



March 25, 2010

Dear Commissioners,

The River Plan / North Reach is back on the Council agenda on April 1, 2010 at 2 pm. We will hear the following four items:

**1. Ordinance: Adopt and implement the *River Plan / North Reach*. (Co-Sponsored by Commissioner Fritz)**

Since the February 17 hearing I have been reviewing the testimony, the questions you asked and working with staff and various members of the community to develop approaches to resolve the outstanding issues. (See the attached responses to questions from Council and from the business community.) As a result of these discussions and meetings, I am planning to introduce a revised package of amendments. These new amendments are attached to this letter and they include:

- Updated contamination language (responds to concerns raised by the Port of Portland; also see attached letter from City Attorney Nanci Klinger to Mayor Adams).
- An amendment to clarify that development on top of existing docks is exempt from the river environmental overlay zone (responds to concerns raised by the Working Waterfront Coalition).
- Various technical changes (responds to concerns raised by Andy Jansky).
- Clarification that the Natural Resource Inventory is a source of information that can be used to prepare an application (responds to concerns raised by the Working Waterfront Coalition).
- Minor changes to the action table (responds to concerns raised by the Linnton Neighborhood Association).
- Clarification that mitigation conducted for the River Plan cannot be used to comply with mitigation obligations under Superfund (responds to concerns raised by the Audubon Society).

**2. Substitute Resolution: Adopt the *River Plan / North Reach* action agenda and the Future of the North Reach and direct the Bureau of Planning and Sustainability to return to City Council for a hearing on specific items in Fall 2010. (Co-Sponsored by Commissioner Fritz)**

I have amended the River Plan / North Reach resolution to direct staff to return to City Council next fall for a hearing on several items:

- River Review:
  - The methodology for assessing a fee-in-lieu of on-site mitigation until there is a functioning mitigation bank in the North Reach. I know that Council wants to be sure that the method used is clear and fair and that the fees compensate for the impacts of development and any temporary loss of function. I have also attached the Call for Nominations of independent scientists to serve on a panel to review the City's proposed HEP/HEA draft.
  - An amendment that sets a threshold under which the use of HEP/HEA is not required to calculate the off-site mitigation fee-in-lieu. This will address the concerns about spending more money on the review process than would ultimately need to be spent on mitigation for the development.
- River Environmental Overlay Zone Development Standards: Additional standards that allow approval of lower impact development proposals without river review if we find that

those are necessary to improve the River Plan.

- Refined River Environmental Overlay Zone maps if necessary changes to the Natural Resource Inventory Maps are identified through ground truthing.

**3. Resolution: Accept Memorandum of Understanding between Siltronic and City of Portland.**

I have made some amendments to the draft Memorandum of Understanding with the Siltronic Corporation. The three primary revisions include new language describing the mitigation tradeoff, the ecoroof provision and changes to Exhibit E that describe allowed activities within the proposed easement area.

**4. Resolution: Direct the Bureau of Planning and Sustainability to negotiate a development agreement with the University of Portland for consideration by City Council. (Co-Sponsored by Commissioner Fish)**

I am also planning to introduce a resolution directing staff to work with the University of Portland to prepare a development agreement that removes the proposed environmental conservation zone from a portion of the bluff area in exchange for mitigation elsewhere on the bluff. This will provide the University with a greater level of assurance that they can build their gateway building in the optimum location for traffic flow between the upper and lower campuses and give the City the assurance that the University will fully mitigate for the impacts of the development.

Finally, I want you to know that we would like to convene the North Reach Advisory Committee (NoRAC) once Council adopts the River Plan. Please see the attached draft description of the role and composition of the NoRAC.

This is a comprehensive plan for a complex area. I believe that the River Plan / North Reach, with these proposed amendments, takes the necessary steps toward enhancing the working harbor, supporting industrial jobs, increasing access, and improving environmental conditions. I look forward to hearing from you and the community on April 1.

Sincerely,



Sam Adams  
Mayor

Attachments:

- Response to Council Questions at the 2/17/10 hearing (March 24, 2010)
- Response to Questions from the Business Community (March 22, 2010)
- Letter from Nanci Klinger to Mayor Adams (March 16, 2010)
- Call for Science Panel Nominations (March 22, 2010)
- North Reach Advisory Committee (March 23, 2010)

## City staff responses to River Plan/North Reach Hearing follow-up questions

March 24, 2010

The following questions were asked by Commissioners and the public during the River Plan / North Reach hearing on February 17, 2010, or were posed to staff after the hearing.

**1a. What is the feasibility of writing an amendment that will ensure that the University of Portland will be able to locate a gateway building in their desired location, at McCosh and Portsmouth, without having to analyze alternative locations, but still require them to minimize the impact of their building, and mitigate for any unavoidable significant impacts?** (Question posed by Commissioner Leonard)

The cleanest and most straightforward way to ensure that the University of Portland can locate their gateway building in their desired location without being subject to an alternatives analysis is to eliminate environmental zoning from the desired location (N. McCosh and N. Portsmouth). It is the approval criteria in the environmental zoning regulations that trigger the requirement for an alternatives analysis. If the proposed environmental zoning overlay is removed from the property, no alternatives analysis is required for future development under city zoning regulations.

Other options exist, but have drawbacks or risks. In terms of the zoning code, one option is to create a new set of environmental review approval criteria (this new set would not include the alternatives analysis), and apply the set only to the University of Portland and only in this one location. This is not a recommended option because the zoning code is not a tool for tailoring development regulations to a specific property owner or single location, and our City Attorney advised against setting such a precedent.

Another option is to add a directive to the ordinance adopting the River Plan that declares that the University of Portland will be exempt from the alternatives analysis approval criterion when the University applies for an environmental review for the gateway building. This option is also not recommended by staff or the City Attorney for several reasons. First, if challenged at LUBA, it has a potential risk of being viewed as a de facto zoning code amendment that has not been adopted using the proper legislative procedure and of being overturned. Second, it sets a precedent for legislative plans that may not be desirable to the City in the long run. Finally, this type of directive or "condition of approval" is likely to get lost administratively because staff in the Bureau of Development Services do not track legislative plan directives.

A third option is to enter into a development agreement with the University of Portland. Generally, a development agreement cannot be used to excuse a property owner from doing what the code requires. It can be used to require an owner to do more than the code minimum, but not less. In other words, a development agreement cannot operate as a de facto code amendment. In the Siltronic situation, Siltronic is giving the City a conservation easement and, in exchange, we are removing/modifying the environmental zoning on the property. If UP is proposing something similar (i.e., a conservation easement in exchange for removing/modifying the "c" zone on their property), that might be workable. What is not workable, from the City Attorney's perspective, is leaving the "c" zone on the property and excusing UP, via a development agreement, from complying with some or all of the "c" zone approval criteria at the time of development.

**1b. Is the University's concern that the EC process would require an alternatives analysis that might lead to a requirement to relocate the proposed gateway building a valid concern, and a likely outcome of the process?** (Question from Commissioner Fritz's office)

The University's concern is valid given the wording of the approval criterion, however, in our understanding of the way the approval criterion is interpreted and implemented, it is hard to imagine that the EC process

would result in a decision to relocate the gateway building away from the bluff. That said, staff's opinion should in no way be interpreted as an assurance. As mentioned above, the only way to ensure an outcome is to avoid the review entirely.

The environmental review criterion calls for the proposed development locations, designs, and construction methods to have the least significant detrimental impact on identified resources and functional values of all practicable and significantly different alternatives. It is true that a significantly different alternative could be one that is outside of the environmental conservation zone or away from the bluff, however relocating the gateway building away from the bluff may not be "practicable". The zoning code definition of practicable is "capable of being done taking into consideration cost, existing technology and logistics in light of overall project purposes". If the project purpose is to provide a gateway building that links the upper and lower campuses, then the University could argue that relocating the building to another place on the campus would not be practicable in light of the overall project purpose.

While relocating the building to another location on the campus may not be practicable, altering the design or orientation of the building within the area of conservation zone at N. McCosh and N. Portsmouth may be practicable (again, within the context of cost and project purpose).

**1c. Would the Type III review, required for University expansion on to the river campus, provide sufficient or guaranteed reassurances that the desired mitigation occurs for the proposed building footprint? (Question from Commissioner Fritz's office)**

The conditional use master plan approval criteria do not address identified natural resources or mitigation for impacts to identified natural resources.

**1d. Are there other instances in the City where a developer agrees to comply with the mitigation measures required under EC standards of review in absence of the EC overlay? In that situation, what overlay would apply? (Question from Commissioner Fritz's office)**

Not to our knowledge.

**2. How does the implementation of the River Plan sync with the Portland Harbor Superfund process? Should we hold off on implementation of the River Plan until the superfund feasibility study is complete? (Question posed by Commissioner Saltzman)**

The Portland Harbor Superfund study area is within the boundaries of the River Plan / North Reach, but the two programs have different authorities, implementation approaches, and goals. Superfund focuses on cleaning up contamination from past operations. The North Reach Plan tries to improve future conditions through development and redevelopment. The two programs should have complimentary results because both ultimately will improve human health and the environment.

The Portland Harbor Superfund cleanup study is a multi-year effort that will result in the remediation of hazardous substances in the Willamette River and adjacent upland areas. The Portland Harbor Superfund site is not the only cleanup site located within the River Plan / North Reach boundary. Cleanups are also conducted under state law and independently.

The River Plan / North Reach is the City's land use plan for a geographic area that includes, but is larger than, the Portland Harbor Superfund Site. The River Plan implements state land use law and long term City planning policy for a range of development activities – not just cleanup actions.

The River Plan / North Reach is very well synced with the Portland Harbor Superfund cleanup study in that the River Plan clarifies and illuminates City policy and zoning regulations regarding land use and development in the working harbor at a time when there will be increased cleanup activity in the area. This clarity will be important as cleanup remedies are designed. Without the River Plan being in place, the state and federal agencies evaluating and determining cleanup actions will have to rely on the sometimes vague and indirect policy and code language of the existing Greenway Plan for direction on City goals for this area. The existing plan provides only general direction on environmental conservation and restoration, and does not give clear guidance on how the City would prefer the cleanup remedies to fit into overall landscape of the North Reach. This lack of direction could result in cleanup remedies that preclude the use of a site as a river-dependent industrial facility or preclude the use of the riverbank for natural resource enhancement.

Staff does not see any reason why the River Plan should wait for the feasibility study to be completed.

**3. One of the stated goals of the River Plan is to fuel private investment with public investment in infrastructure projects. Where is the money for these infrastructure projects coming from?**  
(Question posed by Commissioner Saltzman)

The River Plan proposes public investments in the North Reach to improve competitiveness, expand development capacity and fuel private investment. Many of these projects will be implemented by the City and its public agency partners, such as the Port of Portland. Although the River Plan does not ensure funding for implementation, staff worked to ensure that the projects are in line with the priorities of the implementing agencies and on their capital improvement lists, where possible.

Many of the transportation projects are prioritized on Metro's RTP and are expected to receive funding within the timeframe shown in the Plan. The sanitary sewer and stormwater projects are included in the City of Portland Capital Improvement Plan and are expected to receive funding within the timeframe shown. Other projects were identified as part of the Freight Master Plan, which is not directly related to a dedicated funding source. However the Freight Master Plan was approved by Council and therefore will be taken into account when the Capital Improvement Plan is updated. The upgrade to the water system in Linnton is not on an existing capital improvement list.

**4a. How will the trail be located and designed in ecologically important sites?** (Question posed by Commissioner Saltzman)

There are several places in the North Reach where the Greenway Trail and an ecologically important site coincide. This same situation occurs in many places across the city including Forest Park, Tyron Creek State Park, along the Columbia Slough, and along Johnson Creek. With proper design and mitigation, trails and ecologically sensitive sites can coexist. Development of the Greenway Trail is an important public policy objective as is conservation of significant natural resource areas. In the North Reach, as in other parts of the city, development of the trail will be subject to additional development standards and/or land use review approval criteria aimed at avoiding and minimizing the impacts from the trail on the resource area. The environmental review will not be a process for revisiting whether the Greenway Trail should be built, but rather a tool for ensuring that impacts from the trail are minimized and mitigated.

**4b. How will the trail design deal with at-grade crossings?** (Question posed by Commissioner Saltzman)

The Greenway Trail is a key component of the River Plan / North Reach. During the development of the plan, staff spent many months working with stakeholders to identify a trail alignment that respects the safety, security and operational concerns of river-dependent industrial facilities, increases transportation options in the North Reach, and brings people to and along the river where possible. One of the few locations where there is the potential to bring people to the river is Linnton waterfront. North and south of Linnton, the

Greenway Trail will be located along the shoulder of NW St. Helens Road. A spur trail along NW 107<sup>th</sup> connects NW St. Helens Road to riverfront in Linnton. This trail connection will cross the Portland & Western Railroad track within the existing developed NW 107<sup>th</sup> public right-of-way. The right-of-way currently has a paved roadway, but no pedestrian or bicycle facility. It should also be noted that the Linnton riverfront alignment is not a new alignment—a trail to the waterfront in this location has been envisioned since the 1987 Greenway Plan.

The River Plan / North Reach recommends that Portland Parks and Recreation and the Portland Bureau of Transportation take steps to obtain funding to design a safe and appropriate pedestrian and bicycle crossing of the railroad tracks in conjunction with the design and development of the trail to the riverfront. According to documentation from the US Department of Transportation and the Rails-with-Trails Conservancy, track crossings present the greatest concern for everyone working on a rail-with-trail project. More than half of all rails-with-trails have some sort of track crossing, and most of the crossings are at-grade. As planning for the Linnton trail continues, the City will work with affected property owners, including Portland & Western Railroad, to identify and address track crossing safety and other concerns. We are open to ideas and design solutions short of eliminating the riverfront trail connection, because it is the only riverfront access point recommended on the west side of the Willamette River.

- 5. Please clarify the claims of uncertainty and duplication in the plan. To what extent can people use the appellant rights to undermine certainty? What are the remaining duplication arguments?**  
(Question posed by Commissioner Fish)

At the start of the River Plan process, industry stakeholders asked for more clear standards and approval criteria for development in the Greenway. Staff has addressed this request, and now there is this concern about appeals. Staff's understanding is that the concern about appeals revolves around the nature of the approval criteria. The argument is that the River Plan approval criteria are specific and clear and therefore, will be easier to appeal because they offer more points for a potential appellant to challenge approval of a proposal. The more broad and less specific approval criteria of the existing Greenway Review are hard to appeal because compliance with the criteria is open to more interpretation—in essence, there are more ways to argue that you meet the Greenway Review approval criteria than the River Review approval criteria. The concern is that more people will appeal River Review and will create problems for property owners.

Staff is unsure what to make of this argument. The River Review approval criteria were modeled on the environmental conservation overlay zone review approval criteria, which have been in place for over 10 years, and we are not aware that frivolous appeals of environmental review are a problem elsewhere in the city.

Staff has worked diligently to address concerns about duplication. To that end, we have drafted a coordinated review process that will bring all levels of government together to review and consult on applications for development below the ordinary high water mark. Staff has included review approval criteria that specifically state that mitigation for state and federal agency permits can count toward mitigation for a City permit, and that the City's conditions of approval can not contradict, circumvent or otherwise undermine decisions made by state or federal agencies. These two criteria are intended to address concerns about duplication and conflict. Finally, the recommendation to develop a mitigation bank for the North Reach is intended to offer a one-stop-shopping opportunity for all levels of government when it comes to mitigation. This will further avoid the potential for duplicative mitigation.

We are not interested in duplicating the state and federal permitting processes. We are interested in being part of a coordinated process that ensures that City goals and policies regarding river-dependent industrial development and resource conservation and enhancement are addressed to the extent practicable. Without

our participation we can not ensure that outcome because state and federal agencies are not mandated to ensure compliance with the City's land use goals, policies or code.

**6. What is the nature of the amendments to the cleanup code (North Reach Code Section 33.475.460 Removal and Remediation of Hazardous Substances)?**

The code revisions were made to improve legal clarity and consistency with other sections of Portland City Code, state law and federal law and were not intended to be significant substantive changes to the requirements presented in the June 2009 version of this code section. The revisions are summarized below:

- Changes “applicant” to “person conducting the cleanup” because these regulations also apply to persons who are exempt from filing an application.
- Clarified distinctions between procedural exemptions and substantive requirements in the commentary and regulations. These regulations present substantive requirements for cleanup under DEQ exempt process at ORS 465.315. However, the substantive requirements of these regulations are the same as, and applicable to all, cleanup actions subject to these rules.
- Provides a more complete description of the scope of the Oregon Cleanup Law’s procedural exemption in ORS 465.315(3).
- Provided a more complete description in the commentary of how these regulations implement Goal 15 by adding reference to Goal 15 required protection of habitat and natural vegetative fringe in addition to setback requirements.
- Removed references to the use of these requirements as guidance for EPA cleanups in subsection on review procedure because this is an EPA determination.
- A new section, 33.475.480 G, Demonstration of Impracticability, was added to ensure consistent application of the practicability standard to the requirements within the section.

**7. What is the incremental improvement that the City provides over what would occur as a result of state and federal review? Why not just pay the multi-tiered fee as industry suggests?**

The City has multiple interests in the river that complement the interests of the state and federal regulators. Those interests, which have been documented on pg 56-57 of Volume 1A, include supporting river-dependent uses and protecting river access, protecting and improving ground water and surface water quality, flood protection, and mitigation, including for species and their habitats that are not currently regulated by the state or federal agencies.

One example of the incremental improvement that the City's review provides relates to lamprey. Currently lamprey are on significant decline but are not a listed species, so State and federal agencies do not have the ability to review a project and require avoidance, alternatives or mitigation for lamprey impacts. The US Fish and Wildlife Service, Oregon State University and others have been conducting research on habitat needs for lamprey to inform restoration projects. Lamprey are an important cultural resource for tribes and an important indicator of watershed health. The City has the ability to apply the best available science to the review of functions and values, potential alternatives and mitigation for unavoidable impacts. For example, currently a city review will consider shallow water habitat for salmon but should also look at the depth of such sediment for burrowing juvenile lamprey. Hypothetically, the City could recommend 12 inches of sandy fill rather than 6 inches to maintain and improve important Lamprey habitat functions and values.

The City's ability to regulate and require mitigation for impacts to the habitat functions of non-listed species has the potential to slow the pace of additional listings. This is important because each species listing has annual cost to the region. The region is currently on the pace of one additional listing per year. When National Marine Fisheries Service designated critical habitat for salmon and steelhead it also had to do an economic analysis of the impact of the designation. What they determined is that the annual cost of the salmon listing is approximately \$37.5 million dollars. The total annual cost for the steelhead listing is approximately \$36 million.

Paying a fee-in-lieu of environmental review will ensure that a certain amount of money is going to habitat enhancement in the North Reach. However, if the City moves to a system such as the Working Waterfront Coalition's multi-tiered approach (base mitigation fees on a percentage of project value rather than on impacts), we will lose the benefits of environmental review and potentially raise Nolan/Dolan nexus and proportionality issues because the fees may not end up being proportionate to the impact on environmental resources. In this case a relatively inexpensive project could have very significant environmental resource impacts but only generate a small fee that would not be adequate to cover the mitigation for impacts.

While staff is not in favor of implementing the multi-tiered fee approach, we do support further discussion of development standards that would allow additional types and levels of development to avoid River Review. We also support further discussion aimed at refining the River Review off-site mitigation fee in lieu option to create a threshold under which the use of HEP/HEA will not be required to calculate the mitigation requirement.

#### **8. Will there be more reviews with the new river plan or fewer reviews?**

There should be fewer reviews under the new River Plan code. Currently, virtually all development proposed within 50 feet of top of bank, or riverward of the top of bank must go through a Greenway Review process and meet broadly worded and vague approval criteria and design guidelines. After the River Plan is adopted many more development proposals will be exempt from Greenway Review (the review will be called River Review under the new code). The review requirement under the River Plan has been narrowed to only those instances when development will impact a natural resource area. At least 4.5 miles of the river bank in the North Reach do not have a level natural resource functionality that rises to the level of review. Under today's Greenway code, these 4.5 miles are near or riverward of the top of bank. In addition, in situations where development in a natural resource area does warrant review, some types of development (railroad tracks, cargo conveyors, outfalls) will be subjected to clear and objective development standards rather than the River Review process.



# **River Plan / North Reach: Responses to questions from North Reach Businesses**

March 22, 2010

## **1. Will the River Plan result in less certainty for applicants when they apply for a permit?**

No, the River Plan / North Reach should result in more certainty for applicants. Currently, virtually all development proposed within 50 feet of top of bank must go through a review process and meet broadly worded and vague approval criteria and design guidelines. After the River Plan is adopted many more development proposals will be exempt from review. Generally, the review requirement proposed under the new River Plan has been narrowed to only those instances when development will impact a natural resource area (River Environmental overlay zone). Approximately 4.5 miles of the North Reach riverbank will not be subject to a review. In the areas with a river environmental overlay development such as rail spurs or conveyers will be allowed through specific standards without going through a discretionary review. These standards will allow common development types to move more quickly through the permitting process.

The River Plan also eliminates the 25' greenway setback that applies today in the River Industrial overlay zone. This will increase operational flexibility for industry and eliminate the potential that a proposed building or structure would not be considered river-dependent and river-related and therefore be excluded from the setback area. This exact situation has occurred over the years in the river industrial overlay zone (e.g. Gunderson's paint booth).

## **2. Why should the City regulate in the river below the Ordinary High Water Mark? Isn't that duplicative of state and federal reviews?**

It is the City's job to ensure that development that takes place within the City, even development in the river, is reviewed in the context of the City's goals and policies. The City review will ensure that we get the best industrial development with the least detrimental impact on natural resources as practicable and that any impacts are mitigated. This review compliments the review done by state and federal agencies which, in practice, only addresses discreet resources and in limited circumstances.

The City has heard industry's concerns about duplication and has worked diligently to address them. The River Plan's conditions of approval say that the City's decision can not contradict, circumvent or otherwise undermine decisions made by state or federal agencies, and goes on to state that mitigation for state and federal agency permits can count toward mitigation for a City permit. The City is also proposing a coordinated review process similar to the one that the City has used for its own infrastructure projects. I helped set the stage for the City process when I worked for Mayor Vera Katz. As a result, the City has received permits from state and federal agencies significantly faster than without the coordination. The City wants to provide this coordination service for private applicants. The state and federal agencies are all willing and ready to participate.

Finally, the recommendation to develop a mitigation bank for the North Reach is intended to offer a one-stop-shopping opportunity for all levels of government when it comes to mitigation. This will avoid the potential for duplicative mitigation.

In summary, the City is not interested in duplicating the state and federal permitting processes. The city is interested in being a part of a coordinated process that ensures that City goals and policies regarding river-dependent industrial development and resource conservation and enhancement are addressed to the extent practicable. If the City is not at the table, we cannot ensure that the City's needs will be met because state and federal agencies are not mandated to ensure compliance with the City's land use goals, policies or code.

**3. Will it take more time for a business to get a permit under the new River Plan than it does today under the Greenway Plan?**

Nothing about the River Plan should increase the amount of time that it takes the City to review a development proposal in the North Reach and in some cases it could reduce the amount of time it takes to get a permit because more development will be exempt from review and use of development standards could make permitting more straightforward. No changes to the legal permitting timelines are proposed. Since the new River Plan code clarifies what information is required, applicants will know what is required of them and will therefore be able to provide the City with a complete application sooner. The new exemptions and development standards may even reduce permitting times.

For development in water, currently, state and federal agencies have regulations that apply to the river, so City staff are developing process improvements that will help coordinate the multi-agency reviews and improve chances that the three levels of government will agree on recommendations to improve project design and required mitigation. City staff will commit to processing the review and rendering a final decision as fast as possible within the bounds of City code.

Perkins Coie hosted a very productive meeting among City, state and federal agency staff and the Working Waterfront Coalition in early January. That meeting resulted in a refined coordinated review process as outlined in the attached flowchart.

**4. Will it cost more money to get a permit?**

I recognize that costs are a big issue for industry and especially uncertainty around costs. Yes, it probably will cost more to get a permit under the new River Plan. The biggest change is that when development impacts a natural resource area, mitigation for the impacts will be required. This is new for development on the Willamette River but is current practice elsewhere in the City. Also, because conditions are so degraded in this part of the river, we are proposing that applicants plant or pay to plant native vegetation in the North Reach, but there is a cap on how much must be spent with each permit. I personally worked out a resolution on this issue with the industrial and environmental community. We have also eliminated review in certain areas and for certain development types and developed standards to allow some common development to move more quickly through the permitting process.

Under today's code, every property owner who wants to develop must pay for and go through a review (which many feel has irrelevant approval criteria), must pay to landscape the greenway setback (which many feel does not add any value aesthetically or ecologically), and must pay for all the other City, state and federal permits necessary to conduct the development.

We have worked hard to ensure that our mitigation requirements are clear, defensible and related directly to the level of impact from the proposed development. The lower the impact, the less mitigation will be required. If an applicant takes part in the coordinated review process, the City's required mitigation can be coordinated with the mitigation required for the state and federal permits. The mitigation requirement will ensure that future development does not result in additional loss of natural resource area features and functions in the North Reach. This is an important policy objective and one that I believe will have far reaching benefits overtime for industry and the environment.

The temporary in lieu fee for off site mitigation has not yet been set but will be prior to the January 1, 2011 implementation date. Staff will continue to hold meetings throughout the year to brief interested parties about the results of an upcoming independent science panel review of the mitigation calculation method and further work on the development of the in-lieu-fee. Staff will bring the package to City Council for a public hearing so that we can all understand and comment on the temporary fee prior to implementation.

**5. Why can't businesses just pay a fee and not go through a lengthy review?**

The Working Waterfront Coalition (WWC) developed a proposal that they call a Multi-Tier Fee System. This proposal would allow applicants to pay a percentage of the value of their proposed development instead of going through a review process. While the WWC proposal would result in money for restoration, the proposal does not directly address impacts from development on natural resources areas so is not acceptable to the City. The value of the project has no relation to the level of impact the development may have on natural resources. Therefore, the fee paid may not fully compensate for the impacts of the proposal and may not meet the goal of no net loss.

Because the Multi-Tier Fee System proposal does not relate to actual impacts from development, and can not ensure that there will be no net loss of resource functionality, the fee paid will likely not be considered adequate mitigation by DSL, the Army Corps, and NMFS. Therefore, additional mitigation for impacts to resources may be required by those agencies, thereby possibly "doubling" the amount of mitigation paid by the applicant. The River Plan proposal includes mechanisms (e.g. explicit code language, the mitigation bank, the inter-jurisdictional coordination) to ensure that "double" mitigation does not happen.

The River Plan also requires that final design of a project minimizes impacts to natural resources, a long-standing City policy. The WWC proposal does not include any similar mechanism.

**6. Will staff correct the zoning maps if the natural resource inventory is wrong?**

Yes, staff can correct the zoning maps if the natural resource inventory is incorrect. It is, and will continue to be, the City's responsibility to correct zoning map errors. There are different ways to do this. Prior to implementation of the River Plan, a property owner can request that staff conduct a site visit to ensure that the zoning line correctly delineates the extent of the resource area. Staff can bring corrected zoning maps to City Council in fall 2010. After the River Plan is implemented map corrections can occur through the existing zoning code process paid for by the Bureau of Development Services. During the course of a river review, applicants may submit a site specific environmental assessment prepared by a qualified consultant describing the location, type, extent and quality of the natural resources on the site. The information can inform the impact evaluation and mitigation obligation. Five years from the date of implementation of the River Plan a property owner can also request an NRI accuracy check paid for by the Bureau of Planning and Sustainability.

**7. How does the river plan address conflicts between trails and industry?**

The Greenway Trail is a key component of the River Plan / North Reach. During the development of the plan, staff worked with stakeholders to identify a trail alignment that respects the safety, security and operational concerns of river-dependent industrial facilities, increases transportation options in the North Reach, and brings people to and along the river where possible. The Greenway Trail will not be developed along most of the riverbank in the North Reach due to Homeland Security concerns.

The recommended alignment brings people to and along the river where there are appropriate opportunities. When it comes time to actually design a trail, the City will be sure that safety (e.g. at-grade crossings, rail-with-rail alignments) and security (e.g. separation, fencing, and signage) are addressed.

**8. Industry is going to have to pay for superfund cleanup and for the natural resource damages from contamination. Those costs to businesses will be significant and must be considered in the River Plan.**

Yes, some industries will have to pay for Superfund and related obligations. That may be a lot of money. However, Superfund costs are for past damages to the environment due to pollution. The River Plan requires mitigation for impacts from new development.

The River Plan offers businesses the flexibility of using a mitigation bank run by the City or a private entity. City staff are in the process of developing a mitigation bank certified by the U.S. Army Corps of Engineers and the Division of State Lands. Once in place, the bank will make it easier for applicants who have to meet city, state and federal requirements to mitigate for impacts.

**9. One of the stated goals of the River Plan is to fuel private investment with public investment in infrastructure projects. Where is the money for these infrastructure projects coming from?**

The River Plan proposes public investments in the North Reach to improve competitiveness, expand development capacity and fuel private investment. Many of these projects will be implemented by the City and its public agency partners, such as the Port of Portland. Although the River Plan does not ensure funding for implementation, staff worked to ensure that the projects are in line with the priorities of the implementing agencies and on their capital improvement lists, where possible.

Many of the transportation projects are prioritized on Metro's RTP and are expected to receive funding within the timeframe shown in the Plan. The sanitary sewer and stormwater projects are included in the City of Portland Capital Improvement Plan and are expected to receive funding within the timeframe shown. Other projects were identified as part of the Freight Master Plan, which is not directly related to a dedicated funding source. However the Freight Master Plan was approved by Council and therefore will be taken into account when the Capital Improvement Plan is updated. The upgrade to the water system in Linnton is not on an existing capital improvement list.

**Attachments**

City, State, Federal Timeline/Flowchart  
NRI summary



CITY OF  
**PORTLAND, OREGON**  
OFFICE OF CITY ATTORNEY

**Linda Meng, City Attorney**  
1221 S.W. 4<sup>th</sup> Avenue, Suite 430  
Portland, Oregon 97204  
Telephone: (503) 823-4047  
Fax No.: (503) 823-3089

March 16, 2010

Mayor Sam Adams  
1221 SW 4<sup>TH</sup> Avenue, Room 340  
Portland, Oregon 97204

Re: The River Plan/North Reach – Code Amendments Regarding Environmental Cleanup

Dear Mayor Adams:

As requested, this letter provides responses from the City Attorneys Office to the issues raised in the letter dated February 28, 2010, to Commissioner Leonard from Bill Wyatt, Executive Director of the Port of Portland.

The Port raises the following issues:

**1. The cleanup code was changed by the City Attorneys Office late in the process.**

The City Attorneys Office provided a final technical review of the Cleanup Contaminated Sites Code Section 33.475.480 before presentation to Council. The changes from this review were not intended to be substantive as described in detail in a memorandum to the Bureau of Planning dated February 8, 2010.

**2. Because parties proposing cleanup have environmental consultants and work with DEQ, it is neither warranted nor appropriate for the City staff to review cleanups because they do not have the expertise.**

The City is not reviewing the technical adequacy of a cleanup remedy chosen by DEQ, EPA or a business doing an independent cleanup, it is asking for consideration of preserving future land use options. Cleanup remedies may include site grading, beach recontouring, creation of impervious surfaces, installation of rip rap, installation of equipment staging areas and revegetation which may limit future uses of the property. The River Plan/North Reach requires that the design of these types of physical activities consider long range land use planning goals for maintaining a working harbor and functional ecosystem to the extent practicable (and unless exempted by law as described below).

As stated in the commentary to the rules:

“The goal of these regulations is to ensure that these cleanup actions do not unnecessarily impair river-dependent and river-related uses or natural resources.”

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The City is not reviewing the selected cleanup remedy to determine if all contamination has been identified or will be removed. The City's review focuses on the physical changes to the landscape that affect future uses of the property set out in the City's long term land use code. Because there are many considerations in creating a cost-effective cleanup, the City Code requirements must be met only to the extent practicable.

**3. The Port did not previously oppose this section of code because the code applied only to DEQ-led cleanups and was voluntary for federal cleanups.**

The code was amended to remove the statement that compliance with the code was voluntary for federal cleanups because it was inconsistent with the intended scope and language of the section. Planning Staff wanted the Code to apply to the extent permitted under DEQ and EPA cleanup laws. The statement regarding voluntary federal compliance was not consistent with this objective and inconsistent with the Code's language that required compliance to the extent practicable.

State and federal law have specific and complex laws and policies limiting application of local requirements to cleanups. The City Code was not intended to interject itself into that process nor limit the potential for application of City Code under state and federal cleanup laws. In addition the Code was not intended to apply to only those cleanups exempt from procedural requirements. It was our understanding that all other cleanups that are not exempt (including state led cleanup in a public right of way and cleanups conducted without agency oversight) would be subject to the standards. As a result, the rules were amended to be neutral regarding the DEQ and EPA exemption processes governed by state and federal law. In other words, the City was not trying to prevent EPA from considering these standards if EPA chose to do so.

A policy choice could be made as suggested by the Port and the code could be amended to ensure that it does not apply to any Portland Harbor activities, federal led activities, activities below ordinary high water or any other group of activities. It was not our understanding that the City had made the policy choice the Port suggests..

**4. The City Attorney changed this section to require that City Code apply to EPA-led cleanups.**

The City agrees with the Port that EPA determines which requirements apply to onsite federal-led cleanups and did not intend to suggest that it was requiring compliance with City code even if EPA decides to the contrary. The City did not provide advance communication or "disrespect" any of the Portland Harbor processes because no such City mandate was intended.

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To avoid any confusion, I met with the Port's attorney, Krista Koehl and we agreed on revised language in the introductory commentary and code to be clear on this point and removed unneeded discussion of federal and state processes.

**5. EPA has concluded that City requirements do not apply to the Portland Harbor cleanup.**

It is true that EPA has not, to date, included City requirements in its preliminary identifications of requirements. However, EPA has not made a final determination. EPA will identify the final requirements when EPA issues the record of decision. EPA estimates that the record of decision will be issued in 2012.

**6. Local Laws are rarely identified by EPA as an applicable requirement.**

This is a difference of opinion. EPA identified the City's Greenway Plan (The River Plan/North Reach plan will supersede the Greenway Plan) as a consideration for the cleanup at the McCormick and Baxter site.

EPA stated: "These greenway regulations are in effect along the riparian zone of the Lower Willamette River to protect, conserve, enhance and maintain the natural, scenic, historic, economic, and recreational qualities of lands along Portland's rivers. DEQ and EPA will coordinate with the City of Portland to identify substantive aspects of the Greenway regulations which may be relevant to the barrier wall."<sup>1</sup>

The Willamette River Greenway planning goal (Goal 15) was also identified as a relevant requirement at the Teledyne Wah Chang superfund site. The River Plan/North Reach implements Goal 15.

EPA considers local land use planning an important part of remedy selection. EPA operates under a directive to consider land use in making remedy selection decisions at Superfund Sites (OSWER Directive No. 9355.7-04) which state that EPA:

"...believes that early community involvement, with a particular focus on the community's desired future uses of property associated with the CERCLA site, should result in a more democratic decision making process; greater community support for remedies selected as a result of this process; and more expedited, cost effective cleanups."

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<sup>1</sup> EPA Superfund Explanation of Significant Differences: McCormick & Baxter Creosoting Co. (Portland Plant), August 13, 2002, page 11. This 2002 document describes an additional aspect of the remedy chosen in 1996 and amended in 1998 and confirmed that "these TBC [regulations to be considered] remain unchanged from the ROD.

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The River Plan/North Reach implements Goal 15 and presents the City's desired future land use considerations for the Willamette River.

**7. The City is attempting to put itself in a decision making role over other PRPs or otherwise gain advantage in the Superfund proceeding.**

It is difficult to know what to make of this statement. To the extent it was based on the Port's interpretation of subsection C discussed above and the Port's inference that the City was trying to mandate that the North Reach apply to Portland Harbor Superfund, the proposed changes described in item 4 should have cleared that issue. If it is an objection to the nature of the review, as explained in the first response, the City is implementing requirements to preserve future uses of properties not governing cleanups.

The City has potential liabilities in Portland Harbor as does the Port and both will be subject to EPA's decisions. EPA, not the City, will select remedies in Portland Harbor. EPA will determine the extent to which local land use requirements should be considered in the remedy. The River Plan/North Reach will or will not apply equally to the Port and the City depending on EPA's decision to identify it as a consideration in Portland Harbor. If EPA determines that the Code should be considered, the City would be in a position of having to consider rules that it created, but this is neither novel nor an unfair advantage. The City must always comply with its own requirements.

If you have additional questions, please don't hesitate to contact me.

Respectfully,



Nanci Klinger  
Deputy City Attorney

c: Commissioner Dan Saltzman  
Commissioner Randy Leonard  
Commissioner Nick Fish  
Commissioner Amanda Fritz  
Lori Cohen, US EPA  
Dick Pederson, Oregon Dept of Environmental Quality  
Bill Wyatt, Executive Director, Port of Portland



Call for Nominations  
Dated: *March 22, 2010*

Summary: The City of Portland, Bureau of Environmental Services (BES), Science, Fish, and Wildlife is seeking nominations of independent experts to conduct a peer review regarding the formulation of the City of Portland's proposed "North Reach Willamette River Mitigation Bank".

Dates: Nominations should be submitted by *April 23, 2010* per the instructions below.

For Further Information Contact: Any person wishing further information regarding this request for nominations may contact Ms. Kaitlin Lovell, Designated City Representative (DCR), Bureau of Environmental Services, by telephone/voicemail at (503) 823-7032; by fax at (503) 823-6995 or via e-mail at: [kaitlin.lovell@portlandoregon.gov](mailto:kaitlin.lovell@portlandoregon.gov). General information concerning the City of Portland Watershed Plan can be found at the City of Portland's website at: <http://www.portlandonline.com/bes/index.cfm?c=32184>, and information regarding the City of Portland's River Plan, North Reach can be found at: <http://www.portlandonline.com/bps/index.cfm?c=42540>

Supplemental Information:

Background: In order to address the on-going issues in the North Reach of the Willamette River, City staff, with the input of several stakeholder and community committees, has developed the first phase of the River Plan focusing on the North Reach. The River Plan / North Reach focuses on balancing the competing goals of:

- Maintaining a prosperous working harbor,
- Protecting and enhancing natural resources,
- Facilitating the clean-up of hazardous substances, and
- Providing public access to, along and across the river.

Purpose:

As a tool to help achieve these goals, the City is developing a City of Portland programmatic mitigation bank for the Lower Willamette River, specifically the North Reach of the Willamette River from RM 0 to RM 11.5 (approximately the Broadway Bridge). This mitigation bank will allow individual private or public banks to be certified to offer natural resource mitigation under the City's River Code (formerly the Greenway Code). Information developed by this panel of experts will be used to certify and establish mitigation banks that directly mitigate for development within the North Reach of the Willamette River with the possibility of expanding the geographic range as the River Plan addresses the Central and South Reaches of the Lower Willamette River within the City of Portland. Specifically, panel members will:

- Provide peer review and comment on the City's proposed valuation/quantification of habitat and its application in the North Reach;
- Provide direction for implementation, and identify any gaps;
- Advise the City on the potential need for additional biological factors for consideration.

Qualification Requirements: The City of Portland is seeking nomination of experts with regionally recognized expertise, knowledge, and experience for their work in comprehensive Habitat Evaluation Procedure (HEP), Habitat Equivalency Analysis (HEA), habitat quantification modeling, hydrology, hydrogeology, ecology, or aquatic or wildlife biology. Nominees with experience or expertise in the Willamette River are preferred, and must be qualified, independent scientists. Scientists from academic institutions, or non-regulatory scientists from state, federal or tribal agencies such as but not limited to the NOAA Northwest Fisheries Science Center, U.S. Forest Services Pacific Northwest Research Center, Columbia River Inter-Tribal Fish Commission, or Northwest Power and Conservation Commission Fish and Wildlife Program, are encouraged to apply. Qualified scientists who may have a pecuniary or financial interest in the development or application of the mitigation bank, or who have a direct or indirect conflict of interest in the process will not be considered.

Process and Deadline for Submitting Nominations: Any interested person or organization may nominate qualified individuals in the areas of expertise described above for possible selection and subsequent service on this expert ad hoc Panel. Nominations should be submitted in electronic format (which is preferred over hard copy). Self nominations are acceptable.

The City of Portland, BES, Science, Fish, and Wildlife Program requests:

- Contact information for the person making the nomination
- Contact information for the nominee
- Disciplinary and specific areas of expertise of the nominee
- The nominee's curriculum vita
- Sources of recent grant and/or contract support
- A biographical sketch of the nominee indicating current position, educational background, research activities, and recent service on other advisor committees or professional organizations.

Persons having questions about the nomination process should contact Ms. Kaitlin Lovell, the DCR, as indicated above in this notice. Nominations should be submitted in time to arrive no later than *April 23, 2010*. The City of Portland, BES, Science, Fish, and Wildlife program will acknowledge receipt of nominations.

Selection Process

The City of Portland will select, from those nominated, a balanced review panel which includes candidates who possess the necessary domains of knowledge, the relevant scientific perspectives (which, among other factors, can be influenced by work history and affiliation), and the collective breadth of experience to adequately address the charge.

The Science, Fish, and Wildlife Program will appoint a selection committee to review the pool of nominees. Due diligence will be conducted for all nominees to ascertain a nominee's level of impartiality, and/or lack of competing or conflicting pecuniary interests (including private and public activities) with regards to the outcome of the mitigation bank. The nominee is charged with bringing forth any possible affiliations or activities that could possibly be construed (either by the City or the public) as pecuniary interests. Selection of qualified candidates will be based from information provided by the candidates themselves, and background information gathered by the City's, Science, Fish, and Wildlife Program. Selection criteria to be used for Panel membership include: (a) Scientific and/or

technical expertise, knowledge and experience (primary factors); (b) availability and willingness to serve; (c) absence of financial conflicts of interest or appearance of partiality;; and (d) skills working in committees, subcommittees and advisory panels; and, for the Panel as a whole, (f) diversity of scientific expertise and viewpoints. The City of Portland values and welcomes diversity. In an effort to obtain nominations of diverse candidates, the City of Portland encourages nominations of women and men of all racial and ethnic groups.

Commitment, this review panel will require approximately 20 hours of work, including a 4-6 hour workshop held in Portland with the balance comprised of review and report writing. The workshop will be facilitated and recorded by EnviroIssues. Travel reimbursement is possible but otherwise no compensation will be expended for these services.

## **North Reach Advisory Committee**

### *River Plan / North Reach Plan's Direction*

*“Establish a multi interest North Reach Advisory Committee to help the City evaluate implementation of the River Plan / North Reach, including progress on developing a mitigation bank. Provide an annual report to Planning Commission and City Council.*

*“...If the City Council or the North Reach Advisory Committee believes that provisions in the River Plan are leading to frivolous land use appeals, City Council will request that the Bureau of Planning and Sustainability address the concerns.”*

### Role of the Committee

The role of the North Reach Advisory Committee (the Committee) is to oversee implementation of the River Plan/North Reach and to assess and report on the Plan's effectiveness over time.

1. The intent of the Committee is not to re-debate provisions of the plan.
2. The Committee is advisory and is not a decision making body.
3. The Committee will help the City assess and report on the progress of the Plan's implementation.
  - a. The Committee is expected to identify plan implementation issues (e.g., lack of progress in action items whether due to funding or other issues; lack of clarity in code language...).
  - b. The Committee is expected to assess issues in a systematic manner and to provide an objective review of performance.
  - c. The Committee will provide a forum for debriefing on projects.
  - d. The Committee will monitor and report on any appeals of North Reach Plan provisions.
  - e. The Committee will assess funding needs related to plan implementation.
4. The Committee will ensure that the plan is implemented in a coordinated manner.
5. The City will work with the Committee to review, and if necessary, revise performance measures to use in assessing implementation success.

### Role of the City of Portland

The City of Portland is represented by the Office of Healthy Working Rivers in consultation with other City Bureaus.

1. The City will convene the Committee after passage of the River Plan/North Reach Plan by the City Council
2. The City will set specific goals and desired outcomes for the Committee.
3. The City will appoint members to the Committee.

4. The City will develop a Committee charter specifying goals and desired outcomes and will provide a "position description" for Committee members.
5. The City will conduct discussions in a fair and open setting and will provide a professional facilitator (as needed).
6. The City will establish a meeting framework to ensure that key issues are discussed, resolved and/or forwarded to the Planning Commission and City Council, as appropriate.
7. The City will provide information requested by the Committee or necessary for Committee consideration in a timely manner.
8. The City will establish clear reporting mechanisms to ensure that information is provided in a consistent manner.
9. The City will consider information learned through North Reach Plan Implementation in development of plans for the Central and South Reach.
10. The City will convene meetings quarterly after the effective date of the plan.
11. The Director of the Rivers Office will chair the meetings, draft agendas and provide summaries.
12. The City will ensure that committee members have access to technical experts in their review of River Plan/North Reach implementation.
13. The City will be responsible for drafting annual reports to the Planning Commission and City Council.
14. The City will work with Committee members to accurately reflect Committee discussions. Reports will distinguish majority views from views of a minority of members.
15. The City will also report to Council on any implementation issues raised by Committee members (or others) that require immediate resolution.

### Membership

1. The City will determine membership of the Committee.
2. Applications for membership will be solicited by the Rivers Office following the City Council's approval of the River Plan/North Reach and will forward applications to the Commissioner in Charge of the Rivers Office and the Commissioner in Charge of the Bureau of Planning and Sustainability.
3. The City Council will approve final Committee membership.
4. The Committee will be composed of 12 – 15 members. Members will be selected to ensure a balanced, "multi-interest" group. Each member will be expected to take an inclusive view of implementation.

Members should reflect the main plan policies (economic prosperity, watershed health, access, community engagement and partnerships).

- Industrial property owner(s)
- The Port of Portland
- Environmental
- Watershed Health
- Institutional Member (health, education...)
- Labor Unions

North Reach Advisory Committee  
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OHWR

- Upland and In-water Habitat
  - River Communities (Linnton, St. John)
  - Recreation– Trails, Fishing, Boating
  - Infrastructure – Transportation
  - Rail
  - Sustainability
  - The University of Portland
  - At-large Members (representing broad, regional perspective on the North Reach)
  - City Budget Advisory Committee representative
5. Members will serve 3-year, staggered terms, and may be reappointed.
  6. The Commissioner in Charge of the Rivers Office and the Commissioner in Charge of the Bureau of Planning and Sustainability, or their representatives, will attend meetings as requested.

#### Technical Resource Group

The Committee will be supported by technical resource staff from the City (including PDC), state and federal agencies.