

Staff Memorandum

To: Puget Sound Salmon Recovery Council
From: Jim Kramer
Date: September 11, 2006
Subject: Synopsis and Preliminary Analysis of Initiative 933

This memorandum provides a synopsis of Initiative 933 (I-933) and a summary of analyses conducted by and available from state agencies and other organizations concerning potential impacts on habitat protection, as requested by the Recovery Council at its meeting on July 27, 2006. The report was requested to assess the potential impact of the initiative on implementation of the draft Puget Sound Salmon Recovery Plan submitted to NOAA Fisheries in June 2005.

Staff Conclusion

Sponsored by the Washington State Farm Bureau, Initiative 933 would require a government to consider certain factors prior to enacting any laws that would regulate the use of private property. Composed of ten sections, the most frequently cited sections focus on compensation or waiver (Section 3) and no prohibition on use (Section 5). If a proposed restriction would be determined to “damage” the use or value of private property, reducing the economic value of the property, a state or local jurisdiction would have the choice of paying the property owner for the lost value or waiving the application of the regulation on the particular property. “Damaging the use or value” is defined as including “prohibiting or restricting any use legally existing or permitted as of January 1, 1996” (Section 2(b)(i)).

The draft Puget Sound salmon recovery plan addresses habitat conditions and habitat forming processes which support salmon recovery, and details actions that will be taken within the next ten years to address limiting factors. The intent is to implement the recovery plan (inclusive of regional and local watershed elements) that will result in an improvement in the status of the twenty-two Puget Sound Chinook populations.

The region’s population is expected to increase by 1.4 million people by 2020. Current local, state, and federal environmental and land management regulations are crucially important to protect against further loss of habitat. Under the Puget Sound Salmon Recovery Plan, existing environmental conditions will be protected and restoration projects will rebuild, where possible, the habitat and environmental conditions damaged by past development.

Synopses and analyses available from key state agencies, the Association of Washington Cities, the Washington Chapter of the American Planning Association, the Nature Conservancy, and Preston Gates and Ellis variously indicate the likely detrimental impact the initiative would have on programs and protections upon which implementation of the salmon recovery plan depend.

I-933 will significantly limit or alter the ability of local, state and federal governments to protect the existing habitat and environmental conditions in Puget Sound. This significant

change in current environmental protection will either require a significant increase in the cost of salmon recovery or prevent it from occurring. Since Chinook, Hood Canal Summer Chum and Bull Trout are listed under the Endangered Species Act, the federal government will have a responsibility to ensure environmental protections are in place if the state and local governments are restricted from protecting existing habitat by I-933. This could lead to a significant loss of local and state control to the federal government and diminished certainty for activities critical to economic development.

The Puget Sound Salmon Recovery Plan acknowledges that protecting property rights is a significant issue. To address this important issue, the Plan recommends implementing a comprehensive protection strategy that uses all the available protection tools (regulations, incentives, education and voluntary tools) used to protect the environment. To succeed, the strategy relies upon an assessment of the cumulative implementation effectiveness of the suite of protection tools to provide factual information to local decision-makers and stakeholders, including property owners. Locally tailored solutions to close any protection gaps identified would include obtaining increased funding for incentives to property owners. Such a comprehensive protection strategy will more effectively address the interests and rights of property owners without allowing increased damage to the environment.

Staff Report

This staff report on the likely impact of Initiative 933 on implementation of the salmon recovery plan is provided in three parts.

Part One provides a brief synopsis of I-933 and an overview of habitat components of the Draft Puget Sound Salmon Recovery Plan.

Part Two is devoted to identifying potential effects of I-933, if passed, on salmon recovery and implementation of the habitat components of the draft recovery plan. This discussion focuses on land use protection measures, shore zone habitat, and management and program actions which affect the habitat factors NOAA Fisheries considered in its decision to list Puget Sound Chinook as “threatened” under the Endangered Species List. Sources for Part Two include analyses completed by the Washington State Department of Ecology, Washington Department of Fish and Wildlife, and Puget Sound Action Team. It also includes analyses developed by the American Planning Association Washington Chapter, the Association of Washington Cities, and Preston, Gates and Ellis. A second section provides a brief discussion of state commitments to enforce federal laws. Part Two concludes with a discussion of potential effects of the proposed initiative on the relationship between federal and state governments.

Part Three presents a review of ambiguities and unpredictable elements based on a number of advisories and reports expressing cautions and concerns regarding interpretation of some sections and unpredictable elements of I-933. The Part Three analysis is intended to better inform conclusions on the potential and overall impact on salmon recovery in Puget Sound.

Part One. Synopsis of I-933 and Summary of Key Habitat Elements of Draft Chinook Recovery Plan

A. Synopsis of I-933

Section 1 (Purpose and Findings): This section discusses the purpose and intent of the Initiative. Although Section 1 refers to eminent domain in stating that government “should not take property which is unnecessary for public use or is primarily for private use, nor should it take property for a longer period of time than is necessary,” the American Planning Association (APA) notes that the initiative does not “set forth any specific restrictions or requirements that would affect how eminent domain can be used.” (Washington Chapter of the American Planning Association, p. 2)

Section 2 (Consideration of Impacts and Definitions): The first subsection of this section establishes a process requiring agencies to consider and document the impacts of their regulatory actions on private property, consider alternatives, and estimate compensation due to damages. It provides definitions of key terms, including “private property,” which is defined as real, personal, and other types of property, and “damaging the use or value,” which is defined as including “[p]rohibiting or restricting uses that were legally existing or permissible as of January 1, 1996’ ” and “[r]equiring a portion of property to be left in its natural state or without beneficial use to its owner, unless necessary to prevent immediate harm to human health and safety.’ ” (AWC, p. 3)

Section 3 (Compensation or Waiver): The first sentence of Section 3 reads as follows: “ ‘ An agency that decides to enforce or apply any ordinance, regulation, or rule to private property that would result in damaging the use or value of private property shall first pay the property owner compensation as defined in Section 2 of this Act. This section shall not be construed to limit agencies ability to waive, or issue variances from other legal requirements. An agency that chooses not to take action which will damage the use or value of private property is not liable for paying remuneration under this Section. ‘ ” Subparagraph (2)(b)(i) states that regulations that prohibit or restrict “any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996” may be applied and enforced only if compensation is provided to the private property owner for any reduction in the value of the private property.

Section 4 (No Fee for Seeking Waiver): This section would restrict government from charging any fee for considering whether to waive or grant a variance from a regulation.

Section 5 (No Prohibition on Use): This section states that no future state or local governmental agency regulation may prohibit any use of private property legally existing at the time of adoption of the Ballot Initiative.

Section 6 (Liberal Construction): This section would require liberal construction in interpreting the initiative’s intent to protect property owners.

Section 7 (Other Remedies Not Affected): The remedies provided by the Ballot Initiative would not preclude a property owner from seeking other statutory or constitutional remedies.

Section 8 (Subheadings), Section 9 (Partial Invalidity) and Section 10 (Title of Act): state that subheadings for sections are not part of the law, invalidity of any portion of the law does not affect portions not invalidated, and the act is to be known as “Property Fairness Act.”

B. Key Habitat Components of the draft Puget Sound Salmon Recovery Plan

The recovery plan discusses habitat impairments affecting Chinook salmon and bull trout in Puget Sound in Chapter 3 and explains the relationship of land use activities to the habitat forming processes upon which salmon depend. Historic practices of land development, agriculture, urbanization, and forestry management are major land use activities that have altered habitat forming processes. Limiting factors analyses have been conducted in all watersheds. Problems cited as common throughout most Puget Sound watersheds include altered hydrology and sediment transport, water quality degradation, loss of riparian vegetation, lack of large woody debris, and impaired floodplain processes. The loss of nearshore and estuarine habitat – in some areas as much as 98% -- is a limiting factor throughout most of Puget Sound. (draft Salmon Recovery Plan, 82 – 86).

The regional recovery plan and individual watershed plans reflect strategies to address key limiting factors. Chapter 6 provides a full discussion of strategies to protect existing physical habitat and habitat forming processes, nearshore and estuarine habitat, water quality, and instream flow.

Part Two. Potential Effects on implementation of the salmon recovery plan

A. Potential effects of I-933 on habitat components of the draft recovery plan

The Washington Department of Fish and Wildlife (WDFW) analysis asserts that “I-933 would undermine the important role of local governments and private landowners in protection and restoration of habitat for state listed species to prevent them from becoming endangered and subject to the federal ESA.” In WDFW’s view, the proposed initiative would create “significant conflict” with key regulatory programs which address habitat factors of decline: the Growth Management Act, Shoreline Management Act., State Environmental Policy Act, and Forest Practices Act.

The Puget Sound Action Team (PSAT), in its analysis of HB3311, concludes that legislation like I-933 “would hamper if not eliminate safeguards that protect the health of Puget Sound. Their analysis states that the resulting loss of habitat and species critical to the food web “could result in partial or total ecosystem collapse” manifested as “dead zones” in Puget Sound, similar to those found in the Hood Canal. (APA, p. 6)

Growth Management Act and Critical Areas Ordinances

Urbanization is one of the three most important land use activities affecting salmon habitat. Given the predicted population increase and concomitant growth of urbanization in Puget Sound, the recovery plan identifies habitat protection and restoration as critical to Chinook recovery. The protection of habitat and habitat forming processes must occur both at the individual site as well as the ecosystem scale. The salmon recovery plan states that “implementation of existing and improved regulatory programs is a significant and necessary step towards addressing threats from growth, re-development and on-going activities and practices.” (p. 371).”

The Growth Management Act (GMA) and Critical Areas Ordinances (CAO’s) are key regulatory mechanisms upon which the Puget Sound Salmon Recovery Plan relies to ensure protection of existing habitat. A Preston, Gates, and Ellis analysis observes that “I-933 appears to limit directly the use of these routine requirements” and “counties will under I-933 no longer limit their density allowing the conversion of working farms to residential subdivisions.” Assuming this analysis is borne out, the following results would be expected if I-933 were to pass:

- Removal of constraints on permissible activities, such as construction, which will greatly increase short term sediment input into salmon habitat.
- Increase in population density and conversion of farmland to industrial use will lead to greater water withdrawals, reducing instream flow.
- Increase in impermeable surfaces will create rapid and severe stormwater runoff. Stormwater runoff includes oils, pesticides, metals and other toxic substances.
- Permanent and severe alteration of meandering stream channel and wetland structures. Bank hardening, fill and dikes remove habitat structures, and dikes isolate habitat and increase stream velocity.

In an analysis specific to Skagit County, The Nature Conservancy predicts that I-933 will lead to further development of substandard lots. According to their analysis, I-933, if passed, would mean that Skagit County would need to choose between either waving the new lot certification ordinance or compensating landowners: “...it is expected that waivers would be granted, leading to more incompatible uses in the agricultural zone and an erosion of the agricultural land base.” (TNC, p. 3)

The Puget Sound Action Team cautions that passage of I-933 would result in local governments’ inability to implement the GMA. and that “[w]ithout the tools provided for smart growth in the GMA, there would be high potential for increased sprawl, urbanization and incompatible uses in rural, agricultural and forest resource lands.”

The Association of Washington Cities interprets I-933 as affecting how cities may regulate land use in the future, and that the initiative would directly affect “how and to what extent they will enforce land use laws they have already adopted” (AWC, 4). Their advisory points out that I-933 would prohibit the application or enforcement of

critical area provisions adopted or amended since Jan. 1, 1996 that would impose greater restrictions on the use of property without first compensating the property owners for any decline in property value. (AWC, 3)

The Department of Community, Trade and Economic Development (CTED) cautions that if the measure passes, local governments may be reluctant to update comprehensive land use plans or regulations given the compensation aspects. This could have the consequence of causing CTED to request the Governor's permission to file more petitions for review challenging local governments' plans or regulations or, revisiting criteria for appealing failure to act under the GMA or for local non-compliance.

Shorelines

The protection and restoration of streams and nearshore/shoreline habitat is critical to the success of the Puget Sound Salmon Recovery Plan. The draft recovery plan observes that continued implementation of regulatory programs and updates of existing programs are regarded as vital components of the regional and local watershed protection strategy.

The Shoreline Management Act (SMA) and Shoreline Master Programs (SMP) are important regulatory features integral to the recovery plan, and many jurisdictions are viewing early adoption options as an opportunity to weave salmon recovery needs into the updating process.

The Washington Department of Fish and Wildlife (WDFW) indicates that many of its' regulatory activities under the Hydraulic Code and Hydraulic Project Approval (HPA) process may fit within the scope of the Initiative's definition of 'damaging' activities. Such activities as prohibiting the removal of trees and activities that create natural area buffers to protect fish and wildlife could result in a compensation obligation unless the Department has the authority to waive, and chooses to waive, the regulatory restriction or prohibition that is at issue." (WDFW, p. 1) WDFW's analysis goes on to say:

If the department has the authority to waive HPA requirements that are biologically necessary to protect fish life, such action would impair WDFW's ability to properly protect fish life through the issuance, conditioning or denial of an HPA. This would have significant detrimental impacts to Washington's fish resources, especially those listed as threatened or endangered, as well as the myriad of salmonid recovery initiatives underway to restore and improve those resources. (WDFW, 2)

The Department of Ecology analysis observes that "I-933 appears to significantly undercut the effectiveness of upcoming comprehensive Shoreline Master Program (SMP) updates."

By directly limiting requirements of the SMA and SMP, I-933 would likely result in increased development and subsequent loss of habitat on Puget Sound shorelines. According to the analysis by Preston, Gates and Ellis:

Subsection (2) (b) (v)'s requirement to pay or waive regulations that "require a portion of property to be left in its natural state..." will likely require cities and counties to allow filling and development of privately owned tidelands and bedlands on Puget Sound, harbors, rivers, lakes and streams, regardless of the impacts of that development on health, safety or the environment unless the development can be shown to pose an imminent threat to public health and safety. (p. 7)

The draft salmon recovery plan indicates that there is currently "debate and uncertainty between interested parties at the local and regional levels as to whether current regulatory and incentive programs adequately protect existing habitats for salmon." (p. 372) The recovery plan proposes to assess protection gaps and attempt to address them. It is likely that I-933, if passed, would inhibit the application of current protection tools and would create even further regulatory uncertainty.

B. State Commitments to Enforce Federal Laws

The Puget Sound Action Team outlines the practical effects of removing the state's ability to enforce federal laws such as the Clean Water Act, the Coastal Zone Management Act, and the Safe Drinking Water Act: "[I-933]...could result in a loss of that federal delegation of authority...The federal agencies would then have to step in to enforce these laws." (PSAT Analysis, p. 1)

The Washington State Department of Ecology observes in its analysis of the Effects of I-933 that "The Initiative would likely limit Ecology's ability to implement its responsibilities under the Clean Water act to such an extent that EPA would rescind Ecology's delegation. EPA would then directly regulate anyone discharging to waters of the US in the state of Washington. EPA would not enforce state law, so groundwater protection would be reduced." (DOE Analysis, p. 4)

C. Federal Supplement - Effect on Relationship between Federal and State Governments

The Puget Sound Salmon Recovery Plan involves all levels of government from local to tribal and federal. The National Marine Fisheries Service, in its supplement to the draft recovery plan, details the cooperation and actions that are to be expected between federal and local governments.

It is likely that I-933 would jeopardize this relationship by preventing local government from meeting its obligations. For example, the implementation section of the draft recovery plan states:

“Upon the adoption of the Puget Sound recovery plan by the federal services, an agreement is recommended between the federal agencies and the State of Washington for the conservation and recovery of the salmon. ‘Conservation agreements’ are not specific to the ESA but provide a means to formalize commitments that could support implementation of the plan...’ (p. 469)

“The agreement would also state the intention of the state and federal agencies to jointly pursue funding for local communities if a watershed or sector is implementing the plan.” (p. 469)

Federal assurances can provide a significant benefit to local watershed interests and individual sectors of the community by streamlining the permit process and providing upfront certainty for permit requirements. Currently the actions that may require consultation under the Endangered Species Act, that are important for participating local jurisdictions include:

- a. Erosion control/bank protection
- b. Dike and levee maintenance
- c. Fish passage projects, e.g., culvert replacements
- d. In-stream restoration, e.g., engineered log jams, side channel restoration
- e. Riparian restoration
- f. Docks and piers in fresh and marine waters
- g. Installation of watercraft lifts” (draft Salmon Recovery Plan, p. 470)

In Volume I, Chapter 9, the Plan describes a process by which local and regional entities might receive Federal assurances over time as the Plan is implemented. Whether NMFS will provide regulatory assurances on the basis of a recovery plan depends on several factors:

- The Plan’s comprehensiveness, level of detail, and likelihood of achieving desired results,
- Comprehensiveness and certainty of commitments for implementation, and
- Demonstrated progress in implementation of actions called for in the Plan” (p. 18)

Given key state agencies’ analyses and cautions concerning the likely effects of I-933 on their programs if the measure passes, it is reasonable to doubt that assurances that depend on the factors identified in the recovery plan would be forthcoming.

Part III. Ambiguities and Unpredictable Elements of I-933

1. The date of January 1, 1996 that is given in I-933: It is unclear whether regulations relating to the type or intensity of use of property adopted prior to January 1, 1996 may still fall within the scope of the overall definition. The APA analysis cautions that “...the preamble at (2) (b), which provides the over-arching definition of “damaging the use or value,” does not include any date limitation, instead referring simply to prohibitions or restrictions on the use of private property. The final phrase of the

preamble states that the following subsections (including (2) (b) (i) ‘includes but is not limited to:’ thus, the broader definition of ‘damage’ arguably includes ‘but is not limited to the 1996 date.

2. As written, it is unclear what the criteria are for a restriction to be exempt from the scope of I-933.
3. It is unclear whether or not I-933 affects the regulation of tangible personal property such as vehicles and equipment, and intangible property, such as intellectual property, stocks or bonds.
4. Related to #3, I-933 is intended to amend RCW 64.40, which specifically defines a regulation as applicable to real property. This disparity could lead to litigation.
5. It is unclear what effect I-933 would have on administration of the Clean Air Act, Clean Water Act, and Federal flood insurance eligibility.
6. Section 2 provides a list of a number of exceptions from the Pay or Waive provisions. APA cautions that some municipal judges have determined that because regulatory standards may be applied only if they apply “uniformly” throughout a jurisdiction, regulations that apply only to some parts of a community would become “legally untenable due to I-933’s ‘uniform application’ requirement. (APA, p. 3)
7. Per APA, “it is unclear how the ‘regulation-waived’ valuation of property will be determined under I-933, particularly if surrounding properties also receive similar or even different waivers. (APA, p. 3)
8. Ecology’s analysis notes that I-933 exempts certain regulatory activities from the definition of an activity that is ‘damaging’ to private property based upon health and safety considerations and limits the exemption to a regulatory activity that may be necessary to prevent “immediate threat to human health and safety.” The analysis points out that “Many elements that would normally be categorized as ‘public welfare’ would be excluded from the Initiative’s exemption and may be treated as regulatory activity that damages private property for which compensation is required if the regulatory activity is not waived. Water quality, fish and wildlife would normally fit into the notion of what constitutes ‘public welfare’ ...The Initiative’s focus in immediate human health and safety concerns is too narrow, especially in an age of global warming, to adequately protect the general public welfare, let alone publicly owned fish and wildlife resources. (Ecology, p. 4-5)
9. The Association of Washington Cities indicates that court interpretation or legislative clarification would be needed to ascertain whether local governments would have the option to waive enforcement of state mandated and approved regulations such as those adopted under the Shorelines Management Act. The advisory also indicates that the initiative is unclear regarding the authority of local governments to impose temporary moratoria on land use actions. (AWC, p. 6, 7)

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