



File Code: 1570; 1950
Date:

Dave Anderson
City of the Dalles
1215 West First Street
The Dalles, Oregon 97058

Email: danderson@ci.the-dalles.or.us

Dear Mr. Anderson:

This letter is in response to your objection (#20-06-00-0071-218(B)) to the draft Decision Notice (DN) and Finding of No Significant Impact (FONSI) for the Dog River Pipeline Replacement Project, Barlow Ranger District, Mt. Hood National Forest. I have read your objection and reviewed the project record, the draft DN/FONSI, and the final Environmental Assessment (EA). My review of your objection was conducted in accordance with the regulation at 36 CFR 218 (2013).

PROJECT DESCRIPTION

On June 2, 2020 a legal notice was published in the *Oregonian* announcing the public notice of the draft DN/FONSI and objection filing period for the Dog River Pipeline Replacement Project EA. In the draft DN/FONSI, the Responsible Official selected the Proposed Action, which authorizes the following activities:

- Replace the existing pipeline with a new pipeline, a seam-sealed 24-inch-diameter pipe, running parallel/next to existing alignment;
- Abandon existing 3.4-mile pipeline in place;
- Repair and improve diversion structure;
- Install fish screens and a fish passage structure; and
- Construct a new culvert under a Forest Service road (FSR 1700-014).

The following activities will be required to complete the action:

- Cut and remove approximately 438 live trees (6-48" DBH) and approximately 198 standing dead trees;
- Excavate a trench, 4' deep and 3-4' wide, stage gravel and sand, and fill trench with gravel bedding, pipe, and soils;
- Replace pipe inlet, discharge structure, and flow measuring facilities;
- Bury the pipeline where it intersects Brooks Meadow Creek, with restoration activities following the disturbance;
- Install of an open box culvert for aquatic organism passage on FSR 1700-014, and re-



route the stream temporarily to install culvert and close the road during construction activities; and

- Conduct minor realignment of a small section of FRS 1700-014 to allow for construction vehicle traffic.

OBJECTION ISSUE DISCUSSION AND CONCLUSION

I would like to thank you for your support and continued engagement during this planning process. As you know, the objection resolution meeting was held on September 3, 2020. While no resolution was reached, I appreciate the dialogue that we had. While I understand that Oregon Wild and WaterWatch of Oregon are concerned about the amount of water diverted from Dog River, my response to their objections document my belief that the project will result in an improved condition; project outcomes include allowing for a bypass flow that doesn't currently exist, replacing the current pipeline that leaks, and replacing a culvert for fish passage. In addition, the analysis did disclose that the City could capture more water during peak flows with the new pipeline. Finally, as articulated in the responses to the objection issues that were raised, we reiterated that the City has senior water rights to divert the entire flow of Dog River, and these are water rights that pre-date establishment of the Mt. Hood National Forest.

During the review I found one clarification that will help better understand the Forest's rationale for the decision with regard to the City's ability to take more water with the existing pipeline. The statement was intended to convey the fact that the City has the capacity now with the existing pipeline to divert more water when flows are high enough but is limited by storage at the Crow Creek Reservoir. I can understand how the sentence could be confusing, so I instruct the Responsible Official to update and clarify in the final DN that according to City records, it has been rare that enough flow has been diverted to completely fill the existing pipeline. Also, in my response to the other objectors I noted that the City is not proposing to change their pipeline operations to divert more total water from Dog River, as the City currently diverts enough water from Dog River to meet their needs as documented in the draft DN at 3 and 4.

I conducted my review of the record, final EA, and draft DN/FONSI. I found that other than the clarification noted above, there are no other remedies or resolutions suggested that would resolve the objections; therefore, the project will proceed as planned. Based on my review, I conclude the following:

- The draft decision clearly describes the actions to be taken in sufficient detail that the reader can easily understand what will occur as a result of the draft decision.
- The draft decision considered a range of alternatives that was adequate to respond to the Purpose and Need. The purpose and need and alternatives considered in the final EA reflect a reasonable range of alternatives, consistent with law, regulation and policy.
- The draft decision is consistent with or moves toward attainment of Forest Plan standards and guidelines.
- The draft decision is consistent with policy, regulation, law, direction, and the final EA contains adequate evidence to support the decision. The record and final decision contain site-specific documentation regarding resource conditions, and the Responsible Official's draft decision document is based on the record and reflects a reasonable conclusion.

This concludes my written review of the project. By copy of this letter and the enclosed response document, the Responsible Official may sign the decision after including the clarification noted above, then notify interested and affected persons in accordance with the regulation at 36 CFR 218.12 and 36 CFR 220.7(d). This written response is the final administrative review by the Forest Service or the Department of Agriculture [36 CFR 218.11(b)(2)].

Sincerely,

LISA A. NORTHROP
Deputy Regional Forester
Objection Reviewing Officer

Enclosure

cc: Richard Periman; Michelle Lombardo; Kameron Sam; Ashley Popham; Debbie Anderson;
Heidi Hopkins

**Dog River Pipeline Replacement
Environmental Assessment (EA)
Barlow Ranger District
Mt. Hood National Forest
Objection Statements
September 2020**

Objector	Objection Number
City of The Dalles (CD)	#20-06-00-0071-218(B)
Oregon Wild/Water Watch of Oregon (OW)	#20-06-00-0072-218(B)

The City of The Dalles supports the draft decision as written.

NEPA Analysis/Purpose and Need

Overview and Objector's Suggested Remedies: These objection issues surround the concern that the EA did not analyze the full effects of the larger diversion and therefore failed to consider the full impact of the project on streamflow; that the decision violates the Mt. Hood LRMP; that the Forest did not limit the cubic feet per second (cfs) on the special use permit (SUP). Suggested remedies include analyzing the full effects of the larger diversion, describing how the project meets the LRMP; include an alternative that analyzes 26.3 cfs; or include a condition limiting diversion to 12.3 cfs in the SUP.

Objector Statement #1: Objector states that failure to analyze the full effect of the larger diversion now and avoiding future analysis violates the letter and spirit of NEPA. OW at 4¹.

Response: I find that the Responsible Official conducted an adequate and appropriate analysis of the effects for the project.

The Code of Federal Regulations (CFR) at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives. Identified proposals for the Forest Service actions are described at 36 CFR 220.4(a)(1) which states the Forest Service has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. The regulation at 36 CFR 220.3 states that reasonably foreseeable future actions are those Federal or non-Federal activities not yet undertaken, for which there are existing decision, funding or identified proposals.

The Forest Service analyzed the action as proposed in the EA, which included replacing the pipeline along with several connected actions. While the new pipeline could accommodate additional capacity, the City does not need more than it is currently diverting to meet existing demand and cannot feasibly store it. In the EA at 64², 72, and 73, it is stated that the Wicks Water Treatment Plant intake from South Fork Mill Creek diverts on average about 5.0 cubic feet per second (cfs) annually, but it has a maximum capacity to treat up to about 8.7 cfs. Also, the City's average annual water use was estimated in 2015 to

¹ The reference of OW at 4 refers to the objector, in this case, Oregon Wild/Water Watch of Oregon, and the page number where this issue can be found (page 4). This reference to the objector and page number is used throughout the rest of this document.

² The reference of EA at 64 refers to the document, in this case the EA, and the page number where the cited information can be found. This reference is used throughout the rest of the document.

be 4.7 cfs. Therefore, there is not a compelling need to analyze the City withdrawing more than they currently do or are capable of storing.

While the objector believes that because the City has water rights with a combined maximum diversion of 26.4 cfs it would actualize these rights and divert more than the current 12.3 cfs, I find that the ability and need for the City to divert the maximum amount of water the pipeline could carry is somewhat speculative and would rarely occur. As documented in the hydrology and fisheries analysis sections 3.3 and 3.4 of the EA respectively, both resources noted that the City could fully fill the pipeline when flows are at their highest (about one month out of the year) as documented in the response to Objector Statement #15, however, storage capacity at the Crow Creek Reservoir still limits the total amount of water the City can divert. While the NEPA analysis does analyze periodic diversion rates above 12.3 cfs (EA at 96 and 166), the overall total amount of water diverted by the City will not change.

Further, the City does not plan to increase the total amount of water diverted from Dog River above the current rate for at least another 10 years. Future projects addressed by the City's 2006 Water System Master Plan include expansions of Crow Creek Reservoir on Forest Service lands and the Wicks Water Treatment plant downstream, which are anticipated to increase the reliable summer flows from the municipal watershed to 15.5 cfs, for a total increase of 6.8 cfs. To date, however, only preliminary plans have been drafted, and there has not been any formal proposal submitted to the Forest Service from the City to proceed with the expansion of the reservoir. Because no plan or proposal has been submitted, it is not considered to be "reasonably foreseeable" under Forest Service NEPA regulations.

As documented in the EA at 73, 75, 95, and 116, any future plans by the City to increase water storage would require additional NEPA analysis to ensure compliance with applicable law, regulation, and policy.

Objector Statement #2: Objector states that the draft DN will lead to water appropriation that violates the Mt. Hood LRMP as amended by the Aquatic Conservation Strategy and the EA and DN fail to describe how the project complies with the LRMP standards and guidelines. OW at 6.

Response: I find that the Responsible Official conducted an adequate and appropriate analysis of the effects for the project. The proposal as analyzed in the EA does not violate the Mt. Hood LRMP as amended.

The Forest Service abides by State law related to permitting water use. A permit or water right from the state is separate and distinct from the right to access adjacent land. The Forest Service controls the access and conveyance of third party water rights on National Forest System lands through the special use permit process. The Forest Service has authority to permit and condition access on National Forest System lands to meet land and resource management responsibilities (e.g., Federal Land Policy and Management Act of 1976, Forest Service policy, standards and guidelines, etc.) and requires the permittee to comply with state law. The actual use of the water is defined by the water right. It is the state's responsibility to regulate that use and enforce the terms and conditions of the water right. Although the Forest Service defers to the state in the administration of the laws governing water resources of the state, under certain circumstances, the Forest Service may condition the special use permit to comply with other laws and regulations associated with management of National Forest System lands. Any necessary updates to the permit will occur prior to operation of the new pipeline (Appendix A at 2). The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives.

The EA at 72 specifies that both of the certified, decreed municipal water rights that the City holds (certification #14954 and #5691) have priority dates that precede all other water rights in the Dog River and South Fork Mill Creek subwatersheds. Based on the principle of prior appropriation of Oregon's water laws, they are senior to all other water rights with later priority dates. Moreover, because they are municipal rights, they are not subject to standard forfeiture statutes for non-use (ORS 540.610), and are protected from future appropriations that would impair the municipal water supply (ORS 538.410). Appendix A, response to comments at 3 also addressed this issue, stating that "According to the Oregon Water Resources Department (OWRD), a larger pipeline does not violate State water law. Certificate 14954 allows the City to divert all the water at their point of diversion, which they currently only do during the summer months. The City has a perfected water right for all of the water in Dog River above the diversion with a priority date of 1870, so OWRD interprets the City's water right to be senior to any federally reserved water rights. In this circumstance the State does not recognize federally reserved water rights to supersede the municipal water rights. See Section 3.3.1.4 for more details about water rights."

Appendix A, response to comments at 2 addressed compliance with the ACS, noting that "The EA has been completed in accordance with all applicable laws, policies and regulations including the Aquatic Conservation Strategy, Endangered Species Act, and water rights. Regarding ACS, the EA explains how the Proposed Action is consistent with the ACS objectives in hydrology and fisheries sections of the EA (Section 3.3.3 and Section 3.4.3, respectively). Regarding ESA, a Letter of Concurrence (NLAA) was received from NMFS in April 2020. Also, a Biological Opinion was received from USFWS in August 2017. Effects to ESA-listed species is included in the EA in Sections 3.4 and 3.6.1. The EA discusses water rights in Sections 3.3.1.4 and 3.3.2)."

As for compliance with the Forest Plan as amended, the response to comments, EA Appendix A at 3 states that "In Section 3.3.1 of the EA, under the subheading, "The Dalles Municipal Watershed," there is a discussion of the Key Watershed and consistency is addressed in Section 3.3.3." See also the EA at 42. Specific to Key Watersheds, the EA lists the applicable Standards and Guidelines and identifies how the project is consistent with those standards and guidelines. EA at 128. The objector listed specific standards and guidelines for riparian reserves (not just Key Watersheds); these are addressed in the EA at 128 and 129, including the general riparian management standards and guidelines. Objector's citation to LH-1 and LH-2 are addressed by the condition put on the permit to require a bypass flow of 0.5 cfs from August – October, which, as noted above improves the existing condition and assures compliance with ACS objectives by requiring a minimum flow in Dog River. Minimum flows for aquatic species are also addressed, including the recognition of the water rights held in trust by the Oregon Water Resource Division for the Oregon Department of Fish and Wildlife, which provide stream flow specifically for the protection of the fisheries resource. EA at 73, 95, 116 and 184-186.

See the response to Objector Statement #1 and #3.

Objector Statement #3: Objector states that the draft DN could lead to appropriation of water that should be forfeited and that the Forest must not approve a larger pipeline because it could violate state water law and possibly federal water rights and ACS compliance. OW at 9.

Response: I find that the Responsible Official conducted an adequate and appropriate analysis of the effects for the project. The Forest Service does not have jurisdiction over water rights law compliance and management. The proposal analyzed is in compliance with all federal and state laws, regulations, and policy.

The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives.

The EA at 72 specifies that both of the certified, decreed municipal water rights that the City holds (certification #14954 and #5691) have priority dates that precede all other water rights in the Dog River and South Fork Mill Creek subwatersheds. Based on the principle of prior appropriation of Oregon's water laws, they are senior to all other water rights with later priority dates. Moreover, because they are municipal rights, they are not subject to standard forfeiture statutes for non-use (ORS 540.610), and are protected from future appropriations that would impair the municipal water supply (ORS 538.410).

Appendix A, response to comments at 3 addressed this issue, stating that "According to the Oregon Water Resources Department (OWRD), a larger pipeline does not violate State water law. Certificate 14954 allows the City to divert all the water at their point of diversion, which they currently only do during the summer months. The City has a perfected water right for all of the water in Dog River above the diversion with a priority date of 1870, so OWRD interprets the City's water right to be senior to any federally reserved water rights. In this circumstance the State does not recognize federally reserved water rights to supersede the municipal water rights. See Section 3.3.1.4 for more details about water rights."

See responses to Objector Statements #1 and #2.

Objector Statement #4: Objector states that the Forest failed to analyze the maximum outflow of the new pipeline and only analyzed the current outflow. The objector is concerned that the city will be allowed to increase outflow from current levels without NEPA. OW at 3.

Response: While the EA primarily focuses on the fact that the total amount of water from Dog River will not change as a result of the new pipe (due to various factors, such as storage capacity limits), I find that the EA and supporting documents did address the potential for the City of The Dalles to periodically divert more than 12.3 cfs of water. Also, I find that the City of The Dalles current water right allows the City to divert all of the water in Dog River at the point of diversion.

See the responses to Objector Statements #1, #3, #6 and #15.

Objector Statement #5: Objector states that the EA disregards documentation about increased future use and also states that the reliance on a future analysis of a different project is not an adequate substitution of an analysis of the full amount of water allowed to be diverted under this project. OW at 3.

Response: I find that the EA adequately addressed the potential for increased use by the City of The Dalles.

The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives. Identified proposals for the Forest Service actions are described at 36 CFR 220.4(a)(1) which states the Forest Service has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. The regulation at 36 CFR 220.3 states that reasonably foreseeable future actions are those Federal or

non-Federal activities not yet undertaken, for which there are existing decision, funding or identified proposals.

The EA at 18 documented that the issue of the City's plans for future water use was considered, noting that "Some comments expressed concern about the City's plans for future water use, within the context of current use and water rights. The hydrology section (Section 3.3) of this document provides more background, data, and analysis of the City's future plans." Specifically in that section, the EA at 64-65 documented consideration of the City's Water Management and Conservation Plan (2014), which details any plans for future growth. Section 3.3 of the EA further elaborates, documenting that "Future projects addressed by the City's 2006 Water System Master Plan include expansions of Crow Creek Reservoir on Forest Service lands and the Wicks Water Treatment Plant downstream, which are anticipated to increase the reliable summer flows from the municipal watershed to 15.5 cfs, for a total increase of 6.8 cfs. To date, however, only preliminary plans have been drafted, and there has not been any formal proposal submitted to the Forest Service from the City to proceed with the expansion of the reservoir. More recently, the City has received a limited license from OWRD to explore the feasibility of an Aquifer Storage and Recovery (ASR) system on their property. The permit allows for 16.7 cfs to be used for exploration of the ASR, using water from the Wicks Water Treatment Plant. If feasibility is proven, then it is possible that the City would not need to pursue expanding Crow Creek Reservoir (pers. Comm. Dave Anderson 2019)." EA at 64.

For these reasons, I find that the City's plans to address future use, whether it is through conservation measures or increasing storage capacity, is too speculative at this time to consider in this pipeline replacement project. As stated in Appendix A, response to comments at 3 and 7, any plans the City's intends to undertake in the future, if included on Forest Service lands, then the action(s) would be analyzed under NEPA at that time. The response to comments, Appendix A at 3, also noted that "The new pipeline could accommodate additional capacity if the City were to need it. Currently, the amount of water available is sufficient to meet demand. The City does not plan to increase the total amount of water diverted from Dog River above the current rate for at least another 10 years. The analyses in the hydrology and fisheries sections (3.3 and 3.4, respectively) consider this information."

See also the response to Objector Statement #1.

Objector Statement #6: Objector is concerned that the BA states that use won't increase but doesn't consider that there are months when flows are over 12.3 cfs and the new pipeline will allow increased diversions. OW at 3.

Response: I find that the fisheries analysis specifically considered the potential for increased diversion, although as noted above, Dog River does not regularly provide adequate flows to divert the maximum amount of water a new pipeline could convey. Additionally, the Crow Creek Reservoir still has a maximum capacity that limits how much water can be stored by the City of The Dalles.

The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives.

The EA at 59 documents that "The timing and amount of diverted flow from upper Dog River is based generally on the City's demand, storage capacity, and abundance or scarcity of supply. On average, Dog River contributes about 58 percent of the City's total surface water contribution. Diversion to South Fork Mill Creek in the early summer averages about 7.0 cfs, and about 2.5 cfs during late summer. In most

years, the headworks at the pipeline inlet are operated to increase diverted flow in the late fall and early winter to re-fill Crow Creek reservoir, by early or mid-February if possible. Once full, the amount of diversion is manually reduced to a maintenance flow of about 2-3 cfs until mid- to late-May (Figure 10). Then the rate of diversion is increased to capture the entire amount of upper Dog River's baseflow from July through September and early October (see Table 13)."

The EA at 60-61 goes on to note that "The Dog River pipeline at capacity can potentially transfer a maximum flow of 12.3 cfs. Log records from the City of The Dalles indicate that since 2006, there were two occasions when the pipeline was filled to capacity in the period between October and January, and two other times during the month of May (pers. comm. Dave Anderson 2016)." These events included the following:

- Jan 30, 2006: pipeline flow of 12.3 cfs for short duration (storm event, flow decreased from 12.3 to 2.5 cfs in less than 24 hours, and had only been flowing at 5.7 cfs on 12/29/2005);
- Dec 24, 2014: pipeline flow of 12.3 cfs for less than 1 week, re-filling Crow Creek reservoir;
- May 2009 and 2010 pipeline flow of 12.3 cfs for about 1 week each to finish re-filling Crow Creek reservoir.

The Fisheries Biological Assessment at 53 specifically documented that "The new 24" pipeline has a total capacity of 26.3 cfs as compared to the current capacity of 12.3 cfs (a 114% increase). Although the pipeline has a larger capacity, the quantity and timing of water diverted from upper Dog River would remain generally unchanged from current conditions since the stream flow during peak reservoir fill period (October–February) is rarely high enough to even fill the current pipe, and additionally, the reservoir storage capacity remains unchanged, and thus becomes a limiting factor to increasing diversion volumes. The current water diversion rate from Dog River thus meets the City's demand and storage capacity without need for alteration of pipeline operations."

The EA at 166 also specifically acknowledges the potential for increased diversions, documenting that "During high flow periods (winter and spring) pipeline operations will have the potential to decrease water quantity in Dog River because of the expanded capacity of the replacement pipeline (24-inch diameter) to divert additional water. This expanded capacity will allow The Dalles to fill Crow Creek Reservoir faster by diverting a greater proportion of peak flows when they are available. Once the Reservoir is filled, the amount of diverted flow will be decreased. Pipeline diversions during high-flow periods will decrease the magnitude of peak flows in the river, since up to 26.3 cfs (73% of the estimated D5 flow of 35.9 cfs) (USGS 2017) could be diverted. The diversion capacity of the replacement pipeline will be greater than the average monthly flow in May (15.6 cfs) and June (18.2 cfs) in Dog River upstream of the diversion (MHNF 2017a), therefore the pipeline will only be filled during peak runoff events. USGS streamflow records from 1960–1971 indicate that Dog River flows at the site of the diversion may reach 26.3 cfs or greater in 2 of every 3 years; however, the duration of those peak flows will be minimal. The potential to divert the entirety of spring runoff flows into the pipeline will generally be constrained by flow availability (peak flows may only last a matter of hours or days) and Crow Creek Reservoir."

See also the responses to Objector Statements #2 and #15.

Objector Statement #7: Objector is concerned that the Forest failed to include a condition on the SUP to limit the diversion to 12.3 cfs, which is the amount the EA assumes for analysis. OW at 4.

Response: I find that the Responsible Official does not need to include a condition on the special use permit to limit diversion to 12.3 cfs, and that the EA and supporting documents adequately assessed any potential for the City of The Dalles to divert more than 12.3 cfs of water from Dog River.

See the responses to Objector Statements #2, #3, #6 and #15, as well as the response to comments, Appendix A at 8.

Objector Statement #8: Objector is concerned that the Forest failed to include a condition on the SUP that would require minimum flows both above 0.5 cfs and extending them, and that the Forest did not respond to this issue in their response to comments. OW at 4.

Response: I find that the EA does include a requirement for the City of The Dalles to leave a minimum of 0.5 cfs instream at the point of diversion from August to October, and I find that the Responsible Official adequately documented consideration of comments.

The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives. The regulation at 36 CFR 218.25(b) requires the responsible official to consider comments submitted on an EA.

The EA at 164 explains that the 0.5 cfs increase in instream flows at the diversion point (RM 6) from August to October may have the potential to have slight positive (beneficial) effects to pool volume in listed fish habitat (RM 2.6) during this typical low-flow period in Dog River, while leaving a minimum instream flow of 0.5 cfs would have a beneficial effect on water quantity. EA at 167.

Appendix A, response to comments at 4 specifically addressed the objector's concern about minimum instream flows, documenting that "The City has volunteered to provide a minimum bypass flow of 0.5 cfs during the critical low-flow period between August 1 and October 31. See responses to comments #1, #14, and #16."

See also the responses to Objector Statements #2 and #3.

Objector Statement #9: Objector is concerned that the Forest failed to include a condition on the SUP that would require that bypass flows be protected instream. OW at 4.

Response: See responses to Objector Statements #2, #3 and #8.

Objector Statement #10: Objector is concerned that the decision is based on incorrect statements. In the decision rationale it states "Another consideration I took into account is that the city does not need a larger pipeline to take more water. They could take more water with the existing old pipeline." And in the record it repeatedly states that the capacity of the existing pipeline is limited to 12.3 cfs. The objector is concerned that this is not a replacement project, it is an expansion project. OW at 5.

Response: I find that the decision rationale is adequate, although I agree that the rationale could be clarified regarding the statement cited by the objector.

I asked my staff to provide some clarity around this issue. The EA at 60 states that the current Dog River pipeline at capacity can potentially transfer a maximum flow of 12.3 cfs. Log records from the City of The Dalles indicate that since 2006, there were two occasions when the pipeline was filled to capacity in the

period between October and January, and two other times during the month of May. Under the Proposed Action, the quantity of water diverted from upper Dog River and its tributaries would remain unchanged from current conditions between early November and late July. The City would then reduce the amount of flow diverted between August 1 and October 31 to allow a portion (0.5 cfs) of the base flow to bypass downstream to lower Dog River. Under the existing condition, the diversion captures the entire amount of upper Dog River's baseflow from July through September and early October (EA at 59) without any contribution to downstream instream flows.

The statement cited by the objector was intended to convey the fact that the City has the capacity now with the existing pipeline to divert more water when flows are high enough, but is limited by storage at the Crow Creek Reservoir. I can understand how the sentence could be confusing, so I instruct the Responsible Official to update and clarify in the final DN that according to City records, it has been rare that enough flow has been diverted to completely fill the existing pipeline. Also, the City is not proposing to change their pipeline operations and divert more total water from Dog River, as they currently divert enough water from Dog River to meet their needs as documented in the draft DN at 3 and 4.

As repeatedly noted throughout this document, the EA and supporting documentation did address the potential for the larger pipeline to divert more water during the highest peak flows, but that the City is still limited in the total amount of water that can be stored in the Crow Creek Reservoir. Thus, there would be no change in the total amount of water diverted from Dog River as a result of the new pipeline.

See the responses to Objector Statements #2, #3, #6 and #15, as well as the response to comments, Appendix A at 8.

Objector Statement #11: Objector is concerned that the Forest's analysis of the City's water rights is flawed. The objector states that the EA does not analyze the effects of increased diversion during the winter months that would result from this project, nor does it acknowledge that despite the fact that these are state water rights, the Forest does in fact have the authority to condition use of water under the SUP. OW at 5.

Response: See the responses to Objector Statements #1, #2, #3, #5, #6, #10 and #15, as well as the response to comments, Appendix A at 8.

Objector Statement #12: Objector is concerned that the Crow Creek Reservoir serves as documentation that increased winter diversion at Dog River is a consideration and that the Forest should do an analysis of the full amount of diversion allowed under the project. OW at 5.

Response: See the responses to Objector Statements #1, #2, #3, #5, #6, #10 and #15, as well as the response to comments, Appendix A at 8.

Objector Statement #13: Objector is concerned the EA's description of the state instream water rights is inaccurate and thus the effects analysis is inaccurate. The objector states that the EA is incorrect on a number of points and the Forest fails to consider that the water protected below the reach is also protected against diversions upstream of that reach that are junior to the instream water right. They also state that the EA incorrectly asserts that the instream water right is conditioned to be subordinate to "human consumption" and are somehow junior to "municipal rights." OW at 5-6.

Response: I find that the EA clearly laid out the legal priority of the decreed water rights.

The Forest Service abides by State law related to permitting water use. A permit or water right from the state is separate and distinct from the right to access adjacent land. The Forest Service controls the access and conveyance of third party water rights on National Forest System lands through the special use permit process. The Forest Service has authority to permit and condition access on National Forest System lands to meet land and resource management responsibilities (e.g., Federal Land Policy and Management Act of 1976, Forest Service policy, standards and guidelines, etc.) and requires the permittee to comply with state law. The actual use of the water is defined by the water right. It is the state's responsibility to regulate that use and enforce the terms and conditions of the water right. Although the Forest Service defers to the state in the administration of the laws governing water resources of the state, under certain circumstances, the Forest Service may condition the special use permit to comply with other laws and regulations associated with management of National Forest System lands. Any necessary updates to the permit will occur prior to operation of the new pipeline (Appendix A at 2). The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives.

The EA at 72 specifies that both of the certified, decreed municipal water rights that the City holds (certification #14954 and #5691) have priority dates that precede all other water rights in the Dog River and South Fork Mill Creek subwatersheds. Based on the principle of prior appropriation of Oregon's water laws, they are senior to all other water rights with later priority dates. Moreover, because they are municipal rights, they are not subject to standard forfeiture statutes for non-use (ORS 540.610), and are protected from future appropriations that would impair the municipal water supply (ORS 538.410).

Appendix A, response to comments at 3 addressed this issue, stating that "According to the Oregon Water Resources Department (OWRD), a larger pipeline does not violate State water law. Certificate 14954 allows the City to divert all the water at their point of diversion, which they currently only do during the summer months. The City has a perfected water right for all of the water in Dog River above the diversion with a priority date of 1870, so OWRD interprets the City's water right to be senior to any federally reserved water rights. In this circumstance the State does not recognize federally reserved water rights to supersede the municipal water rights. See Section 3.3.1.4 for more details about water rights."

The EA at 71-74 also documents that there are two surface water rights in the Dog River and South Fork Mill Creek subwatersheds both held in-trust by OWRD on behalf of the Oregon Department of Fish and Wildlife. As for the conditions of these instream water rights, one of the stated conditions on these certificates is "For purposes of water distribution, this instream right shall not have priority over human or livestock consumption." Both of the certified, decreed municipal water rights that the City holds (certification #14954 and #5691) have priority dates that precede all other water rights including the instream water rights in the Dog River and South Fork Mill Creek subwatersheds. Based on the principle of prior appropriation of Oregon's water laws, they are senior to all other water rights with later priority dates.

Objector Statement #14: Objector is concerned the EA failed to consider all reasonable alternatives and that the Forest failed to consider higher flows that would better meet objectives. OW at 10.

Response: I find that the EA considered a reasonable range of alternatives.

The regulation at 36 CFR 220.7(b)(2) states that an EA “shall briefly describe the proposed action and alternative(s) that meet the need for action. No specific number of alternatives is required or prescribed.”

In addition to the Proposed Action, a No Action Alternative was analyzed in detail. EA at 19-20. While concerns were considered throughout the NEPA process, none were identified as issues for the purpose of formulating additional fully developed alternatives. Several concerns and recommendations raised during the scoping and comment periods, however, were addressed as modifications to the Proposed Action, changes to the project design criteria, or as reason to conduct additional research and analysis. For example, based on public engagement, the Proposed Action was updated to include the month of August in providing a bypass flow of 0.5 cfs. EA at 18. The EA has been completed in accordance with all applicable laws, policies, and regulations.

See also Appendix A for how comments received were considered and addressed.

Objector Statement #15: Objector states that the failure to analyze the full amount of water that could be diverted by the new diversion under current water rights fails to fully consider the full effect of the project on stream flows and aquatic species, including ESA listed fish. OW at 3.

Response: I find that the EA and project record appropriately documented the consideration of the maximum amount of water that could be diverted, and impacts on stream flows and aquatic species, including ESA species. See the responses to Objection Statements #1, #5, and #14 regarding analysis of diversion amounts.

The regulation at 36 CFR 220.7(b)(3)(iv) directs the agency to discuss the impacts of the proposed action and any alternatives.

The EA at Section 3.4 documented potential effects to listed (Lower Columbia river steelhead, Lower Columbia River Chinook, and Lower Columbia River coho) and sensitive fish species and their habitat. Appendix A, response to comments, clearly noted that “There are no ESA-listed species in the reach immediately below the Dog River diversion,” which is where the channel becomes dewatered during a portion of the year. Besides short-term effects resulting from installing the new pipeline, the proposed action would provide a beneficial effect to aquatic species. The EA at 150 notes that “The current diversion of water from Dog River into the existing pipeline is not equipped with a fish screen (Figure 48). This project will install a fish screen at the diversion. The proposed structure will be an in-channel screening structure that will prevent passage of resident trout into the diversion. The fish screen will meet ODFW fish screening criteria.”

The pipeline has had many leaks along its length throughout its 100 plus years of use. Currently the only quantification of water loss from the pipeline is a mathematical estimate based upon the volume of the pipe at full capacity. It is estimated by the City that as much as 1.9 cfs may be leaking from the pipeline when it is at full capacity. However, as has been noted prior, there have only been four instances since 2006 when the Dog River pipeline was filled to maximum capacity. The EA at 100 documents that “Installation of a new pipeline would eradicate the water loss that has persisted for many decades from the old conveyance line. The total amount of water loss would no longer factor into the amount of water diverted from Dog River to meet demand. Conveyance of water using the new pipeline would become more efficient, so that only the water needed to meet demand would be withdrawn.” Since the

amount of water loss due to leakage could become available as bypass flow downstream, this is beneficial to stream flows and aquatic species.

As documented previously, the EA at 166 acknowledges the potential for increased diversions, documenting that “During high flow periods (winter and spring) pipeline operations will have the potential to decrease water quantity in Dog River because of the expanded capacity of the replacement pipeline (24-inch diameter) to divert additional water. This expanded capacity will allow The Dalles to fill Crow Creek Reservoir faster by diverting a greater proportion of peak flows when they are available. Once the Reservoir is filled, the amount of diverted flow will be decreased.” However, as also explained in the EA at 166, “The potential to divert the entirety of spring runoff flows into the pipeline will generally be constrained by flow availability (peak flows may only last a matter of hours or days) and Crow Creek Reservoir storage capacity. It is expected that the diversion schedule will be similar to the existing schedule although the larger replacement pipeline will be filled to capacity less frequently, due to the larger capacity of the replacement pipeline.” Thus, the EA considers the fact that the City will likely capture peak flows, although this would occur infrequently as displayed by the data. EA at 166.

Additional documentation that shows consideration of the potential for the City to divert more water at any one time (but again, the City is limited in the total amount of water that can be diverted and stored), the Fisheries Biological Assessment at 53 documented that the new pipeline has a total capacity of 26.3 cfs as compared to the current capacity of 12.3 cfs (a 114% increase). Although the pipeline has a larger capacity, the quantity and timing of water diverted from upper Dog River would remain generally unchanged from current conditions since the stream flow during peak reservoir fill period (October – February) is rarely high enough to even fill the current pipe, and additionally, the reservoir storage capacity remains unchanged, and thus becomes a limiting factor to increasing diversion volumes. The current water diversion rate from Dog River thus meets the City’s demand and storage capacity without need for alteration of pipeline operations.” Therefore, I conclude that the EA adequately considered increased diversion rates impacts to aquatic species.

The EA at 168 notes that “Potential effects to water quality or habitat resulting from the project will be substantially diminished and immeasurable by the time they reach known occurrence of LCR chinook, Coho, and steelhead therefore the effects will be discountable and the determination Not Likely to Adversely Affect (NLAA). Under the proposed project there will be No Effect (NE) to Middle Columbia River (MCR) steelhead and their critical habitat since they are not known to occur within the project action area.” For sensitive species, the EA documents that the proposed action “May Impact Individuals or Habitat” but would not contribute to a trend towards federal listing. EA at 169-171.

Potential effects to water temperature and streamflow are assessed in the Fisheries Biological Assessment at 54, which summarized the potential impacts stating that “The potential for effects to water temperature in South Fork Mill Creek from pipeline operations is neutral. The proposed action will divert the same amount of flow (all available surface water) from June to August from Dog River, while leaving more instream flow (0.5 cfs) in August through October than current conditions. As flow diversion will either be the same or lesser in amount during the warmest period (June-September) with the proposed action, there will be discountable effects to stream temperatures in LFH.”

The April 13, 2020 Concurrence Letter from the National Marine Fisheries Service (NFMS) documented that “The new, larger diameter pipeline would enable the City, at times, to increase the rate at which it diverts water from Dog River. The existing pipeline has a capacity of 12.7 cubic feet per second. The new pipeline will have a capacity of 26.3 cubic feet per second. The flow rate of Dog River at the diversion

ranges from 3 cubic feet per second in September to 16 cubic feet per second in May so the increased capacity is only useful for about one month of the year (Figure 3) during spring high flows.” NFMS Concurrence Letter at 10. As stated above, it is clear that the capacity of the proposed pipe was considered in this analysis.

Final Remedies/Resolution for NEPA Analysis/Purpose and Need: The EA addressed the potential impacts of the project and documented how the project complies with the Forest Plan, as amended, including compliance with the ACS, NEPA, NFMA and ESA.

As documented in the response to Objector Statement #10, I instruct the Responsible Official to update and clarify in the final DN that according to City records, it has been rare that enough flow has been diverted to completely fill the existing pipeline. Also, the City is not proposing to change their pipeline operations and divert more total water from Dog River, as they currently divert enough water from Dog River to meet their needs as documented in the draft DN at 3 and 4.