

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF DIRECTING METRO) RESOLUTION NO. 00-2912
COMMENTS TO THE NATIONAL MARINE)
FISHERIES SERVICE CONCERNING THEIR) Introduced by Presiding Officer
PROPOSED 4(d) RULE) Bragdon
)

WHEREAS, In 1998 and 1999 the National Marine Fisheries Service listed salmon and steelhead species in the Metro region as threatened under the Endangered Species act; and

WHEREAS, In December, 1999, and January 2000 NMFS released its proposed 4(d) rules defining prohibited "take" of Lower Columbia Steelhead and Chinook Salmon, and proposing fish conservation programs that may be approved as exceptions to prohibited "take"; and

WHEREAS, At least four such fish conservation programs in the draft rule, including "urban development", affect the Metro region; and

WHEREAS, Metro's adopted and ongoing Title 3 work to implement state Goals 5, 6 and 7, which meet requirements of the state and the Metro Regional Framework Plan, may also be the basis for an "urban development" fish conservation program, under the final 4(d) rules; and

WHEREAS, A timely response to NMFS seeking clarification of the proposed 4(d) rules, with the goal of enabling Metro's program to qualify under the final 4(d) rules, must be made by March 6, 2000 for Metro communications to be reflected in NMFS final 4(d) rules, due in June 2000; and

WHEREAS, Resolution 99-2815 adopted by the Metro Council, established the framework for a Metro response to the ESA listings, including the assistance of the Metro Executive and Salmon Recovery Coordinator, through regular reporting to the Council; and

WHEREAS, the Metro Council and the Metro Executive considered detailed comments on the proposed 4(d) rules at its informal meeting on February 29, 2000; and

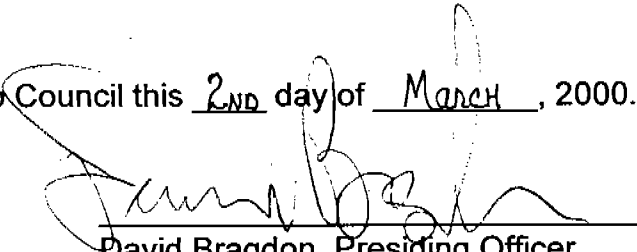
WHEREAS, the Metro Council desires to forward comments, questions and suggested rule revisions to NMFS related to the proposed 4(d) rules;

now, therefore,

BE IT RESOLVED;

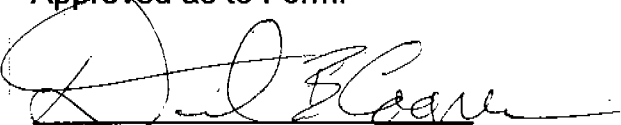
That the Metro Council authorizes the Executive Officer to submit the Metro response to the National Marine Fisheries Service regarding the proposed 4(d) rules, as shown in "Exhibit A."

ADOPTED by the Metro Council this 2ND day of MARCH, 2000.



David Bragdon, Presiding Officer

Approved as to Form:



Daniel B. Cooper, General Counsel

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

Dear Mr. Griffin:

Metro is providing 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 in order to foster protection of existing urban natural resources and increase the restoration of degraded riparian areas 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 the result is that natural resource protection is

often ambiguous and conflicting. Such actions create doubt in the minds of the public as to whether conservation gains from the sacrifices of some sectors for salmon recovery are contradicted by other sectors.

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 in order to enable us to substantially aid in regional salmon and watershed recovery efforts.

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.

Metro sincerely appreciates 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

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

22
23 *Metro’s Planning Focus Benefits Salmonid Habitat*

24 Metro believes NMFS should recognize that the 2040 Growth Concept is already benefiting salmonid
25 habitat by preventing growth patterns typical of many cities within the range of listed species, and possibly
26 even minimizing the size of the Portland Metro urbanized region. Through Metro’s Urban Growth
27 Management Functional Plan, the region’s development can have an overall positive affect on fish habitat
28 by accommodating growth while limiting the extent of human intervention in the natural landscape through
29 the application of the compact urban form.

30
31 *Metro’s Role*

32 Metro is willing to act as a model with its Urban Growth Management Functional Plan for urban
33 development. However, Metro requests that NMFS help Metro by considering the suggested rule
34 amendments enclosed within our comments.

35
36 *Scope of the Urban Development Limitation*

37 Metro believes that NMFS should apply the limitations in the proposed rule to all new development and re-
38 development. The affect of development on fish habitat is the same whether it occurs in previously

1 undeveloped areas or in areas already developed. This change would provide the opportunity for counties
2 and cities to apply consistent riparian land use practices to development.

3 4 *Funding*

5 The federal government must assist Metro, other local jurisdictions within the Metro Region, the State of
6 Oregon, as well as the other states and local jurisdictions with additional funding for the implementation,
7 enforcement, and monitoring proposed as critical aspects of this draft rule. This region, and Metro in
8 particular in certain cases, ought to be identified as key target areas for federal appropriations in the federal
9 budget. Programs such as the Land and Water Conservation Fund, Federal Highway administration
10 Transportation Improvement Program (TIP), as well as agency budgets from the Environmental Protection
11 Agency, Department of Interior, and Department of Commerce should specifically identify salmonid
12 recovery and protection programs for additional federal assistance.

13 14 TAKE AVOIDANCE GUIDANCE

15 Metro has already accomplished an initial assessment of its institutional functions, and the results of that
16 assessment are set forth in "Watershed and Fish Conservation, Protection and Restoration Activities: Initial
17 Report to Metro Council" Fall, 1999. Metro will continue to review its activities with a sharper focus
18 based on the draft "Take Guidance" in the draft rules (*See* 64 FR 73479, at 73481 (December 30, 1999)
19 and 65 FR 170, at 172 (January 3, 2000)). Metro will continue to assess its activities for take avoidance,
20 and these assessments will be reported in quarterly reports to the Metro Council.

21
22 Metro requests clarification of the relationship between take avoidance and the designation of critical
23 habitat. As we understand it currently, NMFS has proposed critical habitat for steelhead and salmon in the
24 Lower Columbia and Upper Willamette River Evolutionarily Significant Units ("ESU") (*See* 64 FR 5740
25 (February 5, 1999) and 63 FR 11482 (March 9, 1998)). This critical habitat includes "all river reaches
26 accessible" by listed salmon or steelhead and consists of the water, substrate, and adjacent riparian areas in
27 these reaches. It would be helpful to know if NMFS applies the take prohibition throughout the general
28 range of the specific ESUs (i.e., geographic extent) or only to the areas of proposed or final critical habitat
29 (i.e., where the species is actually present). Metro assumes that because stream and upland reaches not
30 currently supporting salmonids still may provide essential habitat features such as clean water, sediment
31 inputs, nutrients and woody debris to downstream, occupied reaches, that NMFS would apply the take
32 prohibition equally to both occupied and unoccupied areas.

33
34 Metro appreciates the guidance NMFS has provided in the draft rule regarding what activities may
35 constitute a "take" of listed salmonids. Metro intends to seek additional clarification from NMFS
36 regarding some activities that Metro conducts. These are a class of activities that could remotely constitute
37 a take under the draft rule. However, they do not appear to fall within the general types of activities

1 described in the proposed rule under the take guidance, and also do not come within the programs or sets of
2 criteria described as limits in the proposed rule.

3
4 For those activities that Metro departments believe have the potential to “take” listed salmonids, Metro is
5 modifying current procedures to avoid the possibility of ESA violations. Other Metro activities may fall
6 into one of the 13 programs that NMFS has suggested are adequately protective of listed salmonids. As to
7 those Metro functions, Metro can take additional action to ensure that specific Metro procedures qualify to
8 be part of the “adequately protective” programs.

9 10 TAKE AVOIDANCE GUIDANCE AND IMPLEMENTATION

11 It would be helpful if the final rule included some very basic “checklist-type” of advice or guidance for
12 local jurisdictions or affected individuals. Metro suggests the following language:

13
14 The basic rule of the ESA is that it is prohibited to take listed species.

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

16 All entities and individuals should avoid take.

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

18
19 If an activity may affect listed species or their habitat, and has a federal nexus (permitting, authorizing, or
20 funding), a section 7 consultation may be required to be initiated between the action agency and the NMFS.

21
22 If an otherwise lawful activity will result in the incidental take of listed species, a section 10 permit may be
23 obtained to allow “incidental takes” provided that the project proponent prepares a conservation plan which
24 NMFS must approve before any permits may be issued.

25
26 All local governments should be able to take advantage of any “limit.”

27
28 The rules should allow for minor deviations from the requirements of a program adopted as a limit where
29 the deviation would not affect the protection provided for the listed species.

30 31 INTEGRATED PEST MANAGEMENT PROGRAMS

32 *General Comments*

33 The draft rule describes how Portland Parks and Recreation Department’s Integrated Pest Management
34 plan (Portland Park’s IPM) exemplifies these practices. However, the draft rule does not provide language
35 that would allow other local jurisdictions to adopt the same or substantially similar programs and seek
36 NMFS approval through development of an operational memorandum of understanding (MOU) as is
37 provided for in other parts of the draft rule. Metro recommends that NMFS amend its rule language to
38 indicate that other local jurisdictions may consider, adopt and seek approval for their own IPM plans.

1 *Metro's IPM Program*

2 In 1995, Metro adopted an IPM policy for the agency. Under the program, Metro places first priority on
3 prevention of pests, second on cultural and mechanical practices (i.e. biological controls), and, lastly,
4 chemical products. Metro believes that the approach and practices in our IPM program are substantially
5 the same as Portland Park's IPM program. However, the information provided in the proposed rule was
6 not sufficient to determine whether NMFS would in fact find Metro's program equivalent. Metro already
7 uses many of the guidelines set forth in Portland Park's IPM. However, Metro conducts activities and
8 manages sites different from those governed by Portland Park's IPM. Metro is considering tightening its
9 current operational plan, and undertaking the classification system and define management levels as did
10 Portland Parks. Metro may write our own specific plan for specific waterways, which would address
11 specific areas that we manage, as Portland Parks does.

12
13 Specific activities that differ from those covered by Portland's Park's IPM program include, but are not
14 limited to the following:

- 15 1. Metro owns the Glendoveer Golf Course, although it contracts the operation of this facility. Since
16 the City of Portland operates their courses, is this difference of management a factor in the
17 implementation of the IPM?
- 18 2. Portland Park's IPM plan makes note of lakes and ponds, however it does not mention the specific
19 use of Sonar (fluridone). Further, Portland does not manage a body of water with private
20 residences on it. Would these be factors for approval of Metro's IPM?
- 21 3. At Blue Lake, a Metro-owned and operated park, the water in the Lake is held by a weir, but does
22 drain into the Columbia if the weir is raised. Water-borne chemicals can only enter the Columbia
23 River if lake water is pumped up and over the existing dike between Blue Lake and the Columbia.
24 Does this fact affect approval review of Metro's use of Portland Park's IPM?
- 25 4. Some larger broadcast spray areas, specifically the fence line at Glendoveer Golf Course (at
26 Halsey, SE 148th, and Glisan), are currently conducted under contract by Multnomah County for
27 Metro. Would this management arrangement affect NMFS approval?

28
29 Metro also owns and operates thousands of acres of parks and open space properties. Additionally, Metro
30 approves and funds habitat restoration activities occurring in its Restoration Grants Program. Metro
31 believes its current IPM operations for Regional Parks and Greenspaces are closely aligned with Portland
32 Park's IPM. As reviewed, Portland Park's IPM uses herbicide in 25-foot buffers around water, limited to
33 glyphosate products, Garlon 3A, and surfactant R-11. Metro's open space properties, with the exception of
34 agricultural leased lands, uses glyphosate almost exclusively in concert with an IPM approach on its entire
35 property, not just in the riparian zones. If Metro does not exceed the Portland Park's IPM, but, in fact, uses
36 fewer chemicals than Portland's IPM allows, can Metro gain approval of its IPM under Portland Park's
37 IPM limitation under the draft rule?

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 2. The rule is unclear regarding how Metro would demonstrate to NMFS that our Integrated Pest
9 Management program provides sufficient salmonid protection. For example, does Metro only need to
10 inform NMFS that it has adopted a program similar to the Portland Park's IPM program or would
11 there be a formal review and approval process? If Metro's program differs in some ways, how would
12 Metro demonstrate that protection efforts were still sufficient?
- 13 3. It would be helpful if NMFS would explicitly state whether chemical use, although conducted in
14 compliance with federal labeling requirements (which presumes it is being lawfully used), could
15 nevertheless be considered activity likely to result in the take of listed species. In short, is chemical
16 use, unless it is conducted as one component in compliance with an acceptable overall IMP program
17 reviewed by NMFS, now an "unprotected" use?
18

19 HABITAT RESTORATION ACTIVITIES

20 *General Comments*

21 It is possible for watershed plans to be developed and approved within two years for the Sandy, Clackamas,
22 Tualatin, and Willamette Rivers basins, but it is by no means certain. Until plans are approved, riparian
23 zone planting or fencing, large woody debris placement, and corrective road/stream crossings among other
24 activities may not be considered a taking if those activities comply with approved state guidelines (i.e.
25 Oregon Aquatic Habitat Restoration and Enhancement Guide).
26

27 Guidelines for watershed conservation plans include prioritizing, designing, and sequencing restoration
28 activities based on watershed assessment. This may require that Metro adhere to a watershed plan's
29 priorities in order to avoid taking a listed species. The unintended result may be that Metro, as well as
30 other local jurisdictions and individuals request individual NMFS review of proposed projects. This seems
31 impracticable.
32

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

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

14
15 *Suggested revisions*

16 Metro proposes three revisions to the proposed rule as written.

- 17 1. A project threshold should be considered. Certain activities such as bank restoration and
18 revegetation projects could proceed even if watershed assessments and watershed plans have not
19 been completed within the currently proposed two-year window. However, any in-water work,
20 would be permitted to proceed only if the watershed assessments and watershed plans have been
21 completed within the eventual mandated time frame, or after completion of a section 7
22 consultation (envisioned as a limitation under the proposed rule).
- 23 2. The proposed two-year time frame for completing watershed assessment and water plan
24 development should be extended by a period of time no less than one year. Alternatively,
25 individual restoration projects could proceed within the proposed time frame if; a) they are not in-
26 water projects, or 2) the required watershed assessments and watershed management plans are
27 substantially underway or are expected to be completed within one additional year from the
28 current proposed two-year period.
- 29 3. Restoration projects underway that are currently following other federal agency review and
30 approval processes should be allowed to proceed in a watershed whether or not a watershed
31 assessment or watershed management plan are underway or complete. For example, Metro
32 currently awards federal funds in cooperation with the U.S. Fish and Wildlife Service (FWS) for
33 restoration and environmental education projects within various watersheds. This FWS program
34 review already contains compliance with the National Environmental Policy Act (NEPA) as well
35 as ESA section 7 consultations with both NMFS and FWS if listed species are present and likely
36 to be affected by the project’s implementation.

1 *Artificial Bank Stabilization*

2 On page 73488 under the heading "Habitat Restoration Limits on the Take Provisions" it is stated that
3 NMFS considers a habitat restoration activity to be an activity whose primary purpose is to restore "natural
4 aquatic or riparian habitat processes or conditions." This phrase is also used in proposed rule 50CFR
5 223.208(a)(8)(iii) on page 73504. However, on page 73488 it is stated that NMFS does not consider
6 "artificial bank stabilization to be restoration activity." "Artificial bank stabilization" is not defined,
7 although it should be.

8
9 The bias against using artificial bank stabilization as an erosion control technique may not be practicable in
10 an urban setting. Some stream banks have been hardened to contain contaminated soils or other wastes.
11 Prior development activity has often altered or abolished natural habitat as well as those processes that
12 would allow a natural system to repair itself. As you are aware, many urban streams have been placed in
13 culverts or so channelized so that channel migration is limited or impossible. Because of a high percentage
14 of impervious surfaces in some basins, unnaturally large storm water runoff deluges most urban streams.
15 In some sites, natural stream bank erosion may eat away at low permeability silts which filter contaminants
16 from adjacent buried waste. The loss of bank stability could cause buried solid or hazardous waste to drop
17 into a stream.

18
19 Metro believes that in an urban setting the goal should be to improve the existing, but degraded, riparian
20 area to a productive level (i.e. towards properly functioning habitat conditions). In unusual circumstances,
21 it may be necessary to use artificial bank stabilization techniques to achieve the long-term stability needed
22 to avoid the above problems and promote favorable water quality attributes. For example, a multi-layered
23 rock filter at the lower portion of a slope may be necessary where vegetation does not grow. Plastic
24 geotextiles may be necessary to assist vegetation to prevent erosion of the upper portion during high water
25 periods and to provide long term shading. These techniques are designed to stop stream bank erosion and
26 vegetation loss and provide the long-term stability to:

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

30
31 For example, Metro is undertaking to repair the perimeter bank of the St. Johns Landfill. This project aims
32 to maintain the long term stability of the silt to serve as a physical barrier between surface water and
33 millions of tons of solid and hazardous waste and filter contaminants which would impair water quality.
34 Given the site conditions the best alternative is to use riprap below the vegetation growth line and also
35 geotextile stabilized earth with native vegetation necessary to achieve the two objectives listed above. This
36 design strikes the best balance between the goal of restoring "natural" aquatic and riparian processes and
37 conditions and the goal of restoring properly functioning habitat conditions such as bank stability and
38 pollutant filtering.

1 *Suggested Revisions*

2 To achieve the multiple goals of preventing contaminated soils or solid wastes from entering waterways,
3 and to promote improved habitat conditions and water quality, Metro believes that language should be
4 added to the rules so bank-hardening techniques would be considered habitat restoration under certain
5 circumstances:

- 6 1. If they contribute to the objective of attaining properly functioning habitat conditions including bank
7 stabilization, pollutant filtering, and desirable water quality attributes.
- 8 2. If they provide river access or protect water dependent uses such as boat ramps or other like facilities.
- 9 3. If they are required by unusual site conditions.

10
11 OREGON DEPARTMENT OF TRANSPORTATION'S (ODOT) ROAD MAINTENANCE ACTIVITIES

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

18
19 The proposed rule is also in line with our upcoming "Green Streets" project. Metro's "Green Streets
20 Project" is intended to guide the design of transportation projects to eliminate or minimize the impacts of
21 transportation planning, development and maintenance on watersheds and fish. The "Green Streets
22 Project" will result in recommended regional street design standards or guidelines that will eliminate or
23 largely minimize threats to endangered salmon and steelhead populations. The focus will be on culvert
24 design, stream protection, and control of storm water runoff. At the conclusion of the study (fall 2001), we
25 would hope to develop a Memorandum of Agreement with NMFS to include Green Streets design features
26 as an element of a future 4(d) rule, thereby limiting federal take provisions from projects consistent with
27 those features.

28
29 URBAN DENSITY DEVELOPMENT

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

35
36 *All local governments entitled to seek 4(d) protection*

37 Metro strongly supports a regional approach to conserving and recovering listed salmonids. As stated
38 previously, Metro accepts NMFS's offer to have the Urban Growth Management Functional Plan be a

1 model for achieving the 12 urban development criteria set forth in the proposed 4(d) rule. While Metro is
2 willing to undertake this challenge, and serve in a coordinating role, Metro believes that other local
3 governments within Metro's jurisdiction should have an opportunity to qualify their own ordinances for the
4 4(d) urban development limitation on take protections. However, this will not relieve those cities and
5 counties from complying with Metro's Functional Plan, and local governments which choose that approach
6 must answer to NMFS directly for any failure of those ordinances to achieve NMFS's goals.

7
8 *Limitation on take should apply to all new development*

9 Metro's Urban Growth Management Functional Plan which implements its Region 2040 Growth Concept
10 applies to all areas inside the regional urban growth boundary and Metro's jurisdictional boundary, not just
11 to newly urbanized areas as the preamble of the proposed rule seems to suggest. The 2040 Growth
12 Concept sets for the regions desired urban form for the next 20 years. Applying the limitation on take to
13 all new development is consistent with the 2040 Growth Concept goal of reducing urban sprawl and
14 encouraging growth in the urban area in ways and in places that make the most planning sense. Metro
15 encourages NMFS to apply the limitation on take provisions for urban development to all new
16 development in the Metro region. If NMFS should choose to apply the limitation to all development, it
17 would allow counties and cities to adopt development standards that are consistent throughout a
18 jurisdiction and prevent the uneven application of any regulatory scheme.

19
20 *NMFS needs a standard for reviewing urban development programs*

21 The draft rule contemplates a procedure by which NMFS will evaluate whether local land use ordinances
22 qualify for the limitation on take provisions. For example, NMFS must determine whether an ordinance is
23 "adequately protective" before issuing written approval. What is missing is a standard that NMFS will use
24 as a threshold for determining whether local ordinances comply with those criteria. Oregon's Statewide
25 Planning program requires local government comprehensive plans to comply as a whole with all applicable
26 Statewide Land Use Planning Goals. This is a balancing approach to determine compliance.
27 Implementing such a standard would provide NMFS with a valuable tool for determining when urban
28 development programs satisfy the 12 criteria set forth in the proposed rule.

29
30 *Address potential for unconstitutional taking of private property*

31 In the preamble of the rule, NMFS seems to limit the application of the riparian buffer standards "[t]o the
32 extent allowed by ownership patterns." Although this appears to be an attempt to allow local governments
33 implementing the 4(d) programs to avoid committing unconstitutional 5th Amendment takings, it is an
34 awkward term. It is unclear whether NMFS is willing to risk unconstitutional takings claims as a result of
35 the ESA take prohibitions, and whether NMFS intends for local governments to be the involuntary front
36 lines in those cases. At a minimum, NMFS should provide clarification as to the nature and extent of
37 allowed disturbances that would be acceptable in the 150 feet of the riparian buffer that is beyond the 50
38 feet closest to the stream where the proposed preamble language recommends no mechanical entry.

1 *Stormwater criteria should allow for regional performance measures*

2 Metro has not yet developed regional stormwater functional plan provisions. Metro encourages NMFS to
3 identify in the final section 4(d) rule a stormwater program or model ordinance which will aid local
4 governments in drafting their own ordinances to comply with this criterion. If NMFS does not know of
5 such a program, Metro strongly believes that crafting broad regional performance measures is feasible if
6 the focus is on obtaining an overall reduction in the amount of stormwater that enters regional streams.
7 These performance measures should primarily address on-site retention, off-site detention, treatment of
8 detained water and managed release to avoid damage to streambeds and banks.

9
10 *Stream bank Armoring or Hardening*

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

21
22 *Regional Water Supply*

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

28
29 *Consistency with Other Laws*

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

34
35 *Properly Functioning Condition*

36 One important issue that stands out in the document is that NMFS fails to adequately describe performance
37 measures that are tied to the concept of properly functioning condition. The lack of specificity on
38 performance measures for activities to achieve which receive the limitation on the prohibition on take as

1 described in the 13 programs that are exceptions to the “take” rule. The lack of specificity relates to
2 limited knowledge of basic science in the life history of these threatened salmonids.
3 Answering this question becomes even more difficult as Metro develops programs that may allow for
4 variations in their riparian protection strategy (Goal 5 riparian rules, functional plan). As jurisdictions
5 adopt variations from Metro’s riparian strategy, how much flexibility will NMFS allow for variations from
6 the overall standard set by the 12 principles in the urban density development limitation, and still meet the
7 goals for water quality and fish habitat?

8 9 FUNDING FOR IMPLEMENTATION, ENFORCEMENT, REPORTING

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

15
16 In the draft rule, NMFS should suggest criteria that would make enforcement, funding, reporting, and
17 implementation programs adequate. It is highly likely that current programs vary considerably between
18 local jurisdictions. Local enforcement of ordinances is frequently complaint-driven, and enforcement
19 capability typically not adequate to address even in-coming complaints – let alone proactively conduct site
20 inspections on an on-going basis. Local jurisdictions need some guidance in order to adequately budget for
21 the level of enforcement, reporting, or implementation envisioned by the draft rule. Metro suggests that
22 NMFS provide an example of the level of adequacy envisioned for satisfying this important principle.

23
24 On the other hand, the structure of the draft rules will also require significant NMFS staff review to
25 satisfactorily provide the level and intensity of programmatic review envisioned. This is particularly true
26 for the limitation for urban density development. Whether NMFS is reviewing “adequate protective
27 ordinances” from Metro or from individual local jurisdictions, NMFS’ requirement to provide review and
28 findings of adequacy requires adequate NMFS staffing levels and appropriate expertise and the requisite
29 review authority to work directly with Metro and possibly other local jurisdictions. If NMFS is unable to
30 secure adequate staff resources to complete its review work, the final rule should have contingent language
31 providing direction and limited approval to move forward for local jurisdictions who have adopted
32 integrated, adequate urban density development ordinances, but who are unable to receive complete NMFS
33 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 timesaving 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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OGC/KDH/kww (02/25/2000)