

MEMORANDUM

TO: Puget Sound Salmon Recovery Council

FROM: Rob Masonis, American Rivers
Joe Ryan, Washington Environmental Council

RE: Request for Puget Sound Salmon Recovery Council to oppose I-933

DATE: July 21, 2006

Initiative 933 is a measure sponsored by the Washington State Farm Bureau regarding land use protections in Washington State. Recently, the Farm Bureau turned in to the Secretary of State 315,000 signatures, well over the 224,880 signatures needed to qualify for the November 2006 ballot. The initiative would largely eliminate the ability of the State and local governments to enforce land and water use regulations that are essential to the success of Puget Sound salmon recovery efforts. We respectfully request that the Puget Sound Salmon Recovery Council adopt a resolution opposing Initiative 933.

I-933 is Clearly Inconsistent with the Express Terms of Our Puget Sound Salmon Recovery Plan.

The Puget Sound Technical Recovery Team has concluded that protecting existing habitat and the ecological processes that create it is the most important action needed to increase the certainty for Chinook Recovery. Increased pressures from population growth escalate the urgency to protect habitat. As the Recovery Council, we have decided in our Plan that protecting existing habitats is an on-going effort and will require coordinated action by many, including governments that update and enforce environmental laws and issue land-use permits. And we have concluded that enforcing and improving regulations is important to recovery. The Plan praised land acquisition efforts of groups such as The Nature Conservancy and Cascade Land Conservancy but also concluded: "This kind of program is not a substitute for effective regulations." Our Plan notes that Critical Area Ordinances provide a minimum level of certainty that key habitats are protected throughout the region. Regulations lessen the cumulative negative impacts from multiple developments and land management actions across the entire watershed. The Plan concludes that, "A strong protection program also will rely upon the continued implementation of regulatory programs and updates to existing programs based on new information. Implementation of existing and improved regulatory programs is a significant and necessary step towards addressing threats from growth . . ."

Similarly, the Plan relies on implementation of the Forest and Fish Report rules (hereinafter "FFR") to protect watersheds from the impacts of timber harvests on privately held lands.

The locally developed watershed-based recovery chapters are in accord that regulatory habitat protections and adherence to FFR are central to Puget Sound salmon recovery.

Here are some examples. The Nooksack chapter relies on implementation of the GMA. The Skagit chapter depends on adequate regulatory safeguards. The Snohomish chapter relies on existing regulations and recognizes the need for increasing the certainty of regulatory protections. For the Green/Duwamish chapter, the key strategy for protecting habitat is to implement state and local growth management rules. The Puyallup/White chapter relies on low impact development and Pierce County's Critical Area Ordinance. The Nisqually chapter plans to protect habitat through both acquisition and "by working with regulatory agencies to develop, maintain, and enforce strong regulatory protections." The Mid Hood Canal Chinook chapter relies on existing land use regulations. Similarly, the watershed chapters rely on a Forest and Fish regulations and recent improvements in forest practices.

These numerous references to the Plan make it crystal clear that I-933 is directly at odds with the Plan. Rolling back Critical Area Ordinances, Shoreline Management Act Ordinances, and the Forest and Fish Report rules would fatally undermine salmon recovery in the Puget Sound region. Protecting and restoring habitat at the scale necessary for success simply can't be done without effective regulation at both the State and local government levels. I-933 would essentially eliminate that possibility.

Not only would I-933 undermine salmon recovery on the ground, it would squander the enormous investment of both time and money that have gone into Puget Sound salmon recovery over the last six years by making it virtually impossible to raise the funds necessary for the watersheds to implement the plans they have developed. As the Council has discussed, even without I-933 we face a significant challenge in raising the funds necessary to implement the watershed plans.

If I-933 becomes law, it would likely fatally impair our ability to get the required funding for two reasons. First, we will be unable to make a convincing case to both public and private sector funders that our investments will succeed. What good, for example, would restoring an important reach of spawning habitat do if the surrounding lands are developed without environmental safeguards? Second, it is obvious that the State and local governments cannot afford to pay property owners to protect and restore all of the habitats in the 14 basins necessary to achieve salmon recovery.

Lastly, I-933 would almost certainly lead to a loss of local control of salmon recovery efforts and vastly increase federal regulation. I-933 only applies to state laws and regulations, and therefore it does not eliminate the need to comply with federal laws, such as the Endangered Species Act. In the absence of adequate protections at the state level, federal agencies would have no choice but to use their regulatory authority to obtain compliance with the ESA. Moreover, because citizens can sue to enforce the ESA, we would likely see salmon recovery shift to federal courts as citizens concerned about the loss of salmon are left with no other recourse.

Below is a more detailed analysis of what Initiative 933 would do.

A copy of Initiative 933 is attached. There are hundreds of unanswered questions about 933, but a few of its components are clear.

Section 3, at page 5, requires that if an agency decides to enforce or to apply a regulation that “damages” the use or value of private property, the agency must first pay the property owner compensation. The term "Damage" is radically defined and expanded in Section 2.

Section 2, Subsection (2)(b), at page 3, line 29, defines “damaging the use or value” of property as “to prohibit or restrict the use of private property to obtain benefit to the public and includes, but is not limited to”:

“Prohibiting or restricting any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996.”

“Requiring 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.”

“Prohibiting maintenance or removal of trees or vegetation.”

A very long list of other provisions to this radical definition of "damage" is included in Section 3 of I-933.

I-933 would force the State and local governments to waive land use, zoning and environmental regulations, or pay landowners for any reduction in property value caused by the regulations. In the vast majority of cases regulations would likely be waived because the State and local governments do not have the funds to “pay to regulate”. Following passage of a similar ballot initiative in Oregon, the state has waived its regulations for 90% of the claims and denied the other 10%; none have been paid. Collectively, the Oregon claims cover over 60,000 acres of land and request over \$3.1 billion in payments.

The definition of "damage" in I-933 means that even if a regulation does not reduce the value of private property, government will still have to pay property owners anyway or waive the requirement if a property owner cannot use all of their property. For example, if a regulation prohibits filling in a wetland, since the owner cannot use that property they must be compensated, even though they could build a substantial development on the land outside the wetland.

I-933 eliminates Washington’s Forest Practices regulations by including in the definition of “damage” limitations on the “maintenance or removal of trees or vegetation.” Existing Forest Practice regulations require protections for salmon streams, hold landowners responsible for maintaining their private logging roads, and prohibit logging on steep slopes that are prone to landslides. I-993 would require the state to pay for the value of the trees left along the salmon streams and on steep slopes or wave the protections.

Other specific regulations that would be covered by I-933 include those under the Growth Management Act, Shoreline Management Act, Clean Water Act, and rules protecting agricultural lands from development. The definitions in Section 2 coupled with the pay or waive requirement in Section 3 will require paying compensation for, or waiving, many types of local laws and state regulations. More information on the likely impact of I-933 can be found at www.NOon933.org.

State Agencies' Analysis the Impacts of I-933

- In analyzing a bill similar to I-933, the Puget Sound Action Team concluded that it will impair the shellfish and tourism industries, and may result in additional “dead zones” in Puget Sound, similar to that found in the Hood Canal.¹ In general, The Action Team concluded that the bill could eliminate the safeguards protecting Puget Sound. The resulting loss of habitat “could lead to loss of species critical to the food web and could result in partial or total ecosystem collapse.”
- In its bill analysis Ecology also recognized the potential impacts to other property owners: “Adjoining and nearby property owners could be significantly affected by land use activities, erosion control installations and other activities, which would no longer have oversight through local and state regulations. For example, erosion control action by one property owner may simply move the erosion problem upstream or downstream, damaging other property owners due to absence of resource agency oversight of erosion control actions.” Federal Clean Water Act delegation may be put at risk by 933. The Department of Ecology, commenting on a bill similar to I-933, found that it would “generally require the agency to either reimburse land owners or not enforce the federal Clean Water Act.”² The Department of Fish and Wildlife agreed.
- The Department of Fish and Wildlife has concluded that a bill with the same language as I-933 would “impair WDFW’s ability to properly protect fish life” leading to “significant detrimental impacts to Washington’s fish resources, especially those listed as threatened or endangered.” The analysis requirements in I-933 would substantially increase costs for local governments and state agencies and delay permitting decisions. The Department of Fish and Wildlife, for example, believes it would have to analyze all 4,000 of the project approvals it issues each year under the requirements of Section 2(1), creating an enormous administrative burden.

¹ Washington State Puget Sound Action Team Bill Review HB 3311 p. 2 (February 24, 2006).

² Washington State Department of Ecology Bill Analysis, HB 3311 p. 1 (February 13, 2006) (Ecology Analysis).