BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING THE)	RESOLUTION NO. 12-4350
CHIEF OPERATING OFFICER TO CONVEY)	
CERTAIN REAL PROPERTY IN THE DAIRY)	Introduced by Chief Operating Officer Martha
AND MCKAY CREEKS CONFLUENCE)	Bennett, with the concurrence of Council
TARGET AREA SUBJECT TO A)	President Tom Hughes
CONSERVATION EASEMENT)	-

WHEREAS, on May 16, 1995, the Metro area voters approved Ballot Measure 26-26, authorizing Metro to issue \$135.6 million of bonds for Open Spaces, Parks and Streams (the "1995 Metro Open Spaces Bond Measure"); and

WHEREAS, on June 27, 1996, via Resolution No. 96-2342 ("For the Purpose of Approving a Refinement Plan for the Jackson Bottom – Dairy/McKay Creeks Target Area as Outlined in the Open Space Implementation Work Plan"), the Metro Council adopted a refinement plan which identified over 335 acres for acquisition in this target area, in order to protect the fish, wildlife and water quality values in this portion of the Tualatin River Watershed; and

WHEREAS, between November 2000 and May 2003, Metro Parks and Greenspaces acquired nine parcels totaling 493 acres in the Jackson Bottom – Dairy/McKay Creeks Target Area, including a 62-acre parcel located on Minter Bridge Road, purchased on November 11, 2000, and legally described on Attachment 1 to Exhibit A attached hereto (the "Property"); and

WHEREAS, Metro purchased the Property specifically at the request of Jackson Bottom Wetland Preserve ("JBWP"), a non-profit organization, since the Property is within the boundaries of the Jackson Bottom Concept Master Plan; and

WHEREAS, JBWP has managed the Property for Metro since its acquisition pursuant to Metro Council Resolution 00-3004, dated November 16, 2000, which included a Natural Area Management Agreement that authorized JBWP to manage the Property "for the primary purpose of natural area, open space and floodplain, and wildlife habitat"; and

WHEREAS, JBWP also manages, in partnership with the City of Hillsboro, the nearby 725-acre Jackson Bottom Wetlands Preserve for the purpose of water quality enhancement, education programs, and habitat restoration; and

WHEREAS, Metro remains responsible for capital expenses and repair and maintenance of the Property, despite day to day management by JBWP; and

WHEREAS, Clean Water Services ("CWS"), a public water resources management utility in the Tualatin River watershed, wishes to acquire the Property from Metro to use a portion of it to cultivate native plants for use in its watershed restoration work and to otherwise use the Property for public purposes (as the term is used in ORS 271.330); and

WHEREAS, in consideration for the conveyance of the Property to CWS, subject to the requirement that CWS use the Property for public purposes, Metro would obtain a conservation easement over the Property, in the form attached hereto as Exhibit A, which ensures the Property will be used in a

manner that will help achieve the wildlife and water quality goals set forth in the Open Spaces Bond Measure and the Refinement Plan for the Jackson Bottom – Dairy/McKay Creeks Target Area; and

WHEREAS, Resolution No. 06-3672B ("For the Purpose of Submitting to the Voters of the Metro Area a General Obligation Bond Indebtedness in the Amount of \$227.4 Million to Fund Natural Area Acquisition and Water Quality Protection") adopted by the Council in March of 2006 (the "2006 Natural Areas Bond Measure"), recommended submission to the voters of a general obligation bond to preserve natural areas and clean water and protect fish and wildlife; and

WHEREAS, at the general election held on November 7, 2006 the voters approved the 2006 Natural Areas Bond Measure, which identified the Dairy and McKay Creeks Confluence Target Area goal of protecting the riparian areas and associated wetlands in the confluence area of Dairy and McKay Creeks to improve water quality; and

WHEREAS, the Metro Council approved the Dairy and McKay Creeks Confluence Target Area refinement plan for the 2006 Natural Areas Bond Measure in September of 2007 via Resolution No. 07-3855 ("Approving the Natural Areas Acquisition Refinement Plan for the Dairy and McKay Creeks Confluence Target Area") with Tier One objectives to "Protect important riparian and lowland areas around the confluence of Dairy and Council Creeks and Dairy and McKay Creeks including linkages to existing public lands" and to "Acquire lands along Council Creek to extend protection of the riparian area and to create a linkage between existing public lands," and a Tier Two objective to "Protect riparian and wetland areas along portions of Council, Dairy and McKay Creeks"; and

WHEREAS, the Property does not meet the objectives outlined in the 2006 Natural Areas Bond Measure's updated Dairy and McKay Creeks Confluence Target Area refinement plan, and it is not adjacent to or near any other Metro owned property; and

WHEREAS, conveyance of the Property to CWS with Metro holding a conservation easement will protect the Property in the future while allowing Metro to focus resources on actively managing other natural area properties in furtherance of the purposes of the 2006 Natural Areas Bond Measure; and therefore,

BE IT RESOLVED that the Metro Council finds that, for the reasons stated and as provided herein, the Property is no longer needed for public use by Metro and it is in the public interest to complete the above described conveyance of the Property to CWS, and therefore the Metro Council authorizes the Chief Operating Officer to:

- Convey the Property to CWS by deed substantially in the form attached as Exhibit B to 1. this Resolution, or as otherwise approved by the Office of Metro Attorney, including the requirement that the Property be used for public purposes for at least twenty years following the transfer;
- In exchange for the conveyance to CWS, obtain a conservation easement over the Property in substantially the form as Exhibit A, or as otherwise approved by the Office of Metro Attorney; and
- 3. Execute any other documents necessary to complete the proposed conveyance and acceptance of the conservation easement, as acceptable to the Office of Metro Attorney.

ADOPTED by the Metro Council this 17

Approved as to Form:

on Kean Campbell, Metro Attorney

AFTER RECORDING RETURN TO: Office of Metro Attorney 600 NE Grand Avenue Portland, OR 97232-2736

GRANTOR: Clean Water Services 2550 SW Hillsboro Highway Hillsboro, OR 97123

GRANTEE: Metro 600 NE Grand Avenue Portland, Oregon 97232-2736

CONSERVATION EASEMENT

	THIS CONSERVATION EASEMENT (the "Easement") is entered into this			
day of	, 2012, by and between Clean Water Services, a county service			
district organized under ORS Chapter 451 ("Grantor") and Metro, an Oregon municipal				
corpora	ation (" <u>Metro</u> ").			

RECITALS

- A. On May 16, 1995, the Metro area voters approved Ballot Measure 26-26 (the "Bond Measure"), which provided Metro with funds for the acquisition of natural areas from willing sellers. The Bond Measure was designed to provide Metro with the ability to protect the region's significant open spaces, fish and wildlife habitat, greenways, water quality, and lands near rivers and streams.
- B. With funds from the Bond Measure, Metro acquired real property approximately 62 acres in size located in the City of Hillsboro, County of Washington, State of Oregon, commonly known as 4490 SE Minter Bridge Road, and more particularly described on the attached Attachment 1 (the "Property").
- C. Due to the Property's isolation from natural areas that are the focus of Metro's acquisitions under the 2006 Natural Areas Bond Measure and also due to those factors set forth in Metro Council Resolution No. 12-4350, Metro conveyed the Property to Grantor, subject to Grantor's agreement to grant to Metro this Easement.
- D. In order to preserve the natural features of the Property that provide significant wildlife habitat values, to protect the Property as open space, and to enhance water quality, Grantor desires to grant to Metro, and Metro desires to accept from Grantor, a conservation easement over the Property.

For valuable consideration, the receipt of which is hereby acknowledged by Grantor, and the mutual covenants, terms, conditions, and restrictions contained herein, the parties hereby agree as follows:

AGREEMENT

- 1. Grant of Conservation Easement. Grantor hereby grants to Metro a perpetual, non-possessory conservation easement, in gross, on, over, under, and across the Property. This Easement is being created and acquired in accordance with ORS 271.715 to 271.795, and the provisions herein shall be construed and applied accordingly.
- **2. Purpose**. The purpose of this Easement is to allow certain uses as specified in Section 4 and to ensure that the Property will be retained forever predominantly in its natural condition for protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, educational or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property (as that phrase is used in ORS 271.715(1)) (collectively, the "Conservation Values").

3. Prohibited Uses; Grantor Obligations.

- (a) In order to protect and further the Conservation Values, Grantor shall be expressly prohibited from engaging in the following activities on the Property except as expressly permitted under Section 4 of this Easement:
 - i. <u>Water Rights</u>. Selling, exchanging, or otherwise transferring the water rights associated with the Property off the Property, except as permitted in Section 4.
 - ii. <u>Construction</u>. Except as permitted in Section 4, expanding the square footage of impermeable surfaces located on the Property as set forth in the Baseline Documentation (defined in Section 5, below), including any expansion of structures or parking areas, without Metro's prior written consent, which consent may be withheld in Metro's sole discretion unless the expansion is de minimus, in which event Metro's consent shall not be unreasonably withheld.
 - iii. <u>Moving Impervious Surfaces</u>. Move or relocate any impervious surfaces in a manner that may have an adverse impact on habitat on the Property.
 - iv. <u>Mitigation Bank</u>. Establishing a wetland or eco-system services mitigation bank on the Property whereby mitigation credits could be sold to third-parties except as permitted in Section 4.
 - v. <u>Dividing Property</u>. The partition, division, subdivision, or *de facto* division of the Property.
 - vi. <u>Use</u>. No undeveloped land on the Property may be converted to residential, commercial, timber, agricultural, or industrial use, except as permitted in Section 4.
 - vii. <u>Minerals</u>. Excavating, draining, dredging, mining, drilling, removing or exploring for or extracting minerals, oil, gas, coal, and other hydrocarbons, soils, sands, gravel, rocks or any other materials on or below the surface of the Property.
 - viii. <u>Altering Wetlands, Water</u>. The manipulation or alteration, diminution, or drainage of any natural water course, wetland, stream bank, riparian area, shoreline, or

- body of water on the Property, any activity that causes or is likely to cause significant pollution of any surface of subsurface waters, or any use or activity that causes or is likely to cause significant soil degradation or erosion, except as permitted in Section 4.
- ix. <u>Hazardous Wastes</u>. Placing, filling, storing, processing, disposing, dumping, depositing, abandoning, discharging, or releasing any gaseous, liquid, solid, or hazardous wastes, substances, materials, trash, or debris of whatever nature on, in, over, or under the ground or into the surface or ground water of the Property.
- x. <u>Invasive Species</u>. Introducing invasive species or planting any non-native plants except as permitted in Section 4 or except with Metro's prior written consent.
- xi. <u>Hunting</u>. The hunting or trapping of any birds or other game for sport.
- (b) In the Federal Emergency Management Agency (FEMA) 100-year flood plain portion of the Property, as set forth in the Baseline Documentation (defined in Section 5, below) (the "Lower Bench"), the long term goal is to maximize ecological benefits where practical and ensure farming practices are consistent with a Natural Resource Conservation Service (NRCS) approved conservation and farm plan (the "Conservation and Farm Plan"). Grantor shall prepare the Conservation and Farm Plan within six months of the date of this Easement. Grantor and NRCS may periodically modify the Conservation and Farm Plan with the prior written consent of Metro, not to be unreasonably withheld. All agricultural activities occurring on the Lower Bench shall use the Best Management Practices identified by the Conservation and Farm Plan. These include but are not limited to annual soil testing for nutrients, and establishing cover crops or maintenance of remnant cover crops from November 1 to April 1. By January 1, 2019, Grantor shall have completed riparian and floodplain restoration on the Lower Bench to convert a portion of the existing agricultural lands to native riparian forest for the benefit of water quality and wildlife habitat, to create a buffer of at least 135 feet and not more than 180 feet in depth, as measured from the edge of the Tualatin River, of approximately 8 acres in total. Grantor may perform additional restoration in the Lower Bench.
- (c) Grantor shall provide Metro with not less than thirty (30) days written notice prior to (i) applying for any grading, tree removal (except for any trees located in the existing Christmas tree farm), building, or construction permit, and (ii) undertaking any activity that could materially interfere with or impair the Conservation Values of the Property.

4. Grantor's Affirmative Rights.

- 4.1 <u>General</u>. Grantor reserves for itself and its successors and assigns, all rights accruing from ownership of the Property, including the right to engage in or permit or invite others to engage in any use of, or activity on, the Property that is not inconsistent with the terms of the Easement or otherwise prohibited by the Easement.
- 4.2 <u>Pesticides</u>. Pesticides may be used on the Property as deemed reasonably necessary by Grantor to preserve, protect or enhance the Conservation Values and must be handled in a manner consistent with Grantor's Integrated Pest Management Plan, as updated from time to time.
- 4.3 <u>Construction.</u> Grantor may construct an additional 3,200 square feet of wet propagation beds for nursery plant cultivation and an additional 3,002 square feet of

building footprint for its nursery operations, adjacent to the propagation beds or the buildings existing on the Property as set forth in the Baseline Documentation. The use of existing structures may change, consistent with laws, without contradicting the terms of this Easement.

- 4.4 <u>Agricultural Use</u>. Grantor may continue to use those portions of the Property identified as agricultural or forest lands in the Baseline Documentation for agricultural or forestry use and developed portions of the Property may be changed to agricultural or forestry use.
- 4.5 <u>In-Stream Water Rights</u>. Grantor may permanently or temporarily convert the water rights to "in-stream water rights" (as that phrase is used in ORS 537.332 to 537.360). Any proceeds in the sale or lease of water rights for in-stream uses shall be reinvested into wildlife or habitat restoration on the Property.
- 4.6 <u>Ecosystem Services</u>. Grantor may enter into and make use of in lieu fee and ecosystem services or arrangements that are managed by and for Grantor's benefit.
- 4.7 <u>Trail Construction</u>. Grantor may maintain, renovate, or replace existing trails as identified in the Baseline Documentation, and may expand or add trails with Grantee's prior written consent, provided that all such trails: (a) either serve the existing use of the Property, provide recreation to the public, or assist with fire protection, and (b) are located, designed, and constructed in a manner and with materials that prevent soil erosion and prevent damage to fragile plant communities and wildlife habitat.
- 4.8 <u>Dam.</u> Grantor may repair and retrofit the existing small earthen dam and reservoir as described in the Oregon Water Resources Department Water Right Application No. S-30496 and Permit No. S-24018 and perform any wetland and stream channel restoration to improve fish and wildlife habitat, and ecological functions as permitted by federal, state, and local regulations.
- 5. Baseline Documentation. The current condition of the Property is documented in an inventory of relevant features of the Property, dated _______, 2012, on file at the offices of Grantor (the "Baseline Documentation"). The parties agree that the Baseline Documentation provides an accurate representation and description of the Property at the time of this grant. The Baseline Documentation is intended to serve as an objective, although not exclusive, information baseline for monitoring compliance with the terms of this Easement. Metro shall have the right to access the Property at reasonable times for the purpose of monitoring compliance with the terms of this Easement. [METRO TO CREATE A BASELINE DOCUMENTATION]

6. Enforcement and Remedies.

(a) <u>Notice of Violation</u>. Metro shall have the right to prevent any use of or activity on, the Property that is inconsistent with the purpose and terms of this Easement. If Metro determines that Grantor, or third parties under Grantor's authority, are in violation of the terms of this Easement, Metro shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation. In the event that such violation involves injury to the Property resulting from any use or activity by Grantor inconsistent with the purpose and terms of this Easement, such notice shall demand that Grantor, at Grantor's sole cost and expense, restore the portion of the Property so injured to its prior condition in accordance with a plan

approved by Metro except for modifications or improvements allowed to be made by Grantor per Section 4.

- (b) <u>Failure to Cure</u>. If Grantor fails to cure a violation within 30 days after Grantor's receipt of notice thereof from Metro, or under circumstances where the violation cannot reasonably be cured within a 30-day period, fails to begin curing the violation within the 30-day period, Metro may bring an action at law or in equity to (i) enforce the terms of this Easement, (ii) enjoin the violation by a temporary, preliminary, and/or permanent injunction, (iii) recover any damages to which Metro may be entitled for such violation of the terms of this Easement, and (iv) require the restoration of the Property to the condition and appearance that existed prior to such violation.
- (c) <u>Emergency Enforcement</u>. If Metro reasonably determines that the circumstances require immediate action to prevent or mitigate significant damage to the Property, Metro may enter the Property to prevent or mitigate further damage to or alteration of the Property necessary to protect the Conservation Values or otherwise pursue its remedies under this Section 6 without prior notice to Grantor. Metro shall provide notice to Grantor of any actions taken pursuant to this Section within 24 hours of taking the action.
- (d) Nature of Remedies. Metro shall have available all legal and equitable remedies to enforce Grantor's obligations hereunder. Grantor agrees that Metro's remedies at law for any violation of the terms of this Easement are inadequate, and that Metro shall be entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which Metro may be entitled, including without limitation specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies when seeking specific performance. Metro's rights under this Section 6 shall be cumulative, in addition to all remedies now or hereafter existing at law or in equity, and apply equally in the event of either actual or threatened violations of the terms of this Easement. Grantor specifically acknowledges and agrees that the remedies set forth in this Section do not preclude exercise of the remedies set forth in the Bargain and Sale Deed for the Property, from Metro to Grantor, recorded in the official records of Washington County on _______, 2012, as recording number _______ (the "Bargain and Sale Deed").
- (e) <u>Costs of Enforcement</u>. Grantor shall reimburse Metro for any reasonable costs or expenses incurred by Metro in enforcing the terms of this Easement necessitated by Grantor's violation of the terms of this Easement including, without limitation, all reasonable court costs, attorney fees, expert witness fees, and costs of restoration mitigation. If Grantor prevails in any proceeding initiated by Metro to enforce the terms of the Easement, Metro shall reimburse Grantor for any reasonable costs or expenses incurred by Grantor including, without limitation, court costs, attorney fees and expert witness fees.
- (f) Metro's Discretion to Enforce. Enforcement of the terms of this Easement is at the discretion of Metro. Any forbearance by Metro to exercise its rights under this Easement in the event of any breach of any terms of this Easement by Grantor, its agents, employees, or contractors shall not be deemed or construed to be a waiver by Metro of such term under this Easement. No delay or omission by Metro in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.
- (g) <u>Waiver of Certain Defenses</u>. Grantor acknowledges that it has carefully reviewed this Easement and has had the opportunity to consult with and been advised by legal counsel

of its terms and requirements. In full knowledge of the provisions of this Easement, Grantor hereby waives any claim or defense it may have against Metro or its successors or assigns under or pertaining to this Easement based upon waiver, laches, estoppel, adverse possession, or prescription.

- (h) Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Metro to bring any action against Grantor to abate, correct, or restore any condition on the Property or to recover damages for any injury to, or change in, the Property resulting from (1) causes beyond Grantor's control including, without limitation, natural changes, fire, flood, storm or earth movement, acts of trespassers or the unauthorized acts of persons other than Grantor or Grantor's agents, employees or contractors, or (2) any reasonable and prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.
- (i) <u>Dispute Resolution</u>. If any dispute arising out of this Easement cannot be resolved by the Grantor and Grantee staff representatives, the matter will be referred to the staff representatives' respective supervisors for resolution. If the supervisors are unable to resolve the dispute within 30 days of referral, the matter will be referred to Grantor's General Manager and Grantee's Chief Operating Officer, who will attempt to resolve the issue. The parties agree to make a good faith effort to settle the dispute before resorting to arbitration, litigation, or some other dispute resolution procedure.

7. Liability and Indemnification.

- (a) <u>Liability</u>. The parties acknowledge and agree that because Grantor is the fee owner of the Property, except as specifically provided for under the Bargain and Sale Deed and subsection (b) below, the general liability for risks, damages, injuries, claims, or costs arising by virtue of Grantor's ownership and use of the Property shall remain with Grantor as a normal and customary incident of the right of Property ownership. Nothing in this Easement shall be construed as giving rise to any right or ability of Metro to exercise physical or manual control over the day-to-day operations of the Property, or to otherwise become an "owner" or "operator" of the Property within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, or ORS Chapters 465 and 466, as amended.
- (b) Indemnification. To the extent permitted by Article XI, Section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 to 30.300, Grantor shall indemnify, defend, and hold harmless Metro (and Metro's officers, employees and agents) from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Grantor (or Grantor's officers, employees and agents) on the Property except to the extent such damages are due to Metro's (or Metro's officers, employees and agents) negligence or willful misconduct, or to any breach of this Easement by Metro or Metro's officers, employees and agents. To the extent permitted by Article XI, Section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 to 30.300, Metro shall indemnify, defend, and hold harmless Grantor (and Grantor's officers, employees and agents) from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Metro (or Metro's officers, employees and agents) on the Property, except to the extent such damages are due to Grantor's (or Grantor's officers, employees and agents) negligence or willful misconduct, or to any breach of this Easement by Grantor or Grantor's officers, employees and agents.

- **8. Public Access**. Nothing in this Easement gives the general public a right to enter upon or use the Property where no right existed prior to the conveyance of the Easement.
- **9. Covenants Running With the Land**. The parties acknowledge and agree that the covenants and agreements set forth in this Easement are intended to bind Grantor, Metro, and their respective successors and assigns. The Property shall be held, conveyed, mortgaged, pledged as security for a debt, leased, used, and occupied subject to the covenants, conditions, restrictions, and other limitations set forth in this Easement (the "Restrictions"). All and each of the Restrictions are imposed as equitable servitudes upon the Property and every part thereof shall run with the land. Furthermore, all and each of the Restrictions shall be binding upon and burden, and shall inure to the benefit of, all persons having or acquiring any right, title, or interest to either the Property or the Property.
- **10. Amendment**. Grantor and Metro may mutually agree in writing to amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Metro under any applicable laws, including 26 U.S.C. § 170(h), as amended (or any successor provision(s) then applicable), and ORS 271.715-795. In no event shall the "economic hardship" of Grantor constitute a changed circumstance that would allow Grantor to unilaterally amend this Easement.
- 11. Assignment. This Easement is transferable by Metro, but Metro may only assign its rights and obligations hereunder to an organization that is a "qualified organization" at the time of the transfer under 26 U.S.C. § 170(h)(3) (or any successor provision then applicable) and authorized to acquire and hold conservation easements under ORS 271.715 to 271.795 (or any successor provisions then applicable). Metro shall notify Grantor in writing, at Grantor's last known address, in advance of such assignment. In the event that an assignee assumes the obligations of Metro hereunder, then Metro shall have no further liability with respect to this Easement.
- **12. Recording.** Grantor shall immediately record this instrument, and any amendment agreed to pursuant to Section 10, in the official records of the county within which the Property is located, and in any other appropriate jurisdictions, and Metro may re-record it at any time as may be required to preserve Metro's rights in this Easement.
- **13. Notice and Addresses**. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by mail, postage prepaid, to the address set forth below. Any party may change the address to which its notices are to be sent by duly giving notice pursuant to this Section.

To Grantor: Clean Water Services

Watershed Management Director 2550 SW Hillsboro Highway

Hillsboro, OR 97123

To Metro: Metro

Natural Areas Program Director

600 NE Grand Avenue Portland, OR 97232 With a copy to: Office of Metro Attorney

600 NE Grand Avenue Portland, OR 97232

14. General Provisions.

(a) <u>Governing Law</u>. The interpretation and performance of this Easement shall be governed by the laws of the State of Oregon.

- (b) <u>Liberal Construction and Conservation Intent</u>. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to accomplish the purpose of this Easement and the policy and purpose of ORS Chapter 271. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. Any ambiguities in this Easement shall be construed in a manner which best effectuates the Conservation Values for the Property.
- (c) <u>Changed Circumstances</u>. Grantor and Metro acknowledge that future conditions may change in the areas neighboring the Property, including without limitation, increased development, land use, and zoning changes. Grantor and Metro further acknowledge that such future conditions may result in various hardships to Grantor by virtue of the restrictions contained in this Easement, including without limitation, restrictions on the ability to develop the Property. However, Grantor and Metro expressly intend that this Easement continue in perpetuity regardless of the changed conditions and circumstances and regardless of hardship, whether the hardship is economic or otherwise. In no event shall the hardship of Grantor constitute a changed circumstance that would allow Grantor to unilaterally terminate this Easement.
- (d) <u>Severability</u>. If any provision of this Easement, or its application to any person, entity, or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected.
- (e) <u>Entire Agreement</u>. This instrument sets forth the entire agreement of the parties with respect to the Property and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Property, all of which are merged into this Easement. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section 10.
- (f) <u>Termination of Rights and Obligations</u>. A party's rights and obligations under this Easement terminate upon assignment of that party's interest in the Easement or transfer of the Property, except that liability for acts or omissions occurring prior to transfer shall survive assignment or transfer.

IN WI	TNESS WHEREOF, the parties have executed.	ed this Easement as of the date first set forth
METR	O, an Oregon municipal corporation	CLEAN WATER SERVICES
Ву:	Martha J. Bennett, Chief Operating Officer	By:
Count This in	of OREGON y of MULTNOMAH nstrument was acknowledged before me on _ nnett, as Chief Operating Officer of Metro.	, 2012 by Martha
Notar	/ Public - State of Oregon	
	of OREGON y of	
	nstrument was acknowledged before me on _ neral Manager of Clean Water Services.	, 2012 by Bill Gaffi,
Notar	/ Public - State of Oregon	

Attachment 1

Property Description

PARCEL 1: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Northwest corner of that tract of land conveyed to Victor and Cora Madsen, husband and wife, in Washington County Deed Records Book 344 page 239; thence South 0° 06' West 740 feet on the West line of said Madsen Tract, to the point of beginning; thence continuing South 0° 06' West on said West line, 250 feet to a point; thence South 89° 54' East, 115 feet to a point; thence parallel to the West line of said Madsen Tract, North 0° 06' East, 250 feet to a point; thence North 89° 54' West, 115 feet to the point of beginning.

PARCEL 2: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Northwest corner of that tract of land conveyed to Roger Madsen, et ux, by deed recorded November 21, 1978 as Recorder's Fee No. 78051115, said beginning point lies in the center of Minter Bridge Road and bears South 65° 12' West 582.8 feet from the Southeast corner of the George Sigler Donation Land Claim No. 42; thence South 0° 06' East 1433.0 feet along the West line of said Madsen tract to the Southwesterly corner thereof; thence South 61° 34' East 583.2 feet along the Southerly line of said Madsen tract to an iron rod; thence South 73° 34' East 246.0 feet along said Southerly line of Madsen tract to a point lying in the center of the Tualatin River, said point also being the Southeast corner of that tract of land conveyed to Anton Nussbaumer, et ux, by Deed recorded in Book 286 page 814; thence following up the center of said Tualatin River with all the meanderings thereof 2500 feet, more or less, to a point in the center of said river and the East line of a tract conveyed to W.G. Hare on March 15, 1939 in Book 179 page 157, Deed Records; thence North 1268.0 feet, more or less, along the Hare East line to a point in the center of the Minter Bridge Road (County Road No. 1174); thence along the center of said Minter Bridge Road North 88° 12' East 197.0 feet to an iron at angle in said road; thence along center of said road North 62° 12' East 400.3 feet, more or less, to the point of beginning.

PARCEL 3: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Southeast corner of the George Sigler Donation Land Claim No. 42, in said Section 18, and running thence South 89° 48' East, 220.5 feet to a steel shaft at the Northeast corner of Tract No. 2 of the lands conveyed to Anton and Bertha Nussbaumer, by Deed recorded on page 814 of Book 286, Washington County, Oregon, Deed Records; thence along the East line of the Nussbaumer Tract, South 0° 06' West, 2024.0 feet to the Southeast corner thereof in the center of the Tualatin River, from which point an iron rod bears North 0° 06' East, 94.7 feet; thence North 73° 34' West 246.0 feet to an iron rod; thence following a line of fence, North 61° 34' West, 583.2 feet to an iron rod; thence North 0° 06' East, 1433.0 feet to a point in the center of the Minter Bridge Road, from which point an iron rod bears South 0° 06' West, 27.6 feet; thence in the center of the Minter Bridge Road, North 65° 12' East 582.8 feet to the place of beginning.

EXCEPTING HOWEVER, that certain property heretofore conveyed to Roger Madsen and Gail Madsen, by deed, recorded in Book 716 page 446, September 23, 1968, described more particularly as follows:

A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Northwest corner of that tract of land conveyed to Victor and Cora Madsen, husband and wife, in Washington County Deed Records Book 344 page 239; thence South 0° 06' West 740 feet on the West line of said Madsen Tract, to the point of beginning; thence continuing South 0° 06' West on said West line, 250 feet to a point; thence South 89° 54' East, 115 feet to a point; thence parallel to the West line of said Madsen Tract, North 0° 06' East, 250 feet to a point; thence North 89° 54' West, 115 feet to the point of beginning.

ALSO EXCEPTING the following described tract, to-wit:

A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Southeast corner of George Sigler Donation Land Claim No. 42; thence South 89° 48' East, 220.5 feet to a point; thence North 0° 06' East 102.74 feet to the center of Minter Bridge Road; thence South 65° 12' West, along said center line, 243.1 feet to the place of beginning, and the following described tract:

Beginning at the Southeast corner of George Sigler Donation Land Claim No. 42; thence South 89° 48' East, 220.5 feet to a point; thence South 0° 06' West, 250 feet; thence North 89° 58' West, 220.5 feet; thence North 0° 06' East, 250 feet to the point of beginning.

AFTER RECORDING RETURN TO AND SEND ALL TAX STATEMENTS TO: Clean Water Services 2550 SW Hillsboro Highway Hillsboro, OR 97123

BARGAIN AND SALE DEED

Metro, a municipal corporation ("<u>Grantor</u>"), under the authority granted by ORS 271.330(1), hereby conveys to Clean Water Services, a county service district of the State of Oregon ("<u>Grantee</u>"), the real property described on the attached <u>Addendum 1</u> (the "<u>Property</u>") but if Grantee fails to use the Property for a public purpose within the first twenty (20) years following the date of this deed, then Grantor, or its successors or assigns, may enter and terminate this estate as provided below.

Grantor may send a notice of default to Grantee on or prior to the expiration of the twenty (20) year period following the date of this deed, and if use of the Property for a public purpose does not resume within thirty (30) days following such notice, then Grantor may reenter and terminate this estate. If the condition subsequent and right of reentry set forth herein is declared invalid or unenforceable, then the restriction shall be construed as a covenant running with the land, enforceable by Grantor and its successors and assigns through specific performance and any other available remedy.

Grantee specifically acknowledges and agrees, as evidenced by acceptance and recordation of this deed, that the Property is being conveyed in an "AS IS" condition and "WITH ALL FAULTS" as of the date hereof. No statements, representations or warranties have been made or are made and no responsibility has been or is assumed by Grantor, or any representative acting or purporting to act on behalf of Grantor, as to any matters concerning, or that might in any manner affect, the Property, including but not limited to the condition or repair of the Property. Grantee further acknowledges and agrees that Grantee is solely responsible for ensuring that its use of the Property complies with all applicable laws and regulations, and that Grantor has made no representation or warranty that the use of the Property as of the date of this deed complies with current zoning or other applicable law.

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930 IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301, AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007,

SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

The true and actual consideration for the received.	s conveyance is other consideration or value
Dated:, 2012.	
	METRO, a municipal corporation
	By: Martha J. Bennett, Chief Operating Officer
State of Oregon County of Multnomah	
This instrument was acknowledged before me of Martha J. Bennett, as Chief Executive Officer of	n, 2012 by f Metro, a municipal corporation.
Notary Public - State of Oregon	

This conveyance is approved as to form and content and accepted by Clean Water Services, a special county district of the State of Oregon, as of the date of the conveyance.

Clean Water Services	
By:	
Name:	
Title:	
State of Oregon County of Washington	
This instrument was acknowledged before me on, as	, 2012 by of Clean Water
Services.	
Notary Public - State of Oregon	

Addendum 1

The Property

PARCEL 1: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Northwest corner of that tract of land conveyed to Victor and Cora Madsen, husband and wife, in Washington County Deed Records Book 344 page 239; thence South 0°06' West 740 feet on the West line of said Madsen Tract, to the point of beginning; thence continuing South 0°06' West on said West line, 250 feet to a point; thence South 89°54' East, 115 feet to a point; thence parallel to the West line of said Madsen Tract, North 0°06' East, 250 feet to a point; thence North 89°54' West, 115 feet to the point of beginning.

PARCEL 2: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Northwest corner of that tract of land conveyed to Roger Madsen, et ux, by deed recorded November 21, 1978 as Recorder's Fee No. 78051115, said beginning point lies in the center of Minter Bridge Road and bears South 65° 12' West 582.8 feet from the Southeast corner of the George Sigler Donation Land Claim No. 42; thence South 0° 06' East 1433.0 feet along the West line of said Madsen tract to the Southwesterly corner thereof; thence South 61° 34' East 583.2 feet along the Southerly line of said Madsen tract to an iron rod; thence South 73° 34' East 246.0 feet along said Southerly line of Madsen tract to a point lying in the center of the Tualatin River, said point also being the Southeast corner of that tract of land conveyed to Anton Nussbaumer, et ux, by Deed recorded in Book 286 page 814; thence following up the center of said Tualatin River with all the meanderings thereof 2500 feet, more or less, to a point in the center of said river and the East line of a tract conveyed to W.G. Hare on March 15, 1939 in Book 179 page 157, Deed Records; thence North 1268.0 feet, more or less, along the Hare East line to a point in the center of the Minter Bridge Road (County Road No. 1174); thence along the center of said Minter Bridge Road North 88° 12' East 197.0 feet to an iron at angle in said road; thence along center of said road North 62° 12' East 400.3 feet, more or less, to the point of beginning.

PARCEL 3: A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Southeast corner of the George Sigler Donation Land Claim No. 42, in said Section 18, and running thence South 89° 48' East, 220.5 feet to a steel shaft at the Northeast corner of Tract No. 2 of the lands conveyed to Anton and Bertha Nussbaumer, by Deed recorded on page 814 of Book 286, Washington County, Oregon, Deed Records; thence along the East line of the Nussbaumer Tract, South 0° 06' West, 2024.0 feet to the Southeast corner thereof in the center of the Tualatin River, from which point an iron rod bears North 0° 06' East, 94.7 feet; thence North 73° 34' West 246.0 feet to an iron rod; thence following a line of fence, North 61° 34' West, 583.2 feet to an iron rod; thence North 0° 06' East, 1433.0 feet to a point in the center of the Minter Bridge Road, from which point an iron rod bears South 0° 06' West, 27.6 feet; thence in the center of the Minter Bridge Road, North 65° 12' East 582.8 feet to the place of beginning.

EXCEPTING HOWEVER, that certain property heretofore conveyed to Roger Madsen and Gail Madsen, by deed, recorded in Book 716 page 446, September 23, 1968, described more particularly as follows:

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Beginning at the Northwest corner of that tract of land conveyed to Victor and Cora Madsen, husband and wife, in Washington County Deed Records Book 344 page 239; thence South 0° 06' West 740 feet on the West line of said Madsen Tract, to the point of beginning; thence continuing South 0° 06' West on said West line, 250 feet to a point; thence South 89° 54' East, 115 feet to a point; thence parallel to the West line of said Madsen Tract, North 0° 06' East, 250 feet to a point; thence North 89° 54' West, 115 feet to the point of beginning.

ALSO EXCEPTING the following described tract, to-wit:

A tract of land in Section 18, Township 1 South, Range 2 West of the Willamette Meridian, in the County of Washington and State of Oregon, described as follows:

Beginning at the Southeast corner of George Sigler Donation Land Claim No. 42; thence South 89° 48' East, 220.5 feet to a point; thence North 0° 06' East 102.74 feet to the center of Minter Bridge Road; thence South 65° 12' West, along said center line, 243.1 feet to the place of beginning, and the following described tract:

Beginning at the Southeast corner of George Sigler Donation Land Claim No. 42; thence South 89° 48' East, 220.5 feet to a point; thence South 0° 06' West, 250 feet; thence North 89° 58' West, 220.5 feet; thence North 0° 06' East, 250 feet to the point of beginning.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 12-4350 FOR THE PURPOSE OF AUTHORIZING THE CHIEF OPERATING OFFICER TO CONVEY CERTAIN REAL PROPERTY IN THE DAIRY AND MCKAY CREEKS CONFLUENCE TARGET AREA SUBJECT TO A CONSERVATION EASEMENT

Date: May 17, 2012 Prepared by: Kathleen Brennan-Hunter

(503) 797-1948

BACKGROUND

Resolution No. 12-4350 requests authorization for the Chief Operating Officer to convey to Clean Water Services ("CWS") certain real property, described in Attachment 1 to Exhibit A to the resolution (the "Property"), purchased by Metro with 1995 Open Spaces Bond Measure (the "1995 Bond Measure") proceeds.

In November 2000, Metro purchased the Property specifically at the request of Jackson Bottom Wetland Preserve ("JBWP") as it was included in the boundaries of the Jackson Bottom Concept Master Plan. JBWP has managed the Property since that time. This arrangement was approved by Metro Council in Resolution 00-3004, dated November 16, 2000, which included a Natural Area Management Agreement that authorized JBWP to manage the Property "for the primary purpose of natural area, open space and floodplain, and wildlife habitat." JBWP also manages, in conjunction with the City of Hillsboro, the nearby 725-acre Jackson Bottom Wetlands Preserve for the purpose of water quality enhancement, education programs, and habitat restoration. JBWP is an Oregon registered nonprofit corporation that is located adjacent to the CWS administrative offices at 2600 SW Hillsboro Highway. CWS is an agency partner with JBWP.

The Property contains 62-acres of farmland, including approximately 2,500 feet of Tualatin River frontage, a residence, and two outbuildings. It is located one mile south of Hillsboro at 4490 SE Minter Bridge Road. While JBWP is responsible for the day to day management of the Property, Metro is still obligated to pay for capital expenses, such as major repairs to the buildings, pumps, and pond irrigation.

CWS is a water resources management utility in the Tualatin River Watershed that operates a unified public sanitary sewer and surface water management system in urban Washington County. CWS's overarching goal is to keep the Tualatin River and its tributaries clean and safe for people, fish and wildlife. In addition to operating its sewer and surface water management systems, CWS improves the health to the Tualatin River through watershed restoration such as stream enhancement with native plants, fish habitat protection, and flood management projects to name a few. CWS intends to use the Property in part for its Stream Operation center to cultivate native plants for its watershed restoration work. It will also continue to manage the property in conjunction with JBWP.

Title will be conveyed to the CWS, and Metro will retain a conservation easement (the "Easement") over the entire property. In general terms, a conservation easement is a legal agreement between a landowner and a qualified conservation agency (e.g. Metro) that protects the property to promote conservation goals. Conservation easements are authorized by state law under ORS 271.715 et seq. The proposed Easement ensures the Property will be maintained forever predominantly in its natural condition and includes specific prohibitions and allowable uses that are consistent with uses allowed under the 1995 bond measure. For example, the Easement specifically prohibits subdivision, mineral extraction, increasing impervious surfaces, and additional construction except for the limited right of CWS to moderately expand its native plant nursery operations and to retrofit an existing earthen irrigation pond. The Easement allows agriculture to continue in the upland fields outside the 100-year floodplain. Within the

100-year floodplain, the long term goal is to maximize ecological benefits where practical and ensure that any continued farming practices are consistent with a federal agency approved conservation farm plan. CWS is also required to restore up to eight acres of riparian forest and floodplain.

Oregon Revised Statute 271.330(1) authorizes any political subdivision to convey real property not needed for public use to any governmental body, provided such property issued for not less than 20 years for a public purpose by the governmental body in the State of Oregon. This requirement will be memorialized in a deed restriction that runs with the land and remains on title. Moreover, title to the Property would revert back to Metro if the Property is used not used in conformance with the deed restriction. Metro Code section 2.04.026(a)(2) requires that the Chief Operating Officer obtain approval from the Metro Council prior to transferring any real property owned by Metro.

Transfer of the Property allows Metro to deploy land management and operations staff more efficiently while ensuring the habitat values protected with 1995 bond proceeds stay intact.

ANALYSIS/INFORMATION

1. Known Opposition

None.

2. Legal Antecedents

ORS 271.330(1) states in relevant part:

Any political subdivision is granted express power to relinquish the title to any of its property not needed for public use to any governmental body, providing such property shall be used for not less than 20 years for a public purpose by the governmental body in the State of Oregon.

Metro Code section 2.04.026(a)(2) requires that the Chief Operating Office obtain the authorization of the Metro Council prior to transferring title of real property owned by Metro.

The tax-exempt status of the bonds sold to finance the purchase of the Property imposes some limitations and requirements on whether and how the Property may be transferred. Staff has consulted with the Office of Metro Attorney, which has consulted with Metro's bond counsel regarding this issue. The sale of the property will be in compliance with the advice of the Metro Attorney and bond counsel to ensure that the tax-exempt status of the bonds is maintained.

ORS 271.715(1), State of Oregon authorization for creation of conservation easements.

3. Anticipated Effects

Title to the Property will transfer to CWS with the legally required deed restriction that protects the Property. Metro will hold a conservation easement on the Property.

4. Budget Impacts

The transfer of the Property will relieve Metro of capital expenses for the residence, well pumps, and irrigation system. Other than recording costs and baseline documentation of the Property for the Conservation Easement, Metro will not bear any out-of-pocket costs for this transfer.

RECOMMENDED ACTION

The Chief Operating Officer recommends passage of Resolution No. 12-4350.