

Colorado Transportation Environmental Resource Council (TERC) Meeting

June 8, 2011 * 9 a.m. to Noon

Denver Regional Council of Governments (DRCOG), Denver, CO

[Please note action items in red text.]

Mr. Bill Haas, Federal Highway Administration (FHWA) Colorado Division, introduced himself as the facilitator.

Mr. John Cater, Division Administrator for FHWA Colorado Division, welcomed members, discussed FHWA's focus on sustainability and livability, and indicated that he was glad to see the diversity of agencies in the group and it was a good group to have in place.

Mr. Don Hunt, new Executive Director for the Colorado Department of Transportation (CDOT), welcomed members, indicated that it is important to CDOT and the Governor to work towards environmental sustainability, discussed that they're looking for ways to have more valuable and efficient outcomes to processes, and he wants the TERC to continue being successful.

Mr. Haas thanked DRCOG for hosting the TERC meeting. He then indicated that **Ms. Jennifer Finch** is retiring at the end of June and he wanted to recognize her for all of the great work she's done over the years.

Self introductions. See attached sign-in sheet.

DRCOG Host Presentation - Sustainability Planning

Mr. Steve Rudy thanked everyone for coming, indicated that DRCOG is happy to be part of the TERC, and introduced the presentation about DRCOG's sustainability efforts.

Ms. Wei Chen went through the presentation. DRCOG is planning to make the region a good place to live, work, and play. In 2011, sustainability was incorporated into the 2035 Metro Vision Plan. The DRCOG board adopted six sustainability goals for the agency, which are aspirational and not "slam dunks". Approximately 50 percent of funding is put towards sustainable projects, which include things such as bike/ped and air quality projects among others. DRCOG has a sustainability website that is available for anyone who is interested. Please see the attached presentation for details.
DRCOG to send presentation to Bill Haas.

Discussion after the presentation. **Mr. Hunt** indicated that creating a transportation system that is operationally efficient has come a long way with partnerships in the region (CDOT, DRCOG, Regional Transportation District [RTD], etc.). There are challenges ahead and he looks forward to continuing those partnerships. **Mr. Stan Szabelak**, RTD, indicated that those partnerships go beyond FASTRACKS and he also looks forward to continuing the partnerships.

Endangered Species Act (ESA) Section 7(a)(1) Implementation and the Multi-District Litigation Listing

Ms. Susan Linner, United States Fish and Wildlife Service (USFWS), handed out information about improving ESA implementation through regulation review (please see attachment) and discussed what types of things have been going on at the USFWS with the ESA. Rather than opening the ESA itself back up, which is a complicated and legal process, the USFWS has been trying to make tweaks over the years to the ESA through guidance and policies. The USFWS and National Oceanic Atmospheric Administration (NOAA) have been collaborating to improve ESA implementation. General information can be found on pages 1 and 2 of the handout.

Ms. Linner indicated that most people were aware of Section 7(a)(2) of the ESA, which is the consultation requirement, but Section 7(a)(1) is not as well-known. The handout contains a white paper that was put together by the USFWS and National Marine Fisheries Service about Section 7(a)(1). Generally, this section states that all federal agencies have a responsibility to recover listed species. Lawyers have indicated that this is a continuing responsibility and not just a project-by-project responsibility. It is unclear how to know if the recovery is working, so the white paper was put together to help clarify. The

USFWS is sharing this white paper with partner agencies to get input. [Comments on this white paper should be emailed to Ms. Linner by the end of June.](#)

The USFWS has also been involved in a multi-district litigation. Since 2007, there have been approximately 1,250 petitions to list species. An initial response is typically required by USFWS within 90 days to a petition. The litigation involves the USFWS, Wild Earth Guardians, and Center for Biological Diversity. The USFWS has proposed a settlement that the 251 species as of November 2010 would be listed according to a schedule if the Wild Earth Guardians and Center for Biological Diversity would agree to reduce the number of petitions being filed. The schedule allows the workload for listing species to be scheduled out to 2016 and includes species such as the Gunnison Sage-grouse in January of 2012 and Greater Sage-grouse in January 2015. The Wild Earth Guardians have agreed; however, the Center for Biological Diversity have not agreed. In court on May 18, the judge did not agree to the settlement since the Center for Biological Diversity had not agreed to it. A meeting is scheduled on June 20 with the Center for Biological Diversity to discuss the settlement more and the case will go back to the judge in March. Once the litigation is through the courts, a schedule will be provided.

Vehicle Miles Traveled (VMT) Reduction Measures and Land Use Scenario Analysis

Ms. Cindy Cody, Environmental Protection Agency (EPA), introduced the presentation. EPA is engaged in Denver's efforts to reduce VMT and analyzing land use scenarios through the EPA-Housing and Urban Development (HUD)-DOT partnership, the Regional Air Quality Council (RAQC), and grants that they're providing to DRCOG.

Mr. Haas discussed that EPA is expected to rule on the revised ozone 8-hour standard this summer. This will then need to be incorporated by the RAQC into the Ozone State Implementation Plan (SIP). Control measures will need to be developed to meet attainment for the new standards in each category – mobile sources (for example, vehicles), area sources (for example, industrial/commercial), and stationary sources (for example, power plants). There is support at all levels to look at “out of the box” thinking for these control measures (for example, land use planning). The revised Ozone SIP is due in 2013.

Mr. Eric Sabina, DRCOG, discussed DRCOG's new Focus model. In the 1990s, DRCOG's Metro Vision 2020 Plan put DRCOG on the path to cutting edge measures. DRCOG completed its new Focus model in 2010. Note that this is a new model and so there is some tweaking that is still needed. There are not many in the US – about a dozen are in the development stages. This new model depicts what the region looks like, what its people look like, and behaviors a lot better than the old model. The Focus model has a lot more detail as show below:

- It includes geographic details, which show all households/jobs as addresses on the ground rather than just blocks.
- It has the ability to model bike/ped trips, which couldn't be done in the past.
- It's able to depict people in region rather than just households – it depicts things such as age, gender, student status, work status, etc.
- It depicts people's choices better – trips to work or the grocery store, for example.
- It shows tours/activities that affect each other – for example, if you have to take your kids to daycare, you may be less likely to take transit.
- It can address land use measures better – transit oriented development (TOD) or small business centers, for example.
- Since demographic inputs are more detailed, there aren't as many changing scenarios – this helps with plausibility and certainty of the modeling output.
- It can help with scenario questions such as which scenario would be more practical or cost-efficient.

Mr. Szabelak asked how theoretical model outcomes translate into actual measurements (such as DRCOG's goal of reducing VMT). **Mr. Sabina** indicated that this happens through the validation process. This process includes taking real field data and comparing that data to the modeling data and making adjustments until they match.

Ms. Cody discussed EPA's certainty level. She indicated that more robust neighborhood and corridor analyses and scenarios are needed to help with SIP reduction. The future baseline is what needs to be looked at and have the goal of

reducing those, not the immediate baseline. Need to develop long-term measures to address how to stay in attainment. EPA is providing grants/support to help local communities with planning tools to address these issues.

Programmatic Effects Matrix for Threatened and Endangered Species

Mr. Jeff Peterson, CDOT, introduced the presentation. Mr. Alex Pulley, Felsburg Holt & Ullevig (FHU) gave the presentation (see attached presentation).

FHU has Nebraska Department of Roads (NDOR) as a client. NDOR developed a programmatic analysis to help shorten threatened and endangered species analyses and therefore, overall project delivery. In addition, it provides a consistent analysis across the state and is also a defensible process. This programmatic analysis ties actions (for example, bank stabilization) and the action's location on a map with a species list, agreed-upon determinations, and conservation conditions (mitigation). There is a federal tool available online (Information Planning and Conservation System, IPaC) that has mapping available for federally-listed species with potential conservation measures, but NDOR takes that a step further and does it for the state and also makes determinations. These programmatic determinations were agreed-upon by NDOR, FHWA, USFWS, and Nebraska's wildlife department. "May effect" determinations still require USFWS and FHWA approval/consultation. FHU brought the idea to CDOT for consideration and CDOT has set aside funding to start the process for Colorado.

Associated items with NDOR's programmatic analysis program include:

- "Source of impacts" definitions with "associated actions". This defines the typical sources of impacts that NDOR does (for example, bank stabilization) and defines what associated actions are included in the source (for example, grading would be required during bank stabilization).
- There is an effects matrix that includes the source of impacts, what species may be impacted by the source, and an agreed-upon determination. For example, bank stabilization projects have a determination of "may affect – not likely to adversely affect" the American Burying Beetle (among others).
- There is a list of conservation conditions for each species.
- The information from this analysis gets carried through the National Environmental Policy Act (NEPA) document and construction.

Next steps for CDOT include:

- Refine the activity list to match CDOT's activities. There appears to be quite a bit of overlap.
- Modify the federal species list and add Colorado's species. Again, there appears to be quite a bit of overlap.
- Link the activities to the impacts.
- Develop conservation measures and make determinations.

Each of the steps requires consensus from USFWS, FHWA, and Colorado Division of Wildlife.

Mr. Haas asked what the schedule for the next steps looks like. Mr. Pulley indicated that the funding is for fiscal year 2012, so the process could potentially start in a few months. There is a lot of coordination and consensus needed, but there is a lot of overlap with NDOR, so it shouldn't take as long as NDOR (several years for them). There's no set schedule yet, though.

Short Items

Ms. Vanessa Henderson, CDOT, listed upcoming NEPA documents and when they were tentatively expected to be available for public review. Although it won't have a public review period, she let everyone know that the I-70 Mountain Corridor Record of Decision will be signed on June 16th and will be available on the website if anyone is interested. Upcoming documents for public review include:

- State Highway at 287 in Lamar, Region 2, Environmental Assessment (EA), August 2011.

- US 24, I-25 West to Manitou Springs, Region 2, EA, August 2011.
- I-25 New Pueblo Freeway, Region 2, Draft Environmental Impact Statement (EIS), August 2011.
- North I-25 Front Range, Region 4, Final EIS, late summer 2011.
- Martin Luther King Boulevard, Region 6, EA, July 2011.

Mr. Haas provided an update on the TERC Sustainability Subcommittee. The recommendations to the TERC are being prepared and they will be brought to the TERC in October for discussion. A lot of tools were developed in the workshops and those will be posted to the TERC Sustainability Subcommittee section of the TERC website in the next week or so. **CDOT to post materials.** The materials are located at <http://www.coloradodot.info/programs/environmental/transportation-environmental-resources-council-terc/terc-sustainability-subcommittee.html>.

Mr. Szabelak asked if anyone had seen the NTI emails about streamlining NEPA. He wondered what they were about and if we could talk here or at the next TERC meeting about some of those things. **Mr. Haas** suggested that he look at the federal review items. **Ms. Charmaine Knighton**, Federal Transit Administration, is going to send some information.

Mr. Larry Svoboda, EPA, asked if there was any news about the highway trust funding bill. **Mr. Cater** indicated that they are working on revisions and working on a bill for long-term funding, but the timing is still unknown.

Ms. Lisa Silva, Colorado Department of Public Health and Environment, indicated that the conformity regulation (Regulation 10) is going under review and revision this year.

Mr. Haas asked for topic suggestions for the next TERC meeting and the suggestions are as follows:

- SAFETEA-LU reauthorization status
- TERC Sustainability Subcommittee
- Every Day Counts
- New ozone standard
- 2012 is 10 year anniversary of TERC: should we do something?
- Revisit 2006 questionnaires (on website)
- Updates on joint CDOT/RTD projects
- How I-70 Mountain Corridor ideas are developing after the Record of Decision

Mr. Haas ended by recognizing **Mr. Svoboda** for his services because he is retiring and this was his last meeting. He has been a TERC member since 2003.

The TERC web site can be found at <http://www.coloradodot.info/programs/environmental/transportation-environmental-resources-council-terc>.

NEXT MEETING:
October 6, 2011
Colorado Department of Transportation
4201 East Arkansas Avenue
Denver, CO 80222

TERC ROSTER - MEETING SIGN-UP SHEET - JUNE 8, 2011

PLEASE SIGN IN AND ADD/CORRECT ANY INFORMATION ON THE LIST

PLEASE ALSO LOOK THROUGH YOUR AGENCY'S CONTACTS AND CROSS-OUT OR UPDATE LIST - THANKS

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DRCOG Sustainability Planning

TERC –June 08, 2011



DRCOG

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We make life better!



DRCOG Vision: Enhancing and protecting the quality of life in our region



What does DRCOG do?



Regional Planning



Transportation Improvement Program



Transportation Modeling



Traffic Signal Program



Transit



Congestion Mitigation



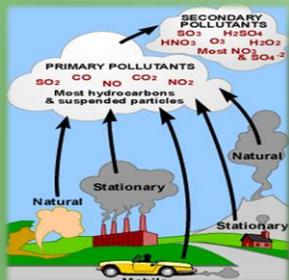
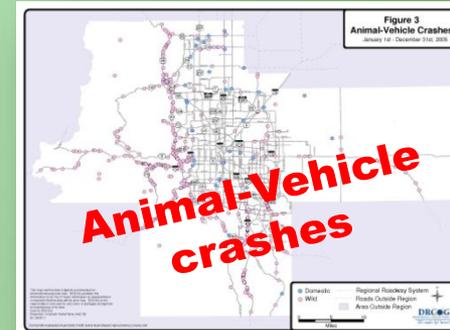
Bicycle & Pedestrian Planning



Public Involvement



RideArrangers
DENVER REGIONAL COUNCIL OF GOVERNMENTS



Air Quality Planning



Regional Sustainability



Area Agency on Aging



Water Quality



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Metro Vision 2035 Plan

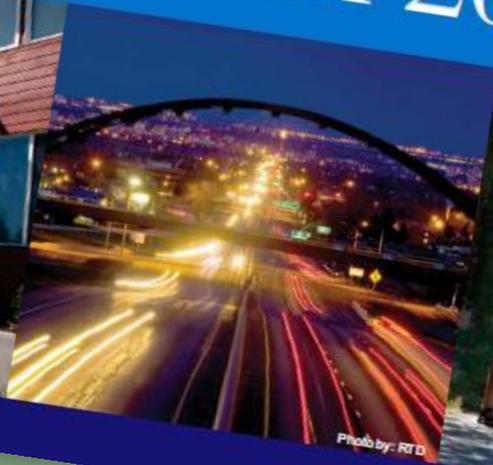
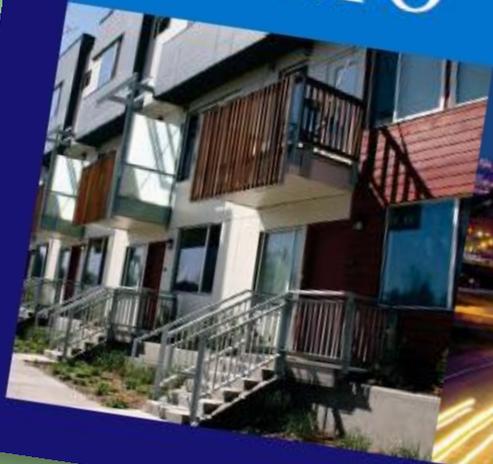
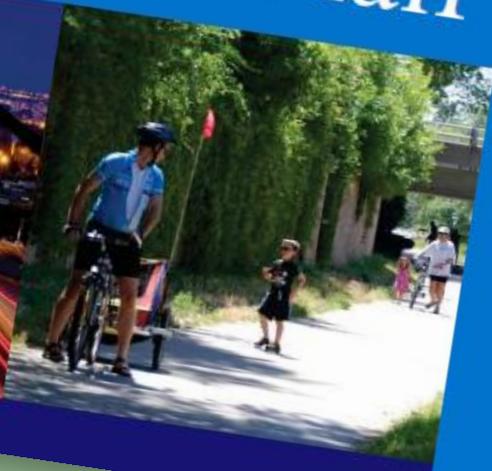


Photo by: RTD



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Evolution of Metro Vision

- 1992:** Guiding Vision
 - 1997:** Metro Vision 2020 Plan
 - 2000:** Mile High Compact
 - 2005:** Metro Vision 2030 Plan
 - 2007:** Metro Vision 2035 Plan
 - 2011:** Metro Vision 2035- “S”
- S = Sustainability



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How are DRCOG's plans implemented?

Local Governments and Partner Agencies

METRO VISION
2020



MILE HIGH
COMPACT

MILE HIGH COMPACT

THIS AGREEMENT is made and entered into this 10th day of August 2000, pursuant to Article XIV, Section 18(2)(a) of the Constitution of Colorado and Section 29-1-203 of the Colorado Revised Statutes, by and among the cities and towns of the State of Colorado, and the counties of Colorado, bodies politic organized under and existing by virtue of the laws of the State of Colorado.

- I. WHEREAS, the Cities and Counties recognize that growth and development decisions can impact neighboring jurisdictions and the region; and*
- II. WHEREAS, Metro Vision 2020, collaboratively created by DRCOG members, business, environmental and neighborhood leaders; provides a regional framework for local decisions on growth and development within the Denver Regional Council of Governments' (DRCOG) region; and*
- III. WHEREAS, the Cities and Counties are willing to make a commitment to the accommodation and encouragement of planned growth and development, to the orderly extension of urban services, to the enhancement of the quality of life, to the protection of the environment, and to the promotion of the economic viability of their respective communities and the region; and*
- IV. WHEREAS, the Cities and Counties support planned growth and development to maximize efficiency through coordination among jurisdictions, provide for the orderly extension and integration of urban services, promote the economic vitality of the Cities and Counties and enhance the quality of life of its residents; and*
- V. WHEREAS, the Cities and jurisdictions; and they re provide for the orderly gr*
- VI. WHEREAS, the Cities and their commitment to add as a whole.*

NOW, THEREFORE, in consid (hereinafter referred to as

- 1. Metro Vision 2020. We ac Moreover, we agree that*



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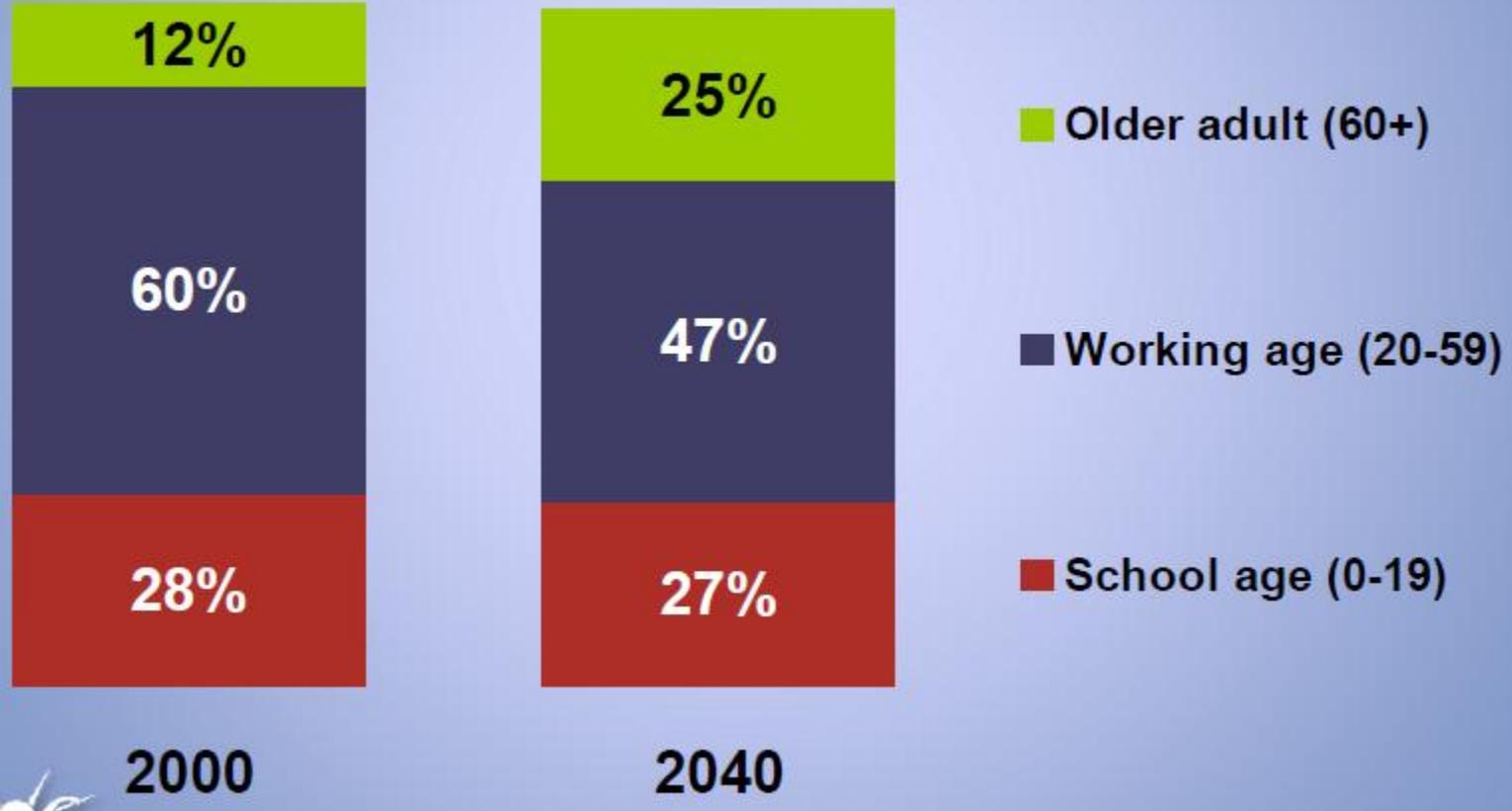
Growth Challenges - By 2035

- 1.4 million more people will live in the Denver region (an increase of 50%)
- Daily vehicle miles of travel will increase by about 60%
- Miles of severely congested roads will triple



Growth Challenges - By 2040

- Percentage of 60+ population will go from 12 percent to 25 percent



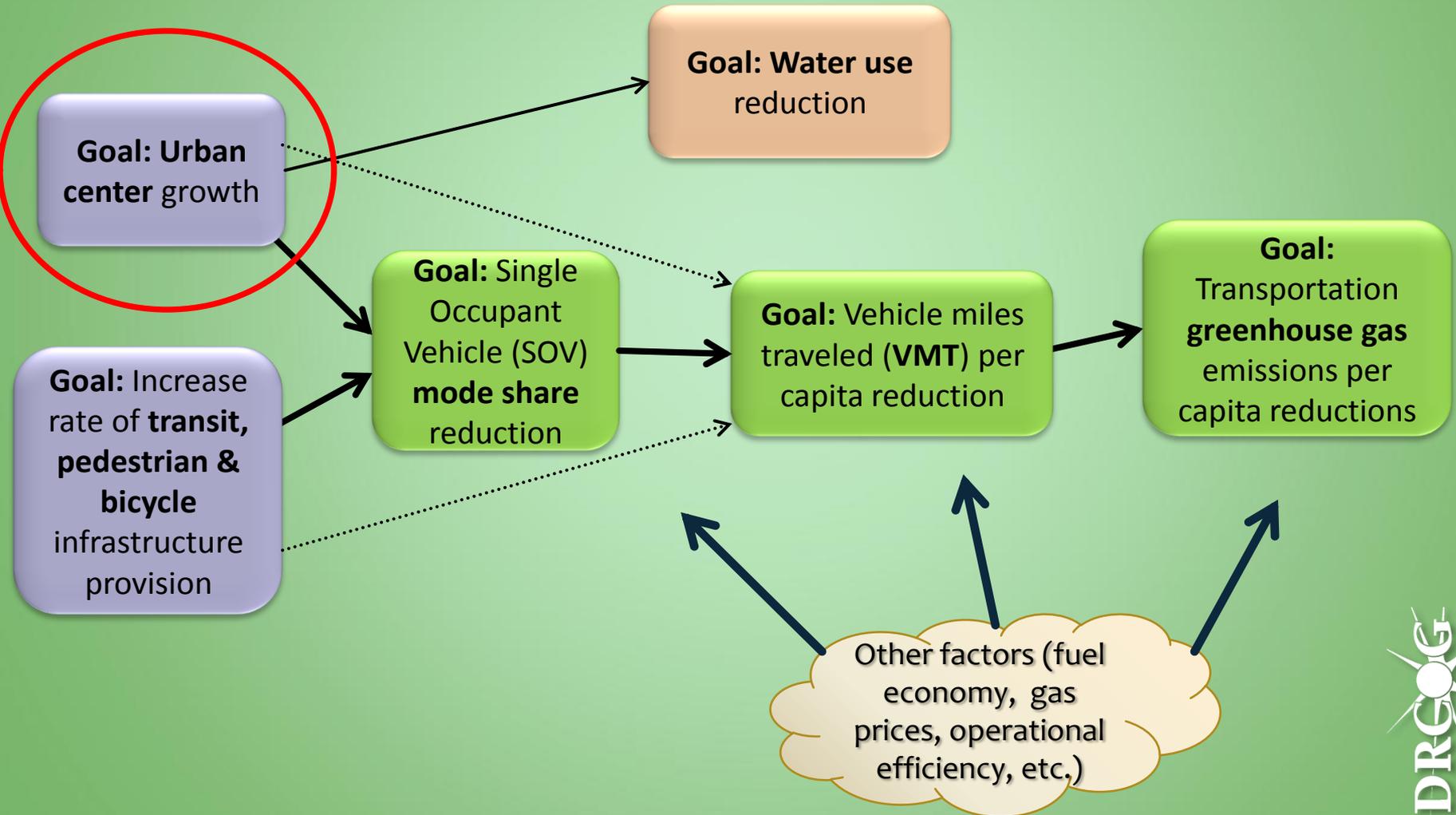
Update 2035 Metro Vision: Incorporation of Sustainability

Key Outreach Themes	Metro Vision Goal
Efficient use of natural and financial resources	<ul style="list-style-type: none">• Increase overall regional density 10%• Reduce per capita water consumption (draft)• Reduce fossil fuel consumption (draft)
Vibrant urban centers that allow people of all ages, incomes and abilities to access a range of housing, employment and service opportunities	Locate 50% of new housing and 75% of new employment in urban centers (draft)
Accessible open space	Protect 880 square miles of state and local parks and open space

2035 Metro Vision: Incorporation of Sustainability

Key Outreach Themes	Metro Vision Goal
A variety of transportation options such as transit, sidewalks, bicycle paths and roads, which people can use to meet their daily needs	<ul style="list-style-type: none">• Increase the rate of construction of alternative transportation facilities (draft)• Reduce single occupant vehicle mode share to 65% of work trips (draft)• Reduce daily vehicle miles traveled per capita 10% (draft)
Clean air and water	Reduce per capita transportation greenhouse gas emissions 60% (draft)

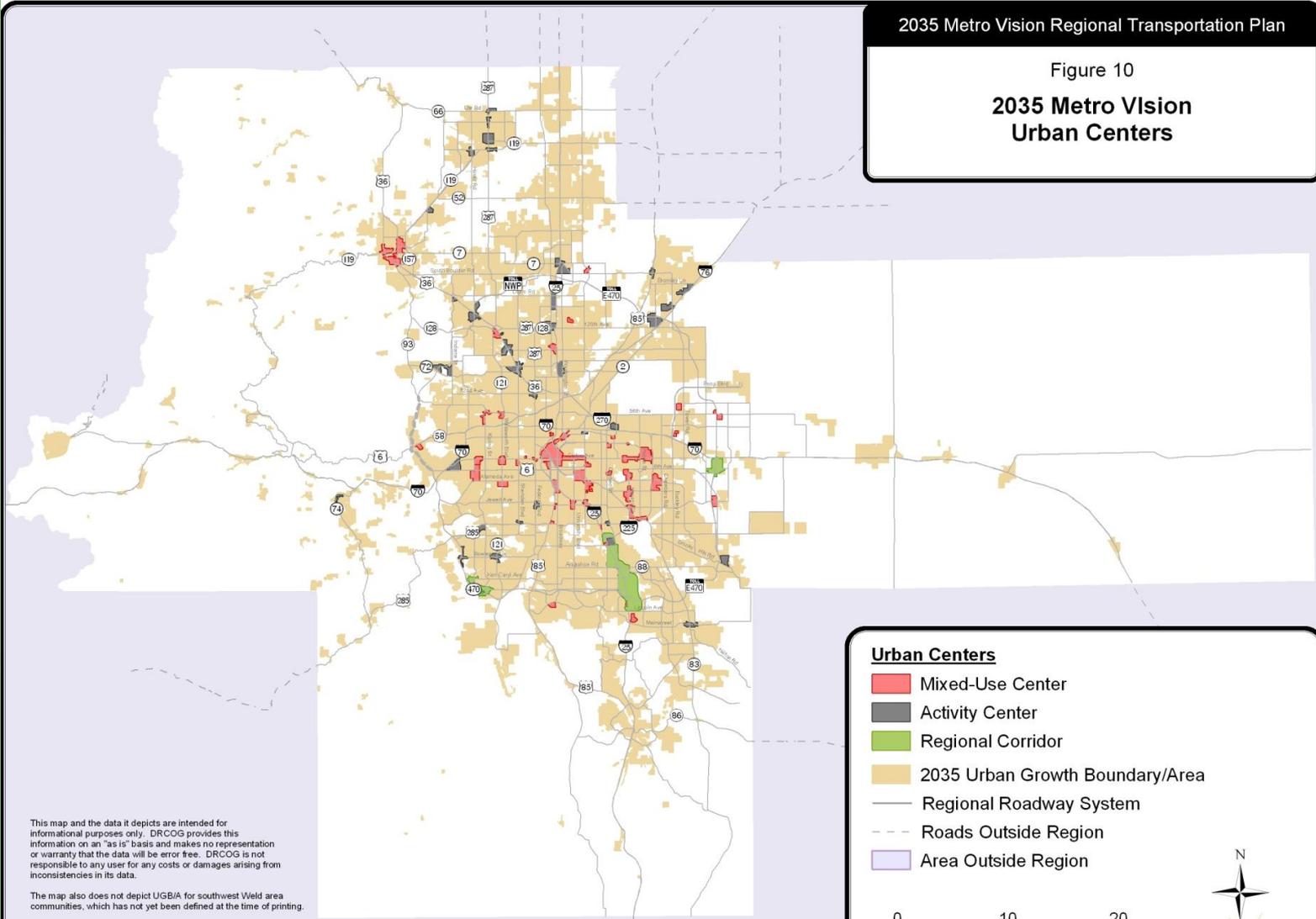
DRCOG Sustainability Goals



DRCOG Designated Urban Centers and UGB

2035 Metro Vision Regional Transportation Plan

Figure 10
**2035 Metro Vision
 Urban Centers**



Urban Centers

- Mixed-Use Center
- Activity Center
- Regional Corridor
- 2035 Urban Growth Boundary/Area
- Regional Roadway System
- Roads Outside Region
- Area Outside Region

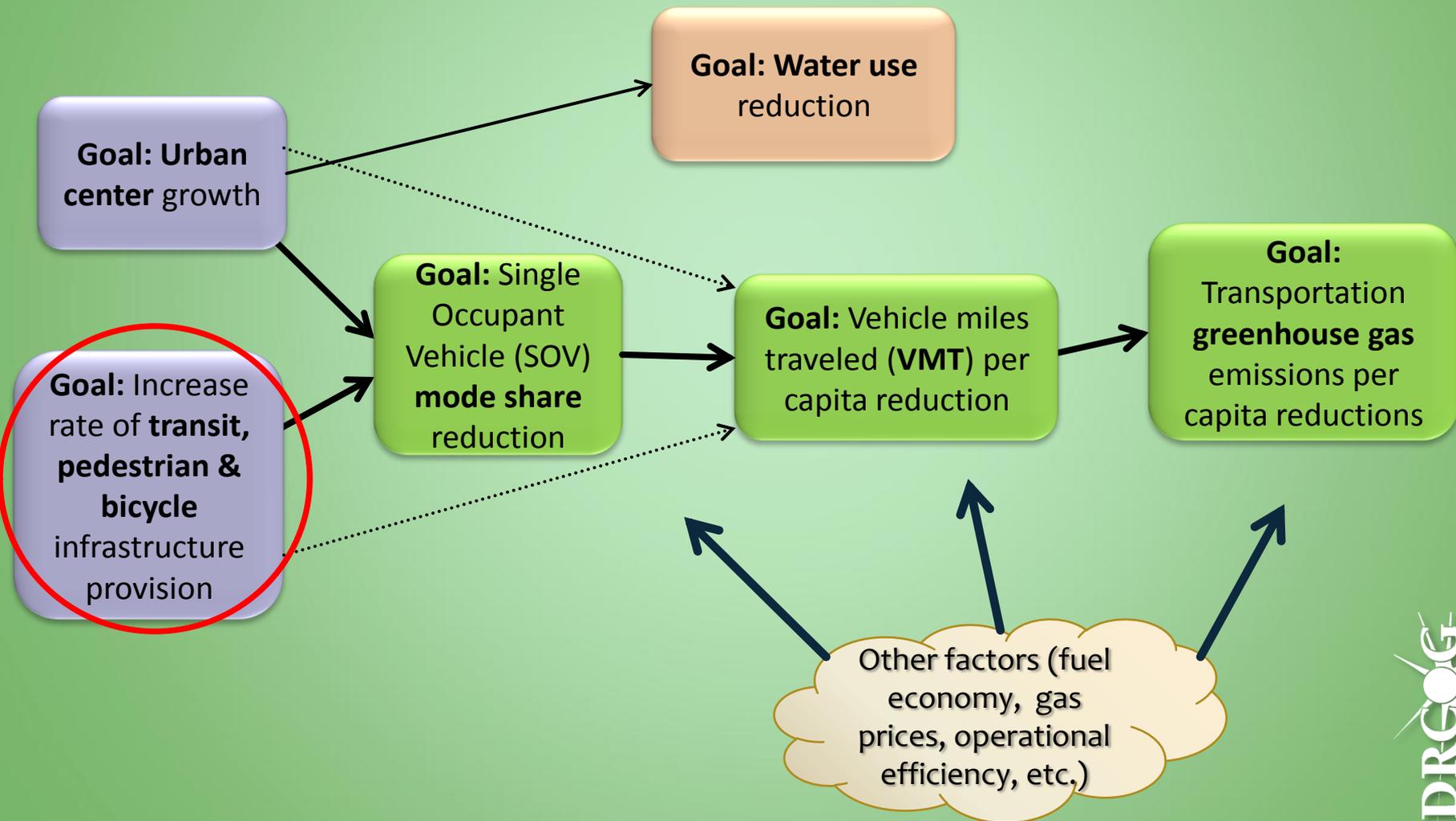
0 10 20
 Miles

This map and the data it depicts are intended for informational purposes only. DRCOG provides this information on an "as is" basis and makes no representation or warranty that the data will be error free. DRCOG is not responsible to any user for any costs or damages arising from inconsistencies in its data.

The map also does not depict UGB/A for southwest Weld area communities, which has not yet been defined at the time of printing.

Source: DRCOG
 Projection: Colorado State Plane, NAD 83
 PJ 10/10

DRCOG Sustainability Goals



Transit-Oriented Developments (TOD)



<http://tod.drcog.org>



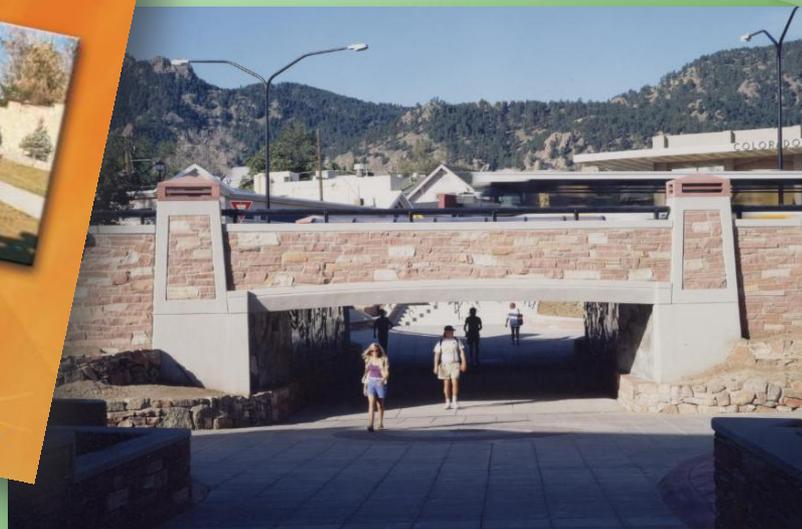
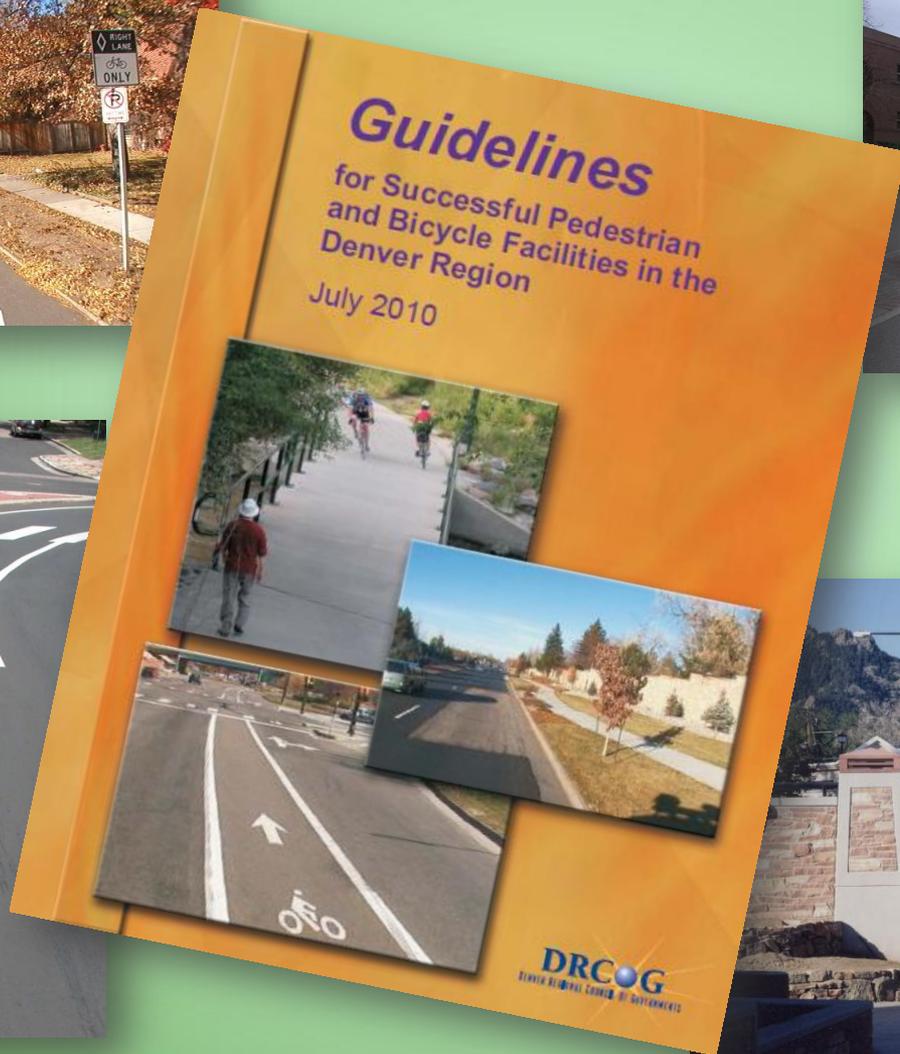
www.drcog.org

Multimodal Improvements

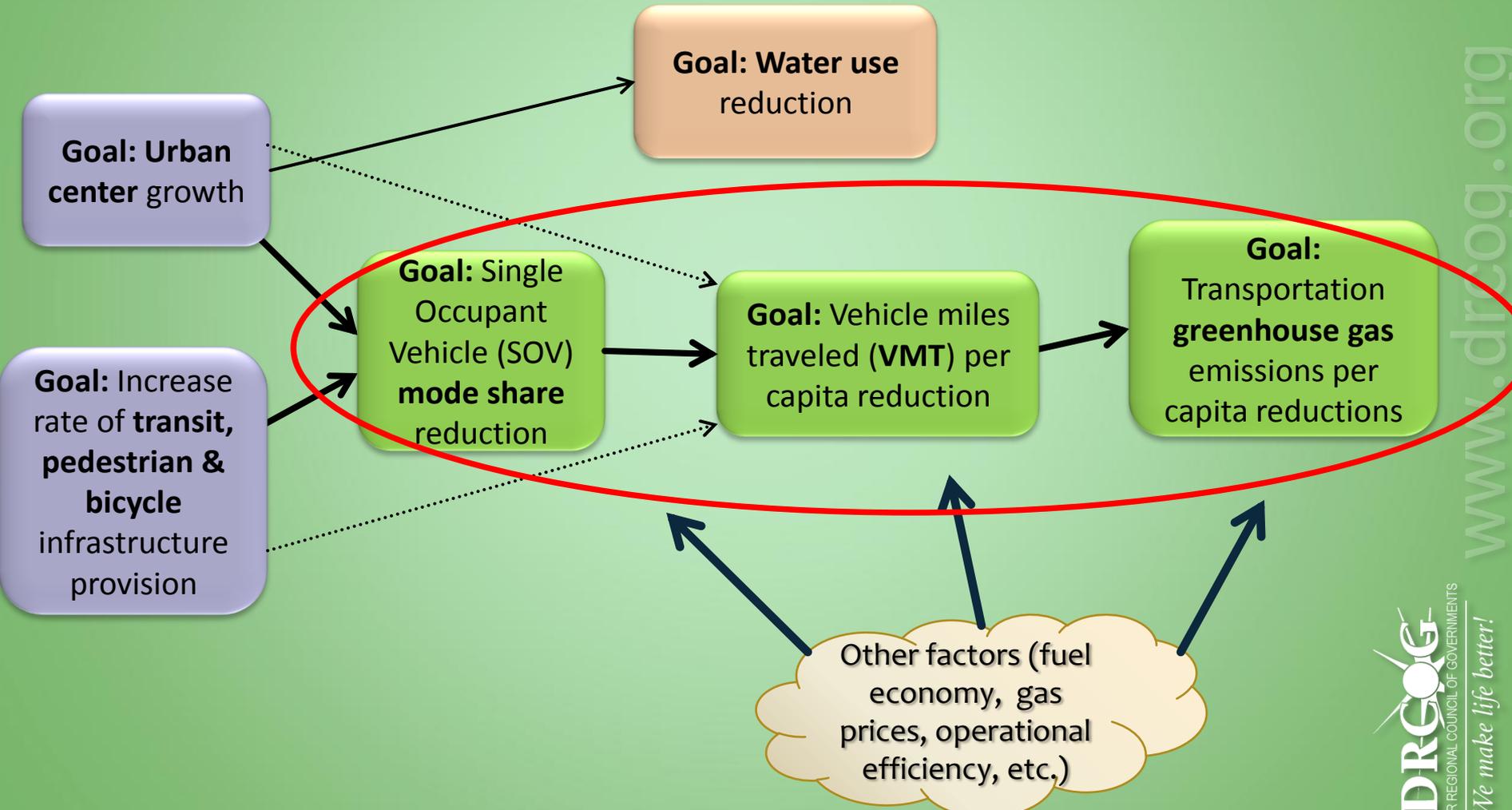


www.drcog.org

Multimodal Improvements



DRCOG Sustainability Goals

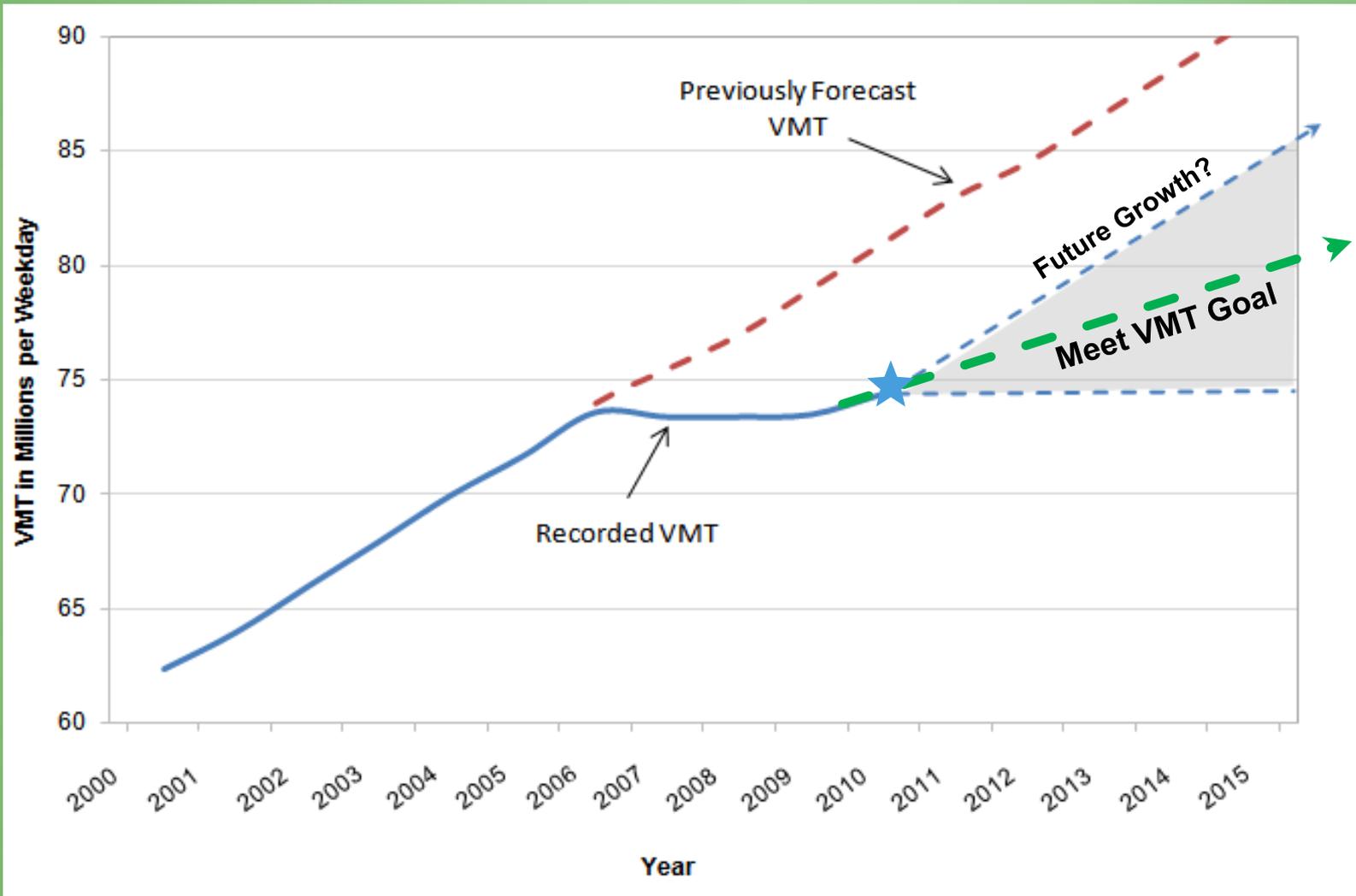


www.drcog.org

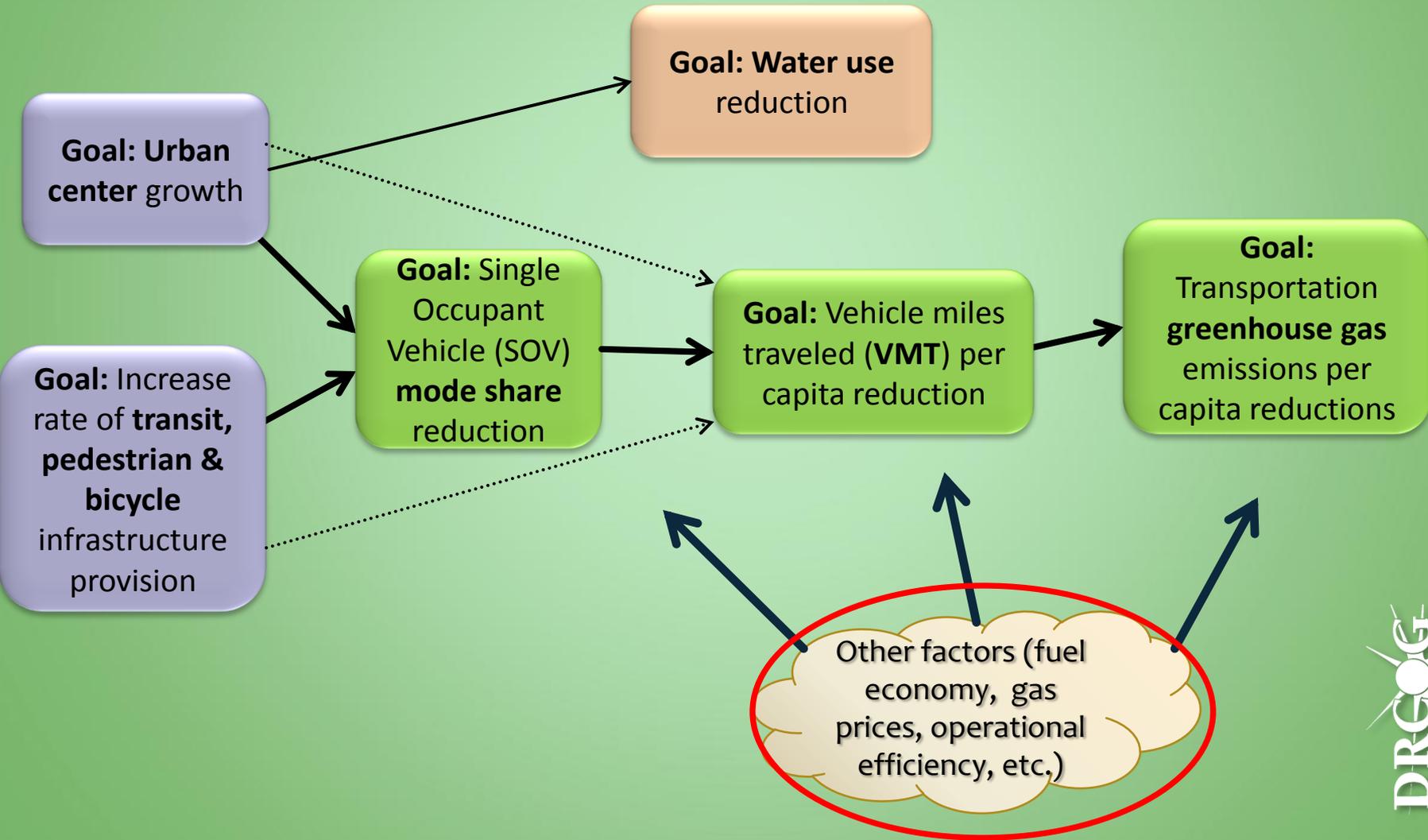
Regional GHG Related Goal Measures

1. Reduce “Drive Alone to Work” from 74% to 65% by 2035
2. Reduce daily VMT per capita by 10% by 2035
 - From 26.3 miles a day per person to 23.7
 - From 42 miles a day per licensed driver to 38
 - From 65 miles a day per household to 59
3. Reduce Per Capita Transportation Greenhouse Gas emissions by 60% by 2035
 - From 9,900 pounds a year per person to 4,000

Vehicle Miles Traveled (VMT)



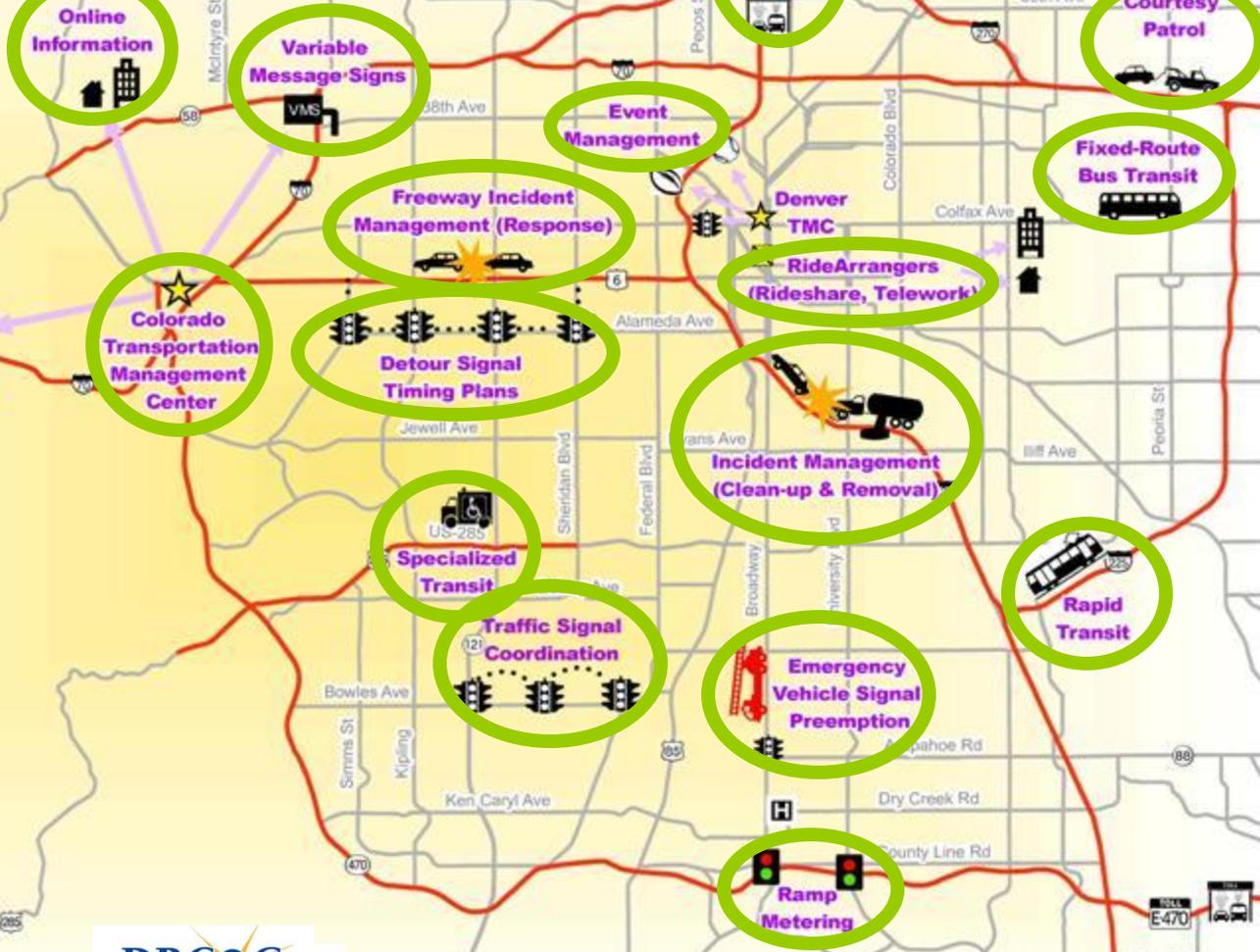
DRCOG Sustainability Goals



Samples of Daily Transportation Operation Activities

Priority Service Areas to be Enhanced

- Traveler Information
- Transportation Operations & Management
- Traffic Incident Management
- Transit Operations & Management



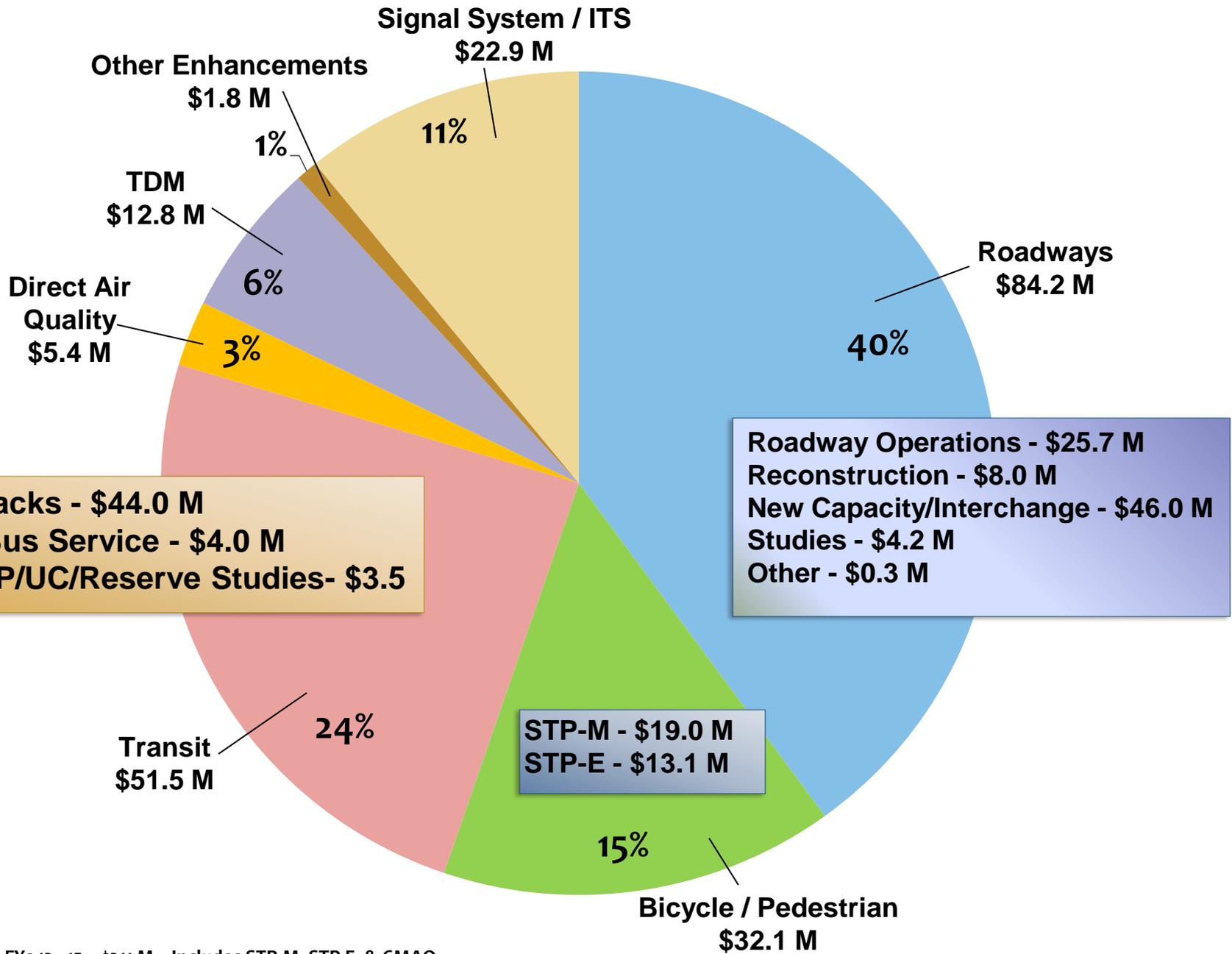
Partners

- CDOT (www.cotrip.org) (5-1-1)
 - management center in Golden
 - maintenance and snowplowing
 - I-25 Express Lanes, ramp meters
- RTD (www.rtd-denver.com)
 - drivers, dispatchers, maintenance
- Law enforcement personnel
 - Colorado State Patrol
 - Local Police and County Sheriffs
- Emergency responders
 - Ambulance, Fire, EMTs
 - Tow trucks, hazard removal
- Local governments
 - Denver traffic management center
- E-470 and Northwest Parkway Toll Authorities
- DRCOG RideArrangers (www.drcog.org)



Source: Regional Transportation Operations Strategy report

Draft 2012-2017 TIP Allocation by Category: FY 12-15 DRCOG Funding



Total funding FYs 12 - 15 = \$211 M, Includes STP-M, STP-E, & CMAQ

Future Steps

1. Implement 2035 Metro Vision
2. Start on 2040 Plan
3. Enhance travel and land use models
4. Improve GHG calculation

Transportation GHG Calculations

- Travel model outputs (VMT) are inputs
- Emission rates, m.p.g., and other fleet factors
- GHG (fuel based) Goal: Per Capita 60% Reduction by 2035
 - 2005 GHG = 9,900 lbs. per capita
 - 2035 GHG = 4,000 lbs per capita
- How to incorporate “non-fuel” factors
 - Construction and maintenance techniques
 - “Upstream” GHGs (e.g. oil/coal extraction, raw materials, etc.)

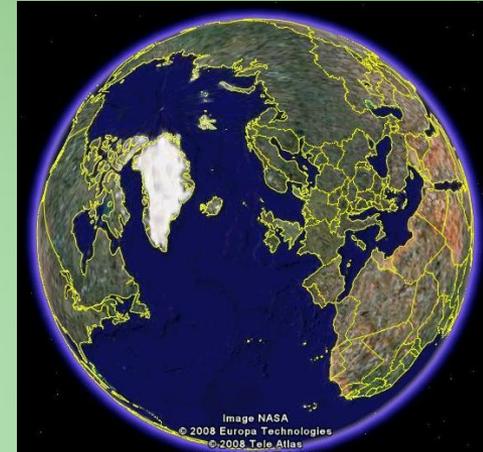
Other Key Points

- Linkage of GHGs to VOC and NOx reduction
 - Ozone is our largest and immediate problem
- Electric/other Vehicle Fleet & Energy Generation
 - How much better is “coal powered” vs. gasoline?
 - Upstream and infrastructure costs, GHS emissions
 - Infiltration of clean energy sources for power plants
- Monitor & Coordinate with other state and federal sustainability or climate change policies

Regional Sustainability

- Resources available:
 - energy conservation & greenhouse gases
 - toolkits, best practices
- See webpages at

<http://drcog.org/index.cfm?page=RegionalSustainability>



DRCOG Regional Sustainability Resources



[DRCOG's Regional Sustainability](#)

[Resources Home](#)

Search

Courses and Workshops



Promoting Energy Efficiency in Your Community and the Future of Property Assessed Clean Energy (PACE)

Date:
Wednesday, Dec. 8, 2010 ([Register](#) by Dec. 3)

Time:
9 a.m. to noon

Place:
Westminster City Park Recreation Center Cor
[10455 Sheridan Boulevard](#)

New information: DRCOG is a provider of AICP CM 2.5 CM credits!

Retrofit programs are increasingly being embraced as cost-effective ways to improve energy efficiency and economy while increasing the comfort and efficiency of Property Assessed Clean Energy Programs (PACE) and counties to offer low-interest loans for energy efficiency.

- the economic and environmental benefits of retrofits
- relevant state & federal legislation
- where PACE has been used in Colorado
- next steps for communities interested in PACE

Communities are encouraged to bring a team of representatives including a mayor, city manager, finance manager/director, sustainability coordinator, and other staff.

Presentations include:

- Energy, Economy & Employment--Demonstrated Economic Benefits of Energy Efficiency (Case Study), Jason Coughlin, National Renewable Lab
- PACE Retrofits Program in Colorado--[Boulder County's Climate Smart Local Government](#)
- Will Tabor, Boulder County
- Statewide Opt-in Districts, Brett Johnson, Colorado Governor's Energy Office
- [State of PACE Nationally](#) and Alternative Financing Models, Cisco DeVries

Contact [Jill Locantore](#) at 303.480.6752 with questions about the workshop.

Promoting Energy Efficiency in Your Community: Getting the Most Bang for the Buck

Date: Wednesday, April 20
Time: 9 to 11:30 a.m.
Location: Lakewood Cultural Center Community Room
[470 S. Allison Parkway](#)

Attendees of this workshop will learn about the following:

- What are Colorado communities doing on energy efficiency?
 - How did they identify their priorities?
- What data is available to help define community needs?
 - Who can communities identify where best to use limited resources?
 - What buildings are the least energy efficient?
 - What resources are available to address identified needs?
- What would most benefit from assistance?
 - Case Study of Denver's Energy Efficiency Upgrade/Insulation Program.

Confirmed speakers include:

- Susannah Pedigo, Community Energy Efficiency Manager-Colorado at Xcel Energy
- Denise Stepto, Principal at Symbiotic Engineering and Residential Program Manager
- Mark Reiner, Greenprint Denver Marketing and Residential Program Manager

There is no fee to attend, but please [register online](#) to reserve a seat. The Denver Regional Council of Governments (DRCOG) and Metro Mayors Caucus are co-hosting this workshop with funding from the U.S. Department of Energy's BetterBuildings program.

to attend, but please [register](#) online to reserve a seat. This workshop with funding from the

Sustainability
Plan. Innovate. Implement.

Questions?



DRGOG

DENVER REGIONAL COUNCIL OF GOVERNMENTS

We make life better!



Improving ESA Implementation through Regulation Review

The U.S. Fish and Wildlife Service (Service) and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) are working collaboratively to improve the implementation of the Endangered Species Act (ESA) by considering appropriate changes to our practices, guidance, policies, and regulations to enhance conservation of listed species. This review and update of regulations, policies, guidance and practices is consistent with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review," and our selected areas for regulatory review and improvement are outlined in the Department of Interior's (DOI) "Preliminary Plan for Retrospective Regulatory Review."

To improve the efficiency and effectiveness of the ESA in conserving endangered and threatened species, the Service and NOAA Fisheries have identified areas where changes in ESA implementing regulations and policies may reduce burdens, redundancy, and conflict, and at the same time promote predictability, certainty, and innovation. This effort is guided by the following objectives, which are in line with the principles espoused in Executive Order 13563, as well as the Service's vision for the Endangered and Threatened Species Program:

- Improving the effectiveness of the ESA to conserve imperiled species;
- Making administrative procedures as efficient as possible;
- Improving the clarity and consistency of our regulations through, among other things, the use of plain language and by providing more precise definitions of many of our key terms;
- Encouraging more effective



Connie Bransilver, USFWS

Florida Panther.

conservation partnerships with other Federal agencies, the states, tribes, conservation organizations, and private landowners;

- Encouraging innovation and cooperation in the implementation of the ESA; and
- Reducing the frequency and intensity of conflicts when possible.

FOCUS AREAS FOR REGULATORY IMPROVEMENT

The Service has identified key regulations and associated policies where there is both a need and an opportunity for improving administration of the ESA. The following changes to the ESA implementing regulations or policies will improve conservation effectiveness, reduce administrative burden, enhance clarity and consistency for agency staff and impacted stakeholders, and

encourage partnerships, innovation, and cooperation.

Minimize requirements for written descriptions of critical habitat boundaries in favor of map- and internet-based descriptions.

In the interest of efficiency, saving taxpayers' money, and making the critical habitat designation process more user friendly to the public, we will continue to publish critical habitat maps, but will make optional any textual description of boundary-coordinate lists in our regulations. Although the boundaries as mapped—or otherwise described in our regulations—would remain the official delineation of a critical habitat designation, we will provide the public easier-to-use tools that clarify which areas are covered by a designation. These tools will be available on the Internet and at the applicable Service or NOAA Fisheries office.

Clarify, expedite, and improve procedures for the development and approval of conservation agreements with landowners, including habitat conservation plans, safe harbor agreements, and candidate conservation agreements.

Although we finalized the implementing regulations and policies for these landowner agreements years ago, we have not systematically reviewed or revised them in response to stakeholder feedback. Comments on these programs have led us to conclude that these tools are valuable in meeting our goals; however, there is room for improvement in the way we implement these tools. A few key improvements that have been identified include:

- Improving consistency in implementing the processes of landowner agreements and plans;
- Reducing the transaction costs associated with developing and approving landowner agreements; Providing guidance to allow flexibility and creativity in application of the tools to accommodate diverse landowner needs;

Expand opportunities for the states to engage more often and more effectively in the implementation of the ESA's various provisions, especially those pertaining to the listing of species.

The Service and NOAA Fisheries have established, in coordination with the States, a Joint Federal/State Task Force for ESA Policy to review operational policies and issues, and to recommend solutions to improve and strengthen the partnership between the States and the Services in implementing the ESA. Through this effort, we will explore ways to improve the implementation of our 1994 policy on state cooperation (94 FR 16020) at the field, regional, and national levels.

Review and revise the process for designating critical habitat to design a more efficient, defensible, and consistent process.

A number of factors (such as litigation and the Services' experience over the years in interpreting and applying the statutory definition of critical habitat) have highlighted the need to clarify or revise the current regulations for designating critical habitat under section 4 of the ESA. Changes are being



Willamette daisy.

considered to clarify the purpose and role of critical habitat, to refine the process for designating critical habitat.

Clarify the definition of the phrase "destruction or adverse modification" of critical habitat, which is used to determine what actions can and cannot be conducted in critical habitat.

The 5th and 9th circuit courts of appeal have invalidated the regulatory definition, finding that the definition "reads the "recovery" goal out of the adverse modification inquiry" by requiring that a "survival" threshold be met (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service* No. 23-35279 (9th Cir. 2004); *Sierra Club v. U.S. Fish and Wildlife Service* 245 F3d. 434 (5th Cir. 2001)). Since 2004, both the Service and NOAA Fisheries have based determinations on policy guidance without the benefit of a regulatory definition. A new regulatory definition would provide a consistent basis to determine whether Federal actions have met their responsibilities under Section 7(a)(2) of the ESA.

Clarify the scope and content of the incidental take statement, particularly with regard to programmatic actions or other actions where direct measurement is difficult.

An incidental take statement is a component of a biological opinion that specifies the impact of an incidental taking of an endangered or threatened species and provides reasonable and prudent measures that are necessary to minimize those impacts. Greater flexibility in the quantification of

anticipated incidental taking could reduce the burden of developing and implementing biological opinions without any loss of conservation benefits.

Working through an interagency group of senior policy leaders from the Service, NOAA Fisheries, and the Environmental Protection Agency (EPA), craft a multi-faceted strategy to address the challenge of the conservation of endangered species and the administration of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). One major element of this effort is to address core scientific issues underlying the effective of FIFRA and ESA responsibilities.

EPA Administrator Lisa Jackson, acting on behalf of herself and the Secretaries of the Interior, Commerce and Agriculture, has requested that the National Academy of Sciences convene an independent scientific panel to provide its expert advice on certain core scientific and technical issues which serve as the foundation for assessing risks to listed species associated with EPA's FIFRA-related activities. In addition, the agencies intend to incorporate expanded opportunities for registrants, the affected states, farming organizations, and other interested parties to participate in the consultation processes – within the constraints of existing budgets, staffing resources, and judicially-required schedules. Lastly, this workgroup will design and execute a pilot project to explore the use of new methodologies to refine the estimates of pesticide and herbicide uses and potential environmental and aquatic exposures in these types of consultations.

PUBLIC REVIEW AND COMMENT

Any proposed policies or regulatory changes will be published in the *Federal Register* and will be subject to an extensive public comment process, including a full analysis under the National Environmental Policy Act.

For more information, please visit: http://www.fws.gov/endangered/improving_ESA/reg_reform.html

**U.S. Fish & Wildlife Service
Endangered Species Program
4401 North Fairfax Drive, Room 420B
Arlington, VA 22203
703/358-2171
<http://www.fws.gov/endangered/>
May 2011**

Exploration into the implementation of 7(a)(1)
Engaging in a conversation with our Federal partners
U.S. Fish & Wildlife Service and National Marine Fisheries Service
April 21, 2011

The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) are working to improve the implementation of the Endangered Species Act (ESA) by considering appropriate changes to our practices, guidance, policies, or regulations to enhance conservation of listed species. This paper and the questions at the ends are designed to explore how we might better utilize section 7(a)(1) of the ESA. The Services recognize that many Federal agencies are conserving endangered and threatened species on their lands or under their authorities, although usually not under formal 7(a)(1) programs. We would like to learn more about these ongoing efforts and explore what staff in our own and other Federal agencies think about numerous issues around the implementation of section 7(a)(1). To that end the Section 7(a)(1) Work Group, composed of staff from the Services, developed the set of questions below. Please feel free to use the questions as a starting point for discussions with staff from the Services and other agencies. The responses to these questions will help determine next steps in our outreach and development of a 7(a)(1) program.

Background: Congress declared in section 2 of the Endangered Species Act (ESA) that it is their policy “that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” 16 U.S.C. 1531(c)(1). Section 7(a)(1) of the ESA, 16 U.S.C. 1536(a)(1), states that “The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.” To date, there are no guidance documents, policies or regulations to implement this section of the ESA. Most Federal agencies have concentrated their efforts on section 7(a)(2) of the Act and the requirement to ensure their actions are not likely to jeopardize the continued existence of listed species. Although some Federal agencies conduct effective habitat and species conservation programs, section 7(a)(1) remains underutilized (France and Tuholske 1986, Ruhl 1997-1998, USFWS 1998, Wood 2004).

The Services see section 7(a)(1) as an opportunity to operate in an affirmative manner on a programmatic level, allowing the Services to collaborate with Federal agencies to develop species conservation programs. Conversely, section 7(a)(2) consultations, which are triggered by a Federal action or Federal nexus to an action, tend to operate in a piecemeal fashion across the landscape and only when an action is proposed. How and if these sections are related is one of the issues we are exploring in the questions that follow.

All of the courts that have examined section 7(a)(1) have concluded that Federal agencies have an affirmative duty to develop and implement programs for the conservation of listed species. In 1998, the U.S. Court of Appeals for the 5th Circuit found that “section 7(a)(1) contains a clear statutory directive (it uses the word ‘shall’) requiring the Federal agencies to consult and develop programs for the conservation of each of the endangered and threatened species listed pursuant to

the statute.” *Sierra Club v. Glickman*, 156 F.3d 606, 617 (5th Cir. 1998). The court clarified that “under section 7(a)(1), each Federal agency must consult with FWS and develop programs for the conservation of each endangered species that it can affect within its authorities.” *Sierra Club at* 606, 618 FN 7. Other courts have come to the same conclusion. See, e.g., *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (section 7(a)(1) gives the Coast Guard duties regarding the right whale); *Florida Key Deer v. Paulison*, (11th Cir. 2008) (Section 7(a)(1) imposes a judicially reviewable obligation to carry out programs for the conservation of listed species); *Wyoming Farm Bureau Federation*, 199 F.3d 1224 (10th Cir. 2000) (Section 7(a)(1) authorizes the trapping and transplanting of rare species in order to conserve them); *Pyramid Lake Paiute Tribe v. Navy*, 898 F.2d 1410 (9th Cir. 1990).

Goal: The Services seek to fully implement Section 7 “Interagency Cooperation” through actively implementing section 7(a)(1). Active participation by Federal agencies in section 7(a)(1) is a key component in working toward and fully supporting the purposes and policy of the ESA.

Objectives: To explore and determine how best to implement section 7(a)(1) within diverse Federal agencies, possibly including delineation of guiding principles and key components of section 7(a)(1) programs, and to develop and implement section 7(a)(1) conservation programs in partnership with Federal agencies.

Questions for Consideration (*Please answer as many or few as you want; it’s not necessary to respond to all. You may want to read through all of them before responding.*):

- 1) What should the role of section 7(a)(1) be in the conservation of endangered and threatened species and their ecosystems?
- 2) Can you give examples of conservation programs you might consider to be section 7(a)(1) programs or leading toward a section 7(a)(1) program? If so, what has and has not worked?
- 3) What should a section 7(a)(1) conservation program look like, e.g. how flexible and/or prescriptive should it be? Should there be requirements and procedures common to all 7(a)(1) conservation programs? What should the role of field, regional and national offices be (in both “action” and “consulting” agencies)? How should a 7(a)(1) program be documented? How should a program’s implementation be tracked?
- 4) How might a section 7(a)(1) program differ, if at all, for different agencies (e.g. land or water management agencies, regulatory agencies, and agencies with primary missions other than conservation)?
- 5) What should the relationship be between section 7(a)(1) and recovery plans or “recommended actions” from 5-year reviews?
- 6) Is there a relationship between section 7(a)(1) and section 7(a)(2)? If so, what is that relationship?

- 7) How would implementing section 7(a)(1) actions be advantageous to Federal agencies?
- 8) How does a Federal agency determine the scope of their section 7(a)(1) responsibility?
How do they know when they are meeting that responsibility?
- 9) What do you see as the greatest challenges to developing an effective conservation program under section 7(a)(1)?
- 10) What resources can your organization bring to the table to help Federal agencies develop or implement programs, planning, or on-the-ground conservation actions under section 7(a)(1)?
- 11) How best should we continue to engage you and others in discussions and development of section 7(a)(1) programs?
- 12) Do you have other comments and thoughts to share with respect to section 7(a)(1)?

Next Steps: Please send responses to questions, comments and ideas to Susan Linner (susan_linner@fws.gov) or Alison Michael (alison_michael@fws.gov). Everyone who responds will be kept apprised of developments in the progress of this initiative.

Literature Cited

- France, Thomas and Jack Tuholske. 1986. Stay the Hand: New Directions for the Endangered Species Act. Public Land Law Review, Vol. 7, pp. 1-19.
- Ruhl, J. B. 1997-1998. Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act. New York University Environmental Law Journal, Vol. 6, pp. 367-410.4
- U.S. Fish and Wildlife Service and National Marine Fisheries Service. March 1998. Final ESA Section 7 Consultation Handbook. Available on the Web at:
http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf
- Wood, Mary Christina. Spring 2004. Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act. Environmental Law, Vol. 34, pp. 605-645.

Embarking on a Threatened & Endangered Species Programmatic Analysis



Jeff Peterson—CDOT-EPB

Alex Pulley—Felsburg Holt & Ullevig

Topics

- Background
- Current USFWS and FHWA Work
- Nebraska Dept. of Roads Approach
- Next Steps

Background

- CDOT Identified Funding to Pursue Programmatic Approach
- Currently requires consultation on all “May Affect-Not Likely to Adversely Affect” determinations

Purpose

- Efficient approval process for ~90% of CDOT projects
- Provide Consistent Analyses
- Provide Defensible Process
- Fully adopts FHWA Every Day Counts Initiative to Shorten Project Delivery

Current USFWS and FHWA Work

- IPaC—*Information Planning and Conservation System*
 - Web-based tool—National scope
 - Species information and potential Conservation Measures
 - Addresses Federal species (not state species)
 - Does not make an effect determination
 - Requires consultation on May Affect

IPaC Screenshot

U.S. Fish & Wildlife Service
IPaC - Information, Planning, and Conservation System
 Environmental Conservation Online System

Search

IPaC Home Page **Initial Project Scoping** Project Register FAQs

Step 1 Natural Resources of Concern [Back] [Continue...]
 Location

Step 2 An online Endangered Species Act species-list is available on this page for your project area, represented by the office(s) listed below. [View or Print the Preliminary Species List](#)
[Request an Official Species List](#)

Step 3 The Endangered Species Act species list below is for planning purposes only – it is not an official species list.
 To request an official species list, click the Request an Official Species List link to the right and follow the instructions.

Step 4 Conservation measures

Project Details:
 Boulder, CO

Project type: Transportation

Endangered Species Act Species-list
 There are a total of 12 species in your species-list

Species that may be affected by your project: [\(View all critical habitat on one map\)](#)

Species	Conservation Status	Link	Field Office
Birds			
Least tern (<i>Sterna antillarum</i>) Population: interior pop.	Endangered	species info	Colorado Ecological Services Field Office
Mexican Spotted owl (<i>Strix occidentalis lucida</i>)	Threatened	species info	Colorado Ecological Services Field Office
Piping Plover (<i>Charadrius melodia</i>) Population: except Great Lakes watershed	Threatened	species info	Colorado Ecological Services Field Office
Whooping crane (<i>Grus americana</i>) Population: except where EXPN	Endangered	species info	Colorado Ecological Services Field Office
Fishes			
Greenback Cutthroat trout (<i>Oncorhynchus clarkii</i>)	Threatened	species info	Colorado Ecological Services Field Office

Nebraska DOR Approach

- Links DOT Actions to Impacts to Conservation Conditions.
- Ultimately leads to programmatic determinations of:
 - *No Effect*
 - *May Affect-Not Likely to Adversely Affect*
 - *May Affect-Not Likely to Adversely Affect with Conservation Conditions*

Nebraska Department of Roads
Federal Highway Administration, Nebraska District

Updated
5/13/2009

Sources of Impacts Definitions

***These definitions have been developed by the agencies involved in this agreement and may not coincide with established language in the Standard Specifications for Highway Construction. They were developed to give the project reviewer a better understanding of the activity and its potential effect to endangered species.**

***Access roads, staging, stockpiling, and borrow sources that are within the Limits of Construction (LOC) and are outside of the Platte River depletion areas are covered under General Conservation Measures found in the Federal and State Listed Species Conservation Conditions document.**

Asphalt Patching- Patching of small areas of the roadway with hot or cold premix bituminous material using hand tools to correct abrupt depressions, potholes, edge failures, upheavals and other surface hazards. This activity is performed with pick-ups and dump trucks on the existing roadway and is different from resurfacing in that it does not involve rollers or other heavy equipment. Related Activities: Armor Coating.

Bank Stabilization- Methods of securing the structural integrity of earthen stream channel banks with structural supports to prevent bank slumping and undercutting and overall erosion prevention. Bank stabilization helps maintain existing or newly constructed earthen banks by using techniques including but not limited to articulated block, riprap, gabions, or brush bundles to keep material in place. This is performed using some type of heavy equipment and may involve surface soil disturbance. Related Activities: Major Grading, Minor Grading, Erosion Control, Bridge Substructure Repair, Culvert Replacement, Extension, Repair

Barge Staging- Movement and anchoring of barges into the channel bottom, channel banks, and connecting to other barges. This may also include activities such as launching, docking, and loading. Related Activities: Piers, Bridge Superstructure/Substructure New and Replacement

Bridge Deck Repair- Repairing decks, expansion joints, patching spalled areas, overlaying and repairing with other material as appropriate to restore the deck from the roadway. Related activities may include but is not limited to timber plank replacement, milling and resurfacing the roadway, as well as silica fume overlays that do not penetrate the full depth of the deck. This may involve the use of heavy equipment on the bridge deck or roadway as well as methods to capture construction debris from falling into the channel. Related Activities: Concrete Pavement Repair, Resurfacing, Milling

Bridge Deck Replacement- Replacement of the entire deck. This may involve the use of heavy equipment as well as methods to capture construction debris from falling into the channel. Related Activities: Concrete Repair, Bridge Superstructure New and Replacement, Night-time work with lights

Effects Matrix

Nebraska

Federal Species Matrix

Sources of Impacts	Within Project		American Burying Beetle	Black-footed Ferret	Blowout Penstemon	Colorado Butterfly Plant	Eskimo Curlew	Gray Wolf
	Yes	No						
Asphalt Patching			NE	NE	NE	NE	NE	NE
Bank Stabilization			MA	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Barge Staging			NE	NE	NE	NE	NE	NE
Bridge Deck Repair			NE	NE	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	MA	NE
Bridge Deck Replacement			NLAA CC ²	NE	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Bridge Painting			NLAA CC ^{1,4}	NE	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Bridge Rail Repair/Replacement			NLAA CC ²	NE	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Bridge Substructure New, Replacement, or Repair - Ephemeral			NLAA CC ^{1,2}	MA	NLAA CC ¹	NLAA CC ¹	NE	NE
Bridge Substructure New, Replacement, or Repair - Intermittent			NLAA CC ^{1,2}	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Bridge Substructure New, Replacement, or Repair - Perennial			NLAA CC ^{1,2}	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Bridge Superstructure New, Replacement, or Repair - Ephemeral			NLAA CC ²	MA	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Bridge Superstructure New, Replacement, or Repair - Intermittent			NLAA CC ²	MA	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Bridge Superstructure New, Replacement, or Repair - Perennial			NLAA CC ²	MA	NLAA CC ^{2 or 1}	NLAA CC ^{2 or 1}	NE	NE
Channel Grade Stabilization Structures			MA	NE	NE	NLAA CC ¹	MA	NE
Channelization, Ephemeral			MA	MA	NLAA CC ¹	NLAA CC ¹	NE	NE
Channelization, Intermittent			MA	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Channelization, Perennial			MA	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Clearing and Grubbing			NLAA CC ^{1,2,3}	MA	NLAA CC ¹	NLAA CC ¹	MA	NE
Cofferdams			NE	NE	NE	NLAA CC ¹	MA	NE
Concrete Pavement Repair			NE	NE	NE	NE	MA	NE
Crack Sealing and Joint Sealing			NE	NE	NE	NE	MA	NE
Culvert Replacement, Extension, Repair - Ephemeral			NLAA CC ^{1,2}	MA	NLAA CC ¹	NLAA CC ¹	NE	NE
Culvert Replacement, Extension, Repair - Intermittent			NLAA CC ^{1,2}	MA	NLAA CC ¹	NLAA CC ¹	MA	NE

Conservation Conditions

Nebraska Conservation Conditions

Updated
2/16/2010

II. **May Affect, Not Likely to Adversely Affect with Conservation Conditions (NLAA CC).** The implementation of the following Conservation Conditions for specific species will result in a reduction of impacts from the threshold of a **May Affect: Likely to Adversely Affect, to May Affect: Not Likely to Adversely Affect.**

ANIMALS

American Burying Beetle:

1. According to protocol, prior to any off roadway activities NDOR Environmental or a scientific permit holder will perform American burying beetle presence surveys or capture/relocation procedure between _____ (defined area of suitable habitat, example R.P. 200 to R.P. 210). *Note: ABB timing graph located in the protocol.* (NDOR Environmental, District Construction, Contractor)
2. Mowing/vegetation removal and carrion (roadkill carcasses) removal must be done according to American Burying Beetle Conservation Measures Protocol and must be implemented within 3 days of the end of the American burying beetle capture/relocation procedure between _____ (defined area of suitable habitat, example R.P. 200 to R.P. 210). This work will be conducted by _____ (District or Contractor).
3. This is a place holder for a future conservation condition.
4. Prior to allowing bridge deck material to fall below the structure (ground and/or dry channel), mitigation measures _____ (CC 1 and 2 for American burying beetle will be implemented). (Contractor)
5. Sodium vapor lighting will be used with directional shielding to focus the lighting onto the driving surface. Lighting will be limited to the extent necessary to meet safety requirements. (Design and Contractor)
6. The contractor shall implement the following American Burying Beetle protocol requirements: _____ (Note: The NDOR biologist completing this assessment will insert any project specific measures after informal discussions with FHWA, NGPC, and USFWS.)

Matrix Justification

Ute Ladies'-tresses	
 <p>PHOTO BY TERESA PERCIVAL</p>	ACTIVITIES Effect Determination
JUSTIFICATION	Asphalt Patching Bank Stabilization Bridge Deck Repair Bridge Deck Replacement Bridge Painting Bridge Rail Repair/Replacement Bridge Substructure New, Replacement, or Repair - Ephemeral Bridge Substructure New, Replacement, or Repair - Intermittent Bridge Substructure New, Replacement, or Repair - Perennial Bridge Superstructure New & Replacement - Ephemeral Bridge Superstructure New & Replacement - Intermittent Bridge Superstructure New & Replacement - Perennial Channel Grates Stabilization Structures Channelization, Ephemeral Channelization, Intermittent Channelization, Perennial Clearing and Grubbing Cofferdams Concrete Pavement Repair Crack Sealing and Joint Sealing Culvert Replacement, Extension, Repair - Ephemeral Culvert Replacement, Extension, Repair - Intermittent Culvert Replacement, Extension, Repair - Perennial Curb & Flume Curb & Gutter Detention Basin Ditching Driveway Shafts
The scope of work for these activities is limited to the road surface/bridge deck which does not support plant growth. Since these activities do not occur within suitable habitat for the Ute Ladies'-Tresses, there will be no effect on the species.	∅
These activities occur in open water, paved areas, urbanized locations, areas previously disturbed by other construction activities, and generally in locations that do not support suitable habitat for the Ute Ladies'-Tresses which occurs in sub-irrigated, somewhat alkaline, wet meadows. Since the activities do not occur in locations with suitable habitat, there will be no effect on the species.	∅
Night-time work with lights does not directly utilize or alter suitable habitat for the Ute Ladies'-Tresses, and it does not directly or indirectly impact the species. Therefore, there will be no effect on the species.	∅
These activities could disturb suitable habitat for the Ute Ladies'-Tresses; therefore, survey(s) are required. If the species is not found, then these activities may affect, but are not likely to adversely affect the species. If the	*

Results and Documentation

- Programmatically Approved (*within DOR*)
 - No Effect
 - May Affect-Not Likely to Adversely Affect
 - May Affect-Not Likely to Adversely Affect with Conservation Conditions
- Requires USFWS & FHWA Approval
 - May Affect and greater

Next Steps

1. Refine Activity List to match CDOT
2. Modify Federal List and add Colorado Listed Species
3. Link Activities to Impacts
4. Develop Conservation Measures to offset impacts and determine Call

Requires consensus from USFWS, CDOW, and FHWA at every step

Benefits of Process

- Provides consistent evaluation and determination of effects (Regions and Consultants)
- Process is defensible
- Provides assurance that full impacts are addressed and mitigated
- Can be used for CatEx, EA, and EIS

Questions?