

**A G E N D A**

600 NORTHEAST GRAND AVENUE | PORTLAND, OREGON 97232 2736  
TEL 503 797 1542 | FAX 503 797 1793



**METRO**

**Agenda**

MEETING: METRO COUNCIL WORK SESSION MEETING  
DATE: July 6, 2004,  
DAY: Tuesday  
TIME: 1:00 PM  
PLACE: Metro Council Chamber

**CALL TO ORDER AND ROLL CALL**

- 1:00 PM 1. **DISCUSSION OF AGENDA FOR COUNCIL  
REGULAR MEETING, JULY 8, 2004**
  
- 1:15 PM 2. **SCHEDULE AND SCOPE OF WORK FOR FISH AND  
WILDLIFE HABITAT AND TUALATIN BASIN  
APPROACH UPDATE**
  
- 2:15 PM 3. **CITIZEN COMMUNICATION**
  
- 2:25 PM 4. **CHIEF OPERATING OFFICER COMMUNICATION**
  
- 2:35 PM 5. **COUNCILOR COMMUNICATION**

Deffebach

**ADJOURN**

Agenda Item Number 2.0

**SCHEDULE AND SCOPE OF WORK FOR FISH AND  
WILDLIFE HABITAT AND TUALATIN BASIN  
APPROACH UPDATE**

Metro Council Work Session  
Tuesday, July 6, 2004  
Metro Council Chamber

## **METRO COUNCIL**

### **Work Session Worksheet**

Presentation Date: July 6, 2004      Time:      Length: 1 hour

Presentation Title:    Schedule and Work Scope for Fish and Wildlife Habitat and Tualatin Basin Program Approach Update

Department: Planning

Presenters: Cotugno, Deffebach, Brent Curtis

#### **ISSUE & BACKGROUND**

In May, 2004 Council adopted Resolution No. 04-3440 which endorsed the Goal 5 Phase II ESEE analysis; made preliminary decisions to allow, limit, or prohibit conflicting uses on regionally significant fish and wildlife habitat; and directed staff to develop a program to protect and restore regionally significant fish and wildlife habitat. Staff would like to outline the milestones and schedule for those milestones ahead in order to develop a recommended program.

The Tualatin Basin Natural Resource Coordinating Committee has begun to review and comment on a program concept to implement the fish and wildlife protection program in the Basin as part of the regional approach. Brent Curtis, Washington County, will review the concepts as they have been developed to date and identify areas that are still under development. The Natural Resources Coordinating Committee is meeting every other week to review this work. They have scheduled open houses to share the proposed program with the public in late July, prior, to their approval and submittal to Metro of the Tualatin Basin Approach.

#### **OPTIONS AVAILABLE**

The Council Informal is an opportunity for the Council to review and discuss the key milestones and ask about what will be considered as the program is developed. The Council can ask Washington County staff about options or intents with the Tualatin Basin Approach.

#### **IMPLICATIONS AND SUGGESTIONS**

This initial presentation of the schedule and milestones will give Councilors an opportunity to anticipate what will be coming before them over the next few months. It is a critical time to review and understand the Tualatin Basin Approach, as that work is proceeding quickly.

#### **QUESTION(S) PRESENTED FOR CONSIDERATION**

Staff request that Councilors identify questions they have about how the Regional Approach or the Tualatin Basin Approach is proceeding.

**LEGISLATION WOULD BE REQUIRED FOR COUNCIL ACTION**  Yes  No  
**DRAFT IS ATTACHED**  Yes  No

Department Director/Head Approval \_\_\_\_\_

Chief Operating Officer Approval \_\_\_\_\_

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A G E N D A

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METRO

Agenda

MEETING: METRO COUNCIL REGULAR MEETING  
DATE: July 8, 2004  
DAY: Thursday  
TIME: 2:00 PM  
PLACE: Metro Council Chamber

CALL TO ORDER AND ROLL CALL

1. INTRODUCTIONS

2. CITIZEN COMMUNICATIONS

3. RISK ASSESSMENT Dow

4. CONSENT AGENDA

4.1 Consideration of Minutes for the June 24, 2004 Metro Council Regular Meeting.

5. ORDINANCES - SECOND READING

5.1 **Ordinance No. 04-1045**, For the Purpose of Amending the 2000 Regional Transportation Plan (RTP) for Consistency With the 2004 Interim Federal RTP and Statewide Planning Goals (*Public Hearing, final action*). Park

5.2 **Ordinance No. 04-1054**, For the Purpose of Amending Chapter 9.01 of Title IX of the Metro Code, Relating to Vacancies in Metro Elective Offices Hosticka

6. RESOLUTIONS

6.1 **Resolution No. 04-3467**, For the Purpose of Authorizing the Chief Operating Officer to Enter Into an Agreement to Sell 48 Graves to the Eastside Jewish Community of Portland and Establish the Eastside Jewish Cemetery Section at Douglass Pioneer Cemetery. McLain

6.2 **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. Newman

7. CHIEF OPERATING OFFICER COMMUNICATION

## 8. COUNCILOR COMMUNICATION

### ADJOURN

#### Television schedule for July 8, 2004 Metro Council meeting

<b>Clackamas, Multnomah and Washington counties, and Vancouver, Wash.</b> Channel 11 -- Community Access Network <a href="http://www.yourtvvtv.org">www.yourtvvtv.org</a> -- (503) 629-8534 Thursday, July 8 at 2 p.m. (live)	<b>Washington County</b> Channel 30 -- TVTV <a href="http://www.yourtvvtv.org">www.yourtvvtv.org</a> -- (503) 629-8534 Saturday, July 10 at 11 p.m. Sunday, July 11 at 11 p.m. Tuesday, July 13 at 6 a.m. Wednesday, July 14 at 4 p.m.
<b>Oregon City, Gladstone</b> Channel 28 -- Willamette Falls Television <a href="http://www.wftvaccess.com">www.wftvaccess.com</a> -- (503) 650-0275 Call or visit website for program times.	<b>West Linn</b> Channel 30 -- Willamette Falls Television <a href="http://www.wftvaccess.com">www.wftvaccess.com</a> -- (503) 650-0275 Call or visit website for program times.
<b>Portland</b> Channel 30 (CityNet 30) -- Portland Community Media <a href="http://www.pcmntv.org">www.pcmntv.org</a> -- (503) 288-1515 Sunday, July 11 at 8:30 p.m. Monday, July 12 at 2 p.m.	

**PLEASE NOTE: Show times are tentative and in some cases the entire meeting may not be shown due to length. Call or check your community access station web site to confirm program times.**

Agenda items may not be considered in the exact order. For questions about the agenda, call Clerk of the Council, Chris Billington, (503) 797-1542. Public Hearings are held on all ordinances second read and on resolutions upon request of the public. Documents for the record must be submitted to the Clerk of the Council to be considered included in the decision record. Documents can be submitted by e-mail, fax or mail or in person to the Clerk of the Council. For additional information about testifying before the Metro Council please go to the Metro website [www.metro-region.org](http://www.metro-region.org) and click on public comment opportunities. For assistance per the American Disabilities Act (ADA), dial TDD 797-1804 or 797-1540 (Council Office).



# TUALATIN BASIN GOAL 5

- BASIN APPROACH - PROJECT UPDATE

Metro Council Meeting - 7/6/04



## Overview of Presentation

- Project Status
- Program Approach and Goal
- Existing Environmental Health Report
- ALP Decision
- Primary Program Tools
- Next Steps
- Questions

## Goal 5 Project Status

	Tualatin Basin	Metro	When
Step 1	n/a	Inventory	2002
Step 2	ESEE - Basin-wide - Local (65 sites)	ESEE - Regional - 6 Options	2003- Spring 2004
Step 3	Program	Program	2004
Step 4	Adopt Ordinances	Compliance Reviews	2005-2006

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## Overarching Goal

- Vision: *“The overall goal is to conserve, protect and restore a continuous ecologically viable streamside corridor system from the streams’ headwaters to their confluence with other streams and rivers, and with their floodplains in a manner that is integrated with the surrounding urban landscape. This system will be achieved through conservation, protection and appropriate restoration of streamside corridors through time.”*

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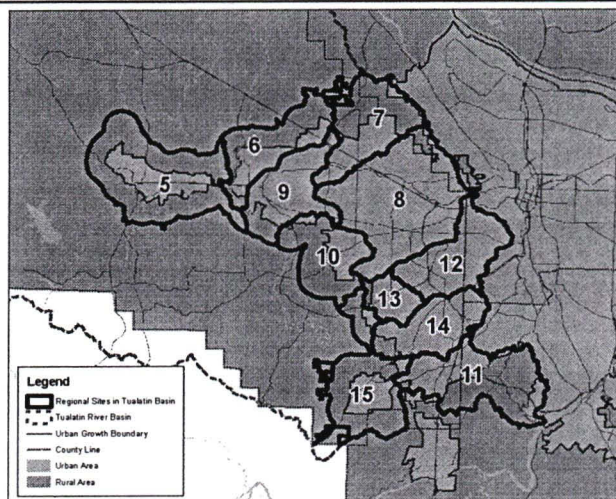


## *Achieving the Goal*

- The Basin Vision will be achieved through commitment to improve the environmental health of each Regional Site and the Basin and a whole.

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## *Existing Environmental Health Report (EEHR)*



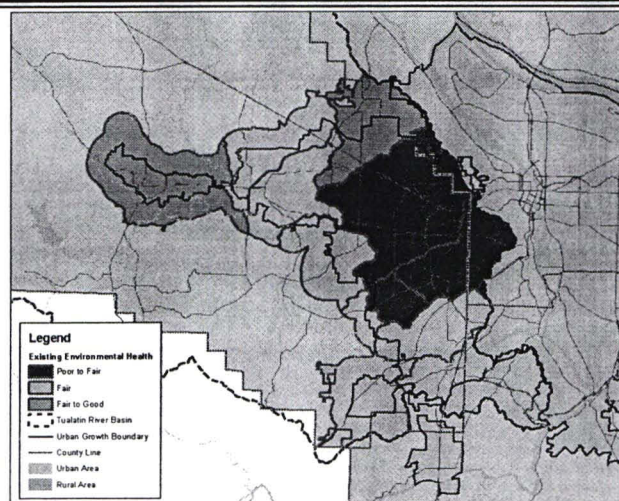
- EEHR Study Area Map of Regional Site Boundaries

## Existing Environmental Health Report (EEHR)

- Provides broad assessment of the Environmental Health of each of the eleven Regional Sites within the Tualatin River Basin:
  - Combines Metro Resource Inventory Data with CWS Watersheds 2000 - RSAT Inventory Data;
  - Provides summary level information from 7 key data elements:
    - ❖ Effective Impervious Area;
    - ❖ Stream Flow Hydrology;
    - ❖ Stream Geomorphology;
    - ❖ Riparian Vegetation;
    - ❖ Water Quality;
    - ❖ Fish Habitat;
    - ❖ Upland Wildlife Habitat.

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## EEHR Results



- Existing Condition for each Regional Site

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## Basin ALP Decision

Land Area Category	Conflicting Use Category			
	High Intensity Urban	Other Urban	Future Urban	Non-Urban
Class I resource	ML	SL	SL	SL
Class II resource	LL	ML	SL	ML
Class III resource	LL	LL	ML	ML
Inner Impact Area	LL	LL	LL	LL
Outer Impact Area	A	A	A	A

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## Basin ALP Decision

Summary of General ESEE Preliminary Recommendations  
Cross Tabulation of Conflicting Use and Environmental Categories  
with Approximate Land Area Percentages

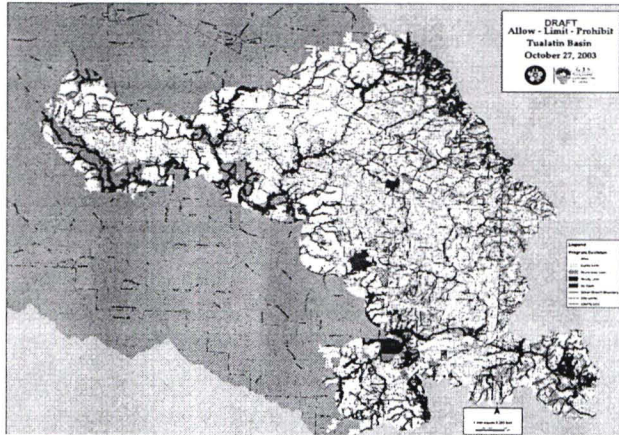
Land Area Category	Conflicting Use Category			
	1 High Intensity Urban 16%	2 Other Urban 40%	3 Future Urban 3%	4 Non-Urban 41%
A Class I resource 17%	1A 2%	2A 5%	3A <1%	4A 10%
B Class II resource 12%	1B <1%	2B 3%	3B <1%	4B 8%
C Class III resource 5%	1C <1%	2C 2%	3C <1%	4C 3%
D Inner Impact Area 5%	1D 1%	2D 3%	3D <1%	4D 2%
E Outer Impact Area 61%	1E 12%	2E 27%	3E 1%	4E 20%

- Allow, Limit, Prohibit Recommendation by Analysis Category
- Three Levels of "Limit"

Legend	
Prohibit	■
Strictly Limit	■
Moderately Limit	■
Lightly Limit	■
Allow	■

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## *Basin ALP Decision*



- ESEE Study Area Map of Preliminary ALP Recommendations

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## *Program Tools*

- Land Use Buffers
- Design Regulations
- Revenue Tools

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## *Land Use Buffers*

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- Title 3 and CWS' Vegetated Corridors standards required significant increases in buffer widths;
- Potential loss of significant development capacity if additional broad based buffer increases are required;
- Lost development capacity may result in loss of local government compliance with Regional Functional Plan requirements related to jobs & housing capacity (particularly Title 1 - Table 1).

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## *Land Use Buffers - Conclusion*

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“The use of further increases of land use buffers [should] not be pursued as a general rule; however, additional land use buffers may be appropriate as an exception in specified, limited situations.”

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## *Revenue Tool Options*

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### ■ Legal Review of:

- System Development Charges (SDCs);
- Fee-in-Lieu of On-Site Mitigation;
- User Fees (SWM model);
- Tax / Bond Levies.

➔ *Review concluded that SDCs would not be a reasonable option.*

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## *Primary Revenue Tools*

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### ■ Fee-in-Lieu

- Design Regulations require mitigation for impacts to resources;
- Payment of Fee will be option to replacement of impacted resources;
- Revenues to be pooled and targeted to restoration efforts within watersheds where fees are collected.

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## *Primary Revenue Tools*

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- **SWM-type User Fees**
  - Broad-based fee collected from households and businesses throughout the Basin;
  - Potential to generate relatively high level of revenue;
  - Utilizes Surface Water Management fee model:
    - ❖ Charged Monthly;
    - ❖ Based on average impervious cover created by single-family dwellings: (Expressed as Equivalent Dwelling Units where 1 EDU = 2,640 Sq. Ft.);
    - ❖ Non-Single-Family development pays based upon impervious area relationship to EDU.

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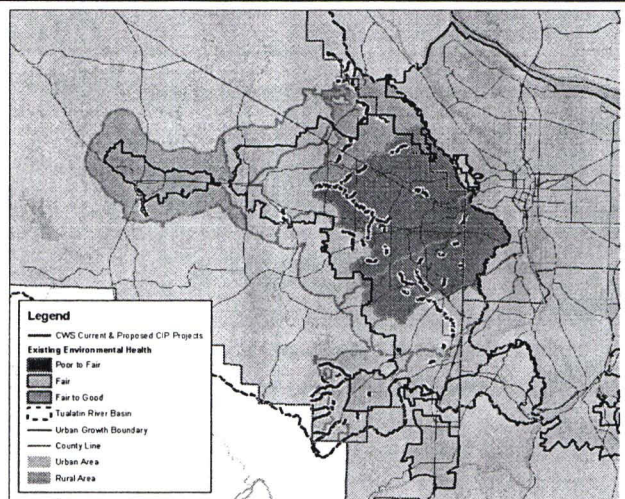
## *Improve Environmental Health: A Case of First Impression*

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- **Unknown & Untested - however:**
- **Reviewed the 'Bookends':**
  - Minimum / 'small' Program - (Healthy Streams CIP & Committed Projects): approx. \$10 Million over 10 years
  - Maximum / 'large' Program - (CWS GIS Model results showing all priority Projects): approx. \$127 Million over 20 years

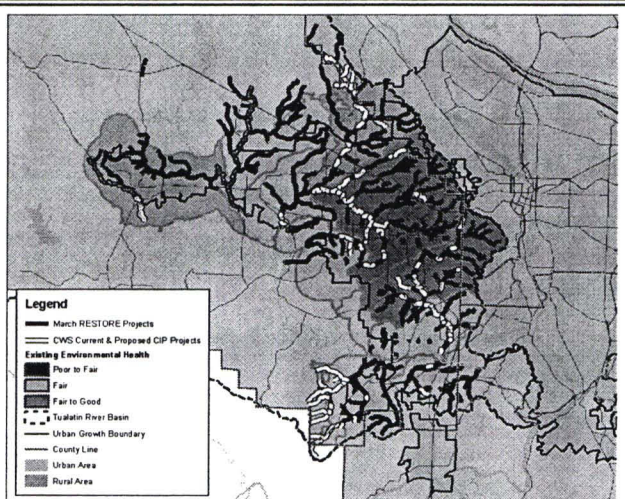
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# HSP Proposed Projects



Geographic Scope of Draft "Small" Program

# Basin Goal 5 Enhancement



Geographic Scope of Draft "Large" Program



## *General Conclusions*

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- 'small' Program does not include adequate projects to assure improvement in all Regional Sites;
- 'large' Program does include improvement projects in each Regional Site.
- Final Program Costs will be determined through iterative process:
  - Fund & build first 5 years of projects;
  - Assess Results;
  - Re-run GIS Model to determine priorities and establish program for next 5 years;
  - Continue Process.

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## *Rate-making*

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- Assuming need for \$127 Million over 20 years (= \$6,350,000 per year):
    - Each 'EDU dollar' generates approximately \$3,125,000 per year;
    - EDU based fee of \$2.03 will generate approximately \$6.35 Million per year.
- ⇒ *Additional funds may be needed to implement non-regulatory program*

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## *Design Regulations / Revenue Tools*

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- Combination of Design and Revenue tools will be utilized to achieve Basin Goals:
  - Design Regulations: focus on preventing further degradation of environmental health;
  - Revenue Tools: utilized to improve health through restoration and enhancement of resources.

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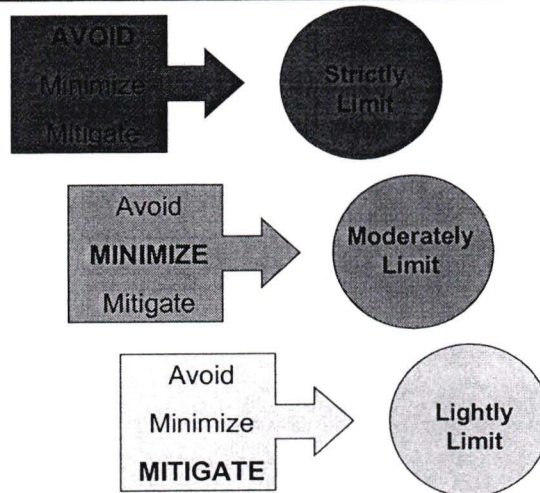
## *TB Goal 5 Program Approach*

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- **Preserve Existing System** through regulation of new development in resource areas and mitigation of disturbances.
- **Enhance Overall Health of Regional Sites** through general fee assessment to support Healthy Streams Plan projects.
- **Mitigate New Development Impacts throughout Basin** by requiring Low Impact Development approaches to reduce EIA for new development.

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## Design Tools



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## Summary of Design Regulations

Program Element	Limit Category			
	INNER IMPACT AREA	LL RESOURCE AREA	ML	SL
<i>Disturbance allowed</i>	yes	yes	with review, up to 50%	only under limited circumstances
<i>Land use tools to minimize disturbance</i>	optional	required	required	required
<i>Mitigation of disturbance (on- or off-site)</i>	no	yes low ratio	yes moderate ratio	yes high ratio
<i>LID required</i>	yes	yes	yes	yes

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## *Non-Regulatory Program Options*

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- Education;
- Stewardship Recognition;
- Restoration Funds;
- Tax Incentives;
- Technical Assistance;
- Promote Volunteer Activities;
- Acquisition.

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## *Next Steps*

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- Adopt Basin Program and submit to Metro by August 16, 2004;
- Refine Program elements and draft model ordinance(s), September - December '04;
- Coordinate final implementation and Ordinance adoption process with Basin cities, January - June 2005.

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QUESTIONS ?

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Update  
Regional Fish and Wildlife  
Habitat Protection Program  
Council Work Session  
7/06/04

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Status Update

- Public outreach
- Inventory model
- Regulatory framework and research areas
- Non-regulatory issues
- Technical and policy review process

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Public Outreach Activities

- Frequent phone calls and visits from interested citizens, property owners, developers and their attorneys
- Requests for information at Damascus concept planning, July 31 neighborhood fair, Wood Village, MHCC, others
- Participating in Tualatin Basin Open Houses in late July

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## Inventory Updates

- Rerun of inventory model
  - Completed map corrections for use in Tualatin Basin Open Houses July 26-29
  - Plan to complete remaining map corrections/data updates by end of summer
- Web site update
  - Next will update web site with revised inventory data and Council ESEE decision

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## Program – Regulatory Framework

- Defining basic framework
  - Avoid, Minimize, Mitigate along with Strict, Moderate and Lightly Limit,
- Researching program elements:
  - Low impact development tools
  - Transfer of development rights, capacity issues
  - Mitigation options
  - Tree ordinances
  - Regionally significant public facilities
  - Similarly situated sites as International Terminals
  - Role of inventory/features in long term

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## Program, Non-Regulatory

- Defining potential for:
  - 06 budget – how can we apply existing resources to fish and wildlife habitat education, assistance
  - New funding sources – explore new sources of funding for restoration, new initiatives
  - Legislative issues – considerations for state, county issues that could support fish and wildlife protection and restoration

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### Technical Review Process

- New program working group to advise staff on implementation issues
- Additional interdepartmental coordination on non-regulatory elements
- MTAC, TPAC and Goal5/WRPAC review at major milestones

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### Policy Review Process

- Frequent updates to Council Informal
- JPACT, GPAC review at major milestones potentially
- MPAC review at major milestones and tack action on staff recommendation for Council consideration

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July 1, 2004

**To:** Tualatin Basin Steering Committee

**From:** Jim Labbe and Celina Patterson, Audubon Society of Portland

**Re:** Comments upon Mitigation, Development Capacity and Constitutional Takings

**Cc:** Tualatin Basin Coordinating Committee and Metro Council

At the June 24 Tualatin Basin steering committee meeting we expressed our concern with the Tualatin Basin Partners' approach to essentially develop a voluntary program for avoiding impacts to the highest value unprotected habitat remaining in the Tualatin Basin. This approach proposes to require mitigation of impacts either on-site or off-site in the form of a fee-in-lieu. Moreover it is clear that at least some members of the steering committee expect mitigation requirements to function as an incentive to avoid impacts in the first place.

We believe a mitigation program is unlikely to compensate for the loss in the functions and values provided by regionally significant resources, especially the highest value habitats. Again, we are concerned with a program that leaves other property owners, the public at-large and future generations burdened with the negative consequences of unmitigated habitat destruction.

This memo outlines the problems we see with trying to mitigate, rather than avoid, the direct and cumulative impacts to habitat lands and the trouble with using a fee-in-lieu of mitigation as an incentive for environmental impact avoidance. We also outline why the stated concerns about "development capacity" and "regulatory takings" are not a valid basis for developing a program that essentially makes protection of high value habitats voluntary.

**Mitigation:**

One major concern with the Tualatin Basin Partners' reliance on mitigation is that mitigation projects are often unsuccessful. A 2002 EPA-funded study in Washington State found that only 13% of wetland mitigation projects were successful. 55% of wetland mitigation projects were "minimally successful" or "unsuccessful." No enhancement projects were fully successful and

eight out of nine (89%) were minimally or not successful (Johnson et al. 2002). Recent studies by the EPA, Army Corp of Engineers, and Division of State lands have also found poor wetland mitigation success rates in Oregon.

Existing restoration and enhancement techniques are expensive and take many years of active monitoring, maintenance, and adaptive management to achieve. Many strategies are unproven, non-existent, or impractical to compensate for the loss of ecological functions and values. Some functions and values at the landscape or watershed scale--such as habitat connectivity and provision of interior habitat-- cannot be mitigated, with very few exceptions. Almost invariably, protecting a resource intact is much more cost-effective than trying to restore or enhance it or the functions and values it provides.

The difficulties and challenges in mitigating environmental impacts raise a number of serious questions about the Tualatin Basin Partners' program reliance on mitigation as means to achieve basin and regional goals:

*Will mitigation protect and enhance habitat that is functionally equivalent to the habitat lost or destroyed by development?* The Tualatin Basin Partner's proposes that mitigation requirements will be based on the limit designations and not the relative value of the habitat. This alone guarantees that many if not most of the functions and values of destroying high quality habitat will not be mitigated.

*How will mitigation compensate for the loss of ecological functions and values needed to support viable fish and wildlife populations and their habitats?*

The Tualatin Basin approach builds off of Clean Water Service's Healthy Stream Plan. However, as a surface water management agency, CWS programs focus on water quality and select aquatic species. How will the Tualatin Basin Partners program mitigate riparian and upland wildlife habitat? The Columbia Basin Fish and Wildlife Authority (CBFWA) advises the Northwest Power Planning Council and the Bonneville Power Administration fish and wildlife habitat policy. CBFWA has developed a methodology for fully mitigating of wildlife habitat based on habitat quality and quantity (<http://www.cbfgwa.org/wc.htm>) that could provide a model for wildlife habitat mitigation.

*How will mitigation compensate for cumulative impacts to functions and values over time within the basin and its sub-watersheds?* In other words, mitigation ratios must address marginal increases in impacts to ecological functions and values within a watershed context. Over time as habitat loss increases the functional value of remaining habitat and mitigation requirements must adjust accordingly. There is also the issue of the temporal loss of habitat, as habitat is converted to developed land uses in a very short time period, while restoration takes many years.

### **Fee-in-lieu of mitigation:**

A fee-in-lieu of mitigation poses several challenges to fully and effectively mitigating impacts:

1) Mitigation fees raise constitutional takings issues, whereas protecting habitat from disturbance on portions of a parcel does not because the Dolan analysis only comes into play when money or property is being taken from a property owner for **public** use, and not when land is kept private and development is simply limited to a portion of the property (see below).

2) Mitigation fees will not be an effective deterrent to avoid development in sensitive areas overtime unless adjustments for inflation and rising land values prevent the erosion of incentives over time.

3.) A fee-in-lieu will distribute costs evenly to all similar parcels and thus could be uniformly passed on to the consumers or back to landowners. Hence developers will likely treat mitigation fees as merely a cost of doing business for streamside developments within the Tualatin Basin.

4. ) Fee-in-lieu can only result in successful compensatory mitigation if:

- There is a baseline level of protection that will achieve the Goal 5 vision, and adequate lands are set aside for mitigation projects.
- Mitigation policies, ratios and fees are designed to fully mitigate habitat quality and quantity (see above).
- The true costs of restoration and protection are included in mitigation fees, including the cost of restoration project planning and design, monitoring, maintenance, contingency plans, and an endowment for perpetual site management that includes adjustments for inflation.
- Responsible and qualified entities use the funding for appropriate projects.

#### **Concerns about Loss Development Capacity:**

The concern about lost development capacity in Washington County is put forth as a major justification for a program decision that does not require future development to avoid destroying or degrading unprotected habitat of even the highest quality. How this decision follows from the ESEE analysis and public input to date is unclear, but it rests on many false or unnecessary assumptions:

1.) The Metro Council has made explicit, in Resolution No. 97-256B, that "protection of environmentally sensitive lands from development could result in a decline in net buildable acres in a local jurisdiction," and that upon "demonstration by a local jurisdiction that such protection results in an inability to meet jobs, housing and other targets established in the Urban Growth Management Functional Plan... the Metro Council will grant an exception consistent with Title 9 of the Functional Plan." The resolution further acknowledges that lost development capacity from natural resource protection could be made up in an expansion of the UGB.

This makes economic and environmental sense; you can relocate factories and homes but not floodplains, wetlands, or stream corridors, and habitats of concern. The need to address loss development capacity in Washington County is, from our standpoint, entirely reasonable. The

concern of some planners is that development capacity will not be made up inside the basin. However the mere expectation that it won't is not and should not be a justification to degrade and destroy the highest value habitat in the Tualatin River Watershed.

2.) The trade-off between development capacity and environmental protection is overstated and misses important opportunities to optimize economic and environmental outcomes. The increasing importance of quality of life factors to the local and regional economy (particularly the highly valued "traded sector") is widely documented and recognized by economic development experts. Hence a program that focuses on the *quality* of development in relationship to the health and functions of the local ecosystem, rather merely maintaining the *quantity* of development is far more likely support the type of economic development desired-- development that enhances rather than degrades the quality of life and the ability to attract and retain a talented workforce and the businesses that are seeking them out.

3.) Whatever their views on the right mix of tools to for a program (more emphasis on regulatory tools according to Metro's polling results), the citizens not articulated this desire or need to maintain development capacity, especially on remaining high value habitat lands. The public has articulated strong support for protection of the highest quality habitats. This desire is being overlooked while the concerns of planners and developers about maintaining development capacity are being inflated.

#### **Concerns about Constitutional Takings:**

Because of two recent Court of Appeals decisions, the *Coast Range Conifers* case, 83 P.3d 966, (Ore. App., 2004), and the *Rogers Machinery v. Washington County and the City of Tigard* case 45 P.3d 966, (Ore. App., 2002), Washington County's legal staff is particularly concerned about crafting policies that might be lead to a "takings" lawsuit. This concern is the basis for a program that makes avoiding unprotected fish and wildlife habitat essentially voluntary.

The *Coast Range Conifers* case took a radical departure from existing Federal and State law by saying a court could look at a portion of a parcel, rather than the whole parcel, to determine whether a land-use regulation deprived a landowner of all economic value. In other words, if a regulation deprives an owner of all economic value in *any portion* of their land, there has been a taking in that portion of the land. If this case stands, it could have a dramatic impact upon ALL land use regulations that deprive owners of the economic use of any portion of their land, including Clean Water Services Title 3 regulations. However, the Oregon Supreme Court is currently considering a petition by the State of Oregon to review the Court of Appeals decision. The attached Amicus Brief filed by the Audubon Society of Portland and others in support of the State's petition outlines the decision's shaky legal foundation in departing from existing State and Federal precedents. Given the case's potentially broad reach and the significant questions about its future and its application, it is premature to craft current policies around its strictures.

The decision in the *Rogers Machinery* case traces the impact of the *Dolan* case, 114 S. Ct. 2309, 1994, in which the U.S. Supreme Court set up a framework for determining whether land use regulations containing provisions that require landowners to dedicate portions of their lands for

**public** rightaways, constitute a taking. When a regulation has such a provision, the two-step *Dolan* analysis applies: 1) there must be an “essential nexus” between the dedication and the governmental purpose of the regulation (in other words, if the government seeks to protect wildlife habitat, the land dedicated must protect wildlife habitat); and 2) if the essential nexus requirement is met, then there must be a “rough proportionality” between the development’s impacts and the concessions required of the landowner. The burden is on the government to prove this proportionality in *each individual* case. However, as the *Dolan* case makes clear and the *Roger’s Machinery* case reiterates, these concerns only come into play when the government is requiring the landowner to dedicate the land to *public* use. ***It does not apply to land- use regulations that simply create no touch zones on a portion of private property.***

Fee-in-lieu mitigation requirements that involve taking money from a landowner must conform to the *Dolan* analysis. Hence mitigation requirements must clearly relate the mitigation to the impact. In other words, if a tree is cut, the mitigation standard must roughly replace the value of *that* tree, and the fee must be used to replace the tree. There are many ways one could compute the value of a mature tree, and *Dolan*, by using the language of ‘rough proportionality’ simply requires that regulators make the effort to clearly define that value. *Dolan* also, however, dictates that the government has the burden of proving that there is proportionality in each individual case. This means that regulations must be crafted to ensure that the mitigation requirements are either low enough that they will always be justifiable; or, that they are specific enough to be ‘tailored’ to a variety of circumstances; or, that they are administered on an individual basis, so that each case will be justifiable if it comes to court. For example, if an ordinance requires that a person cutting a tree pay a fee into a tree fund, the payment must either be low enough that the fee paid would be justified no matter what tree was cut; or, the ordinance could be specific enough by providing criteria for different types, or sizes, of trees that would justify different fees; or, mitigation could be administered on a case by case basis using established criteria.

In the light of these legal precedents, a program requiring development to avoid habitats (via a no-touch zone or maximum disturbance areas) is less likely to generate valid takings claims than a fee in-lieu of mitigation scheme, because the former does not implicate the *Dolan* analysis. Mitigation standards, especially those that extract payments from landowners, must be crafted in order to satisfy the *Dolan* framework. Hence a program to set mitigation values high enough to truly replace the values lost by removing an existing resource must either establish very specific criteria, either within the Development Code, or within an administrative body that will evaluate each case individually.

**Cited:**

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