

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ENTERING INTO AN) RESOLUTION NO. 04-3470
AGREEMENT WITH OREGON WILDLIFE)
HERITAGE FOUNDATION AND PORTLAND)
GENERAL ELECTRIC (PGE) FOR FISH) Introduced by Chief Operating Officer
HABITAT RESTORATION ON METRO OPEN) Michael J. Jordan with the concurrence of
SPACE PROPERTY) Council President David Bragdon

WHEREAS, Metro owns and manages 174 acres of land adjacent to the Clackamas River and Bakers Ferry Road in Clackamas County that was purchased July 18, 2001 from Anthony Parsons; and

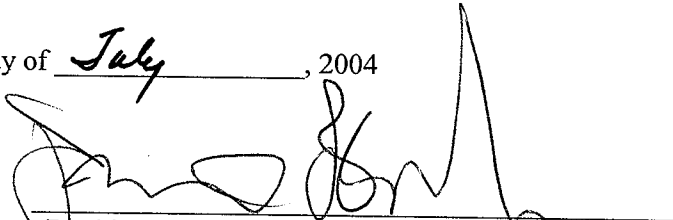
WHEREAS, Oregon Wildlife Heritage Foundation and Portland General Electric (PGE) will fund 100% cost of a fish enhancement project on the subject property that will benefit wildlife and water quality; and

WHEREAS, an agreement is necessary to secure and protect the interests of all parties; and

WHEREAS, a condition of the agreement conveys a real property interest and will be recorded as a restrictive covenant on the property when the agreement is signed. That is, Metro will ensure for 30 years that lands and waters on which habitat is restored are managed and maintained for the purpose for which they were intended; now therefore

BE IT RESOLVED that the Metro Council authorizes the Chief Operating Officer to enter into an agreement with Oregon Wildlife Heritage Foundation and PGE for the restoration of fish habitat on Metro property in substantially the form set forth in Exhibit "A", or in a form approved by the Office of Metro Attorney.

ADOPTED by the Metro Council this 8th day of July, 2004


David Bragdon, Council President

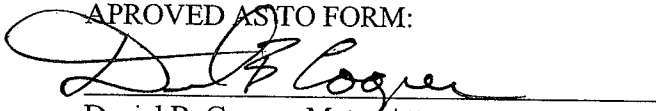
APPROVED AS TO FORM:

Daniel B. Cooper, Metro Attorney



Exhibit A
RESOLUTION NO. 04-3470

**DRAFT METRO-OWHF-PGE
SITE SPECIFIC AGREEMENT**

Project Name: CLACKAMAS RIVER OFF CHANNEL RESTORATION PROJECT

Project Number: _____

This Site Specific Agreement ("Agreement") is effective as of the 30th day of June, 2004, between *OREGON WILDLIFE HERITAGE FOUNDATION*, an Oregon non-profit, public benefit corporation (hereinafter referred to as "OWHF"), *PORTLAND GENERAL ELECTRIC COMPANY*, an Oregon Corporation (hereinafter referred to as "PGE"), and METRO, a municipal corporation (hereinafter referred to as "Metro").

1. *Purpose.* OWHF, PGE, and Metro have entered into this Agreement to help facilitate the development, restoration, and rehabilitation of certain Metro-owned properties, which are also known as the Parsons, Hooten, and River Island properties (all of these properties are collectively referred to hereinafter as "Site"). The legal description of the Site is attached hereto as Exhibit "A" and incorporated herein. The work done on the Site is referred to as the Clackamas River Off Channel Restoration Project (hereafter referred to as "Project" or "CROCR Project"). The overall goal and purpose of the Project is habitat protection and water flow and quality. The Project design and performance specifications/standards are attached hereto as Exhibit "B" and incorporated herein ("Design and Performance Standards"). This Project is funded pursuant to that certain Commitment for Funding dated December, 2003 (hereinafter referred to as "Grant") by and between OWHF and PGE, and with the \$_____ provided by OWHF. The purpose of the Grant is to protect, restore, and enhance two riparian Salmon habitats and improvement of the tributaries along the Clackamas River, namely this CROCR Project and another potential project, called the Clear Creek Restoration Project ("CCR Project"). The CROCR Project and the CCR Project have been identified by Metro, PGE, and the OWHF as being of great importance in any effort to maintain the Salmon habitats on the Clackamas River. The Grant is attached as Exhibit "C" hereto and is incorporated into this Agreement by this reference. The CCR Project will be the subject of a separate agreement and is not covered by this Agreement.

1.1 Prior to the execution of this Agreement, OWHF, Metro, and PGE shall agree upon the design and performance specifications/standards for the Project. OWHF will have the direct administrative, management and supervisory obligations and shall be the party that contracts with the prime construction contractor ("Contractor"), which the parties anticipate will be Interfluv _____. The Construction Contract is attached hereto as Exhibit D. Metro and OWHF shall be designated as third party beneficiaries of the Construction Contract and will provide input and advice to OWHF regarding that contract. Neither Metro nor PGE will be liable for any obligation of OWHF.

2. *Scope of the Agreement.* In consideration of the above and the terms and conditions listed below, OWHF, PGE, and Metro agree to undertake the Project on the Site as follows:

2.1 OWHF agrees to:

(1) Provide funding in cash or in-kind services as set forth in the Grant or One Hundred Percent (100%) of the total Project cost, whichever is less, for the funding of all of OWHF's obligations under this Section 2.1. In-kind services completed by OWHF may include: biological planning, survey, design, construction management and the like.

(2) Serve as Grantee of the Grant, make application for reimbursement under the Grant, and receive Grant funds in an amount sufficient to satisfy OWHF's funding obligation in Section 2.1 of this Agreement. OWHF shall also serve as administrator of the Grant, making any reimbursements to third parties or Metro as allowed under the Grant. OWHF shall be responsible for satisfying and ensuring compliance with all terms and conditions of the Grant.

(3) Subject to adequate funding, be responsible for: obtaining all required permits, the preparation of the Site for the Project activities, and any hiring of contractors for the development of the Site.

(4) Construct, or cause to be constructed, the Project, subject to the terms and conditions of this Agreement, in substantial compliance with the Site Development plans and specifications set forth in Exhibit "B" and developed pursuant to Section 2.1(6) of this Agreement.

(5) Obtain indemnification, in a form satisfactory to Metro, from the Contractor for the Project; and also designate Metro as an additional insured on all insurance policies on or affecting the Project, except for damages caused in whole or in part by Metro's negligence, or as otherwise excepted by law.

(5) Commence the construction of the Project on or about July 15, 2004. Should construction of the Project not commence during July, 2004 for reasons beyond the control of the parties including, but not limited to, the failure to timely obtain required permits, agreements, leases, approvals, and access rights necessary for the development of the Project, the parties will commence the construction of the Project as soon thereafter as possible in a mutually acceptable future month. The parties recognize the construction of the Project cannot be accomplished unless all required permits are granted.

(6) Obtain the topographical, soils, and hydrological data required to properly design the Project; prepare Site development plans and specifications for the Project; and submit same to Metro and PGE for review and mutual approval.

(7) Prepare all Project bid specifications, review, accept or reject all contract bids, and be solely responsible for making any contract changes, additions, or deletions as the work progresses. The prime Contractor shall be required to provide performance and payment bonds and carry casualty and liability insurance indemnifying Metro and naming Metro and PGE each as additional insureds. The contracts shall provide that the Contractor acknowledges that neither Metro nor PGE is a party and that Contractor or its subs will not assert any claims against Metro or PGE in any disputes with subcontractors, material men, or OWHF.

(8) Provide Project alignment and grade staking, and construction management services.

(9) During construction and for five (5) years after construction is completed, maintain the Site improvements at OWHF's sole cost, in accordance with the management plan and the Design and Performance Standards. During said five (5) year post-construction maintenance period, OWHF shall also prepare and submit to Metro and PGE an annual report promptly following the end of each of the first five years of the Project confirming both the status and success of the Project based primarily upon physical characteristics and objective standards (e.g., stability of vegetation, water flow and quality, ability to withstand high water events, and the like).

(10) OWHF shall contractually require the Contractor to construct the Project such that the stability of the channel will be maintained to _____ level and that the Contractor will be liable to OWHF, and to Metro and PGE as designated and intended third party beneficiaries of the Construction Contract for any failure to meet such standard or any other contract requirement.

(11) OWHF shall contractually require the Contractor to indemnify, defend, and hold

OWHF, Metro and PGE each harmless from and against any failure on the part of the Contractor to comply with the terms of the Construction Contract and, in addition, any activity of the Contractor or Contractor's subcontractors. Such indemnification, however, shall not indemnify PGE for PGE's own negligence nor Metro for Metro's own negligence.

(12) OWHF shall contractually require the Contractor to obtain such performance/completion bonds as deemed appropriate by PGE and Metro, and, in addition, to secure and maintain sufficient insurance listing OWHF, Metro and PGE each as additional insureds, to cover any claim or liability that may result from any obligation of the Contractor pursuant to or in any way associated with the Construction Contract.

(13) OWHF shall contractually require the Contractor stabilize the channel (both ascetically and from a hydro-geological standpoint) should the Project be terminated prior to its completion.

(14) Indemnify, defend and hold Metro and PGE each harmless for, from and against any and all claims, demands, damages, losses, liens, judgments, penalties, expenses (including reasonable attorneys and consultants fees), and/or liabilities and which, in whole or in part, directly or indirectly, arise out of or relate to injury to any person or loss of or damage to property which occurs on the Site or on any other property or which arises out of OWHF's or its contractors', employees', or agents' negligent actions or willful misconduct taken in relation to this Agreement or with respect to the Project or the Site.

2.2 Metro agrees to:

(1) Provide to OWHF, and its officers, employees, agents, and the like, all reasonable assistance and cooperation necessary for the implementation of this Agreement, and to provide access rights over Metro's properties to enable OWHF to perform the actions set forth in this Agreement.

(2) In conjunction with OWHF, routinely inspect the Site when any construction is in progress, and keep OWHF advised of any desired changes, additions, or deletions to the Project construction.

(3) Provide OWHF with all information requested by OWHF that is necessary to meet OWHF's obligations under the Grant within the time period reasonably specified by OWHF in the request for information.

(4) Release OWHF from all responsibility and liability for any construction delays to the extent caused by Metro.

(5) After the five (5) –year post-construction period, ensure that any lands and waters on which habitat is restored, enhanced and/or created by this Project are managed and maintained for the purpose for which they were intended in the Grant, to the extent such management and maintenance is budgeted for in the yearly budgets passed by the Metro Council. After the five (5)-year post-construction period, Metro shall provide routine inspection and operation, rehabilitation and maintenance necessary to maintain the continuing viability and function of the Project as intended in the Grant throughout the term of this Agreement, to the extent such management and maintenance is budgeted for in the yearly budgets passed by the Metro Council.

(6) After the five (5) –year post-construction period, be responsible for all costs associated with the operation and maintenance of the Site, to the extent such operation and maintenance is budgeted for in the yearly budgets passed by the Metro Council. Within 30 days after satisfactory completion of construction of the Project, Metro shall record a restrictive covenant against the Property in a form and content mutually agreed upon by Metro, OWHF and PGE, in substantially the form set forth in Exhibit E, ensuring that Metro shall use the Property in accordance with the purposes set forth in the 1995 Open Spaces, Parks and Streams Bond Measure 26-26 and shall not change the use of the subject property during the 30-year Term of this Agreement.

(7) Work with OWHF and PGE to develop a cooperative site-inspection schedule for

OWHF's and PGE's inspection of the Site. The purpose of Site inspections is to ensure that such habitat is managed for the purpose intended in this Agreement and the Grant. During Site inspections, OWHF and PGE may also assess the impact of habitat management practices on the immediate watershed of such Site.

(9) Inform OWHF of any actions or inactions by any party to this Agreement which will change the required delivery or completion times stated in the Agreement.

(10) Not undertake or allow any activity on the subject property during the first five (5) years of the Project which will interfere with or frustrate the activities and objectives of OWHF.

(12) Submit to OWHF any request for reimbursement in a form and content to be mutually agreed upon by the parties.

(13) Conduct a final inspection of the Site prior to accepting any completed Project developments. In the event the parties are unable to agree as to the acceptability of the completed Project developments, they shall follow the dispute resolution provisions set forth below.

(14) That Metro, OWHF and PGE may each publish, reproduce, and use all technical data developed as a result of this Agreement in any manner and for any purpose without limitation and may authorize others to do the same.

(15)

In the event that it has been determined by a majority of the three parties that site conditions after the initial 5-year post-construction period are not meeting the performance standards as described in Exhibit "___" hereto, due to the Contractor's or its subcontractors' failure to properly perform its duties, Metro will allow OWHF, PGE, and/or their contractors to correct such conditions as are necessary to bring the Project in compliance with the performance standards. The need for such corrective activities and the corrective plans shall be approved by a majority of the three (3) parties prior to the work being performed. All permits and costs associated with the corrective action shall be the responsibility of the Contractor in accordance with the Construction Contract.

2.3 PGE agrees to:

- (1) Act as Grantor to the Grant attached hereto as Exhibit "C" and comply with all provisions set forth in the Grant.
- (2) Fund the Project in accordance with the Construction Contract and the specifications set forth in that Contract. PGE has contributed Five Hundred Thousand Dollars (\$500,000.00) to date with respect to the DROCR Project and may contribute such additional sums as PGE deems appropriate.

2.4 OWHF, PGE, and Metro each agree:

- (1) That the Project will be completed in accordance with the this Agreement, the Grant as set forth in Exhibit "C", the Proposal as set forth in Exhibit "B", and the Construction Contract as set forth in Exhibit "D" hereto. Completion of the construction is scheduled for the 31st day of December, 2009.
- (2) That all Project objectives will be implemented in a timely manner.
- (3) To promptly inform the other parties in writing if, for any reason, problems arise during the course of the Project that may slow or stop progress of the Project.
- (4) To show the Project to potential bidders as deemed necessary and hold a pre-construction conference with the successful bidder prior to the commencement of Project construction.
- (5) To acknowledge the contribution of each party in any oral or written communications related to the Project, including signs, demonstrations, promotional materials, advertisements, publications or exhibits prepared by either party referencing this Project. OWHF will provide mutually acceptable Project signs, and Metro will erect and maintain these

signs along roads, entrances, and/or convenient viewing locations on the Site in close proximity to the Project.

(6) To recognize outside contributors who might provide significant funding to help underwrite costs of the Project or who otherwise are mutually deemed to deserve special recognition. This recognition can include signs, plaques, and/or carins on the Project site. The principal costs of such recognition shall be borne by the party initiating the recognition.

(7) To mutually consider the possibility of funding any extraordinary Project repairs that might be required.

(8) Although Contract implementation is the responsibility of OWHF, the Site will remain under the jurisdiction of Metro and Metro will be solely responsible for the Site's administration and management regarding non-Project issues.

(9) A. OWHF appoints Rod Brobeck, as its Project Officer.

B. Metro appoints Jim Morgan, as its Project Officer.

C. PGE appoints John Esler, as its Project Officer.

The parties may change their respective Project Officer at any time by providing the other party with the name of their new Project Officer in writing.

(10) This Agreement is contingent upon the Grant and should the Grant be terminated pursuant to its terms, both OWHF and Metro shall be excused from performance under this Agreement and this Agreement shall automatically terminate upon the termination date of the Grant. Notwithstanding the foregoing, however, if the Grant is terminated prior to completion, OWHF will ensure that the Site is returned to its original condition, and at the request of Metro all improvements, equipment, and other items shall be removed.

(11) The parties recognize that it is in the best interests of all parties to seek contributions/donations from third parties and each party is encouraged to seek contributions/donations. Notwithstanding the foregoing, any third party contributions/donations and/or recognition will require the prior written agreement of Metro, PGE, and OWHF, which shall not be unreasonably withheld, conditioned, or delayed.

(12) The parties shall cooperate in satisfying the concerns, complaints, and actions (if any) of downstream landowners. Notwithstanding the foregoing, however, OWHF and its contractors shall indemnify Metro as set forth in section 2.1(14) above from any downstream landowners' claims, demands, damages, losses, liens, judgments, penalties, expenses (including reasonable attorneys and consultants fees), and/or liabilities which, in whole or in part, directly or indirectly, arise out of or relate to OWHF's or its contractors', employees', or agents' negligent actions or willful misconduct taken in relation to this Agreement or with respect to the Project or the Site, .

(13) That PGE shall be entitled to seek Mitigation Credits, both formal and informal, based upon PGE's participation in and funding of this Project.

3. *Term and Modifications.* This Agreement shall become effective as of the date and year first above written, and shall thereafter continue in force for a period of thirty (30) years. Further, this Agreement may be modified only by the mutual prior written agreement of Metro, PGE, and OWHF.

4. *Miscellaneous Provisions.*

4.1 *No Agency, Joint Venture or Partnership.* The parties agree and acknowledge that this Agreement does not create any agency, joint venturer or partner relationship between them. No party is authorized to enter into any agreements or undertakings for or on behalf of the others or to hold themselves out as agents or representatives of the others.

4.2 *Dispute Resolution.* The parties agree that should disagreement arise over the meaning or interpretation of any provision of this Agreement, the parties shall submit said dispute to mediation in Portland, Oregon, prior to filing suit to enforce the terms of this Agreement.

4.3 *Capacity to Obligate.* The parties hereby warrant that, subject to Metro Council

approval for Metro's participation, they each have the capacity and corporate authority to obligate and bind their respective corporations and are acting with full and complete knowledge of their respective corporations in signing this Agreement.

4.4 *Counterparts.* This Agreement may be executed in counterparts, each of which shall be an original and all of which, when taken together, shall constitute one and the same agreement.

4.5 *Waiver.* Failure of any party at any time to require performance of any provisions of this Agreement shall not limit the right of such party to enforce the provision, nor shall any waiver by such party of any breach of any provision be a waiver of any succeeding breach of that provision, or a waiver of that provision itself, or any other provisions, including this anti-waiver provision.

4.6 *Interpretation.* This Agreement and the rights and obligations of each of the parties hereunder shall be governed and construed in accordance with the laws of the State of Oregon. In the event any action is brought to enforce this Agreement venue shall be in Multnomah County, Oregon, and each party hereby irrevocably consents to the jurisdiction of the Oregon state courts. This Agreement has been submitted to the scrutiny of all parties hereto and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or such party's counsel. It is not the intent of the parties hereto to violate any applicable laws. If for any reason any non-material provision of this Agreement does violate any such laws or is not fully enforceable in accordance with the terms and provisions hereof, this Agreement shall nevertheless be limited or construed to comply with such laws and shall be enforced to the fullest extent permitted by such laws, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

4.7 *Notice.* All notices required to be given hereunder shall be made in writing and shall be deemed to have been duly given, made, and received only (a) upon delivery, if personally delivered to a party; (b) one business day after the date of dispatch, if by facsimile transmission; (c) one business day after deposit, if delivered by a nationally recognized courier service offering guaranteed overnight delivery; or (d) three business days after having been deposited in the United States mail, certified mail, postage prepaid, return receipt requested, at the addresses appearing above.

4.8 *Third Parties.* Nothing contained herein nor the transactions contemplated hereby, express or implied, shall be deemed to inure to the benefit of any person or entity not a party to this Agreement, nor shall it confer upon any such party or entity any right or remedy of any nature whatsoever.

4.9 *Facsimile and Electronic Signatures.* Signatures and/or consents may be evidenced by facsimile, and may be evidenced by E-Mail and/or electronic signatures. Documents with original signatures shall be provided upon request of any party.

4.10 *Entire Agreement.* This document constitutes the entire agreement between the parties and any prior agreements, whether oral or written, have been merged and integrated into this Agreement.

4.11 *Waiver of Trial by Jury.* Each of the parties hereto hereby knowingly, voluntarily, intentionally, and irrevocably waive any right each may have to a trial by jury in respect of any action, proceeding or counterclaim based on this Agreement, or arising out of; under or in connection with this Agreement or any Agreement contemplated to be executed in connection with this Agreement, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party hereto.

4.12 *Costs and Attorney Fees.* In any litigation arising out of this Agreement, including arbitration and any case or proceeding under the Bankruptcy Code or any successor statute, the prevailing party shall be entitled to recover from the other parties all expenses which the prevailing party may reasonably incur in taking such action, including, but not limited to, the costs of searching records, the cost of discovery depositions, attorney's fees and legal assistant fees at trial and on any appeal.

5. *Representation.* Metro, PGE and OWHF have each been informed of that fact and have been

encouraged and afforded an opportunity to select and receive counsel with respect to this Agreement from their own attorneys and professional advisors before signing this Agreement.

THIS AGREEMENT shall bind and inure to the benefit of, as circumstances may require, not only the immediate parties hereto but their respective heirs, executors, administrators, personal representatives, successors in interest and assigns.

IN WITNESS WHEREOF, the parties hereto have executed the Agreement as of the date and year first written above.

METRO

By: _____
Printed Name: _____
Title: _____
Date: _____

PORTLAND GENERAL ELECTRIC COMPANY

By: _____
Printed Name: Stephen Quennoz
Title: Vice President
Date: _____

**OREGON WILDLIFE HERITAGE
FOUNDATION**

By: _____
Printed Name: E. Kimbark MacColl, Jr.
Title: President
Date: _____

EXHIBIT "A"
Legal Description of Site
EXHIBIT "B"
Project Proposal and Design and Performance Standards

DESIGN AND PERFORMANCE STANDARDS:

[FILL IN]

Project Number: Project Name: Location:

Ownership & Size:

Project Activities:

History & Management:

Wildlife Values:

Ancillary Benefits:

Project Cost Estimate:

Length of Agreement:

EXHIBIT "C"

The Grant

See Attached

EXHIBIT "D"

The Construction Contract

See Attached

EXHIBIT "E"
Restrictive Covenant

See Attached

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 04-3470 FOR THE PURPOSE OF ENTERING INTO AN AGREEMENT WITH OREGON WILDLIFE HERITAGE FOUNDATION AND PORTLAND GENERAL ELECTRIC (PGE) FOR FISH HABITAT RESTORATION ON METRO OPEN SPACE PROPERTY

Date: June 29, 2004

Prepared by: Jim Morgan

BACKGROUND

With the passage of the Measure 26-26 open spaces bond measure in 1995 and the ensuing implementation of the Open Spaces Acquisition Program, a portion of the Clackamas River was targeted for acquisition of property to establish a greenway along the river (Resolution No. 96-2308: "For the Purpose of Approving a Refinement Plan for the Clackamas River Greenway as Outlined in the Open Spaces Implementation Plan"). In 2001, 174 acres were purchased along the river immediately downstream of Barton Park, known by the former owner's name of Parsons.

The reach of the Clackamas River that includes the Parsons property is designated water quality limited by Oregon Department of Environmental Quality due to high summer water temperatures which exceed standards for salmonids. This reach also has limited habitat for rearing salmonids which seek cool water temperatures and refuge from predators and high flow velocities in the river.

An opportunity to restore limited habitat is available at the Parsons site, both in the physical characteristics of the site and in the interests of contributing partners. Oregon Wildlife Heritage Foundation (a not-for-profit conservation organization), Portland General Electric (PGE), and Oregon Fish and Wildlife Department propose to fund a fish channel restoration project on Metro property that will benefit wildlife and water quality. An agreement is needed that insures the project is completed to the benefit and protection of all partners. Metro will benefit from habitat improvements on its property at no cost. The only restriction is that Metro cannot take any action that can result in the destruction of the habitat improvements for 30 years. This restriction should not limit any anticipated uses for the property.

Specific objectives of the proposed fish restoration project are:

- Provide additional year-round salmonid rearing habitat by constructing a groundwater-fed channel.
- Provide additional salmonid rearing habitat by constructing a seasonally active side channel.
- Provide additional off-channel backwater habitat available during high river flow events.
- Within constructed habitats, provide maximum habitat complexity.

Cost of the project is estimated to be \$800,000, the majority of which is being contributed by PGE.

Consideration for approval of the agreement is presented to Metro Council due to the ongoing nature of the work under the agreement, and because of the commitment by Metro to maintain the natural area use of the property, in the form of a restrictive covenant, that will be recorded on the property.

ANALYSIS/INFORMATION

1. **Known Opposition:** No known opposition.
2. **Legal Antecedents:** None known.
3. **Anticipated Effects:** The effect will be restoration of fish habitat on Metro property.
4. **Budget Impacts:** The project partners will contribute approximately \$800,000 toward wildlife habitat improvements and enhancements. Upon completion of the project, the actual financial costs of this project will be recorded in the agency's General Ledger. Budgetary authority does not exist to record this transaction; a budget amendment for FY 2004-05 will be necessary and will be forwarded to Council as separate legislation. The project partners are contractually responsible for ensuring the long-term functional goals of this project. Metro's short-term and long-term operational and maintenance costs will not be impacted as a result of this project.

RECOMMENDED ACTION

Chief Operating Officer Michael J. Jordan recommends adoption of Resolution No. 04-3470.