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Tue, Jan 24, 2023 at 3:24 PM

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From: **christine mccurdy** <christinemccurdy@gmail.com>
Date: Sat, Jan 21, 2023 at 12:38 PM
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From: **Hank McCurdy** <hankmccurdy@icloud.com>
Date: Sat, Jan 21, 2023 at 12:35 PM
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To: <christinemccurdy@gmail.com>

This document is against Metro's plan for Burlington Bottom



Fndngs & Cnclsns BCF 3.pages
831K

Exhibit D.101

Findings of Fact and Conclusions of Law

Introduction stopped around p. 30 Aug. 3, 2020

Metro's Access Plan is deficient in multiple ways. It has not met its burden of proof to provide substantial evidence for a large number of criteria. There are two main issues. The first is erosion. The second is whether or not Oregon's land use laws, shaped over the decades by policy makers elected by the citizens of this state and county, will be followed.

- I. Conclusion: Metro has forfeited any deference it might otherwise be entitled to for expertise in land use planning and environmental science because it has engaged in an extensive pattern of misrepresentation of material facts, some of which are obviously intentional leading to the conclusion that those that would seem questionable are probably intentional as well. Additionally, it has engaged in the spoliation of evidence regarding wildlife present in the BCF.

Finding of facts supporting the above conclusion include, but are not limited to the following:

Metro claims to be preserving "core" habitat in the BCF by preserving unfragmented areas of 30 acres or more when under all versions of its multiple BCF trails maps it has left no more than 15 acres unfragmented by trails in the approximately 226 acres of the 339 acre BCF. Its own scientific literature reviews show that many species inhabiting the BCF need far more than 30 acres of intact habitat to remain viable.

Metro claims that it is unaware of any listed species in or near the BCF. Metro has also said the opposite in its 2014 Site Conservation Plan approved by its chief environmental scientist. There it stated that listed andronomous fish are found in BCF in the lower reaches of Burlington Creek and that other listed and rare species “almost certainly occur” in the BCF. (SCP, pp.14-5).

Burlington Creek feeds Burlington Bottoms, which is directly east of the BCF across Highway 30, a distance of about 20 to 25 yards. Burlington Bottoms is widely known by the scientific and environmental community generally to be a *refugia* for listed andronomous fish. Metro now claims in its Access Plan that “There is no *record* of fish use in Burlington Creek or Ennis Creek although it is *possible* that native fish use the lower reaches with less steep gradients.” (Access Plan, p.16) (Emphasis added).

Metro falsely claimed that it is in partnership with the Harborton Frog Shuttle, a volunteer group that captures and transports Red legged frogs across Highway 30 as they migrate back and forth between the Tualatin Mountains, including the BCF, to the wetlands east of Highway 30 to breed. Indeed, Harborton Frog Shuttle knows that Metro’s proposed trails in the BCF will be harmful to the Red Legged Frogs, a state designated sensitive species of high concern, which Harborton Frog Shuttle’s volunteers work to protect. It is implausible that Metro is in partnership with the Harborton Frog Shuttle, which group denies any such partnership has existed.

Metro asserted in reference to the BCF that “Low levels of access are anticipated for the vast majority of the natural area.” (Access Plan, p. 2). It is a false statement that the mountain biking trails Metro proposes for the BCF will be lightly used. Metro acknowledged this in its

Funding Application, to the Oregon Department of Parks and Recreation stating that the great mountain biker use anticipated for the BCF was a reason it was asking for funding. (Exh. 2, p. 14).

Metro has made multiple conflicting claims regarding the location of its trail network within the BCF. On the one hand it claimed that the vast majority of its trails will be in already cleared areas, and on the other hand it stated that they will not be. Metro also claims that it is not allowed to place any of its development in the utility easement corridors that run the length of the BCF despite all the multiple versions of its BCF trails maps having its trails cutting across and running within the easements many times.

Metro claims that its trails will be multi-use when according to its own trail building manual, *Green Trails*, multiuse trails that are to be used for both mountain biking and hiking need to be 48 inches wide with occasional passing areas 10 feet wide so that mountain bikers will be able to pass hikers safely. Instead, the great majority of trails that Metro proposes under all versions of its multiple trails maps for the BCF will be approximately 30 inches wide or less, a width preferred by mountain bikers and known as “single track.” Further, under any version of its multiple trails maps produced thus far, there will be no 10-foot wide passing area. The evidence is clear that hikers, especially those with children and the elderly, will avoid such trails out of fear of injury from mountain bikers making Metro’s proposed trails mountain biking trails, and not multi-use trails as Metro claims.

Metro claims that its trails are aimed at serving the underserved, including people of color and others who are low income. Instead, because Metro’s proposed BCF trails actually will be mountain biking trails its claim of “equity” is false. A mountain bike and necessary

additional gear, such as shoes, water pack, helmet and other equipment is beyond the reach of people making even \$15 per hour. Poor people cannot afford what even a modest outfitting the sport requires. Additionally, there is no public transportation to the BCF or MCF and walking to either MCF or BCF from the Sauvies Island Bridge, where public transportation ends, is a lengthy and dangerous journey, including up steep inclines even before hiking in either the BCF or MCF can begin. This is particularly the case for the MCF where the distance from the bridge is about nine miles.

Metro's statements regarding elk in the BCF, range from they are there, but not as numerous as elsewhere in the area, to there are hardly any there, to saying there was no sign of any, and back again to there are hardly any elk present in the BCF. Metro's claim that there was no sign of elk in the BCF was made in Metro's application for funding to the Oregon Department of Parks and Recreation even though a minimal survey Metro had conducted for BCF elk was also referenced in the application. From the context of the documents it appears that Turnstone Environmental Consulting performed the survey. That survey did in fact show signs of elk in the BCF. The statements of people living in the area show, and poaching evidence does as well, that elk presence in the BCF has not been marginal.

Metro as it repeatedly and publicly stated to a number of people in the public process preceding its presenting its Master Access Plan to the Metro Commissioners in April 2016 that it had done no baseline study to determine the extent of elk in the BCF because such a study would be "too expensive and would not show anything anyhow." Metro's on the ground assessment of other species in the BCF was extremely limited. It stated "... a thorough ecological inventory and assessment has not been done..." Access Plan p.14. This is

despite Metro's own literature (*Green Trails* manual and one of its ecology science literature reviews) stating wildlife inventories should be done before planning trails, the ODFW advising Metro this should be done and the opinions of scientists familiar with the BCF also saying the same thing. Nevertheless, Metro has now committed to doing wildlife studies, long after after the BCF has been significantly disturbed by forest thinning, trucks dumping gravel on the loop road and other substantial disruptive activities including bulldozer and backhoe work. This raises the question, as its own literature points out, of how valid any post-disturbance studies can be for an indefinite period of time.

Despite claiming that an elk study would be too expensive and not show anything, Metro had Turnstone do a limited elk survey for the BCF. The study was done in late March 2016 after Metro had substantially disturbed the BCF through various activities. The Turnstone survey consisted of one and perhaps two days of observation covering about 112 acres of the roughly 250 acres of the BCF south of McNamee Road, where Turnstone deemed it safe, presumably because of the steepness of the terrain. The study showed signs of elk, including tracks, elk browse and the skull of an elk with its antlers cut off. The study noted that it was limited and cursory and that more should be done.

Metro has provided a geotechnical report from an engineering firm, Carlson Geotechnical and has represented it as showing that Metro's proposed trails in the BCF do not present an erosion risk. The Carlson report is a seismic and landslide risk study. It specifically notes that it is not a soils/erosion study. Moreover, the Carlson report sets forth the slope percentages where Metro proposes to install trails. In a BCF plans map that shows striking similarities to the one that Carlson Geotech examined such that both trails maps

appear to be identical, Metro claims that its proposed trails will be on slopes that are far less than half as steep as those that the Carlson Geotech report found.

The first is that it is exempt because it is engaged in activities to protect, conserve, enhance and maintain public recreational scenic and natural values on public land, pursuant to MCC 33.4515. The Multnomah County Planning Department has already rejected this argument. Metro's second argument is that the Siskiyou Biosurvey report is a Wildlife Conservation Plan, which, if Metro's plans do not otherwise meet SEC permit requirements, allows it to obtain such permits by virtue of its Wildlife Conservation Plan. Metro repeatedly makes this claim despite Siskiyou Biosurvey's statement in the report itself that its report does not constitute a Wildlife Conservation Plan.

During periods of high water, which occur from late fall into late spring, the watercourses of BB braid into McCarthy Creek. McCarthy Creek's lower reaches are part of the same flood plain as BB. The BCF sits at the bottom of a 900-acre watershed, which is the sole source of clean, clear water for BB. The streams from the watershed into BB all flow through the BCF. Enough water flows into BB to support six beaver dams. Metro's own graphic shows that the BB watercourses braid into McCarthy Creek. Nevertheless, Metro claims that the BB watercourses do not feed McCarthy Creek and also claims that McCarthy Creek is not a salmon spawning stream. McCarthy Creek is recognized by ODFW as an important salmonoid spawning stream, something that Metro's environmental scientists know or should know.

Metro states it acquired the BCF, MCF and Ennis and Abby Creek forests in the North Tualatin Mountains, all of which sit in the narrowest part of the wildlife corridor between

Forest Park and the Coast Range in order to “keep important wildlife and riparian corridors intact.” Metro acknowledges these are indeed “special places.” Metro is well aware of the biological-diversity importance of “the upland forests and streams that wildlife depend on for connections between Forest Park and the Coast Range.” (Access Plan, pp. iii and 4).

Nevertheless, Metro claims there is no agreed upon standard for a wildlife corridor and dismisses its importance stating instead that it will rely on generally accepted ecology science principals instead. (Access Plan, p. 31). Metro has published a scientific literature review entitled *Wildlife corridors and permeability-a literature review* (Metro, 2010), an approximately 80-page well footnoted publication that discusses the science of wildlife corridors belying Metro’s claim that there is no accepted understanding of the term “wildlife corridor.”

Metro published the above mentioned wildlife corridors booklet as well as a booklet entitled *Hiking, mountain biking and equestrian use in natural areas: A recreational ecology literature review* (Metro, 2017). Both of these publications discuss the science applicable to the subject matter depicted in the titles of the publications. On many points there is a consensus on generally accepted scientific principles. Metro however, ignores many of these principles. For instance, while a segment of unfragmented habitat 30 acres in size will be sufficient for some species, it is insufficient for many others known to inhabit BCF. As Metro points out, the following are typical core habitat area requirements: 26.4 acres for some small mammals, 81 to 484 acres for many species of non-prey birds, 440 acres for elk as well as other species of non-prey birds. (Exh. 25, p. 86). All known versions of Metro’s multiple BCF trails maps fragment the 250 acres or so part of the BCF south of McNamee Road into

far smaller pieces with largest remaining piece of unfragmented habitat at less than 15 acres, and the rest much smaller than that.

Another example of Metro ignoring accepted ecological principals is Metro's claim in its Access Plan, despite the scientific evidence to the contrary as set out in its literature reviews, that elk in the North Tualatin Mountains are habituated to human activity. (Access Plan, p. 32). The statements of a number of people living near Metro's four North Tualatin Mountains forests show this not to be the case. The evidence is instead that both legitimate hunters as well as poachers shoot the elk. For example, during hunting season elk use the MCF to avoid the area where elk hunting is allowed across Skyline Boulevard and Cornelius Pass Road near the MCF. Elk seldom cross roadways during the day, and while they go onto property that Metro characterizes as backyards, the evidence is that they remain wary and leave when humans appear.

Metro's last known BCF trails map was produced December 15, 2017 at the Multnomah County Planning Department's request because Metro had failed to declare a final trail map for the BCF. It still has not done so. Its December 15, 2017 BCF trail map has an inaccurate statement of the length of the new trails proposed. The legend on the map shows 5.7 miles of new trails, but fails to state the length of trail AA, which is characterized by multiple switchbacks and appears to be about a mile in length.

Of all the misstatements and misrepresentations that Metro makes its claim that the preservation of water, wildlife and habitat is its highest priority, and that its trails plans for both MCF and BCF properly balance access so that it meets its declared highest priority, is the most egregious. With regard to the BCF, this is clearly not the case. Instead, its plan for

the BCF is, by its own definition, one of destruction of habitat and not preservation. PUT IN
J. SOLLS HOIDING THR 12,2017 YRAIL MAP

- II. Conclusion: Statewide Land Use Planning Goal 1 requires that all phases of the planning process be open to the public and that the public be given timely and comprehensible information so that genuine citizen input can monitor and inform the process. Additionally, Goal 1 requires regional agencies such as Metro to use Multnomah County's Citizen Involvement process, which Metro has not done. Metro has not met its Goal 1 obligations.

Findings of Fact supporting the above conclusion are as follows:

Metro dismissively claims that it has satisfied Statewide Land Use Planning Goal 1 by "...compliance with the County's administrative procedures which have been acknowledged as consistent with state law." (January 2018 Comprehensive Plan Amendment Submission, p. 99). Metro is incorrect. The process Metro refers to is supposed to be an open process. Metro instead seeks a closed process within the confines of its planning department.

The crux of the matter is that Metro considers the Access Plan a visionary guide for creating a plan as Metro has repeatedly stated. In other words, Metro reserves to itself the right to implement its vision at a time and in a manner as it sees fit within the confines of its planning department and without public input in formulating the final plan.

Goal 1 requires Metro to coordinate its planning efforts with the affected governing body, the County, and make use of the County's existing local citizen involvement programs. Metro has done neither. Instead it has presented the County with a finished document, the Access Plan, and it has not used the County's citizen involvement program. (CP pp. 1-9 to 1-10).

If the County were to adopt Metro's Access Plan as a Comprehensive Plan amendment it would be abdicating its policy setting responsibility. Metro has not engaged in any planning coordination with the County as Goal 1 envisions. If the County were to adopt the Access Plan as a comprehensive plan amendment it would render its own citizen involvement program a nullity.

Goal 1 requires the involvement of a "cross section of affected citizens in all phases of the planning process... broadly representative of geographic areas and interests related to land use..." It also requires that the citizen involvement program shall be "appropriate to the scale of the planning effort."

Metro has devoted tremendous resources both in creating and defending its Access Plan. The endeavor is of regional and statewide importance. Forest Park is the iconic symbol of environmental sustainability for both the Portland region and the entire State. It is one of the primary drivers of Oregon's perceived high quality of life. That perception draws thousands nationally each year to make Oregon, and especially the Portland area, their home, making the Portland area the engine of the state's economic growth.

The BCF and MCF sit at the narrowest part of the wildlife corridor providing "critical habitat connections" between Forest Park and the Coast Range and other natural areas important to the Park's biodiversity and vitality, including Burlington Bottoms. (Comprehensive Plan, pp. 1-31 and 32). Moreover, the natural resources involved, especially BB, McCarthy Creek and Burlington Creek are significant. The creeks are used by listed salmonoids, and BB is one of the few remaining wetlands that were once prevalent in the area making BB all the more important for the remaining runs of salmonoids that use it as a resting place. Its significance extends as far as the fish swim- all the way to Oregon's eastern border and beyond.

Metro's Stakeholder's Advisory Committee is an inadequate substitute for the citizen involvement programs that Goal 1 requires and that the County provides. Metro did not involve a cross-section of affected citizens in all phases of the planning process in its Stakeholders Advisory Committee or elsewhere, and did not match the scale of the undertaking.

The Stakeholders Advisory Committee was a group whose assembly was not well publicized, whose composition was heavily weighted to west Portland and local government employees. It did not have even a regional, let alone statewide representation among its members. Metro made no discernible effort to include Native Americans, or people of color, the ODFW or NOAA. (Exh. 7). Likewise there is no question that Metro has failed to engage the public prior to the public hearing process.

Since publishing its Access Plan in April 2016, ore than four years ago. Metro has produced numerous different trail maps for the BCF without making them available to the general public. Only one set of maps, those found in the Access Plan of 2016, at page 28 for BCF, and page 29, for MCF, have been made public. While Metro does not appear to have produced more than one trail map for the MCF its plan for the MCF also is deficient in that Metro reserves to itself the right to come up with a final plan as it deems fit out of the public eye.

Metro's approach to planning also fails meet statewide Goal 1 because it fails to present the comprehensible information the goal requires. The essence of any trails plan is a map showing with a reasonable degree of specificity where trails will be located. Metro has the capability of producing trail plan maps that show on the maps themselves the slopes of proposed trail locations, but has failed to do so. Its website touts its map-making capability. (Exh. 30).

The need for comprehensible maps is especially important for the BCF because the combination of the slopes and soil type make the BCF highly erodible producing silt, the worst sediment for fish, and which sediment type will adversely effect the already shallow BB lakes making them less functional as flood control assets. It is also important for the MCF because the soil there is even more prone to erosion than that of the MCF.

A mere statement from Metro of the slopes at trail locations contained in a sidebar legend is insufficient. There is a wide discrepancy, much greater than 50%, between Metro's statement of slopes and that of its expert, Carlson Geotechnical, for what appears to be the same BCF trail map. Even if the different statement of slopes percentages between Metro and Carlson Geotech represents honest error, the discrepancy indicates that even a few feet difference in location can result in a significant difference in slope. This is why MCC. 29.351 defines topographic information as:

Surveyed elevation information which details slopes, contour intervals and drainageways. Topographic information shall be prepared by a registered land surveyor or a registered professional engineer qualified to provide such information and represented on maps with a contour intervals not to exceed ten feet.

Additionally, Metro's failing to show the slopes on its trails maps itself is not cured by the legend to the side of its maps indicating what Metro claims to be the slopes of for various trails because many of the trails are a considerable length. It is highly doubtful that all portions of a given trail will be on slopes of just one gradient.

As a consequence of Metro having produced numerous trails maps for the BCF the County Planner required Metro to produce a final trails map for the BCF of sufficient detail so that its plan could be reasonably understood. Metro then produced a further BCF trails map dated

December 15, 2017. But, Metro did not provide the detail in this map that the County Planner requested. Additionally, the contrast between Metro's Access Plan BCF map and its December 15, 2017 map is significant.

Goal 1 is clear in covering every conceivable stage of the process. It mandates that the public be allowed meaningful participation. OAR 660-015-0000(1) provides in part as follows:

Revision - The general public... should have the opportunity to review and make recommendations on proposed changes in comprehensive land-use plans prior to the public hearing process to formally consider the proposed changes.

Metro's reserving to itself the right to implement its "vision," whatever that may be at a given moment, does not give the public an opportunity to review and make recommendations prior to the public hearing process.

Metro has done its best to keep everyone as far away from meaningful participation in the planning process after April 2016 as it can. The County cannot be complicit in a process that aids and abets avoidance of its Statewide Land Use Goal 1 responsibilities. The due process clauses of both Oregon's and the U.S. Constitutions require that the citizens of this County and State be given their Goal 1 processes. Metro's Access Plan does not do that. For this reason and many others Metro's Access Plan should be rejected.

III. Conclusion: Metro's Access Plan also violates the spirit of Multnomah County's Comprehensive Plan, which recognizes that "citizen involvement is essential for creating the most effective land use planning process and outcomes," and that "[a]n informed public is critical to the effective participation in land use planning," and finally, that providing timely and

comprehensive information to the public is part and parcel of the foregoing. (Multnomah County Comprehensive Plan, p.1-9).

Findings of Fact supporting the above conclusion are as follows:

For the reasons stated in the Findings of Fact immediately above as to Metro's failure to provide substantial evidence of compliance with Statewide Planning Goal 1, it also does not provide substantial evidence of meeting a fundamental goal of Multnomah County's Comprehensive Plan, an open process that engages an informed citizenry.

III. Conclusion: Metro's Access Plan conflicts with statewide Land Use Planning Goal 4. The primary objective of Goal 4 is to preserve forestland and the growth of trees for the timber industry, while at the same time allowing for recreational opportunities and agriculture as a secondary objective. These uses, the primary one of timber production and the secondary ones of recreation and agriculture, are to be "consistent with the sound management of soil, air, water and fish and wildlife resources." Metro fails to provide substantial evidence of meeting Goal 4's sound management requirements for soil, water and fish and wildlife resources.

Findings of Fact supporting the above conclusion are as follows:

Metro's Access Plan's states that preservation of water, wildlife and habitat requires unfragmented habitat of 30 acres or more. Although that claim is itself an inaccurate statement of wildlife conservation science as shown by Metro's own publications, Metro does not even meet its own standard of 30 acres of unfragmented habitat for the BCF. Instead,

Metro proposes the destruction of two thirds of the habitat of BCF by carving it into fragmented pieces where the largest intact piece is at best 15 acres and the remainder far smaller than that. Its intensive network of trails proposed for the BCF total of nearly 10 miles is in an area less than 40% of a square mile. As Metro has elsewhere shown, for a number of species that almost certainly inhabit the BCF they need unfragmented habitat far greater than 30 acres and much, much, greater than what Metro proposes for two thirds of the BCF. It is beyond question that what Metro proposes for the BCF is not the sound management of wildlife resources. For the MCF too Metro has failed to provide substantial evidence that it soundly manages for soil, water and fish and wildlife resources.

In the MCF Metro proposes trails that may be too close to an elk breeding, calving and feeding area based on its own environmental science literature reviews, which states elk need up to 400 meters distance from human activity. It does not provide sufficient detail so it can be determined how far away its trail is, which is closest to the mixed meadow and forest area where elk calve and raise their young, so it can be determined whether or not it is too close. Pregnant elk and elk with young need considerable distance between human activity in areas that are vital to their lifecycles. Further, the MCF trails map that Metro published at page 29 of its Access Plan is not its final MCF trails map.

For both the BCF and MCF Metro's Access Plan also fails Goal 4's requirement of sound management because Metro has refused and failed to conduct inventories of the wildlife in either the BCF or MCF prior to making its Access Plan, although it appears to have conducted some bird studies. Again, Metro's *Green Trails* manual advises that wildlife inventories should be done so that trail locations can be accommodated to wildlife needs.

Belatedly Metro has now committed itself to such studies, but the problem is its commitment comes late in the process because Metro has disturbed both the BCF and MCF by extensive thinning as well as other activities, including six months of backhoe, dump truck and bulldozer work in the BCF planned through the end of 2018. Metro's own environmental science literature points out that after a site has been disturbed wildlife studies are of questionable validity.

Metro's Goal 4 failures regarding fish, water and soil are interrelated. Metro has failed to provide substantial evidence that any of its various plans sufficiently address the serious erosion potential. Its Access Plan map fails to show the slopes where it plans to install the trails, making it impossible to determine the risk to both the BCF and MCF watercourses from erosion. Some 96% of the BCF is comprised of Goble Silt Loam, a soil type that in its own right is significantly erodible and when combined with steep slopes such as that found in the BCF, is highly erodible. The soil that predominates in the MCF is even more prone to erosion than the BCF soil.

For the BCF Metro relies on a report from Carlson Geotechnical to claim that its trails plans do not present an environmentally significant erosion risk. It must be noted that the trail plan map that Carlson Geotech reviewed is one version of the many that Metro has produced for the BCF subsequent to its Access Plan trail map of April 2016. Carlson Geotech is a firm Metro hired to do a seismic and landslide assessment of Metro's BCF project. ITS report is neither a soils nor erosion study.

The BCF sits at the bottom of a 900-acre mostly intact watershed that is the sole source of clean, clear, cold water for Burlington Bottoms, a well-known *refugia* for listed

salmonoids. BB is also used by numerous other species, some of which are listed or otherwise designated as at risk, such as the Northern Red Legged Frog. All the watercourses that feed BB run through the BCF. Metro has stated in its 2014 Site Conservation Plan that Burlington Creek, a perennial stream that is the largest in the BCF, is itself used by listed salmonoids. Metro has subsequently retreated from that statement in effect denying it in its Access Plan. Further, during approximately four months of the year, December into April, water fed from the 900-acre water shed braids into the lower reaches of McCarthy Creek, a recognized salmon spawning stream.

Silt is the most pernicious type of sediment for fish. It clogs their gills, making it harder for them to breath. Additionally it remains suspended in the water column the longest settling out when the water slows. The introduction of more silt into the BB will make the eutrophic lakes there even more so, accelerating the change of that habitat, which is a remnant of riverine wetlands that were once prevalent in the Portland area but are no longer.

Metro has failed to provide substantial evidence that it has met the requirements of state wide Goal 4.

V. Conclusion: Metro's Access Plan conflicts with statewide Land Use Planning Goal 5, much in the same way that it does with Goal 4. State-wide Land Use Goal 5's objective is "To protect natural resources and conserve scenic and historic areas and open spaces."

Metro's Access Plan fails to protect natural resources. Goal 5 is to be implemented as described in the Oregon Administrative Rules. Metro's Access Plan does not comply with OAR 660-015-0000(5)(B)(2)(4) and (5) of the Goal 5 implementation rules.

OAR 660-015-0000(5)(B)(2) advises that the renewable and non-renewable resources and physical limitations of the land should be the basis for determining the quantity, quality, location and type of growth in the planning area. Metro has failed to evaluate the resources and physical limitations of both the BCF and MCF. It has failed to inventory the wildlife in both the BCF and MCF as stated above to determine where trails should and should not be placed on account of habitat. Additionally it has conducted no studies to evaluate erosion risk and measures to ameliorate such risk and it has not reformed the wildlife studies to the extent it should have as has been discussed above.

OAR 660-015-0000(5)(B)(4), an implementing provision of Goal 5 requires that fish and wildlife areas and habitats be protected and managed in accordance with the Oregon Department Fish and Wildlife management plans. The Oregon Wildlife Commission's plans are executed through the ODWF. One part of the Oregon Wildlife Commission's plans are set out in OAR 635-415-0005(3)(a), and pursuant to that rule ODFW has issued directives regarding Metro's plans for the BCF. Metro has not followed ODFW's instructions regarding the BCF and has thus not complied with Oregon Wildlife Commission's plans in violation of OAR 660-015-0000(5)(B)(4).

OAR 660-015-0000(5)(B)(5) of Goal 5's implementation rules states that stream flows are to be managed at a level adequate for fish, wildlife and pollution abatement. Metro's plans will inject a harmful level of sediment into the BCF's watercourses, all of which feed BB, and also into McCarthy Creek during periods of high water. Metro's plan for the BCF does not, therefore, comply with Subsection 5.

The findings of fact supporting the conclusion that Metro has failed to meet its statewide Land Use Goal 5 obligations are as follows:

Recreation is allowed under Goal 5, but only secondarily to the requirement of protecting water wildlife and habitat as the first priority. (See OAR 660-015-0000(5)(B)(5)). As discussed above, the destruction of two thirds of the habitat of the BCF does not protect these resources. Further, Metro has an obligation to consult with the ODFW regarding the Oregon Wildlife Commission's plans pursuant to statewide land use Goal 1.

ODFW has been reviewing Metro's BCF trails plans for nearly two years as of December 15, 2017, beginning shortly before April 2016 when the Metro Council approved Metro's Access Plan including the first BCF and MCF trails maps. (Access Plan, p. 28, 29). ODFW's most recent review was completed on December 15, 2017 the same day that Metro issued yet another BCF trail plan map. ODFW's review was for Metro's October 2017 BCF trails map.

Because Metro had issued a number of trails maps for the BCF subsequent to the original published in its April 2016 Access Plan the Multnomah County Planning Department requested Metro issue another map with the expectation that Metro would declare a final BCF trail map. Metro coincidentally issued a December 15, 2017 BCF trail map the same date ODFW issued its directives addressing Metro's BCF October 2017 map. (Appendix B, p. 2). Metro did not commit to its December 15, 2017 trails map as its final plan. Nor has Metro declared a trails map for the MCF as a final plan.

Metro's December 15, 2017 BCF trails map added another segment of trails and three more stream crossings more than its October 2017 plan had. The tenor of ODFW's comments

to Metro has been to reduce trails and stream crossings. Stream crossings are a significant source of erosion before and after construction. Because it adds at least one more trail and two more stream crossings Metro's December 15, 2017 BCF trail map falls short of meeting statewide land use planning Goals 1, 4 and 5 even more so than its prior BCF trails maps.

ODFW's directives fall into two time frames, late February 2016, and December 15, 2017. They are summarized as follows:

February 2016: (See Appendix B, pp. 16-18).

- Habitat fragmentation and loss is the biggest threat to fish and wildlife.
- Erosion into Burlington Creek and numerous unnamed tributaries must be avoided, in part because of their importance to BB, and as important habitat for numerous species.
- It is doubtful that Metro's forest management will offset the negative impacts from trail fragmentation.
- Trail length and width is to be minimized.
- Site new trails away from streams and tributaries, both perennial and intermittent, at least 100 meters from the high water mark.
- Be aware of climate change in designing and constructing bridges.
- Decommission trails and roads wherever possible.
- Survey the wildlife and habitat to inform trail siting, habitat management and public access.

December 15, 2017: (See Appendix F, pp. 2-14).

- The February 2016 observations and recommendations were reiterated and more detail for some was added, including the importance of avoiding erosion into the BB. ODFW noted that where trails were the densest, for instance, where there were multiple switchbacks, the erosion problem was the greatest.
- ODFW previously found that the BCF to be a Category 3 “essential habitat or important habitat” pointing out that the goal with Category 3 habitat is no net loss of habitat quantity or quality with development. OAR 635-415-0005(3)(a).
- Eliminate trail AA because of its impact on the Northern Red Legged Frog, designated by the state as a species of “Greatest Concern.”
- Especially in lower elevation areas reduce the length of trails.
- Conduct an amphibian movement study.
- Decommission two miles of the existing loop road in the BCF as in-kind close proximity mitigation.
- Reduce the number of parking spots to reduce the number of trail users.

Metro has not followed ODFW’s directives. For instance, it has conducted no amphibian movement study. It has increased and not reduced either the number of parking places, or the length of trails or stream crossings. After its December 15, 2017 BCF trails map it appears Metro has issued no further BCF trails map privately or to the public showing compliance with ODFW directives.

Further, As Metro pointed out in its *Ecology Literature Review* (Exh. 15, p. 13) there are many studies evaluating quantifiable indicators of the acceptable levels of use before serious environmental damage occurs for individual trails or a site. Metro has provided

no analysis of the physical capacity of the land to withstand the intense use its trails will bring to the BCF. Additionally, Metro has made conflicting statements regarding use of its proposed trails for the BCF claiming on the one hand use will be light, and on the other hand, given the pent up demand for mountain biking trails, use will be heavy.

Metro's own trail building manual, *Green Trails*, as well as one of its environmental literature reviews, states that before trails are mapped out and before construction begins wildlife surveys should be conducted so that trails can be designed and located to accommodate wildlife. Aside from a bird survey no wildlife surveys were done for the BCF or the MCF prior to the Metro council approving the Access Plan in April 2016. This is despite Metro claiming in its 2014 Site Conservation Plan that listed species used Burlington Creek and other listed species "almost certainly occurred" elsewhere in the BCF.

In the Access Plan Metro demonstrated its intent not to conduct surveys of other wildlife. Now, belatedly, it has committed to doing so in its Funding Application to the Oregon Parks Department. Nevertheless, it is still pressing ahead with trails plans although it has provided no evidence that it has completed surveys for fish and other wildlife, aside from elk. CHECK THIS!!!!!!Despite stating that studies of elk would be too expensive and would not show anything, Metro has had an elk study done for the BCF. But, any wildlife surveys conducted after Metro has disturbed the site will be of questionable validity for an indeterminate amount of time. Metro's thinning operation and other activities such as invasive species control and planting in both the BCF and MCF have disturbed these sites. As Metro pointed out in one of its own literature reviews, once

a site has been disturbed subsequent wildlife surveys ARE IF of negligible value, as wildlife will have vacated the site.

As far as elk in the BCF are concerned Metro stated in the environmental questionnaire that it submitted to the Oregon State Department of Parks for funding that it “monitored” elk in the BCF. This monitoring appears to have been the Turnstone survey, which did show sign of elk in the BCF, but which Metro said in its funding application showed no sign of elk in the BCF. This denial of elk presence conflicts with Metro’s statement one prior statement that there were elk present in the BCF, although not as many as in the MCF, where elk are abundant.

There is no evidence that shows why elk would not be present in the BCF. People who have hiked the loop road in the BCF have seen a number of elk there. Additionally, elk, and other species are found with a good deal of frequency on private land that adjoins and is near the BCF. ODFW captured a bear on land adjoining the BCF in 2017. Finally, the record taken as a whole demonstrates Metro’s effort to downplay the presence of wildlife in the BCF, certainly in contrast to statements Metro made in its 2014 Site Conservation Plan.

VI. Conclusion. Metro has failed to meet Multnomah County Comprehensive Plan’s equity requirement set forth in Multnomah County’s land use goals 1.1 through 1.4. These goals aim for inclusivity by allocating resources that lead to more racial equity. They are also directed at providing minorities with meaningful roles in the planning process.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 1.1 through 1.4 obligations are as follows:

To the extent Metro's Stakeholders Advisory Committee engaged the community in the process those specifically addressed by the goals, that is, "Low-income and minority populations" were not included. Metro has made much of its Stakeholder Advisory Committee as an example of community involvement. (January 2018 Comprehensive Plan Amendment Request, pp. 27 and 38, hereinafter Jan. 2018 CPA Submissions). None of the stakeholders it selected were people of color or of low income. Specifically included were members of the mountain biking community, a number of government employees, and leaders of neighborhood associations, none of who were from inner North or Northeast Portland.

Metro also claims the BCF is in close proximity to St. Johns and "the diverse neighborhoods of inner North and Northeast Portland." (Ibid.). While making green spaces available to all citizens is laudable and is achieved to some degree by almost any park within 25 miles of downtown Portland, the parks Metro proposes for the BCF and MCF do not meet the goal of equity. There is no public transport to either the BCF or the MCF. Public transport closest to the BCF and MCF terminates at the bridge to Sauvie Island off Highway 30. From there the trip to the BCF is formidable without a motor vehicle. It is about four miles, some up a steep grade. The journey to the MCF can only be described as formidable. It is some 8-9 miles, about a mile of which is up an ascent of 900 feet. This is because a landslide has shut down Newberry Road for two years and the route to the MCF from Portland must go up McNamee Road or Cornelius Pass Road. If and when Newberry Road is reopened the journey is still a long one

from the foot of Newberry of about two miles or more up mostly a steep incline with an elevation gain of about 850 feet making the walk there and back coupled with what hiking one might accomplish an expedition only for the most determined and fit. Additionally, the cost of a mountain bike and its attendant necessary equipment and gear, at about \$1500, is beyond the means of someone earning even \$15 per hour, which is the approximate cost of a used automobile.

If the trails in the BCF were truly multiuse Metro's equity argument might be colorable, but since they are really mountain biking single track under all the many versions of its BCF trails maps, Metro's equity claim falls short of substantial evidence. Metro's Access plan not only fails to achieve social and racial equality that Goals 1.1 through 1.4 require, it does not even attempt to do so. Instead it is a veiled attempt to privilege a select few. Metro's plans are for mountain biking trails, which those who can afford the equipment will enjoy. Mountain bikers are a small group of the moderately privileged. They are not entitled to the special treatment that mountain biking parks will afford them.

Additionally, Metro claims that its BCF park will be available to school groups, including the poor of north and northeast Portland. However, the parking lot it has designed for the BCF is inadequate for school buses. Instead it creates a significant safety hazard for them, while it is suitable for private automobiles.

Further, Metro claims that Goals 1.3 and 1.4 are inapplicable to Metro. (Ibid., p. 28). In other words, Metro asks the County to adopt an amendment to the Comprehensive Plan that flaunts County policy. Goals 1.3 and 1.4 grant no exemption to Metro, nor should they. They

should not be read in the strained fashion Metro advocates to avoid a clear and important Multnomah County policy of significant merit.

VII. Conclusion: Metro's Access Plan violates Multnomah County land Use Goal 2.45, which requires that the siting and development of community facilities and services appropriate to the needs of rural areas while avoiding adverse impacts on, among other things, wildlife, and natural and environmental resources.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 2.45 are as follows:

Metro incorrectly claims this goal is inapplicable arguing that it is aimed only at development of facilities that are intended to serve only "immediate/adjacent rural residents and communities." (Jan. 2018 CPA Submissions, p. 33). Metro's claim is that a park, such as those it plans in the BCF and MCF, need to be intended for use by locals only before Goal 2.45 is applicable. Goal 2.45 specifically lists parks as facilities to which the goal applies.

To claim that any park in Multnomah County, the most populous in the state, needs to be for rural residents living near it only, is not supported by the language of Goal 2.45. Rather, where a park is to be situated in a rural area must be done in a way that is sensitive to that rural community, and in addition must be done "avoiding adverse impacts on...wildlife and natural and environmental resources." Metro's plans, overwhelmingly for the BCF, for the MCF, significantly fail to avoid such adverse impacts.

For reasons already discussed Metro's plans for the BCF are for the destruction and not preservation of water wildlife and habitat. By its own restricted definition of what is necessary to preserve habitat, an unfragmented area of 30 acres or more, Metro's plans under any version of its multiple BCF trail maps is deficient. As discussed previously concerning statewide Land Use Goal 4, one of the trails Metro proposes there appears to be too close to an elk calving and feeding area, and will very likely adversely impact that species. Therefore, Metro has not provided substantial evidence of compliance with Multnomah County Land Use Goal 2.45.

VIII. Conclusion: Metro's Access Plan does not meet the requirements of Multnomah County Land Use Goal 4.1, which requires that areas necessary for watershed protection or that are subject to landslides, erosion or slumping, as well as wildlife and fishery habitat, be maintained.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 4.1 are as follows:

Both the BCF and MCF are wildlife and fishery habitat and the soils in both these forests are highly erodible. Further, the BCF especially is prone to landslides and slumping. It is clear that the intense network of trails proposed for the BCF, under any of the numerous trails maps Metro has produced, will result in the destruction and not the preservation of habitat. This is not only because Metro's trails will fragment two thirds of the BCF into unsustainably small pieces that will be insufficient to support numerous species of wildlife that currently use the BCF, but also because they will trigger erosion that will be significant.

Metro's plan maps do not provide sufficient detail so that the erosion risk can be fully evaluated. However, it is clear that in many instances the trails Metro proposes for the BCF will pierce the perched water table present on top of the fragipan during the wettest times of the year from approximately November through April. Additionally, Metro's BCF trails will likely penetrate the fragipan there. The fragipan is a thick largely impermeable layer of soil, which sits from twenty to forty-five inches below the surface in the BCF. Removal of soil down to the fragipan takes away a buffering layer of soil that can to some extent absorb and hold water.

Goble Silt Loam is the predominant soil type in the BCF. Silt sediment remains suspended in the water column for the longest time and is an especially pernicious sediment for fish. Not only does it impede spawning, but it also clogs fishes' gills hindering their ability to breath. The part of the BCF, the approximately 226 acres sitting south of McNamee Road, where Metro proposes its intense network of trails sits at the bottom of a 900 acre, largely intact, watershed that is the sole source of clean clear water for Burlington Bottoms, a well known refugia for listed salmonoids and a place that other species designated as at risk use, such as the Northern Red Legged Frog. All the watercourses that feed Burlington Bottoms run through the BCF.

The 900 acre watershed currently produces a great volume of water, enough to support six beaver dams in Burlington Bottoms. With global warming not only will the volume of water increase, but the intensity of rainstorms will also. Some of the watershed is at the 900 -foot level and runs down to Burlington Bottoms at a much lower elevation. Global warming will not only increase the volume of water the watershed receives, but also its intensity dumping greater volumes of water in shorter periods of time.

Burlington Bottoms contains a number of lakes all of which are presently eutrophic to some degree. Silt from the erosion that Metro's BCF trails will produce will accelerate the eutrophication of these lakes such that their oxygen levels will become further and more rapidly depleted. The extent to which this will harm fish has not been determined, but there is no doubt that less oxygen will not benefit them. Further, as these lakes silt up they will become less effective as flood control areas.

Compounding all of this is Metro's failure to accurately assess the BCF habitat. Metro's own trail building manual, *Green Trails*, advises that before trails are located and installed that the wildlife needs to be assessed so that trails can be located or not installed at all, as may be necessary to appropriately accommodate wildlife. Metro has made a number of conflicting statements regarding wildlife in the BCF all of which amount to an effort to present a picture of the BCF as negligible wildlife habitat. It is highly doubtful that is true. For instance, Metro stated in its 2014 Site Conservation Plan that listed salmonoids use the lower reaches of Burlington Creek, the main perennial stream of the BCF, but that also use of the BCF by other listed species "almost certainly occurs." Also, the ODFW has designated the BCF as "essential habitat for fish and wildlife, or important habitat for fish and wildlife," pursuant to OAR 635-415-0025(3). Metro's effort to paint the BCF as the opposite of both what it previously said and what the ODFW has found, demonstrates Metro's intent not to maintain fish and wildlife habitat as Multnomah County's Land Use Goal 4.1 requires, but rather sacrifice it to recreation.

There are other problems with Metro's approach to the BCF habitat. Metro has conducted limited assessments of BCF habitat and various Metro scientists and planners have stated that conducting a survey establishing a baseline of elk use of the BCF would be too expensive and

not show anything anyhow. At a Stakeholders Advisory Committee meeting a Metro planner claimed that an elk survey had been conducted for the BCF, implying with that language that it was done scientifically. When pressed on the issue he stated that the survey consisted of asking people at a meeting about Metro's plans generally, and not called to assess elk use, to put a green sticky on a map showing where they had seen elk.

Long after the Metro Council approved the Access Plan in April 2016 Metro finally committed to conducting wildlife studies for BCF as set forth in its Funding Application to the Oregon State Department of Parks. Since 2015 Metro has disturbed the BCF and MCF through extensive activities including running dump truck loads of gravel into the BCF in preparation for major roadwork and culvert replacement, as well as other activities such as the extensive cutting of brush and invasive species management, bulldozer and backhoe work and thinning.

Metro's *Green Trails* manual and one of Metro's environmental literature reviews points to the significant difficulty of getting accurate results by conducting wildlife surveys after a site has been disturbed. Metro's after the fact commitment to do wildlife studies that it should have done before compiling its Access Plan further shows Metro has not produced substantial evidence that it has met the requirements of Multnomah County Land Use Goal 4.1.

While Metro has not produced multiple versions of trails maps for the MCF as it has for the BCF, its plans for the MCF suffer from some of the same deficiencies. Metro presents the Access Plan as a vision and a guide for development of both the MCF and BCF and not as a plan. Additionally, its trail location are only approximations. (Jan. 2018 CPA Submissions, p. 59). In the MCF this is a problem because it appears that one of the trails it proposes for the MCF comes too close to the elk calving and feeding area there. Pregnant elk and elk with young

are particularly sensitive to human disturbance as one of Metro's science literature reviews shows. Additionally, elk in the MCF and BCF are not habituated to human presence as Metro claims. They are hunted both legally and poached illegally. Additionally, Metro's thinning operation resulted in downed trees being left suspended over clearly defined elk trails in the MCF, impeding their use by those animals.

As in the BCF, Metro has engaged in no assessment that its proposed trails will have on the soil in the MCF, which is even more erodible than the BCF soil. Metro's one published MCF trail map, found in the Access Plan at p. 29, like Metro's multiple BCF plans, also fails to provide sufficient detail so that the erosion its trails will cause can be evaluated.

There are numerous problems with Metro's Access Plan as it pertains to the BCF and MCF, but one overriding problem is that it has not produced a trail map for either forest that it has designated as its plan. Instead, the Access Plan is presented as a vision statement and guide for development. While a certain amount of leeway may be necessary as conditions in the field during construction may require the alteration of some trail locations, there is a genuine question as to what the slopes are where Metro intends to install trails because it has not come up with a definitive plan. The greater the slope the greater the risk of erosion, and so it is important to know what the slopes will be in particular trail locations.

Much more precision than what Metro provides is required. MCC requires, for instance, the designation of trees of a certain caliper that will be cut down for any development. A further demonstration of Metro's failure to meet Goal 4.1's requirements is that it has already cut down a number of trees in the alignments of a number of trails in the BCF that its expert Carlson Geotech evaluated from the standpoint of seismic and landslide risk. Carlson described the trees

cut down as an “abundant” number. Tress and other vegetation are important components of erosion control. This conduct further demonstrates Metro’s intent to not meet its Goal 4 obligations.

The radically different statement of slopes that Metro has given and what its consultant Carlson Geotech has given for what appear be the very same BCF trails map contributes to the serious questions of Metro’s credibility. Metro’s statement of slopes is far less than half that found by Carlson Geotech. If in fact two the maps are not identical in the location of the trails then they illustrate that only a small difference in location can result in a large difference in slope. Therefore, it is imperative that a definitive, detailed plan be presented and not just a guide or vision for development as Metro states its Access Plan to be.

For the foregoing reasons Metro has not supplied substantial evidence that it has met Goal 4.1.

IX. Conclusion: Metro’s Access Plan does not provide substantial evidence that it has met the requirements of Multnomah County Land Use Goals 5.2, 5.6, 5.11, and 5.12. Goal 5.2 requires protection of natural areas from incompatible development and uses that would significantly damage the natural values of the site. Goal 5.6 requires the protection of vegetated riparian corridors in order to maintain their water quality functions including supporting wildlife in the stream corridors and minimizing erosion and maintaining natural hydrology. Goal 5.11 requires protecting the water quality of streams by controlling runoff that runs into them. Goal 5.12 requires limiting visible and measurable erosion from development in substantial compliance with Title 3 of the Metro Urban Growth Functional Management Plan.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 5.2, 5.6, 5.11, 5.12 are as follows:

Metro has failed to assess the natural values of the BCF and MCF by doing wildlife surveys before drafting its Access Plan as both its *Green Trail* manual and one of its environmental science literature reviews recommend. Therefore, it is doubtful that it has more than a superficial general knowledge beyond that which can be said to be applicable to forests generally. The language of Goal 5.2 requires specific and not general knowledge. Without knowledge specific to the natural values of these two sites Metro cannot claim to have provided substantial evidence that it has met Goal 5.2. Regardless of that deficiency, by its own definition of the minimum that is needed (what Metro refers to as “core habitat”) to protect water, wildlife and habitat, that is, unfragmented pieces of habitat 30 acres or larger, Metro clearly fails to meet Goal 5.2 for the BCF.

Pursuant to its statement of core habitat and to its plan, under any of its multiple trails maps it has drafted for the BCF, Metro destroys rather than protects habitat in two thirds of the BCF. Moreover, Metro's own statements of the minimum unfragmented habitat size that is needed for a variety of species that use the BCF, 30 acres, is too small. A number of species living in and using the BCF need much larger unfragmented habitat than 30 acres, and Metro admits that in its *Green Trails* manual and one of its science literature reviews. Further, a number of factors demonstrate that the trails Metro plans under any of the multiple versions of its trails maps shows that they present a serious risk of erosion damaging the BCF itself, as well as Burlington Bottoms.

One of the natural values of the BCF is that all the watercourses that flow through it feed Burlington Bottoms as its sole source of clean, clear, cold water. Burlington Bottoms is a BPA mitigation site purchased to mitigate the loss of habitat brought about by the BPA's dams on the Columbia and Willamette Rivers. Burlington Bottoms is a remnant of once large riverine wetlands that were found in the Portland region. It is the home of numerous species and is used by listed salmonoids. Erosion in the BCF will introduce silt into Burlington Bottoms, which is harmful to fish and will accelerate the eutrophication of the lakes found there raising water temperatures and depleting oxygen in Burlington Bottoms several, already shallow, lakes.

The factors that show that the risk of erosion that Metro's plans present is so serious that significant damaging erosion is almost certain to occur in the BCF and downstream in Burlington Bottoms include the intensity of the trails network proposed, the switchbacks demonstrated by those plans, as well as the slopes in the BCF, which in combination with the soil type that predominates there make the soil highly erodible. Additional factors include the structure of the soil.

Because the terrain is so steep and because of the composition and structure of the soil Metro's trails under all versions, will in some instances pierce the fragipan, a thick layer of soil on which the Goble Silt Loam that predominates in the BCF sits, and which layer is largely impermeable. Where much, and in some cases all, the Goble Silt Loam is stripped off in the process of Metro's planned trail construction, water absorption will be minimal, and thus erosion will be substantial because there will be little or no soil to absorb rainfall and snow melt. Moreover, a seasonal water table from November to April sits on top of the fragipan, and Metro's trails will likely pierce that water table, obviously further exacerbating erosion. The erosion

problem will be compounded by global warming, which will bring about more intense weather events including heavier rains. Metro has provided no evidence that it will protect the BCF and Burlington Bottoms from these problems. The Carlson Geotechnical report that it relies on is not a soil erosion studies. Rather it assess seismic and landslide risks only.

Metro has made conflicting statements about the presence of listed species in the BCF, including stating in its 2014 Site Conservation Plan that listed salmonoids use the lower reaches of Burlington Creek and that other listed species “almost certainly occur” in the BCF. Metro has demonstrated an intent to present the BCF as negligible habitat. This is in conflict with its statements in 2014. Its 2014 statement is more credible than those in its Access Plan that the BCF has negligible natural values. The Access Plan attempts to paint a different picture of the BCF than its 2014 Site Conservation Plan because Metro has decided to turn the BCF into a park. Metro’s Site Conservation Plan 2014 statements aligns more closely with ODFW’s designation of the BCF as essential and important Category 3 habitat.

The Access Plan is plagued by two overarching problems that contribute to Metro’s failure to comply with Goals 5.2, 5.6, 5.11 and 5.12. The first is Metro’s failure to provide a definitive plan for either the BCF or MCF. The Multnomah County Planner’s office has asked Metro to provide a trail map for the BCF that Metro considers to be its plan. Metro has not done so. That failure alone supports the finding that Metro has not produced substantial evidence to show that it has met the above stated goals. Metro considers the Access Plan to be a visionary statement intended to guide development, and not a definitive plan for any of the four forests the Access Plan covers, including the MCF.

The second overarching problem is erosion. Slope is an important consideration in siting trails in the BCF because the greater the slope the closer the surface of the trail will be to the perched water table and the fragipan. The slopes in the BCF are steep. Without having a definitive trail map accurately depicting the slopes where the trails will be located the extent of the erosion risk cannot be adequately assessed. There is also a question of whether or not Metro has correctly stated the slopes on a map that appears to be identical to that which its consultant, Carlson Geotech, evaluated. Metro has stated the slopes to be much less than half of what Carlson Geotech reported. The trails on both those maps seem to be identically located. If they are not, the difference shows that even a slightly different trail location will make a significant difference in slope. These facts show the necessity of having a definitive trails map that Metro states is its plan for the BCF. A definitive plan is required to comply with the above stated goals and Metro's failure to provide such a plan is a failure to provide substantial evidence of meeting the above goals for the BCF.

Metro's assertion that the Access Plan is a vision and guide for development also presents a problem for it in meeting Goals 5.2, 5.6, 5.11 and 5.12. While Metro has not produced multiple versions of trail maps for the MCF, and while the slopes in the MCF are generally not as great as in the BCF, nevertheless the soil in the MCF is more erosion prone. Additionally, one of the trails Metro proposes for the MCF appears to be too close to the elk calving and feeding meadow. Since Metro has not committed to a definitive trail map for the MCF it has not provided substantial evidence of meeting the requirements of Goals 5.2, 5.6, 5.11 and 5.12.

In addition to the foregoing the ODFW, pursuant to its statutory authority spelled out in OAR 635, Division 415, has directed Metro to modify its BCF trails plan to mitigate the habitat

loss Metro will cause in the BCF. ODFW has designated the BCF as Habitat Category 3, meaning that it is “essential habitat for fish and wildlife or important habitat for fish and wildlife.” OAR 635-415-0025, and that mitigation must take place on site with the goal that there be “no net loss of either habitat quantity or quality.” OAR 635-415-0025. Accordingly, ODFW has directed Metro, among other things, to decommission two miles of the existing 2.9 mile loop road, limit the length of trails and reduce the number of parking spots Metro has planned, and generally avoid causing erosion. Metro has failed to follow ODFW’s directives. Its latest BCF trails map, dated December 15, 2017, does the opposite. It increases the number of parking spots and stream crossings over prior trails maps it produced, lengthened its proposed trails overall, and retains the entire length of the existing loop road. While Metro produced its December 15, 2017 BCF trails map on the same date that ODFW issued its latest directives, Metro has produced no evidence it has formulated another BCF trails plan that conforms with ODFW instructions. Its failure to accept the statutorily authorized guidance of the ODFW is a fatal failure to provide substantial evidence of meeting Goals 5.2, 5.6, 5.11 and 5.12.

Stream crossings are to be avoided as Metro points out, not only in one of its science literature reviews, and in its *Green Trails* manual, but also in its Urban Growth Management Functional Plan, which states it is binding on cities and counties. Table 3.07.13(c), of Metro’s Functional Plan, entitled Habitat Friendly Development Practices, requires in part (a)(19) that stream crossings be minimized. This is because, as Metro has pointed out in one of its science literature reviews, stream crossings both during their construction and afterwards trigger a good deal of erosion. Multnomah County’s Comprehensive Plan’s Strategy 5.12-5 also highlights the stream crossing problem advising that they be avoided. Metro’s latest BCF trails map dated

December 15, 2017, instead increases the number of stream crossings over earlier versions further demonstrating that Metro has failed to provide substantial evidence of meeting Goals 5.2, 5.6, 5.11 and 5.12.

X. Conclusion: Metro's Access Plan violates Multnomah County Land Use Goal 5.14, which requires that development prioritize water quality and natural stream hydrology through management of runoff so it does not adversely affect habitat, specifically including adjacent lakes, stream and ponds and wildlife and that post-development conditions be such that they mimic and not exceed pre-development runoff rates through onsite detention and/or infiltration.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 5.14 are as follows:

ODFW's concerns show that Metro's plans for the BCF violate Goal 5.14. Those concerns caused ODFW to tell Metro to substantially modify its BCF trails plans. Metro has not followed ODFW's instructions. Among ODFW's concerns was that Metro's plans would result in unacceptable harm to the habitat of numerous species through erosion not only in the BCF itself, but also in the adjacent Burlington Bottoms. ODFW warned Metro of this problem both in February 2016 and then again on December 15, 2017. ODFW's warnings of December 15, 2017 were the result of its review of Metro's October 2017 BCF trails map. The same date, December 15, 2017, ODFW again instructed Metro to substantially modify its plans by among other things reducing the length of trails, and decommissioning two miles of the existing 2.9 mile loop road.

Metro issued its December 15, 2017 BCF trails map in response to the Multnomah County Planner asking that it produce a final, more detailed and comprehensible trails map. That map added length to the BCF trails as well as more stream crossings, increasing the harm to the BCF and Burlington Bottoms. Despite being requested to do so, Metro to the present time has not presented a definitive BCF trails map plan, nor has it heeded ODFW's directives. This failure alone is sufficient to support the finding that Metro has not produced substantial evidence of compliance with numerous Multnomah County Comprehensive Goals, including Goal 5.14.

Metro has not supplied any evidence that it intends to provide for "onsite detention and or infiltration to mimic pre-development hydraulic conditions so that post-development runoff rates do not exceed pre-development conditions" that the goal requires, let alone produce an actual plan to do so. Instead Metro vaguely and repeatedly argues that it has numerous experts, including architects, planners and others who have worked on the Access Plan, intending to meet all requirements and applying the latest science and best practices. Typical of such statements is the following: "Metro scientists provide baseline information about current conditions, conservation targets and habitat restoration goals... driven by a desire to protect and improve water quality of streams. That effort and the desired outcomes are reflected in the Master Plan." (Page 43 Jan. 2018 submissions Comp. Plan Amend.) Goal 5.14 requires much more than hopes, desire and proclamations of good intentions. It requires specific demonstration of plans in conformance with the goal. The sincerity of intentions must be demonstrated by specific plans based in substantial evidence, which Metro fails to do.

Metro's intentions to decommission roads, thin forests, and perform reforestation and invasive species management sound positive, but Metro fails to specify what if any roads in the

BCF or what culverts will be removed and replaced and how doing so will control runoff as the goal requires. Additionally Metro's claim that it has a "stormwater design and report" shows nothing. First of all, it does not identify the report and secondly, having a report is meaningless unless it shows a specific Metro plan that will meet goals. Metro claims to have geotechnical and hydrological reports. Again merely possessing a report is insufficient.

If it is relying on the Carlson Geotechnical reports for a claim that is in compliance with Goal 5.14, its reliance is misplaced. Metro is correct that those reports address geotechnical issues, specifically seismic and landslide risk. But those reports are neither erosion nor hydrological reports and make no comment on whether Metro's plans for the BCF meet Goal 5.14's runoff requirements.

Metro appears to hope that the good it may be doing in the rest of its North Tualatin Mountains Forests is in some vague way sufficient to satisfy the requirements it needs to meet in the BCF. While not introducing new trails into the Ennis and Abbey Creek Forests may be laudable, as are its thinning work and invasive species control in those forests, those perhaps meritorious efforts elsewhere are not applicable to the BCF and Burlington Bottoms. Further, Goal 5.14 specifically requires that adjacent sites be protected. The Carlson Geotech reports analyze nothing about Burlington Bottoms.

Without a definitive trails map showing the slopes of trail locations Metro cannot address the problems of the extent its trails will penetrate the fragipan and the seasonal water table perched on top of it. Metro has described its December 15, 2017 BCF trails map plan as preliminary and incomplete, apparently taking the position that given the great expertise it has available to it, its promises to comply with all rules and regulations is sufficient. It is not. As late

as its January 2018 submissions it was still describing the Access Plan as “a long term vision and implementation strategy to guide land management and public use of the North Tualatin Mountains,” and states that “unneeded roads will be decommissioned” without any indication of what if any portions of the loop road in the BCF will be put out of service, even though the ODFW has prior to January 2018 told Metro to decommission two miles of the existing loop road.

Lastly, it is clear that global warming has been and will, into the indefinite future produce rain storm that are much more intense dropping volumes of water greater and within shorter time periods than in the past. Metro, aside from agreeing with this result of global warming, has produced no plan to deal with it as Goal 5.14 requires. Promises to address the issues are not substantial evidence of compliance.

XI. Conclusion: Metro’s Access Plan violates Multnomah County land Use Goal 5.27, which requires that development protect significant native fish and wildlife habitat and wildlife corridors, and specifically limit conflicting uses within these habitats. Instead Metro’s plans for the BCF do the opposite. The same is the case for the MCF.

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County’s land use Goals 5.27 are as follows:

The ODFW has designated the BCF and Burlington Bottoms as essential and important habitat for fish and wildlife. Any habitat that is used by listed and other at risk species is significant under Goal 5.27. Metro has admitted that the BCF is such an area, although it has

sought to retreat from that admission. Burlington Bottoms is used by listed salmonoids and other important species. Multnomah County has zoned both the BCF and Burlington Bottoms as well as the MCF with the SEC designation, meaning they are areas of significant environmental concern. Further, during periods of high water Burlington Bottoms watercourses braid into the lower reaches of McCarthy Creek a stream designated by ODFW as a salmon spawning stream and Metro has not offered any evidence about protecting that stream from the silt its unmodified BCF plans will likely generate.

As discussed above by its own definition of core habitat Metro's multiple trail plans for the BCF are destructive and not protective of habitat. Because Metro's plans destroy and do not protect water, wildlife and habitat, ODFW has twice asked Metro to substantially modify its plans to decrease their negative impacts on the BCF and Burlington Bottoms habitats.

Further, Metro insists that its Access Plan is a visionary guide for development and an implementation strategy and has failed to produce a final trails map for the BCF despite the Multnomah County Planning Department's request that it do so. It has not done so for the MCF either. For all the above reasons Metro has failed to provide substantial evidence it has met the requirements of Goal 5.27 for the BCF and Burlington Bottoms, as well as McCarthy Creek.

As to the MCF there can be no doubt that the elk calving and feeding area there is significant habitat. It appears that one of Metro's proposed trails come too close that area. And, since Metro insists that its Access Plan is a guide and vision statement, rather than a plan itself, it cannot be said where Metro ultimately plans to place the trail that appears to be too close to the calving/feeding area. This is of particular concern since pregnant elk and elk with young are

especially sensitive to human presence and because the elk in this area are not nearly as desensitized to human presence and activity as Metro argues.

Metro admits these elk are subject to longer hunting seasons with more liberal tag regulations (January 2018 Comprehensive Plan Amendment Request, p.49), which surely makes them wary of human activity. That the ODFW may or may not consider the North Tualatin Mountains a big game area elk, and a de-emphasis area, is likewise irrelevant. Additionally, Metro's claim that "fragmented habitat has a lesser impact" on the elk in the North Tualatins is unsupported. For these additional reasons Metro has not produced substantial evidence that it is protecting the significant habitat of the MCF.

XII. Conclusion: Metro's Access Plan violates Multnomah County land Use Goals 7.1 through 7.6, which as Metro states, is aimed at reducing impacts from natural hazards such as erosion, flooding, landslides, earthquakes and wildfires, including to natural resources among other things. (January 2018 Comprehensive Plan Amendment Request, p.49).

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's land use Goals 7.1 to 7.6 are as follows:

Multnomah County's Comprehensive Plan hazard maps show the following: both the BCF and MCF are in areas of severe erosion hazard (Figure 7.3); Burlington Bottoms is in a flood hazard area. (Figure 7.5); the BCF is in a moderate earthquake area, and a significant part of the MCF is in an area of moderate to heavy earthquake risk (Figure 7.12).

Metro relies on compliance with Multnomah County's permit requirements as evidence of meeting all the above goals regarding erosion, flooding, landslides and earthquakes, citing to Multnomah County's Hillside Development permit requirements. (January 2018 Comprehensive Plan Amendment Request, p. 54). Metro admits that at least some of its BCF trails and perhaps MCF trails will be located on slopes exceeding 25%. As will be seen when Metro's application for HD permitting is addressed below Metro's BCF plans fails to qualify for the HD permit. The findings regarding Metro's HD application are incorporated herein and show that Metro has failed to provide substantial evidence of meeting Goals 7.1 to 7.6.

Metro's Access Plan suffers from the essential defect that plagues its attempting to meet numerous other Multnomah County land use goals and statewide land use planning goals, and that is its failure to provide final trails map plans for both the BCF and MCF. Metro admits that its trails locations are just approximate. Metro's reliance on the Carlson Geotech reports highlights the difficulty with such approximations.

There is a vast difference between what Metro says the slopes for trail locations in the BCF are and what Carlson Geotech says they are for what appears to be the same BCF trail map. The Carlson report shows the slopes to be more than twice as steep as what Metro claims. Even if the two maps that appear to be the same are in fact different, that shows that even a slight difference in the location of a trail results in a much larger difference in the slope where the trail is located. Because Metro has not come up with final trail plans with the slopes designated the erosion risk cannot be evaluated. Therefore, Metro's failure to provide final, clear maps for either the BCF or MCF results in Metro's failure to provide substantial evidence that it is meeting Multnomah County's land use Goals 7.1 to 7.6 for these reasons alone.

But, there is also a problem with Metro's reliance on the Carlson Geotech report itself. The Carlson report itself states that it is preliminary. And as stated above, the BCF trails map Metro provided to Carlson Geotech is materially different from those it subsequently formulated. So, the Carlson report is indeed preliminary and cannot serve as substantial evidence.

Additionally, BB is in the same flood plain as McCarthy Creek and is, as noted above, a flood hazard area. Multnomah County's Comprehensive Plan states "Flooding related to deficient storm water management also can be an issue and is addressed by storm water management policies and strategies found in Chapter 5 of this Plan. At the same time, if left undisturbed floodplain areas can act to store excess flood waters and reduce potential impacts of flooding." It also states that the potential for flooding is "most applicable to the Sandy River and its tributaries [and] the Willamette River/Multnomah Channel." Especially with global warming and the increasingly intense rains it has brought, flooding is an important matter. As recently as 1996 floods threatened downtown Portland.

As found earlier in these findings of Fact and Conclusions of Law Metro has not provided substantial evidence that it meets Goal 5.14 (Chapter 5 of the Multnomah County Comprehensive Plan) and this deficiency in turn leads to the conclusion that Metro has not provided substantial evidence that it meets Multnomah County Land Use Goals 7.5 and 7.6. These latter two goals require that the value of floodplains be preserved to reduce flooding by allowing the storage and conveyance of stream flows through existing natural flood conveyance systems.

BB is a remnant of the extensive riverine riparian wetlands once common in the Portland region, elevating its importance for flood control. The BCF soil is predominantly highly erodible

Goble Silt Loam. Silt is the sediment type that remains suspended longest in the water column settling out when water slows. It is highly likely that silt from the BCF will settle into the already eutrophic Burlington Bottoms lakes if Metro installs the intense network of trails its various maps propose, making them shallower and reducing their capacity to hold flood waters. Metro has provided no substantial evidence that it will ensure that post-development storm water runoff conditions will not exceed pre-development runoff rates through onsite detention and or filtration as Goal 5.14 requires, and, therefore, fails to provide substantial evidence of meeting Goal 7.5 and 7.6 requirements. Metro simply fails to address this issue and therefore lacks substantial evidence here as well to show it meets Multnomah County's land use Goals 7.1 to 7.6.

XIII. Conclusion: Metro's Access Plan violates Multnomah County land Use Goals 8.7 and 8.8, which require supporting the natural values of Forest Park. Goals 8.7 and 8.8, require supporting only those recreational activities in the West Hills that do not cause significant negative impacts on natural and environmental resources that are identified in Multnomah County Land Use Goal 5. The Access Plan also fails to meet the requirements of Goal 8.2 that public agencies' development of recreational opportunities is to be consistent with "wildlife habitat and wildlife corridor protection."

The findings of fact supporting the conclusion that Metro has failed to meet Multnomah County's Land Use Goals 8.2, 8.7 and 8.8 are as follows:

The pertinent natural and environmental values identified in Multnomah County Land Use Goal 5 are exemplified in the subsection headings of the Comprehensive Plan's Chapter 5, including "Water Quality and Erosion Control" and "Fish and Wildlife Habitat." Prior to setting out specific goals and strategies to protect natural resources the Comprehensive Plan recognizes the importance of the wildlife corridor between Forest Park and the Coast Range to the continued vitality of Forest Park's ecosystem. It states the following:

The majority of the West Hills or Tualatin Mountains have been determined to be significant wildlife habitat. This ecosystem is part of a larger system, which includes Forest Park to the south and east and natural areas in Washington and Columbia Counties, stretching eventually to the Coast Range on the north and west. Forest Park is especially dependent upon a natural connection to the Coast Range in order to retain the diversity of wildlife, which makes the park a uniquely intact wildlife habitat. The wildlife habitat in Forest Park is designated as of state importance including an ODFW Conservation Opportunity Area. (Multnomah County Comprehensive Plan, p. 5-10).

The Comprehensive Plan also observes that:

The West Hills are a long narrow extension of the Coast Range ecoregion...[that] connect wildlife in Forest Park to the Coast Range, Tualatin Basin, Multnomah Channel, Sauvie Island, and the Columbia and Willamette Rivers. This confluence of three habitat types (valley, river/wetlands and mountains) provides a particularly rich but fragile (due to its long narrow shape and nearby urbanization) wildlife connections of statewide importance identified by the State of Oregon Department of Fish and Wildlife as a Conservation Opportunity Area. (Multnomah County Comprehensive Plan, p.1-31).

The BCF sits at the narrowest choke point between Forest Park and the Coast Range. It is clear that the ODFW considers Metro's plans for the BCF to be detrimental to the fish and wildlife habitats of both the BCF and Burlington Bottoms because its trails, including numerous stream crossings, will substantially harm those habitats. Therefore, ODFW has called upon Metro to

make major reductions in the volume of trails it plans for the BCF, reduce the parking it has planned, and conduct wildlife surveys, among other things. Metro has failed to follow ODFW directives, which ODFW has now given to Metro twice. Given the lapse of time between ODFW's last directives of December 15, 2017, up to the present time during which Metro has not responded to ODFW's directives, it appears that Metro is refusing to do so, apparently taking the position, despite overwhelming evidence to the contrary, that its visionary guide for development embodied in its Access Plan is sufficient. It is not. The Comprehensive Plan already provides the vision. It is as follows:

WEST HILLS VISION

The vision of the West Hills planning area is to retain its cherished rural character, natural resources, scenic views, forestry and agricultural productivity, to enhance resource protections, and to reduce and manage cumulative impacts of traffic, recreation and development in order to preserve the distinctive character of the West Hills for future generations. (Comprehensive Plan p. 1-30).

Much of the 900-acre watershed that sits upland above the BCF is in private hands, protected by a conservation easement, voluntarily entered into by those landowners. Metro's Access Plan is in vivid contrast to these landowners. Despite Metro's claims, its Access Plan is not one of preservation of water, wildlife and habitat, but rather it is one of destruction. It seeks to elevate recreation over preservation. Metro takes the position that there is no generally accepted scientific conception of the meaning of the term "wildlife corridor" even though Metro in 2010 authored a lengthy, comprehensive literature review of the topic entitled *Wildlife Corridors and permeability- a literature review*. Both the Comprehensive Plan and Metro's *Wildlife Corridors* publication show that the wildlife corridor concept is well understood and

broadly accepted. Whether or not Metro is correct that scientists have not come to a generally accepted understanding of what a wildlife corridor is, which contention seems doubtful, what is relevant is the conception of what a wildlife corridor is in the Comprehensive Plan. It is not a matter of theory in the Comprehensive Plan. Metro's ill-formed plans, as preliminary as they are, damage the wildlife corridor between Forest Park and the lands generally to the north and west of it. Metro has not produced substantial evidence that it has met Goals 8.2, 8.7 and 8.8.

SKIPPING TRANSPORTATION FOR NOW (P. 68 -98) OF JAN 2018 AND MORE RECENT SUBMISSIONS

XV. Conclusion: Metro's Access Plan violates MCC 33.2000, the code section describing the purposes of Commercial Forest Use District. It requires the conservation of watershed, wildlife habitats, and wildlife and other forest associated uses. It also allows recreational use compatible with forest uses and directs that especially erosion hazards be minimized. Instead Metro's plans for the BCF do the opposite, as they likewise do for the MCF.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.2000 are as follows:

Metro's Access Plan for the BCF, is one of destruction and not conservation of water, wildlife and habitat. The Access Plan enhances and does not minimize the hazard of erosion. There are multiple reasons Metro fails to provide substantial evidence of compliance with MCC 33.2000, which have already been mentioned in these Findings of Fact and Conclusions of Law and will be summarized in part briefly here. There are multiple other reasons Metro's Access

Plan fails to meet other required criteria, which will be shown later in these findings as these individual criteria are addressed.

As found above, Metro has failed to supply substantial evidence of meeting Statewide Planning Goals 4 and 5, as well as numerous Multnomah County Comprehensive Plan goals and MCC Chapter 33 code provisions relating to water, wildlife and habitat. Metro is plagued by its failure to designate final, detailed trail maps for both the BCF and MCF as Metro's final plan for these forests. For instance it appears from Metro's MCF trails map that its MCF trail closest to the elk calving and feeding area is too close. And of course the Access Plan reserves to Metro the option of changing its plan to meet its "vision." That vision puts recreation first and preservation of water, wildlife and habitat second, despite Metro's claim to the contrary. Additionally, as will be addressed below, Metro fails to provide substantial evidence that it has met numerous requirements necessary for it to receive, for example, SEC and Hillside Development permits.

XVI. Conclusion: Pursuant to MCC 33.2030, State and local parks are allowed as a conditional use in CFU districts so long as plans meet all applicable criteria of MCC Chapter 33. Metro has failed to supply substantial evidence that it has met all applicable criteria. Metro is incorrect that recreation is a primary objective of Statewide Land Use Goal 4. It is not.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.2030 are as follows:

As noted above there are numerous instances in which Metro has failed provided substantial evidence that it has met requirements of MCC Chapter 33. As will be seen later in

these findings and conclusions, there are many other instances where Metro has failed to provide substantial evidence of compliance with other MCC Chapter 33 requirements. Metro's Access Plan failures will summarized in part briefly here.

Metro is plagued by its failure to designate trail maps for both the BCF and MCF as Metro's final plan for these forests. As stated above Metro's Access Plan reserves to Metro the option to implement its "vision." That vision puts recreation first and preservation of water, wildlife and habitat second, despite Metro's repeated claims to the contrary. Statewide Goal 4 does not allow the prioritization of recreation over water, wildlife and habitat, nor do many Multnomah County Comprehensive Plan Goals and Code provisions already addressed and that will be addressed later in these findings and conclusions. For instance, Metro fails to provide substantial evidence that it has met numerous requirements necessary for it to receive, for example, SEC and Hillside Development permits.

XVII . Conclusion: Pursuant to MCC 33.6010(B) a community service use is allowed in the CFU district when it will not adversely affect natural resources. The overwhelming evidence is that Metro's plans for the BCF and MCF will adversely affect natural resources and Metro has failed to supply substantial evidence otherwise.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.6010(B) are as follows:

As noted above there are numerous instances in which Metro has failed provided substantial evidence that it has met requirements summarized in part briefly here. Metro has

failed to supply substantial evidence of meeting Statewide Planning Goals 4 and 5, as well as numerous Multnomah County Comprehensive Plan goals relating to water, wildlife and habitat. Further, Metro is plagued by its failure to designate final, detailed trail maps for both the BCF and MCF as Metro's final plan for these forests. Additionally, as will be discussed below, Metro fails to provide substantial evidence that it has met numerous requirements necessary for it to receive, for example, SEC and Hillside Development permits.

Metro's plan for the BCF is not, as it claims, one that protects water wildlife and habitat. Instead it destroys habit and harms wildlife and degrades water under any of the many trails maps it has put forward. Further, until Metro identifies a trail map for the MCF that it states is its plan, it cannot be stated, for instance, that the trail closest to the elk calving and feeding area in the MCF is not too close to that area so as to avoid harm to those animals and their young. So, Metro has, therefore, failed to supply substantial evidence that this MCF trail does not unreasonably, adversely affect these elk. Metro's reservation of the option to change plans in order to implement its vision also amounts to a failure to provide substantial evidence of having met MCC 33.6010(B)'s requirements.

XVIII. Conclusion: When proceeding under a conditional use a developer must apply for Design Review on a form provided by the Director and no permit can issue for the development until all conditions of approval that the Director determines are appropriate have been met. Metro has not applied for design review and the Director has not otherwise reviewed Metro's designs.

Therefore, Metro has not met any of the requirements of MCC 33.7000-.7060.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.7000-.7060 are as follows:

Metro claims that it has met the numerous criteria of its Design Review obligation, and asks the decision maker to agree with that claim, but without the Director's involvement. It may or may not be true that Metro's plans will satisfy the Director, but until Metro has produced a final plan satisfactory to the Director, no such claim is valid. It appears Metro believes that Multnomah County can issue the permits Metro needs conditionally. That is not the case. MCC 33.7040 provides otherwise. It states:

FINAL DESIGN REVIEW PLAN Prior to land use approval for building permit review or commencement of physical development where no additional permits are necessary, the applicant shall revise the plans to show compliance with all land use approvals granted, all conditions of approval and required modifications...

The code then follows up with specifics of what the final plan needs to show. Metro is incorrect that permits can be conditionally issued without Design Review. Design Review is to come first. For instance, the Director in this case should find in agreement with ODFW that Metro must reduce the number of parking spaces it plans, and decommission two miles of the existing loop road, as well as other things ODFW has not twice requested Metro to do. The Director has the authority to do require Metro follow the ODFW's directives. MCC 33.7050 (A) (1) (a) requires "The elements of the design review plan shall relate harmoniously to the natural environment..."

Because, for instance, Metro's plan for the BCF is for the destruction of, and not the preservation of water, wildlife and habitat, Metro's claims that it has met its Design Review obligations are premature and not supported by substantial evidence and do not meet the mandatory language of MCC 33.7050 (A)(1)(a). The Director may find other deficiencies in Metro's Design Review plans. It is not the function of the decision maker to determine what the Director may require.

XIX. SKIPPING PARKING RELATED REQUIREMENTS FOR NOW (PP 47-53) MY ARGUMENT WILL be that they have not accurately estimated the traffic/use and cannot know if parking will be adequate creating danger from people parking on McNamee.

XX. Conclusion: Metro's plan for the BCF under any of its multiple trail maps fails to meet the requirements to qualify for an SEC permit because contrary to its claims otherwise Metro does not provide substantial evidence that its BCF plan protects, conserves or enhances water, wildlife or habitat as MCC 33.4500 requires. Instead, it does the opposite. For that same reason Metro does not qualify for the exception under MCC 33.4515(A)(B)(5) that it relies on to assert its plan does not require an SEC permit. Metro's BCF plan promotes recreation over the conservation of natural values to the extent that it significantly harms them.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4500 and MCC 33.4515(A)(B)(5) are as follows:

Metro's assertion that all that is needed is unfragmented pieces of habitat of 30 acres or greater in order to preserve and enhance water, wildlife and habitat is incorrect. It is contradicted by one of its own ecology science literature reviews. Contrary to Metro's Access Plan claim, it is clear that a number of species that regularly use and inhabit the BCF need unfragmented pieces of habitat far greater than 30 acres. Metro's plans for the BCF leave the approximately 240 acres of the area of the BCF that is south of McNamee Road with only one unfragmented area of 15 acres at best, while the remainder of that acreage is sliced into pieces, generally long and narrow, that are far smaller. As one of Metro's ecology science reviews points out, long, narrow pieces of habitat suffer greater habitat fragmenting edge effects than do more rectangular pieces. Metro's intent is to add approximately 6-7 miles of new trails into the part of the BCF that is a little larger than one third of a square mile so that the trails, including the existing 2.9 mile loop road, will be approximately 9 or 10 miles total.

One of Metro's BCF Access Plan map labels the part of the BCF north of McNamee Rd. as "Core Habitat," meaning according to the Access Plan that it has unfragmented habitat of 30 acres or more. Another calls this area "Conservation Area." (Exh. 2, p28). It has no such label for the area south of McNamee Rd. By its own definition of what is required, Metro's plan is one of destruction of the water, wildlife and habitat of the BCF and not one of protection and preservation. In addition to the foregoing Metro has failed to heed the directives of the ODFW to drastically reduce the volume of trails it intends for the BCF, among other criticisms that the ODFW has of Metro's BCF plans. The ODFW made clear to Metro in February 2016 that fragmentation is the primary threat to Oregon's fish and wildlife. The ODFW instructed Metro to reduce the length of trails Metro proposed for the BCF and the number of parking spots.

ODFW has designated the BCF as Category 3, essential and important habitat. Metro claims that overall it is doing environmental good because, considering the environmental good it is doing elsewhere in its three other Tualatin Mountain forests, Ennis Creek, Abbey Creek, and the MCF, the BCF is a small sacrifice of habitat and on that basis its plan is warranted. However, what it may or may not be doing elsewhere is irrelevant to the BCF and its effects on BB.

As stated above, on December 15, 2017 ODFW instructed Metro to decommission 2 miles of the existing 2.9 loop road in the BCF and reduce parking among other things. Metro has failed to do so. Instead, it increased parking, trail length, and added stream crossings. Stream crossings are to be avoided according to Metro's three written statements on stream crossings, because of the erosion problems they trigger. These documents are its *Functional Plan*, one of its science literature reviews, and its *Green Trails* manual.

Further, Metro has not produced substantial evidence that the trails it plans to install will not cause serious erosion harming the streams within the BCF itself and Burlington Bottoms, when all indications are otherwise. The credible and substantial evidence is that Metro's plans for the BCF present a genuine risk of serious erosion. Metro's expert report from Carlson Geotechnical is not a soils study and Metro has failed to address the erosion problem other than to claim that its plan enhances and protects water wildlife and habitat in a balanced way. That claim is not supported by substantial evidence.

Except for a minimal study of birds in 2015, inhibited because of drought conditions that year, Metro has failed to inventory the BCF's wildlife before creating its plans. Doing so is contrary to Metro's own *Green Trails* manual, one of its science literature reviews and common sense. Metro's failure in this regard is particularly alarming because of the conflicting statements

Metro has made about the presence of fish and wildlife in the BCF. In its 2014 Conservation Site Plan, approved by Metro's chief environmental scientist, Jonathon Soll, Metro indicated that listed salmonoids used the lower stretches of Burlington Creek, and stated that other listed and rare species almost certainly occurred in the BCF. Since then Metro has sought to describe the BCF as degraded habitat and as not important, which is in contrast to the ODFW's designation of it as Category 3 habitat and in contrast to Metro's own prior statements.

In addition to the foregoing Metro has deliberately sought to avoid the importance of the BCF to Burlington Bottoms. The BCF sits at the bottom of a 900-acre, largely intact, watershed that is the sole source of cold, clear water for Burlington Bottoms, a well known *refugia* for listed salmonoids. Burlington Bottoms is a remnant of once extensive riparian wetlands in the Portland area and has been a Bonneville Power Administration habitat mitigation site since the 1990's to mitigate for the habitat loss the BPA's dams caused on the Columbia and Willamette Rivers. Burlington Bottoms existence and importance is very well known. All the streams that feed Burlington Bottoms run through the BCF.

Metro has engaged in an effort to diminish the wildlife and habitat value of the BCF, not only in its Access Plan, which in significant part contradicts Metro's 2014 Site Conservation Plan, but also in the RTP Environmental Screening Form Metro submitted to the Oregon Parks and Recreation Department as part of its application for funding. There Metro was required to answer a number of questions and provide information.

Metro denied that threatened or endangered species or their habitat were present either in the BCF itself, or near it, including Burlington Bottoms. Burlington Bottoms is about 25 yards across Highway 30 from the BCF. Metro further denied that the BCF had any effect on

McCarthy Creek, which it acknowledged was a salmon stream. Metro claimed that its project would not cross Essential Fish habitat. None of the foregoing that Metro told the Oregon Department of Parks and Recreation was accurate. On May 1, 2017 senior Metro planner Karen Vitkay certified that to the best of her knowledge the information she supplied on the RTP form was “accurate and correct.”

Metro also claimed in its funding application that its project would have only four stream crossing “structures.” (Exh. 2, p. 8). The number of its stream crossings quickly escalated from that point as Metro continued to revise its BCF trail map doubling the new stream crossings to eight in five months. Beginning with its Access Plan BCF trail map that has four stream crossings not including those of the loop road. Its December 2017 BCF trail map has eight stream crossings not including those of the loop road.

Metro has not supplied substantial evidence to contradict ODFW’s designation of the BCF as Category 3 essential and important habitat for fish and wildlife.

Metro’s own illustrations in its Access Plan show Burlington Bottoms water courses braiding into the lower reaches of McCarthy Creek. Since all the streams that feed Burlington Bottoms run through the BCF, Metro’s claims that the BCF has no effect on McCarthy Creek are dubious at best. Finally, Metro has told a number of people that conducting an elk survey of the BCF would be too expensive and not show anything anyhow. Nevertheless, Metro has stated on its RTP form that it would conduct wildlife surveys in the BCF generally and stated that it had done “monitoring” of the BCF elk.

In late March 2016, after Metro had begun to substantially disturb the BCF through various activities, it had Turnstone Environmental conduct a brief, limited elk survey of the BCF.

Metro's BCF disturbance activities shortly before Turnstone conducted its limited elk survey is described in Metro's records as "hack and squirt" including the application of herbicides, and as a separate activity, the creation of numerous snags for a total cost of about \$10,000 for both projects. Those activities commenced at the very end of 2015 with snag creation ongoing through the time of the Turnstone survey, which did show elk in the BCF. The Turnstone survey entailed only 120 acres of the BCF, acknowledged its effort was limited and recommended additional studies. Metro did not disclose on its funding application the limited nature of the Turnstone study, or its ongoing BCF disturbance activities.

Whether such wildlife surveys as Metro may conduct in the BCF will be of any value is uncertain for an indeterminate length of time into the future. Aside from the activities mentioned above, Metro has conducted extensive thinning in the BCF, as well as other work, including invasive species control, extensive planting as well as running dump truck loads of gravel into the BCF. Metro is currently engaged in what it describes as "major road work" on the loop road including backhoe, bulldozer and dump truck work commencing as of early September 2018 and this work will run until at least the beginning of 2019. The disturbance of the site has been steady, and extensive. One of Metro's own literature review questions the value of post-disturbance surveys, as does its *Green Trails* manual. Overwhelmingly the evidence shows that Metro's BCF plans do not enhance natural values as MCC 33.4515(A)(B)(5) requires, and Metro has therefore not met its burden of providing substantial evidence that it has done so.

Alternatively to its claim for exemption from SEC requirements under MCC 33.4515(A)(B)(5) Metro claims to have complied with SEC permit requirements by providing a Wildlife

Conservation Plan. Metro relies on a Siskiyou Biosurvey it commissioned. However, that survey itself indicates that it does not qualify as a Wildlife Conservation Plan.

Metro also fails to provide substantial evidence that it meets the criteria of MCC 33.4500 and MCC 33.4515(A)(B)(5) because its MCF Access Plan map does not show that its trail closest to the elk calving and feeding area is far enough away to avoid harm to those animals. And again, since Metro reserves the right to change its plan in the future to conform to its vision, it has no plan, just a vision that it claims will conform to law. Its vision does not qualify as substantial evidence.

XXI. Conclusion: MCC 33.4520 requires that an application for an SEC permit supply certain information including a map with certain details and a written description of the proposed plan and how it complies with the applicable criteria of MCC 33.4560 to .4575. Metro has not provided the required maps for either the BCF or MCF, and in addition has otherwise failed to produce substantial evidence that it complies with the applicable criteria.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4560 and MCC33.4575 are as follows:

Metro has failed to declare a final trail map for either the BCF or MCF, and therefore has failed to provide substantial evidence of compliance with MCC 33.4520 that it do so. Metro declares that it has provided substantial evidence that it has met all the criteria required by MCC 33.4560 to .4575. Those criteria will be addressed below in these findings and conclusions. As

will be discussed, it is clear that Metro has not provided substantial evidence that it has met the criteria found in MCC 33.4560 to .4575.

XXII. Conclusion: MCC 33.4530 requires that the decision on an application for an SEC permit be based on conclusions consistent with the purposes of the SEC subdistrict. Metro has not supplied substantial evidence allowing such a finding to be made. The purposes of the SEC subdistrict are described in MCC 33.4500. They are to protect, preserve, enhance, restore and maintain significant natural and manmade resources which are of public value, “including among other things, river corridors, streams, lakes ... flood water storage areas, ... wetlands, wildlife and fish habitats... and to establish criteria, standards and procedures for the development, change of use, or alteration of such features or of the lands adjacent thereto.”

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4530. are as follows:

Metro’s plan for the BCF faces numerous hurdles. The first is the question of what is the plan? Metro’s trail maps vary so significantly, and may change in accord with Metro’s “vision” that consistency with the purposes of the SEC designation is impossible to gauge, unless the frame work of state statute, statewide land use goals, administrative rules, the Multnomah County Comprehensive Plan and the Multnomah County Code (hereinafter environmental law framework) authorize surrendering policy making to Metro’s bureaucracy of planners and scientists. It does not.

The BCF trail map in the Access Plan has four stream crossings and 15 parking spaces while Metro's last known plan of December 2017 has 25 parking spaces and eight stream crossings. Metro's October 2017 BCF trail map added a trail segment labeled AA, and its December 20017 trails map added another segment of trails. The ODFW believes that Metro's plans for the BCF harm fish and wildlife and has instructed Metro to make radical changes to its plans that amount to a reduction of parking, trail length and stream crossings.

The last BCF trail map that the ODFW reviewed was Metro's October 2017. Metro's December 2017 BCF trails map added trails, parking spaces and stream crossings and is worse than the October 2017 BCF trails map in its negative impact on water, fish and wildlife and habitat. Metro's plans elevate recreation over water, wildlife and habitat and under all versions of its BCF trails maps calls for the destruction and not the protection, preservation, or enhancement of the wildlife and fish habitat. The erosion that Metro's plans will almost certainly cause will diminish the stormwater storage capacity of Burlington Bottoms by accelerating the eutrophication of the lakes found there.

In addition to the foregoing Metro's Access Plan reserves the option to change its plan to implement its Access Plan vision. Its vision is so vague as not to afford anything definite enough to evaluate. It refers to the Access Plan as a guide for development rather than a finished and final plan that can be measured against the applicable criteria.

Metro's failure to present a final BCF trails plan is significant. Two of the primary experts it relies on, Carlson Geotech and Siskiyow Biosurvey, evaluated different BCF trail maps. (See Metro's Exhibits 2 and 19 to its January 2018 submissions). Aside from evaluating trails plans based on different maps that had fewer stream crossings and less trail length overall than

Metro's latest known BCF trail map of December 2017, Metro's reliance on the AKS Engineering and Forestry report is also of limited assistance. (See Metro's Exhibit 4 to its January 2018 Permit Submissions). It evaluates storm water runoff, but only for the parking area and improvements to the existing loop road's entry to the BCF on McNamee Rd., and not for the extensive network of trails that Metro proposes.

The Carlson Geotech report is a seismic and landslides study. While it provides substantial evidence for those risks, it does not address the erosion risks that Metro's proposed trails present under any of the multiple version of its BCF trails maps. Metro has not provided substantial evidence that its trail plans will not cause erosion of silt into the watercourses of the BCF and into Burlington Bottoms. Indeed, Metro's failure to show that any of its multiple BCF trails maps adequately addresses the clearly substantial erosion problem is a major failing and an obvious concern to the ODFW.

The MCF trails map found in the Access Plan appears to be the only one Metro has produced. However, it does not show whether or not the trail it proposes closest to the elk calving and feeding area in the MCF is far enough away from it to prevent the elk that use it from being detrimentally disturbed. Pregnant elk and elk with young, the most sensitive of the species, use that area. Again, Metro has failed to declare a final MCF trails plan and reserves the right to implement its vision, including "revisiting" its decision to eliminate what it referred to as the "viewpoint trail," that went directly and deep into the elk calving and foraging area. According to its Access Plan Metro intends to revisit its decision to eliminate its "viewpoint trail" directly into the elk calving and foraging area after evaluating its experience with elk and their reaction to the trails in the BCF, which trails Metro plans to construct first. The problem is

that in the Access Plan Metro has taken the position that very few elk use the BCF raising the question of how valid Metro's observations with regard to trails and elk in the BCF will be and further raising the question of the sincerity of Metro's plans regarding the MCF's elk calving and foraging area.

Metro has failed to produce substantial evidence that either its BCF or MCF plans meet the purposes of MCC 33.4530.

XXIII. Conclusion: MCC 33. 4570(B)(1) provides that where a development contains any non-forested cleared areas development shall only occur there except as necessary to provide access and minimum clearance standards for fire safety. MCC 33.4570(B)(2) requires that development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developed portion of the site. Metro has not met its burden to produce substantial evidence it has met these two standards

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4570(B)(1) and (2) are as follows:

Metro has not addressed why the cleared area of the BPA and PGE easements in the BCF near McNamee Road cannot be used for the parking, bathroom, and other amenities it desires other than to conclude, without supporting evidence, that they cannot be.

Both the BPA and PGE easements are extensive cleared areas that run the length of the BCF. The question is can the BPA or PGE exclude Metro from using the same area so long as Metro does not materially conflict with their easement rights? It may very well be that

Metro's parking lot and amenities will be welcomed by the utilities and will give the utilities better access to their structures and easement areas there, together with the added convenience, for instance, to a toilet and picnic table that their workers can use.

All versions of Metro's BCF trails plan cut across the utility easements many times. Metro also plans extensive lengths of trails within the utility easements. Presumably, therefore, Metro concluded that the utility easements do not prohibit their use for trails. Metro offers only its conclusion that the area it has chosen, more than 200 feet from the public road, for its parking lot and amenities (picnic table, toilet etc.) is the "only topographically viable location" for its proposed parking lot and amenities without producing evidence why that is the case. Further, Metro has not shown there is a "non-topographically viable" exception. The standard is "reasonable practical access."

Indeed, the location Metro has chosen is not the only topographically viable location for its parking lot and related amenities area. The power company easement areas are already cleared, run up to McNamee Road and are on a slope the same as, or not materially steeper than where Metro wants to put its BCF parking lot and amenities. Moreover, the utility easement area bordering McNamee Rd. provide reasonable practical access.

Access from McNamee Road across and onto the BPA and PGE easement at that point is obviously well within the 200-foot limitation from a public road requirement of MCC 33.4570(B)(2). After a moderate incline for a distance 30 to 40 feet just west of the juncture of the access road (loop road) and McNamee and onto the utilities' easement the land has a moderate slope the same as, or not materially different than, the location where Metro presently proposes for its parking lot and amenities. Indeed, the utilities seem to have created a rough entry to their easements in that location. Metro would have to cut

down a minimal number trees either for its parking lot and amenities or for the fire zones if it put its parking lot and related amenities on the already cleared areas of the power easements near McNamee Rd. Instead, the location where Metro wants to put its parking lot and amenities will require cutting down a great number of trees. This is because the required primary and secondary fire zones around its toilet will extend far into a heavily wooded area.

Metro makes the claim that the area it has selected for its parking lot and related amenities, more than 200 feet off the public road, is the only one that is “topographically viable.” This statement is not supported by substantial evidence, and is not the standard Metro needs to meet. Metro needs to produce substantial evidence why the already cleared area in the PGE and BPA easement near McNamee Road cannot be used and why there is not reasonable practical access to that easement area. It has not done so. Further, Metro’s proposed network of trails range far beyond 200 feet from McNamee Road.

Metro admits its proposed parking lot and amenities location is beyond the 200 foot limitation of MCC 33.54570(B)(2), ignores the 200 foot development limitation from a qualifying public road, and attempts to fall back on a claim that it is allowed to do so because it has a valid wildlife conservation plan. (January 2018 Permit Submissions, p. 64.) As will be addressed below, Metro does not have a valid wildlife conservation plan to fall back on, nor can it qualify for one under the plans all of its various BCF maps propose. Also, Metro has not shown that McNamee Road fails to provide “reasonable, practical access to the developable portion of the site.” MCC 33.4570(B)(2).

McNamee Road winds through the BCF for over 4,000 feet. (Jan. 2018 CPA Submissions, Exh. 22). While there may be some portions of McNamee Road where it runs

through the BCF that have such steep drop offs that accessing the BCF in those locations may not be practical because of the erosion risk or some other construction factor, that is not for the decision maker to speculate. Metro offers no evidence to show that access along the aforementioned 4000 feet plus length of McNamee winding through the BCF does not provide “reasonable, practical access to the developable portion of the site.” Indeed it does, there are already three to four roads leading into the BCF from McNamee north of the road, and there are multiple areas on the south side of the road where the terrain is not steep.

XXIV. Conclusion: MCC 33.4570(B)(5) provides that the development shall be within 300 feet of a side property line if adjacent property has structures and developed areas within 200 feet of that common side property line. The substantial evidence is that there are structures and developed areas within 200 feet of a common side property line in the BCF and that Metro’s development ranges far beyond the 300-foot limitation from that side property line.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4570(B)(5) are as follows:

Metro seeks to use the boundaries of railroad tracks and the PGE and BPA utility easements as a “side property line” for purposes of MCC 33.4570(B)(5) analysis. Metro misinterprets the requirements of MCC 33.4570(B)(5) in claiming the utility corridor and rail line boundaries have side property lines within the meaning of the code provision. The boundaries of the railroad right of way and the utility companies’ easements are not side property lines. Additionally, there is at least one structure that is either a house or

outbuilding that is within 200 feet of the common property line in a developed area on the east BCF boundary.

Metro ignores this structure, and states: “This standard cannot be applied to a recreational use in a forested area.” Metro does not support this statement with any law or facts, and then falls back on a non-existent wildlife conservation plan “to avoid any issue concerning the satisfaction of this standard.” (Jan. 2018 CPA Submissions, p. 65).

Additionally, Metro misinterprets the requirements of MCC 33.4570(B)(5). There is no reason to put the adjective “side” in front of the words “property line” unless it is intended to mean something because all properties have boundaries on each side of them, whether they are easements or fee simple absolute interests. If the legislative intent was to require development within 300 feet of any and all property lines the code provision would not include the word “side.” Instead, MCC 33.4570(B)(5)’s intent is to contain development close to the perimeter boundary line, that is, a side property line, when there is a structure in a development off the subject property that is within 200 feet of the common perimeter boundary. The aim is to cluster development and preserve habitat, just like the purposes provision for the SEC subdistrict states (MCC 33.4500). The power line easements are not on a side of the BCF. Instead, they are located well into the BCF.

The railroad easement is closer to the east side BCF property line, but its boundaries are still not side property lines. Even if the utility easements and railroad right of way boundaries could be considered side property lines, while some of the trails Metro proposes are arguably within 300 feet of the railroad easement and utility companies’ easements, very few of them are.

Under Metro's interpretation all property boundaries are side property lines. They are not. Even if they were Metro's BCF trails range far and wide beyond 300 feet from anything that Metro would hope to consider a "side" property line.

Metro has not provided substantial evidence of compliance with MCC 33.4570(B)(5).

XXVI. Conclusion: If Metro cannot satisfy the requirements MCC 33.4570(B)(1) and (2) it needs to avail itself of MCC 33.4570(C) and produce a "Wildlife Conservation Plan" as an exception to the requirements of MCC 33.4570(B). The Wildlife Conservation Plan itself must also satisfy certain criteria. MCC 33.4570(C) (1)(2)(3) and (5). Metro does not provide substantial evidence that it meets the preconditions entitling it to use the Wildlife Conservation Plan exception (MCC 33.4570(C)(1)(2)). Additionally, and aside from not meeting the preconditions necessary to use the Wildlife Conservation Plan exception, it does not provide substantial evidence that it meets the requirements of what a Wildlife Conservation Plan needs to show.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4570(C), MCC 33.4570(B)(5) and (C(1)(2)(3) and (5) are as follows:

As set forth above Metro does not provide substantial evidence that it cannot meet the requirements of MCC 33.4570(B)(1) and (2). Therefore, it is not entitled to use a "Wildlife Conservation Plan" pursuant to MCC 33.4570(C). Nevertheless, it attempts to do so. Even if Metro was entitled to use a Wildlife Conservation Plan because it could not meet the standards MCC 33.4570(B)(1) and (2), which are clearly aimed at protecting wildlife habitat, it fails to

meet the even more stringent wildlife protective criteria of what constitutes a Wildlife Conservation Plan pursuant to MCC 33.4570(1)(2)(3) and (4).

The author of the report Metro relies on for its claim that it has a Wildlife Conservation Plan, Siskiyou Biosurvey, states that its report is not a “formal” Wildlife Conservation Plan. Formal or informal, Siskiyou Biosurvey’s report does not qualify as a Wildlife Conservation plan, and its authors recognize that.

Metro’s expert is correct that Metro has no Wildlife Conservation Plan because its report does not meet the MCC 33.4570(C)(1) precondition for offering one in any event, but for other reasons as well. The Siskiyou Biosurvey report is based on a BCF trails map dated June 2017. That BCF map follows the same approximate framework of all Metro’s known BCF trail plans where the network of proposed trails range far and wide through two thirds of the BCF, and where also, the parking lot and amenities are located well into the forest.

MCC 33.4570(C)(1) requires that Metro show it cannot meet the requirements of MCC 33.4570(B)(1) because of “physical characteristics unique to the property.” Metro makes the claim that the location it has selected for its parking lot and related amenities is the only one that is “topographically viable.” As already found above, this statement is incorrect and, therefore, Metro has failed to provide substantial evidence that there are physical characteristics such that it cannot meet the requirements of MCC 33.4570(B) for its parking lot and related amenities. In short, Metro needs to show why the already cleared area in the PGE and BPA easements near McNamee Road cannot be used. Metro simply asserts that it cannot without providing substantial evidence showing why. Thus, Metro is not entitled to show that a Wildlife Conservation Plan “results in the minimum departure

from the standards required in order to allow the use,” nor has it made this showing in any case. (MCC 33 5470(C)(1)).

Further, simply Metro ignores its network of 5-7 miles of new trails. It makes no mention of why any characteristics unique to the property preclude it from putting its network of trails elsewhere than where it generally proposes in all versions of its BCF trails maps, including the June 2017 BCF map that Siskiyou Biosurvey relied on.

When an applicant cannot meet the requirements of MCC 33.4570(B) it is allowed to deviate from those requirements pursuant to another subsection of MCC 33 5470(C), that is, subsection (C)(2). An applicant is allowed to deviate from MCC 33.4570(B)’s requirements on a showing in a Wildlife Conservation Plan that its alternate plan exceeds the standards of MCC 33.4570(B) “and will result in the proposed development having a less detrimental impact on forested wildlife habitat than the standards of section (B),” MCC 33.4570(C)(2). Metro cannot show that under any version of its BCF trails maps that its plans will have less impact than a plan conforming to MCC 33.4570(B) for three reasons.

The first is that Metro admits that it is destroying two thirds of the BCF habitat. All versions of Metro’s BCF trail plans slice up the habitat into pieces much smaller than even the size, 30 acres of unfragmented habitat, that Metro incorrectly claims is necessary to preserve “core” habitat. (Unfragmented habitat much greater than 30 acres is needed for a number of species inhabiting the BCF.) If Metro confined its proposed trails to within 200 feet of McNamee Road as MCC33.4570(B)(2) requires, there would not be nearly the habitat fragmentation and destruction that results from all versions of its present BCF trails maps. All versions of its BCF trail maps show trails venturing far off, well in excess of 200 feet, from McNamee Rd. the only public road in the area of the BCF. All versions of Metro’s

BCF trails maps also show its network venturing far beyond 200 feet off existing loop road that Metro incorrectly claims is a public road.

Since the loop road is not a public road Metro cannot use it as a measuring point from which to calculate the 200 foot development containment area from a public road that MCC 33. 4570(B)(2) requires. In any event Metro cannot show that any of its BCF trails maps exceed the standards of MCC 33.4570(B) “and will result in the proposed development having a less detrimental impact on forested wildlife habitat than the standards of section (B),” and so has failed to provide the necessary substantial evidence necessary to meet MCC 33 5470(C)(2).

The second reason that all versions of its BCF trails maps including, as well, its proposed parking lot and related amenities, are not less detrimental to wildlife habitat than the standards of MCC 33.4570(B), is that Metro is not confining its development to already cleared areas. Metro will cut numerous trees to position its parking lot, toilet, etc., in the location it proposes based on its assertion that the primary fire zone can be limited to 30 feet and also that the secondary fire zone requirement of 100 feet can be waived. However, because of the increasing risk of fire danger that Metro’s BCF plans present, in addition to the tinder box conditions that climate change has been causing all over the western regions of the United States and Canada, irrespective of Metro’s plans, the secondary fire zone will not be waived. Additionally, the MCC requires that the primary fire zone be 130 feet, and not the 30 feet that Metro claims, because of the proximity Metro’s toilet will be to slopes requiring 100 feet be added to the primary fire zone. Because Metro’s proposed toilet location is so close to a heavily wooded area cutting down a great many more trees than Metro has projected would be required. If Metro put its parking lot and toilet in the utility

easement near McNamee Rd., which is an already cleared area it would have to cut down very few trees. There are a few scrubby trees that have cropped up in the otherwise cleared utility easements near McNamee Rd..

Additionally, all versions of its BCF trails plans traverse large swaths of heavily forested areas. Unfortunately, according to the Carlson Geotech report, Metro has already cut down a significant number of trees in the alignment of a number of the trails shown on the BCF trail map that Carlson Geotech reviewed. While it is possible that Metro's thinning operation resulted in cutting the abundant numbers of trees that coincidentally just happened to be in the trail alignment of a number of the trails in the map that Carlson Geotech reviewed, that is highly unlikely. The evidence is, if based only on the indications from Carlson Geotech's observations, that Metro's BCF trail plans will require cutting down many trees. But also the evidence is undisputed, independent of the indications from Carlson Geotech's observations, that miles of Metro's proposed new trails will run through heavily forested areas and that cutting down many trees would be necessary to fulfill Metro's plans.

Metro claims that the vast majority, and then more recently, just the majority of its BCF trails will be either in the utilities' easement corridors or along the loop road and therefore, the majority of this development will take place in already cleared areas. That assertion is wildly inaccurate. (Curiously, in its Full Funding Application Metro claims that its BCF trails will not be placed in cleared areas because putting them there would increase erosion from exposure to wind and sun. (Exh. 2, p. 38)). While some of its BCF trails, under all versions of Metro's maps, will cut across the utility easements and run within them for some short distances and, likewise sometimes closely parallel the loop road for short

distances, to claim that most of its trails are in cleared areas is clearly false, and therefore not supported by substantial evidence.

Thirdly, Metro has also failed to meet the requirements of MCC 33.4570(C)(2). It requires Metro to show that while it can meet the development standards of MCC 33.4570(B), its Wildlife Conservation Plan has alternate conservation measures that will exceed Section B requirements and have a less detrimental impact on wildlife habitat than do the requirements of MCC 33.4570(C)(1).

Assuming for the sake of argument that Metro could meet the requirements of Section B, (which it has not done) none of the versions of the trails it has proposed are better than plans complying with Section B would be by having “a less detrimental impact on forested wildlife habitat than the standards in Section B.” Again, Metro’s trails range far and wide in forested areas and fragment the habitat to the extent of destroying it in two thirds of the BCF, in all its various BCF trails maps, including the June 2017 plan that its expert, Siskiyou Biosurvey relied on. If Metro’s development was within 200 feet of a public road, in this case, McNamee Road, clearly there would be less habitat fragmentation than any of Metro’s trail maps for the BCF propose. (See MCC 33.4570(B)(1)(2)).

Lastly, MCC 33.4570(C)(5) would provide one final possible avenue for Metro, but only if Metro met the preconditions required for it to use a Wildlife Conservation Plan, which Metro has failed to do. If a Wildlife Conservation Plan fails to meet the criteria of MCC 33.4570(C)(3), it can still qualify by meeting MCC 33.4570(C)(5)’s criteria.

The first criterium for MCC 33.4570(C)(5)(a) is the same as that of MCC 33.4570(C)(3)(a), and that is that “measures are included in order to reduce impacts to forested areas to the minimum necessary to serve the proposed development by restricting the amount of

clearance and length/width of cleared areas and disturbing the least amount of forest canopy cover.” As stated above Metro as failed to provide substantial evidence that it cannot use the already cleared areas of the utility easements near McNamee Road for its parking lot and amenities, and thus cannot use MCC 33.4570(5) to qualify for a Wildlife Conservation Plan, even if it met the preconditions allowing it to use a Wildlife Conservation Plan. Additionally, Metro has not shown any evidence that there are not other places to put its proposed network of trails that are the minimum necessary to disturb the least canopy cover.

XXVII. Conclusion: MCC 33.4570(B)(2) mandates that development shall occur within 200 feet of a public road capable of providing reasonable practical access to the developable portion of the site. The Multnomah County Department of Community Services found that Metro’s assertion that the loop road in the BCF was a public road, as that term is used in MCC 33.4570(B)(2), was incorrect and requested that Metro revise its response to approval criteria MCC 33.4570(B)(2) accordingly. Metro has failed to do so and has, therefore, not supplied substantial evidence that it has met the criteria.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4570(B)(2) are as follows:

Just like MCC 33.4570(B)(1), the requirements of subsection 2 are mandatory requiring “development” to be within 200 feet of a public road. “Development” pursuant to MCC 33.0005, includes any act of grading and removal of vegetation. Trail building requires

grading and vegetation removal as the Carlson Geotech report shows for each of the trails it reviewed. Metro's failure to provide substantial evidence of meeting MCC 33.4570(B)(2) is addressed in part in the findings of fact immediately above.

Since the loop road is not a public road, the question is whether McNamee Road is capable of providing reasonable practical access to the developable portion of the site. It is. McNamee Road winds through the BCF in a generally west/east direction dividing the BCF into two sections with about 90 acres of its area to the north of McNamee and the remaining acreage of approximately 240 acres where Metro wants to install its trails, parking lot and related amenities to the south of McNamee. McNamee Road winds through the BCF for about 4000 feet. It provides reasonable practical access to the developable portion of the site. Since Metro's plans for the BCF under all versions of its trail maps range far more than 200 feet from McNamee Road Metro has not provided substantial evidence that it has met the MCC 33.4570(B)(2) criteria.

XXVIII. Conclusion: MCC 33.4575(B)(2) mandates that no development shall occur within a Stream Conservation Area, but will be allowed upon satisfaction of certain requirements, in addition to other general SEC permit submittal requirements. As previously determined in these findings and conclusions Metro has failed to supply substantial evidence that its plans for the BCF meet either the overall purposes of the SEC subdistrict designation or a number of the specific SEC permit requirements, and that further, Metro failed to supply substantial evidence that it is entitled to an exemption from SEC permit requirements. For these reasons Metro has failed to provide substantial evidence that it has met MCC33.4575(B)(2)'s requirement that before allowing development in a Stream

Conservation Area that the applicant satisfy general SEC permitting requirements. Additionally, Metro has admitted that its plans call for developing within the Stream Conservation Area of Burlington Creek. Therefore Metro needs to meet the requirements of MCC 33.4575(B) through (F). Metro has not supplied substantial evidence that it has done so.

The findings of fact supporting the conclusion that Metro has failed to meet MCC 33.4575(B) through (F) are as follows:

In order to develop in a Stream Conservation Area an applicant must meet SEC permit requirements, which Metro has not done as already described in these findings and conclusions. Metro also must do a number of other things as follows:

1. Submit a site plan drawn to scale showing all proposed development as well as streams, watercourses drainage ways, storm water facilities and topography to the best available USGS 7.5 feet to 15 feet topographical information.
2. Provide a detailed description and map of the Stream Conservation Area including that to be affected by the development, an assessment of the Stream Conservation Area's functional characteristics and water sources as well as a description of the vegetation types and fish and wildlife habitat.
3. A description and map of soil types in the proposed development area and specifications for all proposed draining, filling, grading, dredging and vegetation removal including the amounts and methods.

4. A study of any flood hazard, erosion hazard and/or other natural hazards in the proposed development area and any proposed protective measures to reduce such hazards as required by MCC 33.5520. (MCC 33.5520 covers the “Grading and Erosion Control Standards,” which are a part of the Hillside Development permit requirements).
5. A detailed Mitigation Plan, which shall demonstrate that the proposal will enhance the fish and wildlife resources, shoreline anchoring, flood storage, water quality, and visual characteristics of the stream in its pre-development state.
6. The Mitigation Plan should contain the information in points 1 to 4 above and in addition show applicants coordination efforts to date with the requirements of other local, State and Federal agencies, as well as an annual monitoring plan for five years that ensures an 80 percent annual survival rate of any required plantings. (MCC 33.4575(C)(1-6), MCC 33.4575(D)).

In addition to the foregoing an applicant shall show the following in design specifications: a bridge or arched culvert that does not disturb the beds or banks of the stream and are of the minimum width necessary to allow passage of peak winter flows; that all storm water be collected and disposed of in dry wells or other best management practices emphasizing groundwater recharge and peak stream flows (MCC 4575(E)(1)); that all trees removed over 6” in caliper be preplaced by one or more native species equivalent in caliper to the tree removed (MCC 4575(E)(4)); satisfaction of the erosion control standards of MCC 33.5520.

Metro has failed to declare a final trails map for either the BCF or MCF and therefore has not provided substantial evidence satisfying point 1 above.

Metro has not provided substantial evidence that it has provided an Assessment of the Stream Conservation Area's functional characteristics and water sources as well as a description of the vegetation types and fish and wildlife habitat described in point 2 above. Metro states in its Access Plan (p. 14) regarding fish and wildlife that "...a thorough ecological inventory and assessment for the North Tualatin Mountains has not been done." Instead, Metro asserts that it relies on input from external experts, and a substantial body of research without further specification beyond the vague and general observation that the BCF habitat is typical of northwest Oregon forests.

While MCC 33.4575(C)(2) does not use the word "thorough" for the required description of the types of fish and other wildlife present that it calls for, more than the generalities of what Metro has provided is required. This is especially the case when Metro has made numerous misstatements that raise questions of its credibility and competence. These include conflicting statements Metro has made regarding fish and wildlife in the BCF, and its ignoring the BCF's importance for BB, among a number of other things. But there is also Metro's systematic effort to downplay the significance of especially the BCF habitat and wildlife.

This is apparent not only its Access Plan, which for instance questions the general acceptance of the concept of wildlife corridors, but also in its submissions supporting its request for amendment of the Comprehensive Plan and for Permits. Because of its lack of credibility and seeming bias towards downgrading the significance of the BCF habitat, Metro's representations regarding fish and wildlife, without more than the minimal actual studies it has conducted does not come to the level of substantial evidence that MCC33.4575(C)(2) requires.

Metro has no substantial evidence that it has provided a description and map of soil types in the proposed development area and specifications for all proposed draining, filling, grading, dredging and vegetation removal, including the amounts and methods described in point 3. Granted, providing this information is onerous for the five to seven miles of new trails Metro proposes for the BCF, however, this is the requirement. Nor has Metro provided substantial evidence of a study of any flood hazard, or erosion hazard in the proposed development area, nor has Metro provided any proposed protective measures to reduce such hazards as required by MCC 33.5520 as described in point 4.

Metro has failed to provide substantial evidence that its proposal will enhance the fish and wildlife resources, shoreline anchoring, flood storage, water quality, and visual characteristics of the stream in its pre-development state described in point 5. Neither has Metro shown any coordination efforts to date with other local, State and Federal agencies, aside from choosing to ignore the instructions of the ODFW, nor has it provided an annual monitoring plan for five years that ensures an 80 percent survival rate of any required plantings as described in Point 6.

Metro has provided no hydrology study. Its Access Plan has a heading “Hydrology and Water Quality” (Access Plan, p. 13) under which it describes the location of streams and makes general statements about risks, acknowledging that culverts and old logging roads are significant sediment generators that harm fish and amphibians. It also states McCarthy Creek drains 400 acres. The MCF alone is itself more than 400 acres. The creek drains an area probably closer to 900 hundred acres or more. The opponents of Metro’s plans have provided a hydrology study created in the early 1990s as part of a habitat evaluation for Burlington Bottoms, which covers

the BCF streams and related watershed. But given global warming and consequent more intense rainstorms, that study is outdated as a guide for peak flows. The study stated that it had not measured peak flows.

Metro has stated that it will “repurpose” the existing loop road as a trail. The loop road crosses Burlington Creek and traverses through the Stream Conservation Area in a looping route for considerably more than 700 or 800 feet. Roads and culverts are known to be very significant sources of erosion, as Metro acknowledges. Metro has failed to show in design specifications that a bridge or arched culverts across Burlington Creek will not disturb the beds or banks of the stream and are of the minimum width necessary to allow passage of peak winter flows. It has failed to show that all storm water will be collected and disposed of in dry wells or other best management practices emphasizing groundwater recharge and peak stream flows. Metro has failed to provide the required substantial evidence it needs on these particulars.

Metro has failed to provide any evidence that all trees removed over 6 inches in caliper will be preplaced by one or more native species equivalent in caliper to any tree removed. Finally, Metro has not provided substantial evidence that it will satisfy the erosion control standards of MCC.33.5520, which will be addressed below.

XXVIII. Metro has not provided substantial evidence that its BCF plan meets the purposes of the Hillside Development permit requirements, which includes controlling erosion and the production and transportation of sediment. (MCC 33.5500).

The findings of fact supporting the conclusion that Metro has failed to meet the purposes of the Hillside Development Permit requirements MCC 33.5500 are as follows:

Metro has already cut down a number of trees in the proposed alignments for trails A, D, E, G, and H, which number of downed trees the Carlson report variously describes as “significant” and “abundant.” (Jan. 2018 CPA Submissions, Exh. 2, pp. B7-B12). MCC 33.5515 (A) requires the applicant provide a map that includes trees with an 8-inch or greater caliper, or an outline of forested areas showing, among other things, the location of the development and trees to be removed. Given the abundant number of trees Metro has already cut down in the trail alignments of its September 5, 2017 BCF trail map it must be assumed that some were of 8 inch caliper or greater. The idea behind the code’s requirement that certain size trees be shown in a plan is so that plans can be evaluated to see if they are compatible with the purposes of MCC 33.5500. Cutting down trees in a proposed trail before showing them in a plan as required is substantial evidence that a plan is not within the purposes of MCC 33.5500.

Metro may claim that the trees it cut down in its proposed trail alignments as documented by Carlson Geotech was a part of its thinning operation for forest health, and therefore should be excused, because the abundant number of trees cut down in the trail alignments just happens to be a coincidental byproduct of its thinning operation.. Allowing such excuse would thwart MCC 33.5500 and allow an applicant to circumvent it. Vegetation, including trees, is important for erosion control. It is important that plans be vetted before and not after action is taken on the ground. Based on the numerous misstatements of fact on other issues that Metro has made, as well as its attempt to diminish the importance of the BCF in its own right, in addition to ignoring

its obvious importance for the BB, the conclusion is inescapable that Metro has no intent of complying with MCC 33.5500.

Metro relies on the Carlson Geotechnical report to show that its plans for the BCF control erosion and the production and transportation of sediment. That reliance is misplaced. The main body of the Carlson report concerns the trailhead/parking lot area and stream crossings. Appendix B discusses one version of Metro's BCF trail system, the September 5, 2017 map. Neither the main body of the report or its Appendix B, however, say anything of consequence about erosion, and nothing about the extent of the sedimentation BCF's watercourses will be subjected to, or what effect that sediment will have on Burlington Bottoms. Instead, the CarlsonGeotech report concerns itself with seismic hazards and slope stability/landslides from the standpoint of risks to human life given the recognized seismic and slope instability conditions in the BCF. It determines there is minimal risk to human life from these risks and nothing more.

The extent of the Carlson report's comments on erosion is to recommend trail locations on slopes of 50% or less and to direct runoff across the trails to avoid puddling. (Jan. 2018 CPA Submissions, Exh. 2, pp. 9-11, 21). Other than that the Carlson report recommends following "County and State regulations" regarding erosion and sediment control. (Ibid., p. 11). Appendix B of the report notes that it was limited to the identification and evaluation of landslide hazards for the trail network and trailhead area. (Ibid., p. B-11). The main body of the report likewise did not include erosion risk evaluation as part of the scope of its work, but was instead to provide "geotechnical recommendations for the proposed trailhead and stream crossings." Ibid., p 5).

Appendix C of Carlson Geotech's report, a USDA-NRCS Soil Resource Report, gives information on the type of soil found only on a very small part of the site consisting of 3.9 acres (area of interest-AOI). It is directed at describing the soils where Metro proposes to install its parking lot, and includes only a small area within the AOI where any of the new trails Metro proposes will be located, depending on which of the versions of the trails maps one chooses to rely. It does not analyze the interplay of soil type, climate and slope. It adds little, beyond confirming that indeed the soil in question is Goble Silt Loam. It adds nothing that fosters Metro's argument that the site is suitable for the development proposed from the standpoint of erosion risk. Therefore, Metro has failed to provide substantial evidence that its plans control erosion and the production of sediment as MCC 33.5500 requires.

XXX Conclusion: MCC 33.5515 (A) requires the applicant provide a map that includes trees with an 8 inch or greater caliper, or an outline of forested areas showing, among other things, the location of the development and trees to be removed. Metro has only done this for the area where it proposes to place its parking lot and related amenities in the BCF and not for its larger trails networks in both the BCF and MCF. Therefore, it has not provided substantial evidence of meeting MCC 33.5515 (A)'s requirements.

The findings of fact supporting the conclusion that Metro has failed to provide substantial evidence that it has met the requirements of MCC 33.5515(A) are as follows:

In its Jan. 2018 Permit Submissions, page 72, Metro states that "the majority of this development will take place in already cleared areas such as in the power line right of way and a cleared area near existing [sic, loop road] roads." Metro points to the Siskiyou Biosurvey report, Exh.19 in its January 2018 Permit Submissions for its support for this

statement. But the map in Exh. 19, in its January 2018 Permit Submissions shows this statements to be inaccurate.

The inaccuracy can be seen even more clearly on the larger BCF trails map, spread over three pages that Metro provides. (Jan. 2018, Permit Submissions, Exh. 22). This shows that that the majority of the proposed trails are not within the easement corridor and are not close enough to the loop road or the utility easements to make the claim that the proposed trails are in the equivalent of cleared areas. Rather, the opposite is true. Indeed, in its Funding Application Metro said that its proposed trails are not located in already cleared areas in order to limit the erosive effects of sun and wind. Because of that concern Metro claimed that it was specifically avoiding putting trails in the power companies' easements. (Exh. 2, p. 38).

In addition to the foregoing contradiction is the following. On the one hand, Metro claims that the majority of its proposed trails are in the cleared areas provided by the utility corridors and equivalent cleared areas hugging the loop road. On the other hand, Metro claims in its Siskiyou Biosurvey report that it cannot meet the requirements necessary to obtain an SEC permit because of "the lack of previously cleared areas," and that the "cleared areas include the areas...within the utility corridor [which] cannot be planted in trees or otherwise developed." (Jan. 2018 Permit Submissions, Exh. 19, pp. 3 and 6). Metro does not explain why its proposed trails in all versions of its BCF trails maps cross the power company easements many times if the power companies' easement corridor cannot be developed.

The multitude of Metro's differing factual claims amount to a lack of substantial evidence. Since the majority of Metro's proposed trails are not in cleared areas Metro needs

to show the location of trees to be removed in its development, which it has not done. With at least 6.7 miles of new trails proposed in its latest BCF trail map, it is very likely that many trees will need to be removed, aside from the significant/abundant number that Metro has already removed from the alignments of the various trails in its September 5, 2017 BCF plan. (Note that Metro's December 2017 BCF trails map understates the length of the new trails it proposes by about a mile or more. (Jan. Permit Submissions, Exh. 22)). The Carlson report observes that the BCF is heavily forested with coniferous and deciduous trees. Based on the evidence that Metro has provided it is impossible to tell whether or not Metro intends to cut down trees of an 8 inch or greater caliper, although that seems highly probable, and so, Metro has not supplied substantial evidence of meeting MCC 33.5515 (A)'s requirements for the BCF. Nor has it done so for the MCF because Metro's MCF trail plan suffers from the same defects as its BCF plan. It makes no mention of whether or not its proposed trails in the MCF will require tree removals, and if its MCF plans do require tree removals Metro provides no maps showing that as MCC 33.5515(A) requires.

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XXXI Conclusion: Metro has not provided substantial evidence it has complied with MCC 33.5515 (B), which requires an estimate of the extent, depth and location of all proposed cuts and fills.

The findings of fact supporting the conclusion that Metro has failed to provide substantial evidence that it has met the requirements of MCC 33.5515(B) are as follows:

MCC 33.5515 (B) requires the applicant make an estimate of the extent and location of all cuts and fills. With the exception of its proposed parking area Metro has failed to do so. The extensive network of trails proposed for the BCF, given the slopes where they will be located according to the Carlson Geotech report, will require cutting into the slopes.

The width of a trail in combination with slope dictates the depth of the cut into the slope and determines how close to, or whether the trail surface will pierce either the fragipan and/or the seasonal water table that perches above it. So, to satisfy substantial evidence requirement a statement beyond that a cut may be minimal, as the Carlson Geotech report states, is needed, accompanied by an analysis of what erosive effects will ensue and, for instance, whether a dry well or other remedial measure will be needed to control the resulting erosion.

The fragipan, a dense, thick block of largely impermeable soil sits below the surface of the BCF at between twenty and forty-five inches. Given the slopes Carlson has identified of where trails are proposed to be constructed and the widths of those trails, cuts will penetrate the fragipan, and the seasonal perched water table that rests on top of it in many places. The moderately permeable Goble Silt Loam will be stripped away with obvious negative erosion consequences made more severe as rain events intensify from global warming. In many places there will be little if any soil remaining above the fragipan to absorb water.

The Carlson report has a description of some of the cutting the BCF network of trails will need, but it is incomplete. It generally describes the cuts that will be needed as

“minimal.” In the context of the BCF the cuts will not be minimal. The Carlson report’s description of them as such may be a product of its not analyzing the erosion problem.

Metro’s September 5, 2017 BCF trails map that Carlson Geotech based its final report on has six trails where some or all of the slopes are 33% or greater. There is no September 5, 2017 trail map in the record. The statement of the slope for the various trails is in the body of the Carlson report (Appendix B). The Carlson report states the width of six of nine trails in the September 5, 2017 BCF trail map.

For instance Trail A is .9 miles long with a width ranging between 36 and 48 inches and slopes ranging from 33% to 50%. That trail would go to the fragipan in places and beyond it in others. The total length of these six trail segments that are at a 33% slope or greater is 3.9 miles, and while the trails may not go into the perched water table above the fragipan or into the fragipan itself for that entire distance, it is highly likely that it will for extensive lengths of those 3.9 miles.

As previously discussed the Carlson report reviewed an earlier version of the BCF trails map that had fewer stream crossings and a shorter overall length of trails than the last known BCF rails map of December 2017. Metro’s overarching problem remains and that is, the question of what is the final plan? Until that is known in sufficient detail the Carlson report’s comments on cutting and fill for the BCF trail network remains speculative. The same is true for the MCF. Until the final plan is known in reasonable detail Metro has not met its burden of substantial evidence to show compliance with MCC 33.5515(B).

XXXII. Conclusion: MCC 33.5515 (D) requires the applicant to provide a narrative or plan, in conjunction with the map that MCC 33.5515(A) requires, which provides all applicable

supplemental reports, certifications or plans relative to engineering, soil characteristics, stormwater drainage, stream protection, erosion control or replanting.

The findings of fact supporting the conclusion that Metro has failed to provide substantial evidence that it has met the requirements of MCC 33.5515(D) are as follows:

Metro has not provided a report or other explanatory material regarding erosion control or stormwater control for either the BCF or MCF, which given the erosion risk that its plans for both the MCF and BCF present, do not come up to the level of substantial evidence to show it has met the requirements of MCC 33.5515(D).

Metro points to Exhs. 20, 4, and 2 (January 2018 Narrative, p. 72) as its evidence that it has met MCC 33.5515(D)'s requirements. But those Exhibits show that it has not. Exhs. 20 and 4 deal solely with Metro's proposed BCF parking area. As explained above, the Carlson Geotechnical report is not an erosion study but instead, it is a landslides and seismic risk assessment. Specifically, it deferred analyzing erosion and sedimentation stating "Erosion and sedimentation measures should be employed in accordance with the applicable County and State regulations." (Jan. 2018 Permit Submissions, Exh. 2, p. 11). The Carlson report also noted that hydrological issues were beyond the scope of its assignment. As to the MCF Metro points to nothing that even purports to satisfy any of MCC 33.5515(D)'s requirements. Therefore, Metro has not provided substantial evidence for either the BCF or MCF that it has met MCC 33.5515(D)'s requirements.

XXIX. Conclusion: MCC 33.5515(E) requires an applicant provide (1) information showing “that the proposed development to be on land with average slopes less than 25%, and located more than 200 feet from a known landslide and no cuts or fills in excess of 6 feet are planned...” or, (2) a geological report by a certified engineering geologist or geotechnical engineer certifying that the site is suitable for the proposed development, or, (3) an HDP Form completed and signed by a Certified Engineering Geologist or Geotechnical Engineer indicating the site is suitable for the proposed development. Metro has not provided substantial evidence that its proposed trails are on slopes averaging less than 25%, nor has it shown that the site is suitable for its proposed development because it has not addressed the erosion issue. One of Metro’s proposed trails is within two hundred feet of a known landslide. Additionally, Metro’s qualified experts signing of the HDP Form-1, in the context of the facts and circumstances of this matter, including Metro’s plethora of scattershot BCF plans, is of itself not substantial evidence satisfying MCC 33.5515(E).

The findings of fact supporting the conclusion that Metro has failed to provide substantial evidence that it has met the criteria of MCC 33.5515(E) are as follows:

The Carlson report shows that segments of Trail E on the September 5, 2017 BCF trail map are within two hundred feet of a known landslide, and therefore Metro’s BCF plan does not meet MCC. 33.5515 (E)(1)’s requirement that trails be more than two hundred feet away. Additionally, Metro’s BCF trails will not be on land with an average slope of less than 25%.

The County's slope map shows that the only places in the BCF where slopes are about 10%, aside from the negligible stretch of Burlington Creek, are on a few ridge tops. On average the slopes for the site exceed 25%. The Carlson report draws the same conclusion. (Jan. 2018 Permit Submissions, Exh.2, p. B3). Further, Multnomah County's Comprehensive Plan's Steep Slopes Map shows the slopes to be overwhelmingly greater than 25% on average in the BCF, as well as the MCF. (Jan. 2018, Permit Submissions, p. 71).

Pursuant to MCC 33.5515 (E)(1) the Director is not to issue a HD permit where on average slopes are 25% or greater, unless the applicant provides a certified engineering geologists or geological engineers report that the site is suitable for the proposed development, or has provided an HDP Form-1 signed by such an expert. Metro relies on Carlson Geotechnical for its needed expert's report and HD Form-1.

While the Carlson Geotech's report's authors are sufficiently credentialed, as is the signer of the HDP Form-1, the report only certifies that the site is suitable for development from the standpoint of seismic and landslide hazards and fails to address the substantial erosion risk. So, its statement that the site is suitable for the proposed development is fatally limited. Because the Carlson report does not address the crucial issue of erosion it does not supply the substantial evidence of a certified engineering geologists or geological engineers report required by MCC 33.5515 (E)(1), nor does Carlson Geotech's *pro forma* sign off on the HDP Form-1 meet the requirements of MCC 33.5515 (E).

The clear directive of MCC 33.1004 requires that code provisions be interpreted to "effect its [sic] objectives and to provide justice." In keeping with that same spirit, MCC 33.4415 (E)(3)(a) provides:

...[I]f the Director requires further study based on information contained in the HPF Form-1, a geotechnical report as specified by the Director shall be prepared and submitted.

The reasons the Director will require further assessment and analysis are that the HDP form that Carlson Geotech signed noted that the trail locations it reviewed in compiling its report were preliminary, and further, that its report was based only on the existing plan, that is, the September 5, 2017 BCF trails map. The extent to which Carlson Geotech found the trail locations to be preliminary is more fully detailed in the body of its report where it recommended that a number of the trails be either rerouted or otherwise relocated because of the steepness of the slopes where Metro proposed to locate them. Additionally, since creating its September 5, 2017 BCF trail map Metro has produced at least three other BCF trail plan maps making additions and subtractions to trails, trail lengths and stream crossing numbers, that is, Metro's subsequent trail maps for the BCF made material changes over its September 5, 2017 map. Further evidence of the preliminary status of the Carlson Geotech report is that the Carlson Geotech report is itself a revision of a report, a revision it must have felt compelled to make because its first report had addressed an August 31, 2017 BCF map, a plan that is not in the record. (January 2018 Narrative, Exh. 2, p. 2).

That a geological expert needs to fully address the erosion issues is apparent. The width of a trail in combination with slope determines depth of the cut into the slope, which in turn determines how close to, or whether the trail surface will, pierce either the fragipan and/or the seasonal water table that perches above it. The September 5, 2017 trails map that Carlson Geotech based its final report on has six trails where some or all of the slopes are 33% or greater. The statement of the slope for the various trails is in the body of the

Carlson report (Appendix B). It shows, for instance, that Trail A is .9 miles long with a width ranging between 36 and 48 inches and slopes ranging from 33% to 50%. That trail would go to the fragipan in places and beyond it in others. The total length of these six trail segments that are at 33% or greater is 3.9 miles, and while the trails may not go into the fragipan or the perched water table above it for that entire distance it is likely to do so for significant distances.

The number of stream crossings is also material because they are such significant generators of sediment both during and after construction. For instance, the thinning Metro has done in the BCF has laden the forest floor with debris and Metro has shown no analysis of debris dams that may form behind the bridges and culverts it proposes and their erosive effects, a problem that grows more and more acute with the intense weather events brought on by global warming. Metro's proposed stream crossings, repositioning of some trails, removal of others and insertion of other trails are all very important to the erosion dynamic.

The September 5, 2017 map that Carlson Geotech reviewed may or may not be the same as the June 2017 BCF trail map that Metro produced, although it is so strikingly similar, except for the slope designations, that it appears to be. For its June 2017 BCF trails map the slopes Metro assigned to the trail locations are far less than half Carlson's determination. If the difference is an honest error it points up the necessity of a final and accurate map. It may be that a difference of just two or three feet in location can make a large difference in slope. So, here too, because Metro has failed to provide a final accurate map with slopes it has not provided the substantial evidence it needs.

Since its August 31, 2017 map Metro has put forward at least four more BCF trails maps. The September 5, 2017 trail map that Carlson Geotech finally reviewed had 6 stream crossings and 5.1 miles of new trails in addition to the existing 2.9 loop road. Since then Metro's BCF trails maps have varied the stream crossings from 7, back down to 5 and finally 8 in its December 2017 trails map, along with 6.7 miles of new trails, that is, an addition of 1.6 miles of trails over Metro's September 5, 2017 version.

Further, Metro has made various statements about new trail lengths, at one point saying the new trails would be as much as 7 miles. (Exh. 2, p. 24). Since Metro has declared no final trail maps, and apparently desires the right to change them as it goes along according to what it calls its visionary guide to development, the Access Plan, it is unknown what the final trail lengths, trail locations and number of stream crossings might be. Metro's scatter shot plans cannot be the basis for substantial evidence to conclude that a *pro forma* execution of HDP Form-1 is adequate within the spirit of Multnomah County's land use code.

It is anticipated that the Director will at a minimum specify firstly, that Metro come up with clear trail maps for both the MCF and BCF, secondly, that Metro declares those maps to be its final trails plans, thirdly that Metro show on the face of the maps at reasonable intervals along the length of each trail the slopes where the trails will be located. It is anticipated that the Director will, fourthly, instruct Metro have the requisite expert thoroughly analyze the erosion risks its plans may present, and to provide solutions, including those to handle 10 year weather events.

XXX.) Conclusion: MCC 33.5520 (A)(1)(b)(c) and (d) require that cut and fills not be on slopes greater than 3:1 (33% slopes) unless (b) a geological/and or engineering analysis certifies that steep slopes are safe, erosion control measures are specified, (c) cut and fills shall not endanger adjoining property and finally, (d) that proposed drainage systems have adequate capacity to bypass upstream flows through the development sufficient to handle a 10 year event. Metro has provided no substantial evidence that it satisfies the above criteria.

The findings of fact supporting the conclusion that Metro has failed to provide substantial evidence that it has met the criteria MCC 33.5520(A)(1)(b)(c) and (d) are as follows:

Many parts of Metro's BCF trails will be on slopes 33% and greater. Metro has relied on Carlson Geotech's report to satisfy the MCC 33.5520 (A)(1)(b)(c) and (d) criteria. (See Jan. 2018 CPA Submissions, p. 72-3) but that report fails to do so, aside from showing that most of the steep slopes are safe for the development itself from a seismic and landslide standpoint. However, the Carlson report recommended the rerouting and relocation of a number of trails because from a seismic and landslide standpoint the slopes were too steep. Additionally, the Carlson report provides neither specified erosion control measures for the BCF trails network, nor proposes drainage systems that have adequate capacity to bypass upstream flows through the development sufficient to handle a 10 year event for either the parking area or the broader trail network. Therefore, Metro has not provided the substantial evidence it needs to satisfy MCC 33.5520 (A)(1)(b)(c) and (d). And again, Metro's plans are plagued by the lack of final plans.

The same holds true for the MCF where metro does not even purport to provide evidence to meet the MCC 33.5520 (A)(1)(b)(c) and (d) criteria.

Metro states, referring to MCC 33.5520, that “This standard can be met by a condition of approval that will ensure compliance.”(Jan. 2018 CPA Submissions, p. 74.) Metro is incorrect. Statewide Land Use Goal 1 requires an open and transparent process in which the applicant provides timely and comprehensible plan details so that the public can be fully engaged, and requires doing so before the hearing process. Conditional approval based on fulfilling significant criteria such as those required to be met under MCC 33.5520(A)(1)(b)(c) and (d) defeats the purpose of Land Use Goal 1. The conditions of approval need to be that Metro presents a plan that fulfills

code requirements.

Appendix C accurately describes Goble Silt Loam as dominated by silt three feet below the surface. But, it describes this soil as “well drained.” This characterization is in contrast with the HH Assessment that describes Goble Silt Loam as “moderately well drained” and that “the hazard of erosion is high” on slopes 15% and greater. (Exh.8, Appendix 3, pp. 39-40). The HH Assessment provides more context than Appendix C. It notes that Goble Silt Loam has the second highest runoff potential of all soils, which are divided into four USDA-SCS hydrological soil groups A through D. (Exh. 8, p.13). The HH Assessment is also more thorough as it concentrates on the entire watershed, which must to be done in order to properly assess the erosion problem. The HH Assessment makes clear the substantial erosion risk that the soil, slope and climate of the BCF present.

A disinterested third party produced the HH Assessment. While the USDA-NRCS Soil Resource Report that Metro has produced through its paid expert, Carlson Geotech, is not necessarily inaccurate, as far as it goes, it does not go very far. (Permit Submissions, Exh. 2, Appendix C). The HH Assessment presents a fuller and, therefore, more complete and accurate picture. Metro’s Carlson report does not provide substantial evidence that it has met the purposes of MCC 33.5500, nor does the report Metro obtained from Siskiyou Biosurvey.

Long before Metro purchased Ennis Creek, Abby Creek, McCarthy Creek and Burlington Creek Forests in ???, the ODFW designated the BCF in _____ as “essential habitat for fish and wildlife or important habitat for fish and wildlife,” in accord with OAR 635-415-0025.

