regardless of the specific construction method selected, the installation of a pipeline up to 66 inches in diameter poses significant risks to wildlife. Removal of vegetation including large trees, increased sedimentation, and other pollutants, as well as increased noise pollution are extremely concerning in a context where species are already under heightened pressure to climate change and other compounding human induced factors.

The ecological value and potential presence of listed species in areas not previously considered in the 2018 Biological Opinion may have been underestimated. The upland and riparian areas in and around the Fanno Creek Watershed where the MPE_1.0 route change would occur is known by residents to be home to a broad spectrum of plant and animal species including many migratory birds. While the area is developed and various levels of degradation have occurred over time, new construction is rare and well-established landscapes are common. As such, mature trees provide ideal habitat for birds, squirrels, and many other species. A noticeable abundance of frogs, bats, beavers, and waterfowl are frequently observed in and around Fanno Creek and surrounding wetlands. The extent and quality of available habitats have been further enhanced by the recent expansion of the Portland Audubon's Backyard Habitat Program in the City of Beaverton and unincorporated Washington County.

The proposed site for the receiving shaft to be installed on SW Mary Lane adjacent to the Upper Fanno Creek Crossing is in close proximity to several large trees including one believed to be Giant Sequoia (*Sequoia gigantea*); a species classified as Endangered by the IUCN due to regeneration challenges. Root systems of this Giant Sequoia are known to grow near the surface of the ground in every direction for 100 feet or more (see [National Park Service, 2017](#)). Therefore, adverse effects associated with the installation of a pipeline are not unreasonable. Nonetheless, it is unclear whether the direct and indirect impacts of the project on these trees and this ecosystem in their absence have been considered.

If the proposed modifications are approved, and the project is permitted to proceed, we recommend implementation of on-site compensatory mitigation measures at the impact site, or at least within the same watershed. These measures may include, for example, extensive native plant revegetation, invasive plant removal (manual, i.e., without the use of herbicides), and/or the addition of bat and owl boxes.



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On April 21, DTA submitted a formal request for documents prepared for, or used in determining the impacts of the Willamette Water Supply Program and the proposed modifications on listed species or critical habitats. We remain optimistic that additional information and scientific data therein will shed light on the decision-making processes that underlie the contents of this application. However, approval of the proposed modifications in reliance on the 2018 Biological Opinion is inconsistent with the requirements of the ESA. The project (as modified) should not be allowed to proceed absent full compliance with the Endangered Species Act. We welcome an open dialogue regarding the current permit request, potential mitigation strategies, and the Willamette Water Supply Program generally as the project continues to evolve.

Respectfully submitted,

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