

A G E N D A

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METRO

Agenda

MEETING: METRO COUNCIL/EXECUTIVE OFFICER INFORMAL MEETING
DATE: February 29, 2000
DAY: Tuesday
TIME: 2:00 PM
PLACE: Council Annex

CALL TO ORDER AND ROLL CALL

- I. UPCOMING METRO LEGISLATION**
- II. DRAFT 4D RULE**
- III. ESTABLISHMENT OF COUNCIL CRITERIA FOR THE REVIEW OF POSSIBLE PROJECTS TO BE INCLUDED IN THE PROPOSED FINANCIALLY CONSTRAINED SYSTEM IN THE REGIONAL TRANSPORTATION PLAN**
- IV. EXECUTIVE OFFICER COMMUNICATIONS**
- V. COUNCILOR COMMUNICATIONS**

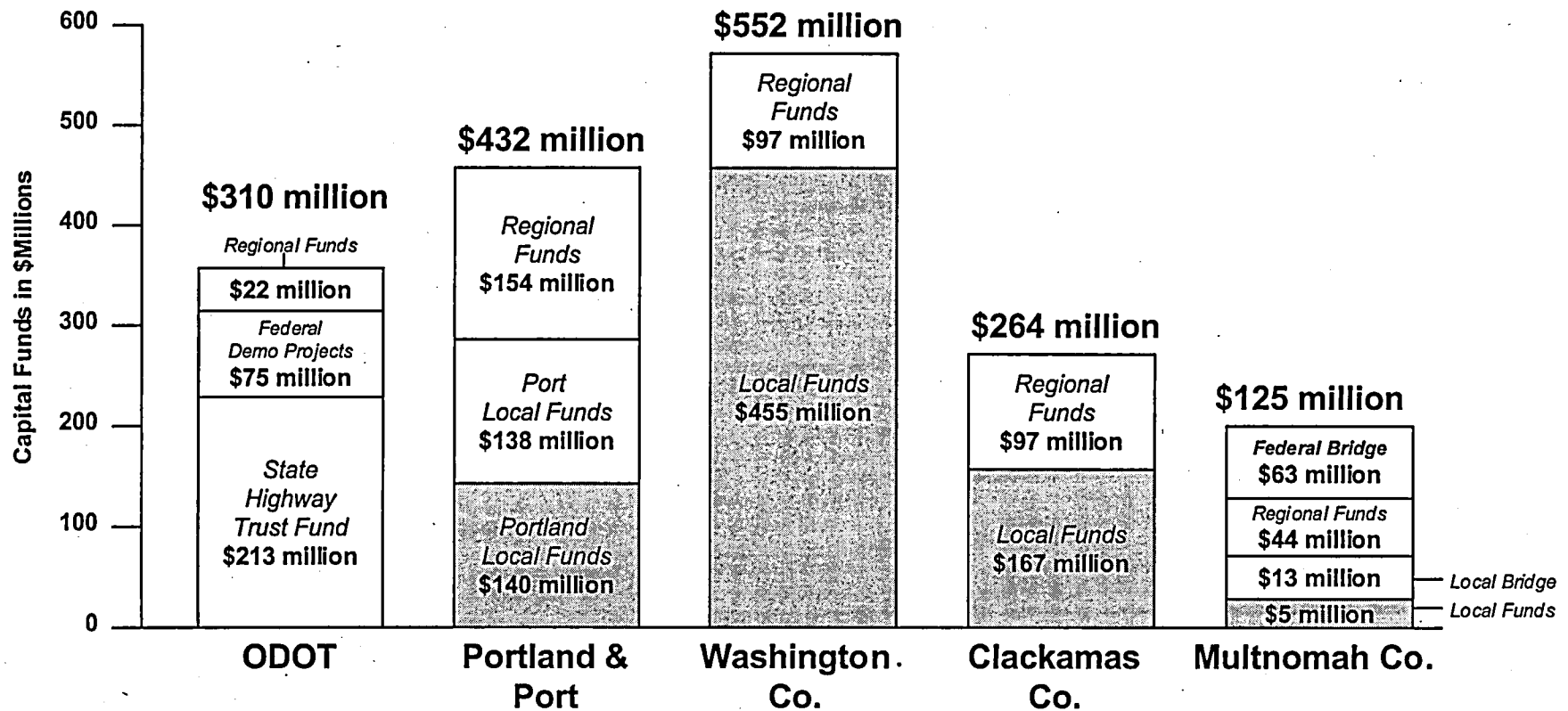
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Constrained Funding Assumptions



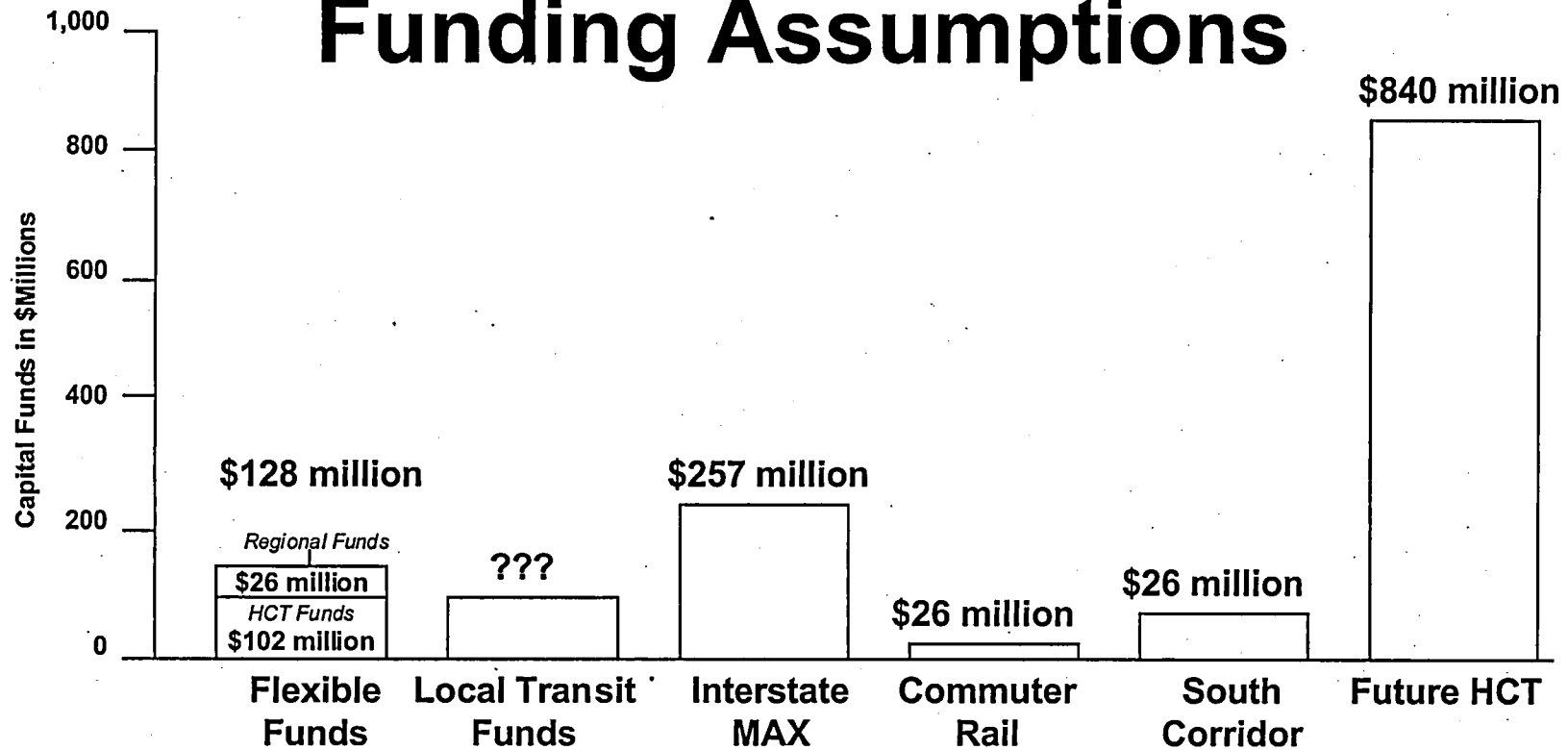
February 28, 2000



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Constrained Transit Funding Assumptions




February 28, 2000



METRO

Date: February 28, 2000

To: JPACT

From:  Andy Cotugno, Transportation Director

Re: Fiscally Constrained RTP – Revenue Assumptions

This memo is intended to provide an overview of funding assumptions to be made in order to define what to include in the Fiscally Constrained Scenario of the RTP. Highlighted in **BOLD are portions that we need feedback from JPACT.**

As you will recall, the RTP adopted in December 1999 is structured around the following five scenarios:

- **The Preferred RTP** – This represents all the projects and programs designed to fully meet the needs of the region; inclusion in the Preferred RTP represents policy concurrence on the merits of a particular project. The December 1999 RTP adopted the Preferred RTP system.
- **The Strategic RTP** – This represents the projects and programs that the region intends to pursue sufficient funds to implement; inclusion in the Strategic RTP represents an intent to fund and implement a particular project. The December 1999 RTP adopted the Strategic RTP system.
- **The Fiscally Constrained RTP** – This represents the programs and projects that the region expects can be funded with existing resources plus new funding sources that can reasonably be expected to be raised based upon the region's historical track record. It is required by USDOT and EPA in order to demonstrate that air quality standards can be met based upon realistic revenue assumptions, not wishful thinking. Development of the Constrained RTP requires estimation of what revenue sources will be raised and for what transportation projects. It does not bind future decisions on which project to fund through the MTIP/STIP or through federal demo funds or newly raised state or local funds. However, upon approval of the Air Quality Conformity Determination for this RTP update, any project not included in the Constrained RTP that is funded through any federal, state or local funding source will require a new Conformity Determination to be made and approved by USDOT and EPA. **This Fiscally Constrained RTP is the system that is now being defined.**

- **The Existing Resources RTP** – This represents the programs and projects that the region expects can be funded with resources that are currently adopted and requires no further action by federal, state or local elected bodies or the voters. Existing sources are forecasted for the 20-year RTP period to take into account the affects of inflation, growth, fuel efficiency, etc. The Existing Resources RTP was developed as an illustrative exercise to demonstrate the conditions without new sources of funding. The December 1999 RTP adopted the Existing Resources RTP system.
- **The Committed RTP** – This represents the programs and projects that the region has already committed funds to through the MTIP/STIP or local Capital Improvement Programs. This represents the conditions if nothing else is done beyond the current 4-5 year capital programs. The December 1999 RTP adopted the Committed RTP system.

In general, the Fiscally Constrained RTP is developed in the following major components:

1. **Local Sources** – All local sources of transportation funding and the projects they are committed to is accounted for, including: System Development Charges (SDCs), Traffic Impact Fees, Local Improvement Districts (LIDs), Urban Renewal Funds, Street Maintenance Fees, Tri-Met Payroll Tax, local gas taxes, federal forestry receipts, parking revenues, general funds, general obligation bonds, property tax levies. For purposes of the RTP, some of these funds must be spent on capital improvements and are assumed to be used for projects; others can be spent on Operations, Maintenance and Preservation and are assumed to be used in this manner.
2. **State Sources** – The State Highway Trust Fund is assumed to be increased at the rate of 1-cent gas tax increase per year plus an additional 1-cent every fourth year plus a \$10/year vehicle registration fee increase in 2002 and a \$15/year increase in 2012. Truck taxes are assumed to maintain cost-responsibility with auto taxes regardless of whether weight-mile taxes remain or a diesel tax is substituted. Current practice for distributing these funds to ODOT, City and County jurisdictions is maintained. Since this is the primary source of funds for Operations, Maintenance and Preservation of the system, it is assumed that none is used for capital improvements in the RTP with the exception of the 2-cent gas tax dedicated by the Legislature to ODOT Modernization. This \$12 million per year (in 2000 dollars) is assumed to be used for improvements to the state highway system with the priority focused on the Bond Program list approved by JPACT in November.

A key policy choice to make is whether to assume the ODOT Bond Program is passed by the voters in May and whether the Legislature adopts further Bond Programs in the future. At this point, the issue appears moot since the six-year list of bond measure projects approved by JPACT and the OTC can be funded with the 20-year revenue stream whether or not the measure passes in May. Furthermore, it is not recommended to assume future Bond Programs. Future Bond Programs would either require additional gas tax increases beyond that already assumed or would require reducing the funding level for Operations, Maintenance and Preservation commensurate with the annual debt requirement. Neither assumption appears reasonable at this time. After the May vote and the next Legislature, the issue can be reevaluated.

Also assumed as state funding is \$19 million per biennium statewide for special needs transit service, producing approximately \$1.4 million per year for operations and \$2.45 million per year for capital. These funds would be dedicated to this service and therefore do not affect the balance of the RTP definition.

3. **Federal Sources** – The direction on federal transportation funding provided by USDOT is to simply assume the funding level in the last year of TEA-21 plus inflation through the end of the RTP period of 2020. In general, these funds are handled in the following major components:

- A. **ODOT Funding** – Most of the formula federal highway funding goes to ODOT to be used on a statewide basis. At the direction of the Oregon Transportation Commission, it is assumed these funds will be used for Preservation projects and therefore not be available for ODOT Modernization projects in the RTP.
- B. **Tri-Met Funding** – Federal Transit funds that come to the region on a formula basis are assumed in Tri-Met's financial plan which, together with local sources, provides them the ability to expand service at the rate of 1½% per year. As with the Federal Highway Funds, these are assumed to be at the funding level in the last year of TEA-21 plus inflation through 2020.
- C. **FTA Discretionary (New Starts and Bus) Funding** – The base assumption is that the region will be successful in securing funds for the three major transit projects approved as part of the Federal Priorities Paper: Interstate MAX, South Corridor Transit Improvement Program and Wilsonville-Beaverton Commuter Rail. This represents a reasonable assumption based upon historical funding from these sources. However, there is a choice to be made for the 2010-2020 time period in the RTP:

It is recommended that the region continue to assume a \$60 - \$70 million annual funding level. This funding amount would allow light rail transit to be built from downtown Vancouver to Milwaukie.

- D. **FHWA Demo Funds** – Every six years when Congress reauthorizes the transportation programs, they also earmark projects requested by individual members of Congress. Based upon the past three bills, this is, in fact, a growing source of Federal Highway Funding. Following the direction to assume the funding level in the last year of TEA-21 plus inflation, this amounts to about \$10 million per year.

Historically, this has been for projects approximately 40% on ODOT's system and 60% on the local system. It is recommended to assume this as the appropriate ratio to use for future earmarked projects, resulting in \$4 million per year for ODOT projects and \$6 million per year for other projects.

- E. **Bridge Funding** – FHWA Bridge Repair funding has historically come to the region at the rate of about \$4.6 million per year, of which \$3.7 million per year is used for Willamette River bridge rehabilitation.
- F. **Federal Flexible Funds** – STP, CMAQ and Enhancement funding have been the primary categories that the MTIP process has allocated. Assuming the same level as the last year of TEA-21 plus inflation, this amounts to about \$25.6 million per year through 2020. Of this, the region has already committed \$6 million per year through 2010 for High Capacity Transit implementation (as part of the financing resolution for Interstate MAX and South Corridor bus program). The remainder is proposed to be distributed throughout the region for planning, transit, bike, pedestrian, boulevard, TDM, TMA, TOD and road projects. While a geographic balance for these funds is intended, the MTIP criteria that emphasizes the 2040 Growth Concept and cost-effectiveness and safety are the key criteria. In addition, road projects are intended to emphasize freight access as well as locations with off-peak congestion before including projects aimed at peak-hour congestion.

After the February 25th TPAC meeting, we will have a recommendation on the project list that can be funded with these revenue assumptions.

ACC:rmb

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**Federal – State Revenues
Available for Capital Projects
on the Regional System**

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	Highways				Transit						
	(1998 \$ Millions)	State Highway Trust Fund *	Optional Capital Bonding (reduces OM&P) **	Federal Demonstration Projects (40% to Highways)	Highway Total (w/out bonding)	Interstate MAX	Commuter Rail	South Corridor	Recommended Option Future LRT	Option 2 Future HCT	Transit Total (with Future LRT)
	2000	\$11.98									
	2001	\$11.81	\$172.62			\$50.00	\$1.00	\$3.00			\$54.00
	2002	\$11.64				\$60.00	\$0.00	\$3.00			\$63.00
	2003	\$11.48		\$4.15		\$60.00	\$8.00	\$3.00			\$71.00
New TEA	2004	\$11.34		\$4.15	\$15.49	\$60.00	\$8.00	\$3.00			\$71.00
	2005	\$11.17		\$4.15	\$15.32	\$27.50	\$9.00	\$3.00			\$39.50
	2006	\$11.00		\$4.15	\$15.15			\$20.00	\$40.00		\$60.00
	2007	\$10.82	\$143.72	\$4.15	\$14.97			\$20.00	\$40.00		\$60.00
	2008	\$10.63		\$4.15	\$14.78			\$20.00	\$40.00		\$60.00
	2009	\$10.44		\$4.15	\$14.59				\$60.00		\$60.00
New TEA	2010	\$10.24		\$4.15	\$14.39				\$60.00		\$60.00
	2011	\$10.02		\$4.15	\$14.17				\$60.00	\$10.00	\$60.00
	2012	\$9.81		\$4.15	\$13.96				\$60.00	\$10.00	\$60.00
	2013	\$9.60	\$119.67	\$4.15	\$13.75				\$60.00		\$60.00
	2014	\$9.39		\$4.15	\$13.54				\$60.00	\$10.00	\$60.00
	2015	\$9.19		\$4.15	\$13.34				\$60.00	\$10.00	\$60.00
New TEA	2016	\$8.83		\$4.15	\$12.98				\$60.00		\$60.00
	2017	\$8.64		\$4.15	\$12.79				\$60.00	\$10.00	\$60.00
	2018	\$8.44		\$4.15	\$12.59				\$60.00	\$10.00	\$60.00
	2019	\$8.26	\$99.64	\$4.15	\$12.41				\$60.00		\$60.00
	2020	\$8.07		\$4.15	\$12.22				\$60.00		\$60.00
	Total	\$212.77	\$535.64	\$74.70	\$236.41	\$257.50	\$26.00	\$75.00	\$840.00		\$1,198.50

* Assumes all non-capital specific revenues to OM&P.

** Forecast assumes an annual one cent increase in the state gas tax and \$10 increase in state vehicle registration fee every 6th year for OM&P. Years 2000-2003 are updated estimates from STIP 2000, discounted to 1998 \$.

**Regional Revenues
Available for Capital Projects
on the Regional System**

(1998 \$ Millions)	Regional STP	CMAQ	Enhancements	Willamette River Bridges (from federal sources)	Other Bridges (from federal sources)	Safety	Federal Demonstration (60% to non-highway)	Total Revenues	Allocation to HCT	Allocation to Regional Initiatives*	Willamette River Bridges (80% of Fed Bridge \$ + \$0.6 m local)
2000	\$13.92	\$7.57	\$1.40	\$2.74	\$0.69	\$1.01		\$27.33		\$2.96	
2001	\$14.12	\$7.82	\$1.40	\$2.73	\$0.68	\$0.97		\$27.73		\$3.04	
2002	\$14.46	\$9.27	\$1.40	\$2.72	\$0.68	\$0.94		\$29.47		\$2.95	
2003	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52		\$2.27	
2004	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2005	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2006	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2007	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2008	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2009	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2010	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2011	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2012	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2013	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2014	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2015	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2016	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2017	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2018	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2019	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
2020	\$14.76	\$9.47	\$1.40	\$3.70	\$0.92	\$1.45	\$6.82	\$38.52	\$6.00	\$3.00	\$4.30
Total 2004-2020	\$250.92	\$160.99	\$23.80	\$62.90	\$15.64	\$24.65	\$115.94	\$654.84	\$102.00	\$51.00	\$73.10

Years 2000-2003 revenues have been committed to projects and are not available for reallocation.

Years 2000-2003 of STP, CMAQ and Enhancements updated based on TEA-21 authorization.

All revenues shown in 1998 \$. After 2003, revenues are expected to grow at the rate of inflation.

* Includes regional planning (\$750,000), Transit Oriented Development (\$1 m), and TDM programs; including TMA start-ups (\$1.25 m).

**Regional Revenues
Available for Capital Projects
on the Regional System**

(1998 \$ Millions)	Total Available for New Regional Projects	Proposed Allocation to Transit (6%)	Proposed allocation to ODOT Arterials (5%)	Proposed allocation to the Port (5%)	Proposed Allocation to East Multnomah County (10%)	Proposed Allocation to Portland (30%)	Proposed Allocation to Clackamas County (22%)	Proposed Allocation to Washington County (22%)
2000								
2001								
2002								
2003								
2004	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2005	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2006	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2007	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2008	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2009	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2010	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2011	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2012	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2013	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2014	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2015	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2016	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2017	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2018	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2019	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
2020	\$26.32	\$1.58	\$1.32	\$1.32	\$2.63	\$7.90	\$5.79	\$5.79
Total 2004-2020	\$447.44	\$26.85	\$22.37	\$22.37	\$44.74	\$134.23	\$98.44	\$98.44

**Local Revenues
Available for Capital Projects
on the Regional System**

			Portland			
	WR Bridges	Gresham TIF	Grand Total	URD's	SDC's	Grand Total
2000	\$0.60	\$0.24		\$3.50	\$1.75	
2001	\$0.60	\$0.24		\$4.00	\$1.75	
2002	\$0.60	\$0.24		\$4.00	\$1.75	
2003	\$0.60	\$0.24		\$4.00	\$1.75	
2004	\$0.60	\$0.24		\$4.00	\$1.75	
2005	\$0.60	\$0.24		\$4.00	\$1.75	
2006	\$0.60	\$0.24		\$4.00	\$1.75	
2007	\$0.60	\$0.24		\$4.00	\$1.75	
2008	\$0.60	\$0.24		\$4.00	\$1.75	
2009	\$0.60	\$0.24		\$4.00	\$1.75	
2010	\$0.60	\$0.24		\$4.00	\$1.75	
2011	\$0.60	\$0.24		\$4.00	\$1.75	
2012	\$0.60	\$0.24		\$4.00	\$1.75	
2013	\$0.60	\$0.24		\$4.00	\$1.75	
2014	\$0.60	\$0.24		\$4.00	\$1.75	
2015	\$0.60	\$0.24		\$4.00	\$1.75	
2016	\$0.60	\$0.24		\$4.00	\$1.75	
2017	\$0.60	\$0.24		\$4.00	\$1.75	
2018	\$0.60	\$0.24		\$4.00	\$1.75	
2019	\$0.60	\$0.24		\$4.00	\$1.75	
2020	\$0.60	\$0.24		\$4.00	\$1.75	
Total	\$12.60	\$5.00	\$17.60	\$83.50	\$36.75	\$120.25

All revenues shown in 1998 \$

**Local Revenues
Available for Capital Projects
on the Regional System**

	Clackamas County			MSTIP	Washington County		Grand Total	Port Revenues
	URD's	SDC's	Grand Total		TIF Road Revenues	TIF Transit Revenues		
2000	\$0.00	\$1.90		\$19.10	\$8.69	\$1.45		
2001	\$6.35	\$1.90		\$20.20	\$8.69	\$1.45		
2002	\$6.35	\$1.90		\$21.50	\$8.69	\$1.45		\$7.26
2003	\$6.35	\$1.90		\$22.80	\$8.69	\$1.45		\$7.26
2004	\$6.35	\$1.90		\$24.10	\$8.69	\$1.45		\$7.26
2005	\$6.35	\$1.90		\$25.60	\$8.69	\$1.45		\$7.26
2006	\$6.35	\$1.90		\$27.10	\$8.69	\$1.45		\$7.26
2007	\$6.35	\$1.90		\$7.20	\$8.69	\$1.45		\$7.26
2008	\$6.35	\$1.90		\$7.60	\$8.69	\$1.45		\$7.26
2009	\$6.35	\$1.90		\$8.10	\$8.69	\$1.45		\$7.26
2010	\$6.35	\$1.90		\$8.60	\$8.69	\$1.45		\$7.26
2011	\$6.35	\$1.90		\$9.10	\$8.69	\$1.45		\$7.26
2012	\$6.35	\$1.90		\$9.60	\$8.69	\$1.45		\$7.26
2013	\$6.35	\$1.90		\$10.20	\$8.69	\$1.45		\$7.26
2014	\$6.35	\$1.90		\$2.60	\$8.69	\$1.45		\$7.26
2015	\$6.35	\$1.90		\$2.70	\$8.69	\$1.45		\$7.26
2016	\$6.35	\$1.90		\$2.90	\$8.69	\$1.45		\$7.26
2017	\$6.35	\$1.90		\$3.00	\$8.69	\$1.45		\$7.26
2018	\$6.35	\$1.90		\$3.20	\$8.69	\$1.45		\$7.26
2019	\$6.35	\$1.90		\$3.40	\$8.69	\$1.45		\$7.26
2020	\$6.35	\$1.90		\$3.60	\$8.69	\$1.45		\$7.26
Total	\$127.00	\$39.90	\$166.90	\$242.20	\$182.59	\$30.52	\$455.31	\$138.00



Purpose of the Financially Constrained System

- Required by federal regulations
- Basis for demonstrating compliance with federal air quality laws
- Primary source of projects for upcoming MTIP process

February 28, 2009



Revenue Projection

- Federal funds keep pace with inflation
- Increases in state highway trust fund to OM&P at 1+1+1+2...
- Federal transit money will be allocated to priority HCT projects
- Local funds are growing

February 28, 2009



Revenue Projection

- Highways = \$342 m
- STP & CMAQ = \$ 436 m
- Bridge & Safety = \$103 m
- Possible Local & Port of \$733 m
- FTA "New Starts"

February 28, 2009



Possible Approaches

- Geographic Equity
- 2040 Implementation
- Air-Quality Based
- Current Funding or MTIP Emphasis

February 28, 2000



Geographic Equity Approach

- Used for 1995 RTP
- Assumes "committed" projects
- Additional projects identified by geographic formula

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2040 Implementation Approach

- 50% for central city & regional centers
- 30% for industrial areas and intermodal facilities
- 20% for other areas

February 28, 2000



TPAC Hybrid Approach

- Assumes "committed" projects
- Geographic equity establishes funding targets
- 2040 emphasis for projects within geographic areas
- Must be multi-modal

February 28, 2004



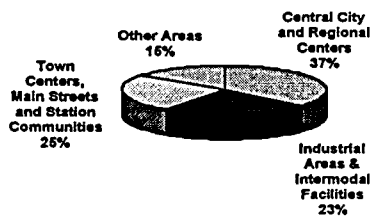
TPAC Hybrid Approach

- ODOT Arterial Fund - 5%
- Clackamas Co. - 22%
- Washington Co. - 22%
- East Multnomah - 10%
- Portland - 30%
- Tri-Met - 6%
- Port of Portland - 5%

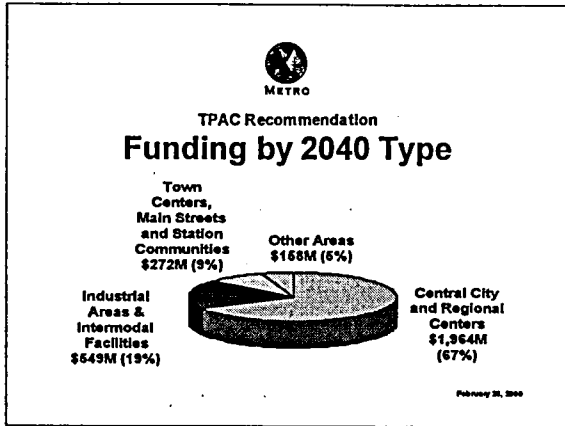
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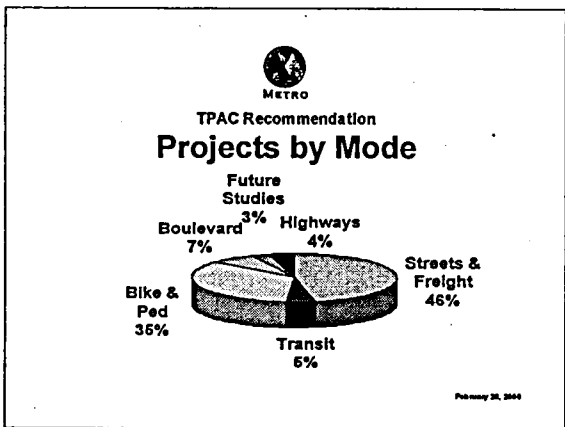


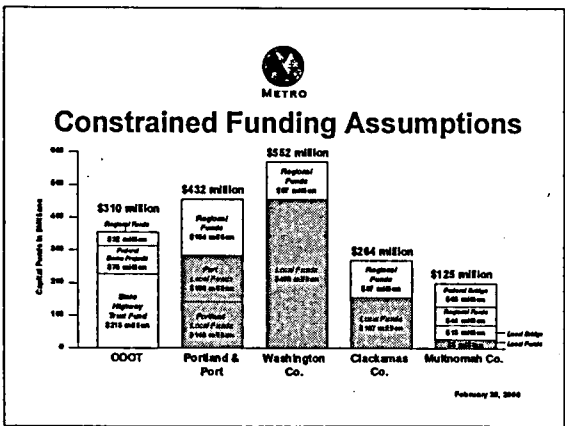
TPAC Recommendation Implementing 2040

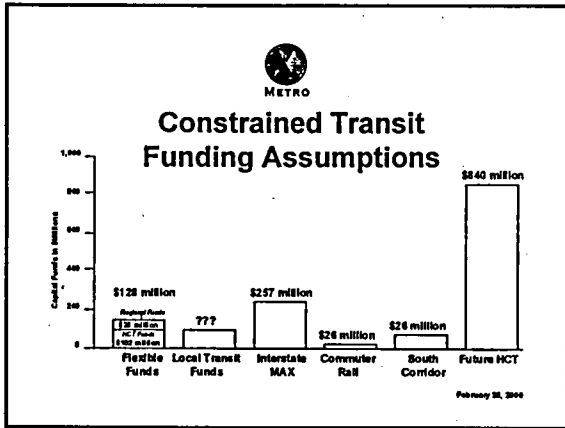


February 28, 2004









-
- Next Steps**
- JPACT and Council approval of proposed financially constrained system
 - Modeling and analysis
 - Air Quality conformity findings for draft RTP
- February 28, 2008

-
- Public Review**
- JPACT, MPAC and Council briefings on final RTP draft, including Air Quality conformity
 - Final RTP public comment period begins on May 1, and includes financial constraint element
- February 28, 2008

MEMORANDUM

TO: David Bragdon, Presiding Officer
Metro Council
CC: Metro Department Directors
DT: 25 February, 2000
RE: Metro's draft comments on the Proposed Endangered Species Act Section
4(d) Rule

Attached to this cover memorandum for your consideration are three documents:

1. A draft cover letter from Metro Council and my office addressed to the National Marine Fisheries Service
2. A draft narrative comment on the proposed section 4(d) rule prepared by my staff based on Metro Department and Metro Council comments
3. A draft annotated technical comment suggesting revisions to the proposed rule prepared by the Office of General Counsel.

I look forward to participating in a discussion about our comments to the National Marine Fisheries Service at the Council Informal scheduled for Tuesday, February 29, 2000 at 2 PM. If you have any questions about these draft documents, please contact David Moskowitz, Metro's Salmon Recovery Coordinator at 797-1579, Ken Helm in the Office of General Counsel at 797-1882, or Michael Morrissey in the Council Offices at 797-1907.

Garth Griffin
Branch Chief, Protected Resources Division
National Marine Fisheries Service
525 N.E. Oregon Street, Suite 525
Portland, Oregon 97232

DRAFT

Dear Garth:

Metro is pleased to provide the attached comments on the proposed Endangered Species Act (ESA) section 4(d) protective regulations for threatened species of salmon and steelhead. Metro's comments apply to the draft rules published in the Federal Register on December 30, 1999 (64 FR 73479)(steelhead 4(d) rule) and on January 3, 2000 (65 FR 170) (salmon 4(d) rule). Thank you for your efforts to allow comments on both rules simultaneously.

Metro's attached comments address several important aspects of the proposed rules. We recognize the innovative approaches advanced in these draft rules, and we hope the National Marine Fisheries Service (NMFS) will proceed towards promulgation of the final rule with an open mind in ensuring that this approach is maintained and even improved.

There are four important policy considerations we wish you to consider as you weigh our comments and those of others concerned about the fate of northwestern rivers and their native salmon.

First, the rules must focus on restoration of already degraded conditions. The built environment in the urban areas has reduced the health of the urban watersheds and salmon abundance. Regulatory efforts that simply affect new development are not adequate to assist in the ultimate goal of salmon recovery. We believe that even if all future urban development is perfectly planned and implemented to have no adverse impact on watershed health, the region's salmon and steelhead will still falter towards extinction because the built environment will not be changed. The ESA protective regulations must apply to all development to foster protection of urban natural resources in conjunction with restoration of the tarnished gems within Metro's boundaries.

Second, the federal agencies with regulatory responsibilities in the region must stand together and united towards a common goal of recovery. Metro believes the "federal family" often takes contradictory positions as each agency makes individual decisions reflecting its specific agency mission or authority. It was the need for a coordinated approach to transportation, land use and solid waste planning that prompted the legislative formation of Metro. Metro has worked to meet its coordinating responsibilities promptly and efficiently. Federal agencies balance their own competing statutory or treaty obligations and often the result is that natural resource protection is watered down. An example of this is the Columbia River channel deepening project where protection and restoration of a critical portion of the salmon's life history has been balanced against economic development. This federal agency action creates doubt in the minds of the public whether conservation gains from the sacrifices of some sectors for salmon recovery are merely swallowed by other sectors. If habitat protection and restoration is the cornerstone to regional recovery, how can natural resource conditions be permitted to be degraded in the estuary so critical to all the salmon our urban region is trying to protect? If the federal agencies do not make the hard decisions to protect salmon where they have the principle responsibility and authority, efforts to do the same thing by Metro or any other local government may well be for naught.

Third, Metro supports accountability for enforcement, reporting, implementation, and funding proposed in the draft rule. However, attaining the level of implementation envisioned by NMFS will, and should, require a substantial commitment of new resources to adequately implement, enforce, and report on these efforts to protect and restore watershed health and salmonid abundance. Funding a greater level of implementation monitoring and enforcement will be a bitter pill for most local governments to swallow. A sustained, substantial federal investment must accompany our efforts so we may take a substantial bite of salmon and watershed recovery.

Fourth, while Metro realizes that the section 4(d) rules for salmon and steelhead are only one part of an overall ESA recovery effort, we believe NMFS must move expeditiously towards developing an ESA recovery plan that will result in a de-listing of these listed species. The ESA describes the basic recovery planning criteria fairly well, but Metro recognizes the complexity of producing a plan that contains even those basic elements. Nevertheless, Metro believes that NMFS must set forth recovery goals without delay. The entire region must come to understand where it is being asked to go as they embark on and struggle with a host of activities all generally pursued under the guise of "ESA salmon recovery." Setting these goals is NMFS' responsibility. Metro is committed to contributing to both setting and meeting these goals. Please engage us early and often in moving forward on this most important aspect of the ESA.

We sincerely appreciate the effort to which you and your skilled staff is making. We look forward to productive discussions about our comments, and about how NMFS may consider and revise the draft rules. Please contact David Moskowitz, Metro's Salmon Recovery Coordinator, at 503/797-1579 if you have any questions about our comments.

Sincerely yours,

Mike Burton
Executive Officer

David Bragdon
Presiding Officer

cc: Honorable Governor John Kitzhaber, MD
Metro Council
Honorable Erik Sten, City of Portland
Metro Policy Advisory Committee (MPAC)
Paul Risser, chair, Willamette Restoration Initiative
Bruce Laing, Tri-County ESA Coordinator

Enclosures

1 **COMMENTS ON THE DRAFT SECTION 4(D) PROTECTIVE REGULATIONS**
2 **METRO REGIONAL SERVICES**

3
4 Metro Regional Services (Metro) offers the following comments on draft protective regulations for five
5 populations of Pacific steelhead and salmon (*See* 64 FR 73479 (December 30, 1999) and 65 FR 170
6 (January 3, 2000)). Metro provides these comments based on its charter and statutory authorities, and upon
7 Metro Council Resolution No. 99-2815A (September 30, 1999) which states that “Metro will proactively
8 seek comprehensive solutions to ESA listings for salmon and steelhead in cooperation with other
9 jurisdictions and organizations working on this issue.”

10
11 **PRINCIPLE ISSUES**

12 Metro supports the basic approach NMFS has taken in this draft rule as an important, innovative and
13 dynamic effort to provide protection for listed salmonids in the Pacific Northwest. Our comments,
14 concerns, clarifications and suggested revisions are offered as constructive criticism and are meant to help
15 improve the effectiveness of the implementation and enforcement of ESA Section 9 prohibition against
16 take.

17
18 **[insert Key Issues Summary here]**

19
20 Metro’s comments will address several of the proposed 13 programs in the order in which they are
21 presented in the draft rule. Metro will provide general comments, as well as specific rule amendment
22 language. In general, Metro’s comments and amendment language will be directed at the draft regulatory
23 language. NMFS must also sufficiently address its own background, or preamble language as necessary to
24 reflect any changes to the final regulatory language.

25
26 **TAKE AVOIDANCE GUIDANCE**

27
28 Metro has already accomplished an initial assessment of its institutional functions, and the results of that
29 assessment are set forth in “Watershed and Fish Conservation, Protection and Restoration Activities: Initial
30 Report to Metro Council” Fall, 1999. Metro will to continue with a sharper focus based on the draft “Take
31 Guidance” in the draft rules (*See* 64 FR 73479, at 73481 (December 30, 1999) and 65 FR 170, at 172
32 (January 3, 2000)).

33
34 Metro requests clarification of the relationship between take avoidance and the designation of critical
35 habitat. As we understand it currently, NMFS has proposed critical habitat for steelhead and salmon in the
36 Lower Columbia and Upper Willamette River Evolutionarily Significant Units (“ESU”) (*See* 64 FR 5740
37 (February 5, 1999) and 63 FR 11482 (March 9, 1998)). This critical habitat includes “all river reaches
38 accessible” by listed salmon or steelhead and consists of the water, substrate, and adjacent riparian areas in

1 these reaches. It would be helpful to know if NMFS applies the take prohibition throughout the general
2 range of the specific ESUs (i.e., geographic extent) or only to the areas of proposed or final critical habitat
3 (i.e., where the species is actually present). Metro assumes that because stream and upland reaches not
4 currently supporting salmonids still may provide essential habitat features such as clean water, sediments,
5 nutrients and woody debris to downstream, occupied reaches, that NMFS would apply the take prohibition
6 equally to both occupied and unoccupied areas.

7
8 Metro appreciates the guidance NMFS has provided in the draft rule regarding what activities may
9 constitute a “take” of listed salmonids. It would be helpful to receive some clarification from NMFS
10 regarding some activities that Metro conducts which could constitute a take under the draft rule.

11
12 *Metro Activities that may injure or kill salmonids*

13
14 The following activities Metro conducts or authorizes may injure or kill salmonids or adversely modify the
15 habitat upon which they depend. Some of these activities do not fall within programs identified in the draft
16 rule and as such, be qualified for a limitation on the prohibition on take. Metro requests that NMFS
17 provide clarification as to the likelihood NMFS will focus its enforcement resources on these activities.

18
19 Observing spawning salmonids during educational field trips.

20
21 Accidental discharge of pollutants into a stream where salmonids are present. Examples are spilling of
22 liquid or solid waste during transport from regional collection facilities to a regional landfill.

23
24 Use of exotic or hatchery reared juvenile salmonids in Metro-funded environmental education or stream
25 restoration programs when those non-native salmonids are released into waters where listed salmonids are
26 present.

27
28 Land use policy development, adoption and implementation activities that may result in the eventual
29 development of salmonid habitat.

30
31 Metro issues franchises for operation of material recovery facilities and licenses for composting facilities.
32 If these facilities are not owned by Metro, is Metro legally liable for activities on these sites that constitute
33 a “take”? Would a permit for these sites, issued by DEQ, shield Metro from liability? Should the language
34 of Metro permits and licenses be modified to reduce risk?

35
36 For those activities that Metro departments believe have the potential to “take” listed salmonids, Metro is
37 modifying current procedures to avoid the possibility of ESA violations. Other Metro activities may fall
38 into one of the 13 programs that NMFS has suggested are adequately protective of listed salmonids. As to

1 those Metro functions, Metro can take additional action to ensure that specific Metro procedures qualify to
2 be part of the "adequately protective" programs.

3 4 TAKE AVOIDANCE GUIDANCE AND IMPLEMENTATION

5
6 It would be helpful if the final rule included some very basic "checklist-type" of advice or guidance for
7 local jurisdictions or affected individuals. Metro suggests the following language:

8
9 The basic rule of the ESA is that it is prohibited to take listed species.

10 The 4(d) rules describe categories of activities that are likely to or may be likely to cause a take.

11 All entities and individuals should avoid take.

12 The 4(d) rules provide limitations on the prohibition against take.

13
14 If an activity may affect listed species or their habitat, and has a federal nexus (permitting, authorizing, or
15 funding), a section 7 consultation may be required to be initiated between the action agency and the NMFS.

16
17 If an otherwise lawful activity will result in the incidental take of listed species, a section 10 permit may be
18 obtained to allow "incidental takes" provided that the project proponent prepares a conservation plan which
19 NMFS must approve before any permits may be issued.

20
21 First, all local governments should be able to take advantage of any "limit."

22
23 Second, the rules should allow for minor deviations from the requirements of a program adopted as a limit
24 where the deviation would not affect the protection provided for the listed species.

25 26 INTEGRATED PEST MANAGEMENT PROGRAMS

27 *General Comments*

28
29 NMFS has helped identify a new, watershed-friendly set of practices for pest management by local
30 governments. The draft rule describes how Portland Parks and Recreation Department's Integrated Pest
31 Management plan (Portland Park's IPM) exemplifies these practices. In 1995, Metro adopted an IPM
32 policy for the agency. Under the program, Metro places first priority on prevention of pests, second on
33 cultural and mechanical practices (i.e. biological controls), and, lastly, chemical products. Metro believes
34 that the approach and practices in our IPM program are substantially the same as Portland Park's IPM
35 program. However, the information provided in the proposed rule was not sufficient to determine whether
36 NMFS would in fact find Metro's program equivalent.

37

1 Metro is currently undergoing a re-examination of this policy and we believe this review should make
2 Metro's IPM program more congruent with Portland's approved program. However, Metro is seeking some
3 clarifications of the proposed rule that might make this process easier.

4
5 1. While we recognize that specific elements of a plan must be weighed in the context of the overall plan,
6 guidance on which elements, or types of elements, NMFS considers the most important would be
7 helpful.

8
9 2. The rule is unclear regarding how Metro would demonstrate to NMFS that our Integrated Pest
10 Management program provides sufficient salmonid protection. For example, does Metro only need to
11 inform NMFS that it has adopted a program similar to the Portland Park's IPM program or would
12 there be a formal review and approval process? If Metro's program differs in some ways, how would
13 Metro demonstrate that protection efforts were still sufficient?

14
15 In addition, the draft rule does not provide language that would allow other local jurisdictions to adopt the
16 same or substantially similar programs and seek NMFS approval through development of an operational
17 memorandum of understanding (MOU) as is provided for in other parts of the draft rule. Metro
18 recommends that NMFS amend its rule language to indicate that other local jurisdictions may consider,
19 adopt and seek approval for their own IPM plans.

20
21 *Metro's IPM Program*

22
23 Metro already uses many of the guidelines set forth in Portland Park's IPM. However, Metro conducts
24 activities and manages sites different from those governed by Portland Park's IPM. Metro is considering
25 tightening its current operational plan, and undertaking the classification system and define management
26 levels as did Portland Parks. Metro may write our own specific plan for specific waterways, which would
27 address specific areas that we manage, as Portland Parks does.

28
29 Specific activities that differ from those covered by Portland's Park's IPM program include, but are not
30 limited to the following:

- 31 1. Metro contracts the operation of Glendoveer Golf Course, while Portland operates their course; is
32 this difference of management a factor in the implementation of the IPM?
- 33 2. Portland Park's IPM plan makes note of lakes and ponds, however it does not mention the
34 specific use of Sonar (fluridone). Further, Portland does not manage a body of water with private
35 residences on it. Would these be factors for approval of Metro's IPM?
- 36 3. The water in Blue Lake is held by a weir, but does drain into the Columbia if the weir is raised.
37 Does this fact affect approval review of Metro's use of Portland Park's IPM?

1 4. Some larger broadcast spray areas, specifically the fence line at Glendoveer Golf Course (at
2 Halsey, SE 148th, and Glisan), are currently conducted under contract by Multnomah County for
3 Metro. Would this management arrangement affect NMFS approval?
4

5 Metro also owns and operates thousands of acres of parks and open space properties. Additionally, Metro
6 approves and funds habitat restoration activities occurring in its Restoration Grants Program. Metro
7 believes its current IPM operations for Regional Parks and Greenspaces are closely aligned with Portland
8 Park's IPM.
9

10 As reviewed, Portland Park's IPM uses herbicide in 25-foot buffers around water, limited to glyphosate
11 products, Garlon 3A, and surfactant R-11. Metro's open space properties, with the exception of
12 agricultural leased lands, uses glyphosate almost exclusively in concert with an IPM approach on its entire
13 property, not just in the riparian zones. If Metro does not exceed the Portland Park's IPM, but, in fact, uses
14 fewer chemicals than Portland's IPM allows, can Metro gain approval of its IPM under Portland Park's
15 IPM limitation under the draft rule?
16

17 HABITAT RESTORATION ACTIVITIES

18

19 It is possible for watershed plans to be developed and approved within two years for the Sandy, Clackamas,
20 Tualatin, and Willamette Rivers basins, but it is by no means certain. Until plans are approved, riparian
21 zone planting or fencing, large woody debris placement, and corrective road/stream crossings among other
22 activities may not be considered a taking if those activities comply with approved state guidelines (i.e.
23 Oregon Aquatic Habitat Restoration and Enhancement Guide).
24

25 Guidelines for watershed conservation plans include prioritizing, designing, and sequencing restoration
26 activities based on watershed assessment. This may require that Metro adhere to a watershed plan's
27 priorities in order to avoid a takings. The unintended result may be that Metro, as well as other local
28 jurisdictions and individuals request individual NMFS review of project management. This seems
29 impracticable.
30

31 NMFS also states that it does not consider herbicide applications or artificial bank stabilization to be
32 restoration activity. However, using herbicide properly and with clear limitations, such as outlined in
33 Portland's Waterways Pest Management Policy, may be an essential component to a riparian restoration
34 project. The draft rule appears to describe a scenario, for riparian restoration purposes, in which activities
35 such as site preparation, that would include weed abatement whether herbicide is included or not may be
36 considered a taking. This may be an unintended result of the draft rule if adopted as written.
37

1 Metro suggests that NMFS consider amending the draft rule language to provide an alternative process for
2 continuing restoration activities in the event watershed or sub basin assessments are not completed and no
3 state or federally approved watershed management are in place. Metro believes that a prioritized,
4 integrated restoration program is absolutely necessary to successfully address the limiting factors for
5 watershed health and salmonid abundance. However, Metro also believes that continuing to allow for
6 individual restoration projects (often referred to as "random acts of kindness") is essential to maintain
7 active citizen and watershed council interest and involvement. This local involvement could be seriously
8 compromised if restoration activities are prohibited while administrative hurdles prevent completion of
9 either assessments or management plans. Stable funding for watershed council operations, conflicting state
10 and federal watershed assessment guidelines or protocols, and state legislative squabbling all are real
11 obstacles to completing the type of assessment and planning work the draft envisions being completed
12 within two years.

13 14 *Artificial Bank Stabilization*

15 On page 73488 under the heading "Habitat Restoration Limits on the Take Provisions" it is stated that
16 NMFS considers a habitat restoration activity to be an activity whose primary purpose is to restore "natural
17 aquatic or riparian habitat processes or conditions." This phrase is also used in proposed rule 50CFR
18 223.208(a)(8)(iii) on page 73504. However, on page 73488 it is stated that NMFS does not consider
19 "artificial bank stabilization to be restoration activity." "Artificial bank stabilization" is not defined,
20 although it may be important to define this term.

21
22 The bias against using artificial bank stabilization as an erosion control technique may not be practicable in
23 an urban setting. Some stream banks have been hardened to contain contaminated soils or other wastes.
24 Prior development activity has often altered or abolished natural habitat as well as those processes that
25 would allow a natural system to repair itself. As you are aware, many urban streams have been placed in
26 culverts or so channelized so that channel migration is limited or impossible. Because of a high percentage
27 of impervious surfaces in some basins, unnaturally large storm water runoff deluges most urban streams.
28 In some sites, natural stream bank erosion may eat away at low permeability silts which filter contaminants
29 from adjacent buried waste. The loss of bank stability could cause buried solid or hazardous waste to drop
30 into a stream.

31
32 Metro believes that in an urban setting the goal should be to improve the existing, but degraded, riparian
33 area to a productive level (i.e. towards properly functioning habitat conditions). In unusual circumstances,
34 it may be necessary to use artificial bank stabilization techniques to achieve the long-term stability needed
35 to avoid the above problems and promote favorable water quality attributes. For example, a multi-layered
36 rock filter at the lower portion of a slope may be necessary where vegetation does not grow. Plastic
37 geotextiles may be necessary to assist vegetation to prevent erosion of the upper portion during high water

1 periods and to provide long term shading. These techniques are designed to stop stream bank erosion and
2 vegetation loss and provide the long-term stability to:

- 3 1. Maintain the soil filter needed to combat water quality degradation by contaminants
- 4 2. Maintain shading by a riparian canopy cover of native vegetation necessary to achieve water quality
5 attributes such as temperature, pH, dissolved oxygen, etc. essential to species conservation.

6
7 For example, Metro is undertaking to repair the perimeter bank of the 60 year old St. Johns Landfill. This
8 project aims to maintain the long term stability of the silt to serve as a physical barrier between surface
9 water and millions of tons of solid and hazardous waste and filter contaminants which would impair water
10 quality. Given the site conditions the best alternative is to use riprap below the vegetation growth line and
11 also geotextile stabilized earth with native vegetation necessary to achieve the two objectives listed above.
12 This design strikes the best balance between the goal of restoring "natural" aquatic and riparian processes
13 and conditions and the goal of restoring properly functioning habitat conditions such as bank stability and
14 pollutant filtering.

15
16 *Suggested Revisions*

17
18 To achieve the multiple goal of preventing contaminated soils or solid wastes from entering waterways,
19 and to promote improved habitat conditions and water quality, Metro believes that language should be
20 added to the rules so bank-hardening techniques would be considered habitat restoration under certain
21 circumstances:

- 22 1. if they contribute to the objective of attaining properly functioning habitat conditions including bank
23 stabilization, pollutant filtering, and desirable water quality attributes;
- 24 2. if they are required by unusual site conditions.

25
26 OREGON DEPARTMENT OF TRANSPORTATION'S (ODOT) ROAD MAINTENANCE ACTIVITIES

27
28 Metro is supportive of the approach in the draft rule. The potential impacts for transportation planning and
29 development seem reasonable and attainable. ODOT's Road Maintenance Guide is an important tool for
30 Oregon, and hopefully other local jurisdictions. Metro support the inclusion of the Guide in the rule. In
31 regard to extension of the practices identified in the Guide to local cities and counties, Metro's
32 Transportation Department would be willing to coordinate such an effort. We will follow up on this
33 suggestion through the Transportation Policy Alternatives Committee (TPAC) to determine local interest.

34
35 The proposed rule is also in line with our upcoming "Green Streets" project. Metro's "Green Streets
36 Project" is intended to guide the design of transportation projects to eliminate or minimize the impacts of
37 transportation planning, development and maintenance on watersheds and fish. The "Green Streets
38 Project" will result in recommended regional street design standards or guidelines that will eliminate or

1 largely minimize threats to endangered salmon and steelhead populations. The focus will be on culvert
2 design, stream protection, and control of storm water runoff. At the conclusion of the study (fall 2001), we
3 would hope to develop a Memorandum of Agreement with NMFS to include Green Streets design features
4 as an element of a future 4(d) rule, thereby limiting federal take provisions from projects consistent with
5 those features.

6 7 URBAN DENSITY DEVELOPMENT

8 This portion of Metro's comment will identify key issues that relate to how Metro can comply with NMFS
9 proposed additions to 50 CFR 223, Section 12 as set forth in the proposed 4(d) rule. A technical appendix
10 is attached which recommends specific amendments to the proposed rule that will clarify the 12 urban
11 development criteria, and make it more feasible for Metro and other local governments to comply with the
12 criteria.

13
14 *All local governments entitled to seek 4(d) protection* - Metro strongly supports a regional approach to
15 conserving and recovering listed salmonids. As stated previously, Metro is prepared to take a leading role
16 in this effort and accept NMFS's offer to have the Urban Growth Management Functional Plan be a model
17 for achieving the 12 urban development criteria set forth in the proposed 4(d) rule. While Metro is willing
18 to undertake this challenge, Metro believes that other local governments within Metro's jurisdiction should
19 have an opportunity to qualify their own ordinances for the 4(d) urban development limitation on take
20 protections. However, this will not relieve those cities and counties from complying with Metro's
21 Functional Plan, and local governments which choose that approach must answer to NMFS directly for any
22 failure of those ordinances to achieve NMFS's goals.

23
24 *Limitation on take should apply to all new development* - Metro encourages NMFS to apply the limitation
25 on take provisions for urban development to all new development in the Metro region. Metro's Urban
26 Growth Management Functional Plan applies to all areas inside the regional urban growth boundary and
27 Metro's jurisdictional boundary, not just to newly urbanized areas as the preamble of the proposed rule
28 seems to suggest.

29
30 *NMFS needs a standard for reviewing urban development programs* - The draft rule contemplates a
31 procedure by which NMFS will evaluate whether local land use ordinances qualify for the limitation on
32 take provisions. For example, NMFS must determine whether an ordinance is "adequately protective"
33 before issuing written approval. What is missing is a standard that NMFS will use as a threshold for
34 determining whether local ordinances comply with those criteria. Oregon's Statewide Planning program
35 requires local government comprehensive plans to comply as a whole with all applicable Statewide Land
36 Use Planning Goals. This is a balancing approach to determine compliance. Implementing such a standard
37 would provide NMFS with a valuable tool for determining when urban development programs satisfy the
38 12 criteria set forth in the proposed rule.

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Address potential for unconstitutional taking of private property - In the preamble of the rule, NMFS seems to limit the application of the riparian buffer standards “[t]o the extent allowed by ownership patterns.” Although this appears to be an attempt to allow local governments implementing the 4(d) programs to avoid committing unconstitutional 5th Amendment takings, it is an awkward term. It is unclear whether NMFS is willing to risk unconstitutional takings claims as a result of the ESA take prohibitions, and whether NMFS intends for local governments to be the involuntary front lines in those cases.

Stormwater criteria should allow for regional performance measures – Metro has not yet developed regional stormwater functional plan provisions. However, Metro strongly believes that crafting broad regional performance measures is feasible if the focus is on obtaining an overall reduction in the amount of stormwater that enters regional streams. These performance measures should primarily address on-site retention, off-site detention, treatment of detained water and managed release to avoid damage to streambeds and banks.

Stream bank Armoring or Hardening – Although Metro does not generally endorse stream bank hardening, such measures are appropriate where bioengineering techniques are not possible and where the armoring is part of a restoration plan. In narrow circumstances armoring can facilitate revegetation of stream banks that would otherwise be futile. For the reasons presented under **Habitat Restoration**, bank hardening may be necessary to achieve or protect desirable water quality attributes and properly functioning habitat conditions that support salmonid productivity in urban streams. Temporary access by heavy machines may also be necessary to build structures that promote desirable water quality attributes and filter pollutants. In addition, for bank hardening projects discussed above and to improve the overall native vegetation community structure, it may be necessary to remove some or all existing native plants and replace them with the same or similar native vegetation.

Regional Water Supply- Metro and Portland area water providers entered into an intergovernmental agreement in 1996 with the region’s water suppliers to implement the Regional Water Supply Plan. The plan provides for a coordinated regional approach to supplying regional water needs under the direction of a Regional Water Providers Consortium through the year 2050. Metro recommends the Regional Water Supply Plan as a model, like the Urban Growth Management Functional Plan, for satisfying this criterion.

Consistency with Other Laws - In at least two places the draft rule clarifies that any development which qualifies for the limitation on take provisions must also comply with applicable "state and federal laws and permit requirements." "Applicable regional law" should be added to this list to recognize Metro's authority to regulate land use and other areas such as solid waste processing, transportation, and disposal.

1 *Properly Functioning Condition* - One important issue that stands out in the document is that NMFS fails
2 to adequately describe performance measures that are tied to the concept of properly functioning condition.
3 The lack of specificity on performance measures for activities to achieve which receive the limitation on
4 the prohibition on take as described in the 13 programs that are exceptions to the “take” rule. The lack of
5 specificity relates to limited knowledge of basic science in the life history of these threatened salmonids.
6 Answering this question becomes even more difficult as Metro develops programs that may allow for
7 variations in their riparian protection strategy (Goal 5 riparian rules, functional plan). As jurisdictions
8 adopt variations from Metro’s riparian strategy, how much flexibility will NMFS allow for variations from
9 the overall standard set by the 12 principles in the urban density development limitation, and still meet the
10 goals for water quality and fish habitat?

11 12 FUNDING FOR IMPLEMENTATION, ENFORCEMENT, REPORTING

13
14 One of the 12 principles for the urban density development states that local jurisdictions must provide
15 adequate funding, enforcement, reporting, and implementation. This principle should apply most
16 accurately as a part of each of the previous 10 substantive principles described in both the preamble and the
17 draft regulatory language. This principle is perhaps the most difficult to describe, and the one most subject
18 to the vagaries of the annual budget process each local jurisdiction must conduct.

19
20 In the draft rule, NMFS should suggest criteria that would make enforcement, funding, reporting, and
21 implementation programs adequate. It is highly likely that current programs vary considerably between
22 local jurisdictions. Local enforcement of ordinances is frequently complaint-driven, and enforcement
23 capability typically not adequate to address even in-coming complaints – let alone proactively conduct site
24 inspections on an on-going basis. Local jurisdictions need some guidance in order to adequately budget for
25 the level of enforcement, reporting, or implementation envisioned by the draft rule. Metro suggests that
26 NMFS provide an example of the level of adequacy envisioned for satisfying this important principle.

27
28 On the other hand, the structure of the draft rules will also require significant NMFS staff review to
29 satisfactorily provide the level and intensity of programmatic review envisioned. This is particularly true
30 for the limitation for urban density development. Whether NMFS is reviewing “adequate protective
31 ordinances” from Metro or from individual local jurisdictions, NMFS’ requirement to provide review and
32 findings of adequacy requires adequate NMFS staffing levels and appropriate expertise and the requisite
33 review authority to work directly with Metro and possibly other local jurisdictions. If NMFS is unable to
34 secure adequate staff resources to complete its review work, the final rule should have contingent language
35 providing direction and limited approval to move forward for local jurisdictions who have adopted
36 integrated, adequate urban density development ordinances, but who are unable to receive complete NMFS
37 review, findings and approval.

PROPOSED ESA 4(D) RULE AMENDMENTS – ANNOTATED

The following amendments are intended to improve, (1) the ability of the proposed 4(d) rule urban development criteria to correct the conditions which led to the decision to list of steelhead and salmonid as threatened species, and (2) to improve NMFS's ability to review local urban development programs submitted to qualify for a limit on take prohibitions. These amendments are based on Metro's local experience regulating aspects of urban development and providing regional services.

As acknowledged at 64 Fed Reg 73493, Metro administers an urban growth boundary ("UGB") and a program of enforceable regulations for urban development. Oregon's land use system has effectively separated urban development from rural lands for over 25 years. Working within that land use planning system, for the past five years Metro has been preparing enforceable region-wide regulations to coordinate and supplement earlier regulations in city and county comprehensive plans. Water quality and flood management regulations were adopted in Metro's Urban Growth Management Functional Plan in 1996 and 1998. Two years of work on additional riparian area protection for fish and wildlife consistent with statewide planning Goal 5 will yield adopted regulations in June, 2000. 1997 policies on stormwater management in Metro's Regional Framework Plan may be implemented by Metro in 2000. Based on this extensive experience in development and administration of conservation program regulations, these suggested amendments to the proposed 4(d) rules should significantly improve NMFS ability to achieve their purposes.

Specific amendments to the proposed language of 50 CFR 223, Section 12 (64 FR 73505) are suggested below. Language in *italics* would be deleted, and underlined language would be added.

I. 12(i) – Administration**A. Clarify which local governments may seek urban development limitations on take.**

Metro agrees that the Urban Growth Management Functional Plan serves as a good model for urban development activities in the region. However, as this section is currently drafted it implies that all 24 cities and three counties in Metro's jurisdiction would be prevented from submitting their own urban development program for NMFS review and approval. The suggested amendments would allow cities and counties in Metro's jurisdiction to submit their own urban development program if they so desire.

The proposed language would also clarify what constitutes and adequately protective ordinance by stating NMFS's desired outcome from such urban development programs.

“(i) Such development occurs pursuant to city, *and* county ordinances or Metro Urban Growth Management Functional Plan (Functional Plan) that NMFS has agreed in writing are adequately protective sufficient to assure that plans and development that comply with them will result in development patterns and actions that conserve listed salmonids, or within the jurisdiction of the Metro regional government in Oregon, with ordinances that Metro has found comply with an Urban Growth Management Functional Plan (Functional Plan) that NMFS has agreed in writing are adequately protective.”

B. Clarify the requirements for complying with the 12 urban development criteria and add a standard of review for local program compliance.

Metro and other local governments need to understand the standard of review to be used by NMFS to determine compliance with the 12 urban development criteria. Metro recommends the following:

“For NMFS to find ordinances or the Functional Plan to be adequately protective, they must address all of the following issues criteria in sufficient detail and in a manner that assures that urban developments will contribute to conserving listed salmonids. City and county ordinances or Metro’s Functional Plan are sufficient to result in development patterns and actions that conserve listed salmonids when on the whole they assure the objective of each of the following 12 criteria and any failure to meet individual criterion requirements is technical or minor in nature.”

From the 25 year experience of the Oregon land use program, this “substantial compliance” standard of review provides substantial discretion for the reviewer while avoiding significant implementation delays from technical litigation. This suggested 4(d) rule amendment changes the current reference to 12 “issues” and “principles” to established “criteria” for NMFS review of a local conservation program. The test is paraphrased from the long standing Oregon state law standard for the state to use in applying the Statewide Land Use Planning goals to city and county comprehensive plans (ORS 197.747) as interpreted by *Schlumberger Technologies v. TriMet*, 145 Or App 12, 17 (1996).

II. 12(i)(B) - Stormwater

For Metro to help NMFS and local governments achieve adequate stormwater management for the Metro region it is important for NMFS to be more specific with the type of goals that stormwater regulations should achieve. Metro believes that adequate

stormwater management can be achieved through broad performance measures that would apply regionwide. Those performance measures should be directed at four regulatory outcomes: (1) retention of stormwater on-site whenever possible, (2) detention to manage stormwater that cannot be retained on-site, (3) pre-treatment of stormwater prior to discharge, and (4) managed release of treated stormwater from detention facilities.

“Avoid stormwater discharge impacts to water quality and quantity or to the hydrograph of the watershed. Such impacts can be avoided through on-site retention, off-site detention, treatment and managed release of treated stormwater.”

III. 12(i)(C) – Riparian Buffers

Metro recommends that NMFS directly address the question of whether the riparian buffer criteria could result in an unconstitutional taking of private property for public use. The preamble of the rule on riparian buffers (64 FR 73494) hints at NMFS position by stating that “[t]o the extent allowed by ownership patterns, the development set-back should be” This seems to acknowledge that some properties may be completely or substantially in the 200 foot riparian buffer area. Metro recommends the following language be added to section 12(i)(C):

“For existing lots or parcels which are fully or predominantly within a riparian buffer area that are demonstrated to be rendered unbuildable by implementation of this criterion, local regulations may assure that the lot or parcel will remain buildable with the least practicable disturbance of the riparian area, and may impose conditions that require restoration of the property.”

Metro has found it desirable and necessary to address in its regulations the issue of possible loss of all economic use of existing lots or parcels. Property rights advocates demanded and received such assurances in Metro’s 1996 and 1998 water quality and flood management regulations. A more specific description of a “least practicable disturbance” requirement for allowing one residence per buildable lot in riparian areas is part of Metro’s draft fish and wildlife habitat conservation program. NMFS clarity on this point would be excellent time-saving assistance to develop any local ordinance within riparian regulations to conserve salmonids.

IV. 12(i)(D) – Stream Crossings

As a land use regulatory standard, the word “possible” is generally interpreted to mean an applicant must demonstrate that complying with the standard is virtually impossible in order to vary from requirement. That is very difficult and potentially unworkable standard. Metro recommends a “practicable” standard for stream crossings.

“Avoid stream crossings wherever possible practicable by considering alternative transportation modes and designs and preferring bridges over culverts, and where on must be provided minimize impacts through choice of mode, sizing and placement of crossings and 100 year floodplain design of all new culverts.”

Metro has long experience with the pitfall of “possible” versus “practicable.” Engineers can propose construction of unlimited solutions with unlimited funds, making a review standard of “possible” impossible to meet. The suggested amendment attempts to incorporate most of the considerations in the preamble of the proposed rule into the criterion.

V. 12(i)(E) – Streambank Hardening

An absolute prohibition on bank armoring or hardening goes much farther than is prudent in urban areas such as the downtown Portland Willamette River waterfront. In certain circumstances, limited bank armoring as part of an overall bank restoration program makes restoration possible where it would otherwise not occur. This criterion should allow limited bank hardening combined with restoration.

“Protect historic meander patterns and channel migration zones by generally avoiding hardening of stream banks. Bank hardening may be allowed as part of a bank stabilization and restoration plan that requires revegetation as a component. Bank erosion shall generally be controlled through vegetation or carefully bioengineered solutions. Riprap blankets or similar hardening techniques are not allowed, unless impracticable because of particular site constraints or unless these techniques promote water quality attributes which help attain properly functioning conditions.”

VI. 12(i)(F) – Wetlands

Metro agrees with this criterion, and believes that existing Metro regulations will meet the standard. However, clarity on where wetlands must be protected for conservation of listed salmonids as compared to other wetlands is needed. Statewide Planning Goal 5 provides such a distinction, and Metro has incorporated that standard into its fish and wildlife habitat conservation program. Based on that experience, Metro recommends the following additional language:

“Protect wetlands and wetland functions.” “Include all existing natural wetlands within riparian areas along all perennial and intermittent streams within riparian buffers.”

Retain and protect all other existing natural wetlands to the extent practicable.”

VII. 12(i)(H) – Landscaping and Herbicides, Pesticides and Fertilizers

Metro suggests that NMFS amend this criterion to focus protection on riparian areas and recognize existing regulation of chemicals. In some circumstances, increasing the area of landscaping is desirable. For example landscaped area can act as sponges to retain stormwater which keeps the water and chemicals that may be applied to yards on-site instead of reaching a stream. Application of herbicides and pesticides may also be needed in riparian areas under controlled conditions to combat invasive plant species.

“Require landscape designs which favor planting native species or subspecies to reduce need for watering and application of herbicides, pesticides and fertilizer. At a minimum, require restoration with native plant species or subspecies where riparian buffer areas are disturbed.

VIII. 12(i)(J) – Water Supply

Metro recommends amending the criterion to reflect regionwide water supply planning a basis for protecting salmonids. Metro and Portland area water providers entered into an intergovernmental agreement in 1996 with the region’s water suppliers to implement the Regional Water Supply Plan. The plan provides for a coordinated regional approach to supplying regional water needs under the direction of a Regional Water Providers Consortium through the year 2050. Metro recommends the Regional Water Supply Plan as a model, like the Urban Growth Management Functional Plan, for satisfying this criterion.

IV. 12(i)(K) – Enforcement

Metro relies on its local partners to enforce functional plan requirements that are implemented through local codes. As a result, Metro cannot “provide” enforcement for those local governments. The phrase “all necessary enforcement” implies some undefined absolute rather than a performance measure requiring results. Review of “funding” to adequate levels is inappropriate and unnecessary because “sufficient enforcement” measures would reflect adequate funding. Metro can help ensure urban development programs are properly applied through its oversight operations. Metro can also work with its local partners to monitor urban developments to determine whether those programs are meeting Functional Plan requirements. Based on these observations, Metro recommends the following:

“Provide all necessary enforcement, funding, reporting, and implementation measures. Ensure that ordinances addressing these urban development criteria are

implemented, regularly monitored, and enforced to achieve the purposes of the ordinances or Metro's Functional Plan.

X. 12(i)(12) – Compliance with other laws

Metro has stated above that other local governments within Metro's jurisdiction should have the opportunity to develop their own urban development programs for purposes of obtaining the 4(d) limitation on take. At the same time, Metro's Functional Plan is a holistic approach to regional urban planning of which fish and wildlife protection is just one component. Local ordinances related to protecting listed salmonids must also be consistent with Functional Plan. Therefore, "Metro regional law" should be added to this criterion.

The development complies with all other state and Federal environmental or natural resource laws and permits, and where applicable, Metro regional law.

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