DEPT. OF ECOLOGY ANALYSIS OF INITIATIVE 933
June 30, 2006

INTRODUCTION

This document is intended to answer initial questions about the agency's programs and responsibilities that arise from Initiative 933. It presumes the reader has knowledge of the content of I-933.

It should be noted that many elements of I-933 could be interpreted in different ways. It is not the intent of this brief analysis to explore every possible effect that could result from I-933. It is extremely difficult to predict which activities of the agency would trigger damage claims under the Initiative. Due to inconsistencies and ambiguities in the language of the Initiative, it is likely that years of litigation will be required to clarify the lines between non compensable and compensable actions by Ecology and other regulatory agencies.

GENERAL CONSIDERATIONS

I-933 includes many ambiguities that will substantially affect its interpretation. These include:

1. Whether or not the application or enforcement of statutes (as opposed to regulations, ordinances and rules) triggers the compensation requirement;
2. The date January 1, 1996 and the significance of the phrase "includes but is not limited to" in the definition of damage to the use or value of property;
3. The interpretation of the phrase, "apply equally to all property subject to the agency's jurisdiction" in the exceptions to the definition of damaging the use or value;
4. The definition of the term "immediate threat" in the exceptions to the definition of damage to private property.

Does applying or enforcing a state statute trigger the requirement for compensation?

Under the Initiative, 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. An agency that chooses not to take action which will damage the use of value of private property is not liable for paying remuneration. Many of the possible effects of proposed I-933 hinge upon whether or not statutes, i.e. state laws codified in the Revised Code of Washington, are deemed to be an "ordinance, regulation or rule" under Sec. 3 of the proposed Initiative.

Black's Law Dictionary (1999) defines an ordinance as "an authoritative law or decree; esp., a municipal regulation. Municipal governments can pass ordinances on matters that the state government allows to be regulated." Black's Law Dictionary (1999) defines a regulation as a "rule or order having legal force, issued by an administrative agency or a

local government." In a general sense, a regulation is typically an agency interpretation of a statute. Black's Law Dictionary (1999) defines a rule as a "regulation governing a court's or an agency's internal procedures." Given these definitions, it appears that a statute is not an ordinance, regulation, or rule per se. However, a rule interpreting or implementing a statute likely falls under the umbrella of an ordinance, regulation, or rule thus triggering Sec. 3 above.

This conclusion, however, is not supported by another section of the Initiative that lists several statutes (worker health and safety laws, wage and hour laws, dairy nutrient management restrictions in chapter 90.64 RCW) as exceptions to activities that damage the use or value of property. Listing these statutes as exceptions may indicate that statutes are to be included in the definition of an "ordinance, regulation, or rule" that may trigger damage claims.

The date January 1, 1996 and the significance of the phrase "includes but is not limited to" in the definition of damage to the use or value of property

Due to the conflicting combination of date specific language, generic language and the open-endedness of the damages definition in I-933's Sec. 2 (2)(b) , which ends with the unrestricting phrase "includes, but is not limited to," the possible ramifications of the proposed Initiative may not be restricted by a date.

The interpretation of the phrase "apply equally to all property subject to the agency's jurisdiction" in section 2.2(c)

While Ecology rules apply equally to every person in the state of Washington, standards vary by water body and air shed. Site specific conditions and permits are tailored to specific pollutants based on the applicable standards. Further, by its nature, enforcement is specific to a single property or person. Therefore, it is assumed in this analysis that this exception does not apply to Ecology activities.

The definition of the phrase "immediate threat to human health or safety" in the section 2.2(c)(i) exception to the definition of damage.

The term "immediate" is not defined in the Initiative. It may require the identification of some danger to human health and safety that is relatively near in time, directly connected to the proposed use of the property, and not speculative. Construing this phrase narrowly, as required by the Initiative, may mean that threats such as 100-year floods are not included because, although they are a real threat, they cannot be predicted and may not occur for many years into the future.

Regulated pollutants can have an immediate impact on human health through air, water and soil pathways. This is particularly true for air pollution that can enter the human body through the lungs. While impacts on human health can be immediate, the effects are more commonly incremental and cumulative and may not rise to the definition of "immediate threat". An exception to this may be the impact of some air borne pollutants on sensitive populations. Except as discussed in the Air Quality section, it is assumed that this exception does not apply to Ecology regulations.

Another threshold question is whether or not a discharge permit is a property right, such that conditions on a permit trigger the requirement for compensation. Because permits by their nature restrict use and do not "apply equally to all property subject to the agency's jurisdiction", an argument could be made that under I-933 the enforcement of regulations would be seen as potentially decreasing the value of affected property. It should be noted that a contrary argument could be made that permits actually entail a grant of conditional rights that increase the value of the affected property. No one has a property right to discharge pollutants, so issuing a new permit allowing discharge under certain conditions may not be considered as damaging a property right. However, it is possible that setting more stringent conditions in a permit renewal may be interpreted as damaging a use if the more stringent requirements require reducing production or would make the existing operation more expensive.

Pay or Waive
In general, Ecology does not have the authority to waive its regulatory responsibilities.

Permit Fees
This analysis assumes that money is not included in the definition of personal property. If "personal property" includes money, fees and penalties may be interpreted as damaging the use or value of private property.

Rule Development
Per Sec. 2(1), "prior to enacting or adopting any ordinance, regulation, or rule which may damage the use or value of private property," Ecology would have to "consider and document" each of the items enumerated in Sec. 2(1) (a-i): essentially a cost benefit analysis of how the rule would affect private property and an identification of less restrictive alternatives. Many of the requirements in Sec. 2(1) are already required under the Administrative Procedures Act (APA), Chapter 34.05 RCW but additional analysis is likely to be required. I-933 requires an agency to consider and document the private property that will be affected by the action as well as the estimated compensation that may need to be paid under the Initiative. Depending on the level of detail required by these provisions, the effort required to comply with these provisions could be significant. However, since I-933 does not amend the APA, the relationship to the APA is not clear (e.g., timing of analysis). This additional analysis may delay the development of rules and require additional resources to implement.

ANALYSIS OF APPARENT IMPACTS ON ECOLOGY'S REGULATORY RESPONSIBILITIES

WATER QUALITY PROGRAM
Ecology's Water Quality Program is authorized under federal and state laws. Ecology is delegated by the U.S. EPA to implement all federal pollution control laws. Under state and federal laws, Ecology's responsibilities include setting water quality standards,

issuing and enforcing wastewater discharge permits, developing and implementing water cleanup plans, and protecting ground water quality.

Summary of Impacts
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. If issuing an order that contains restrictions on how a business is operated is interpreted as damaging the use or value of private property, Ecology's enforcement program would be restricted to penalties and warning letters unless the state is able to compensate property owners for costs incurred to bring them into compliance. Under these circumstances, the limits on enforcement authority would likely cause EPA to revoke the delegation of authority to Ecology to carry out the NPDES program. 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.

Analysis
The following analysis looks first at impacts to Ecology's implementation of the Federal Clean Water Act and then to impacts to Ecology's implementation of the State Water Pollution Control Act (RCW 90.48).

Federal Permitting:
Ecology issues NPDES permits based on a delegation of authority from EPA. Because of this delegation, EPA does not directly regulate most dischargers in the state. Most permits set effluent limits for the levels of contaminants in the discharge. Since meeting the effluent limits may require reducing production or revising operational methods, it is possible that issuing permits with effluent limits could be interpreted as "damaging the use or value of private property". However, no one has a property right to discharge pollutants, so issuing a new permit allowing discharge under certain conditions may not be considered as damaging a property right. But, it is possible that setting more stringent conditions in a permit renewal may be interpreted as damaging a use if the more stringent requirements require reducing production or would make the existing operation less economically viable.

Some types of permits set requirements on activities rather than setting specific effluent limits. An example is the Concentrated Animal Feeding Operation (CAFO) permit that limits the amounts of manure that can be applied to land and restricts how closely it can be applied to waterbodies. The exception for "compliance with dairy nutrient management restrictions or regulations in chapter 90.64 RCW in section 2.2(c)(vii) of the Initiative only applies to dairy farms, which are regulated by the Washington State Dept. of Agriculture. Concentrated Animal Feeding Operations under Ecology's Water Quality Program are regulated under other laws. These activity requirements would likely be interpreted as restricting the scope or intensity of land use. Stormwater permits also rely primarily on "Best Management Practices" (BMPs), which require that activities be performed in ways that will prevent contaminants from being picked up by stormwater flowing across a site.

Aquatic Pesticide permits are a special class of discharge permits and do not appear to fall within the exceptions. Ecology has been sued for allowing the application of aquatic pesticides and also for not allowing the application of aquatic pesticides. Both types of suits have alleged damages to property. The effect of I-933 on the aquatic pesticide program is unclear.

Enforcement under the Clean Water Act:
Ecology is responsible for enforcing the Clean Water Act in Washington State based on a delegation of authority from EPA. The enforcement tools include warning letters, penalties and administrative orders. If issuing an order that contains restrictions on how a business is operated is interpreted as damaging the use or value of private property, Ecology's enforcement program would be restricted to penalties and warning letters unless Ecology is able to compensate property owners for costs incurred to bring them into compliance.

Setting Water Quality Standards:
Under the federal Clean Water Act, Ecology is required to set water quality standards for waters of the state, or EPA will. Standards vary across the state to protect the beneficial uses of the waterbodies. Setting standards in itself does not appear to directly impact private property and the pay or waive provisions of I-933 do not seem likely to apply.

Completing and Implementing Water Clean-up Plans -TMDLs:
TMDLs (Total Maximum Daily Load) identify the maximum amount of a given pollutant that a waterbody can receive and still meet or come back into compliance with water quality standards. That "total load" is then allocated among the permittees discharging to that water body. Permit holders discharging to waterbodies covered by a TMDL are often required to meet more stringent effluent limits. Ecology is required by the Clean Water Act to work with permit holders and property owners, using voluntary methods when possible and mandates where necessary, to bring the water body back into compliance with the water quality standards. Ecology is under a court-ordered agreement to complete TMDLs on a 15 year schedule. If using mandates to implement TMDLs is determined to be damaging the use or value of private property, Ecology would have to compensate property owners or be out of compliance with the Clean Water Act. If establishing TMDLs is determined to be damaging the use or value of private property, Ecology would not be able to comply with the court-ordered agreement and its 15 year schedule for completing TMDLs statewide. The impact of the Initiative on court ordered actions is unclear.

Permitting under the State Water Pollution Control Act:
Most of the permitting requirements Ecology follows are in rule, rather than in the statute. If Ecology's issuance of permits is interpreted as damaging the value or use of private property, then Ecology would likely either have to compensate the applicant or decline to issue the permit. The statute (90.48.200) provides that if Ecology has not acted on a permit application within 60 days, the applicant receives a temporary permit allowing discharge as described in the application.

Enforcement under the State Water Pollution Control Act:
Ecology is responsible for enforcing RCW 90.48. The enforcement tools include warning letters, penalties and administrative orders. Although the rules apply equally to every person in the state of Washington, by its nature, enforcement is specific to a single property or person. Many of the enforcement actions Ecology takes are to enforce rules and regulations. In those cases, the same analysis as above would apply. However, a significant portion of enforcement actions are to enforce the statute – RCW 90.48.080 - directly. If these actions are not covered by I-933, that portion of Ecology's enforcement actions would be unaffected.

Operator Certification under the State Water Pollution Control Act:
Ecology certifies the operators of domestic wastewater treatment plants. On occasion, Ecology has to revoke the certificate of an operator for cause under WAC 173-230-100. If the certificate is included under the definition of personal property in I-933, Ecology would have to compensate the operator before revoking the certificate.

Ecology's Implementation of the Forest and Fish Agreement:
Through the Forest Practices Board, Ecology co-promulgates forest practices rules affecting water quality and provides Clean Water Act assurances for the Forest and Fish rules. The Forest and Fish program was established by the Forest and Fish Act and is based on a combination of statute, rules and an on-going adaptive management program. The rules are designed to comply with RCW 76.09 and prevent violations of RCW 90.48, as well as the federal Clean Water and Endangered Species Acts. The Department of Natural Resources is the lead agency for enforcement of the rules. The current rules require that portions of timbered lands, from 50 – 200 feet, on some 60,000 miles of streams be left in its natural state as buffers to protect fish and water quality. If these rules fall under I-933, the state would be required to compensate the landowner or waive the rules. If the rules are waived and violations of RCW 90.48 occur, Ecology's enforcement responsibilities may be increased. If the state is unable to assure compliance with the Forest and Fish rules, the Washington State Forest Practices Habitat Conservation Plan (2006) will be jeopardized.

Water Quality Program Contact:
Melodie A. Selby (360) 407-6489

AIR QUALITY PROGRAM
Ecology's Air Quality Program is authorized under the Federal Clean Air Act, the State Clean Air Act and the Motor Vehicle Emission Control Act. The agency's responsibilities include preventing violations of national ambient air quality standards and reducing risk from toxic air pollutants, smoke, industrial and commercial sources, and diesel soot. The agency develops and implements area-specific cleanup plans, designs and implements customized strategies to prevent violations of federal standards, and develops and implements natural event action plans to minimize health impacts.

<u>Summary of Impacts</u>
If the Initiative is broadly interpreted, the state's delegation of federal clean air programs would likely revert to EPA over time. Because EPA lacks the resources to effectively implement the various elements of Washington's Clean Air Program, pollution levels would likely increase and return some areas to violation of federal air quality standards and subject the state to sanctions, possibly including the loss of federal grant dollars, for failure to meet its responsibilities under the federal clean air act.

<u>Analysis</u>
Air pollution causes lung disease, worsens existing respiratory and cardiopulmonary disease, increases chronic respiratory illness and the likelihood of contracting cancer, and decreases lung function in children – predisposing them to chronic obstructive pulmonary disease as adults. Air pollution can hasten death for people afflicted with such diseases. However, because these are chronic illnesses rather than acute, it is not known if controlling air pollution or some portion thereof would fall under the exception necessary to prevent an "immediate threat to human health".

Four general areas of air quality protection could be affected by the Initiative:
1) Regulation of woodstoves and fireplaces; 2) Industrial permitting; 3) Motor vehicle emission control programs; and 4) Regulation of outdoor burning and agricultural burning.

Many air quality rules, standards and requirements have been changed and made more stringent since 1996. A broad reading of the Initiative could revert industrial, commercial, outdoor and agricultural burning, woodstove and motor vehicle air quality standards or requirements back to 1996. If the state is unable to provide compensation to affected air dischargers for the impacts to their property for bringing them up to today's standards, over time, the state's delegation of federal clean air programs would likely revert to EPA. In addition, the state would likely see significantly increasing pollution levels, potentially returning some areas to violation of federal air quality standards and potentially subjecting the state to sanctions for failure to meet its responsibilities under the federal clean air act. Sanctions could include the loss of federal grant funds including federal highway funding.

The Initiative provides an exemption if "damaging the use or value" is in the form of "restricting the use of property when necessary to prevent immediate harm to human health and safety". Depending on the definition of "immediate harm" there is a plausible argument that at least some air quality requirements could be retained under this exemption.

Many air quality standards, requirements and conditions are specified in state statutes, such as vehicle testing and outdoor burn restrictions, and could remain in effect if these laws fall outside the purview of the Initiative.

Woodstoves/Fireplaces:

State law and implementing regulations restrict the types of stoves and fireplaces that can be sold and also restrict use of certain woodstoves and fireplaces during high pollution days. If the Initiative is read to include this kind of personal property, an argument could be made that these requirements could damage the use or value of the stove or fireplace.

Industrial Permits:
If permission to operate through an air permit is interpreted as a grant of a right to use the property, then I-933's effect on permitting programs is probably small. If the interpretation is that permits somehow restrict use, then the impact would be large. As noted above if permits have been modified to include more stringent conditions after 1/1/96, it is more likely the Initiative would have a large effect. Permit program changes or inability to enforce or enact conditions would jeopardize federal delegation of these permit programs. If the Initiative is read to require repayment of control costs incurred since 1996, the financial impact could be significant.

Motor Vehicle Emission Controls:
The state has two principal motor vehicle control programs, an emission testing program in selected counties and a requirement that new cars sold beginning with 2009 models meet more stringent California standards. A vehicle cannot be relicensed if it fails to take and pass a required emission test. The emission check program could be considered a restriction on use of private property and, barring application of the immediate threat to health exception, subject to the Initiative.

Regulation of outdoor burning and agricultural burning:
This aspect of air quality has the most direct link to land use and real property. State law and implementing rules that ban burning of certain types in certain geographic locations, require permits with conditions, place restrictions on how burning is conducted or otherwise contain the use of outdoor burning. Because burning is usually the cheapest method of disposal or "management" of vegetative waste, alternatives may cost more, or may not be available, and a limited opportunity to burn may result in some alteration of how an owner chooses to use their property. Thus, I-933 could create a significant compensation liability or a rollback in public health protection.

Air Quality Program Contact:
Marsh Taylor (360) 407-6873

SOLID WASTE AND FINANCIAL ASSISTANCE PROGRAM
The Solid Waste Program is authorized by federal and state statute to set standards for siting, design and operation of solid waste facilities. The Industrial Section regulates petroleum refineries, pulp mills, and aluminum smelters in Washington.

Summary of Impacts
If buffers around solid waste facilities meet the Initiative's definition of requiring property to be left in its natural state, the state would likely have to waive or pay for

buffers required under the current standards for siting landfills and other solid waste facilities. If we are unable to impose buffer standards, adverse impacts from solid waste facilities siting and development are likely and we would expect to see an increase in complaints from adjacent property owners and neighboring communities. A rollback to 1996 industrial permit levels would result in less protection for human health and the environment.

Since 1996, several regulations have required more stringent air standards for pulp mills and aluminum smelters. Our New Source Review changes were rolled into the Air Quality Program's Prevention of Significant Deterioration permits. This cost mills many millions of dollars. These investments were to boilers and other infrastructure and are unlikely to be reversed. However, lower standards may result in less effective performance under the Initiative unless compensation is provided.

Analysis

Agency regulations set buffers or setbacks for seismic zones, holocene faults, unstable areas, channel migration zones, drinking water wells, surface waters, airport runways, and property boundaries. These requirements are intended to keep solid waste facilities and activities safe and reliable, and reduce the chance of nuisance. While these siting standards are intended to prevent harm from earthquakes and flooding, they do not fall under the exception 2.2(c)(ii) because they are not contained in building or fire codes.

Siting Standards are contained in:

> *Special Incinerator Ash* Chapter 173-306 WAC Section 350;
>
> *Biosolids* Chapter 173-308 WAC Site Management Standards are in Section 210(4), 220(4), 230(4), 240(4), and 270(5).
>
> *Solid Waste Standards* Chapter 173-350 WAC Several definitions in Section 100, including Buffer, Setback, Channel Migration Zone, and 100 Year Floodplain. For most activities and facilities (e.g. composting, recycling, piles), there are no specific location standards, except to comply with the performance standard set out in Section 040(5). There are additional siting requirements for: Surface Impoundments and Tanks—Section 330(2); Limited Purpose Landfills – Section 400 (2)(a,b,c, and d), and a reference to RCW 70.95(060); Inert Landfills – Section 410(2)(a,b,c, and d).
>
> *Landfill Standards* Chapter 173-351 WAC has two sections – Location Standards – Section 130, and Other Location Standards – Section 140. Buffers are described in Section 140(3)

Applying Rules Equally:

Hazardous waste rules would not meet the exception in 2.2(c). Hazardous waste from households or small quantity generators is treated differently from hazardous waste from

other generators. It is allowed to be handled via the solid waste rules, which are not as stringent as hazardous waste rules.

1996 Rules Rollback:
All of our major Industrial Section permits have been revised since 1996. Rolling back these standards would increase emissions, including additional fluoride, methanol, acetaldehyde, and many other substances.

Solid Waste Program Contact:
Cullen Stephenson (360) 407-6103

TOXICS CLEANUP PROGRAM
Ecology is responsible for implementation of the Model Toxics Control Act (MTCA), Chapter 70.105D RCW, which addresses the legacy of contaminated sites resulting from past practices as well as newly created and discovered contamination problems. Cleaning up contaminated sites protects human health and the environment and puts the land back into productive use.

Summary of Impacts
The application of I-933 could effectively shift responsibility and financial liability for cleanup from potentially liable persons (the generators of the waste and the current owners of the property) to the State and taxpayers. This would severely reduce the pace of cleanups and remove some of the incentives for voluntary cleanups.

Analysis
Potential impacts include, but are not limited to, the following:

Voluntary Remedial Actions
Under MTCA, persons may voluntarily investigate and clean hazardous waste sites. Such remedial actions may either be conducted independently or with Ecology oversight under an order or consent decree. Those who conduct actions independently may request an opinion from Ecology on whether further action is required under MTCA. Arguably, even if Section 3 did apply to enforcement actions, it would not apply to such voluntary actions. Of course, if Ecology were not able to take enforcement actions, then there would be less incentive for persons to voluntarily conduct such actions (absent market forces).

Taxpayers pay for cleanup.
The application of I-933 could effectively shift the responsibility and financial liability for cleanup from potentially liable persons (the generators of the waste and the current owners of the property) to the State and taxpayers.

Under I-933, Ecology may not be able to require potentially liable persons to investigate or cleanup contaminated property without compensation. This is more likely if the cost

of cleanup exceeds the increase in fair market value resulting from the cleanup. In these cases, the property would either remain contaminated or the State would have to compensate the property owner for the cost of the investigation and cleanup.

Even if the State were to conduct the investigation and cleanup of the contaminated property itself using taxpayer funds, the broad definition of private property to include personal property may effectively prohibit the State from recovering its costs.

By shifting the responsibility and financial liability for the cleanup from potentially liable persons to the State and taxpayers, the investigation and cleanup of contaminated properties will be delayed and fewer cleanups will be conducted during each year.

Cost is considered when selecting a cleanup action under MTCA.
The economic analysis required under MTCA may be affected by consideration of damage assessments, particularly if the cost of cleanup exceeds the increase in fair market value of the property due to the cleanup.

Costs of institutional controls (restrictive covenants) is increased.
Institutional controls (ICs) are controls that prohibit or restrict activities on a property that may interfere with the integrity of a cleanup (e.g., restrict land use to industrial). Cleanups that rely on ICs are less permanent, but also less costly. Property owners might argue, though, that such controls result in damage to the use or value of the property and, therefore, require compensation under Section 3.

Retroactive Compensation
The state would likely have to compensate land owners with restrictions on land use that were established after January 1, 1996.

Toxics Cleanup Program Contact:
Michael Feldcamp (360) 407-7531

WATER RESOURCES PROGRAM
Ecology regulates water use under state law and case law including surface and ground waters, water well construction, water right claims registration and relinquishment, instream flows, trust water rights, water conservancy boards, watershed planning, and water supply facilities.

<u>Summary of Impacts</u>
I-933 defines a water right as private property in Sec. 2(2)(a), however, it is unclear how that statement would actually be interpreted due to the fact that under current Washington law, water is not considered private property per se but rather a special kind of right, subject to due process protections. Under current law, water is deemed a natural resource held in common for the public good. Private parties can be granted a usufructuary right in water (right to use) but the water still belongs to the public.

> RCW 90.03.010 states: "Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use…"

The denial of a water right permit based on detriment to the public interest or based on a lack of water due to the adoption of Instream Flow Rules could lead to claims for compensation based on the argument that the denial unfairly required the property owner to bear a cost of obtaining "benefit to the public, the cost of which in all fairness and justice should be borne by the public as a whole." (I-933 Section 2(2)(b)).

Also, if the expectation of the ability to utilize the water resources of the state is a sufficient basis for creating a compensable property value, the "damages" as defined by the Initiative may be said to occur to the land, which is private property. If this is the case, the Initiative would limit the state's ability to manage water and/or would require that the state compensate property owners when adopting instream flows, denying water rights, determining relinquishment, or regulating wasteful practices.

Analysis

How would I-933 impact Instream Flow Rules?
Instream flow rights are similar to any prior appropriation water right in that instream flow rights provide a beneficial use as defined in statute and case law and are junior to any water rights that came before them (senior water rights). Any person holding a water right senior to an instream flow right is not affected by the instream flow rule. Any person applying for a water right after an instream flow rule has gone into effect would be subject to the senior instream flow water right. It would likely take a broad interpretation of I-933 to trigger a pay or waive requirement resulting from some later arriving junior who alleges damages stemming from what would simply be a more senior water right. If that is how the Initiative is interpreted, it would seem that the entire prior appropriation system would be in jeopardy. That appears unlikely. Other aspects of instream flow rules, however, appear more likely to fall within the purview of I-933. For example, previous Instream Flow Rules have delineated how much water is allotted to growth (reservations), the amount allotted to various sectors (industry, agriculture, etc.), whether or not the basin is closed (or when closure will occur), and what sort of mitigation schemes are acceptable.

The Initiative states that damaging the use or value of property includes "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…" This provision appears to operate independently of the provision that defines damaging as "Prohibiting or restricting any use or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996." Thus, any instream flow rule, regardless of the date enacted, which affect a landowner's hopes or expectations regarding property values and income production could be subject to damages claims. Further, instream flows and

closures are generally not needed to prevent immediate harm to human health and safety and would therefore not qualify for that exception.

How would proposed I-933 affect Ecology permitting decisions regarding new water rights?
A water right vests when an applicant, after applying for and receiving a permit from the department, puts water to beneficial use. Future expectations may be expressed by a land owner but do not become water rights unless the foregoing process is followed. Unlike land use applicants (subdivision, building permits, etc.) applying for a water right does not vest a right, but rather secures a place in line for a potential right to use public water and a priority date in the event of future water shortages. RCW 90.03.247 clearly allows Ecology to condition a new water right to instream flows even if the application was filed prior to the effectiveness of the instream flow rule.

Applications for a water permit cannot be granted unless Ecology finds that the use of the water be for a beneficial purpose, that water be available for the appropriation, that the proposed use not impair existing water rights, and that the use be not detrimental to the public interest. (RCW 90.03.290). If Ecology denied a permit based on these tests, the denial may trigger a takings claim leading to Ecology possibly having to compensate the owner of the land who was effectively left with no choice but to keep a "portion of (his/her) property in its natural state or without beneficial use to its owner." (Sec. 2(2)(b)(v)). This appears unlikely due to the fact that the water right has yet to vest.

The regulation of ground water subject to the withdrawal permit exemption found in RCW 90.44.050 in favor of prior established rights, including instream flows or the adoption of rules to limit or prohibit development of new exempt uses, would likely lead to claim damages under the Initiative's provisions.

Water rights can considerably enhance the value of property to which they are appurtenant. For example, in eastern Washington the value of irrigated land is commonly ten times the value of land without irrigation rights. Denial of a water right may upset the hopes and expectations of the land owner to increase the value of the land and produce income and may potentially be viewed by the owner as depriving him/her of "economically viable use of property" (Sec. 2(1)(e)). Denial based on detriment to the public interest may be particularly questioned under I-933.

How would proposed I-933 affect relinquishment?
Relinquishment is defined in RCW 90.14.160 and states:

> "Any person entitled to divert or withdraw waters of the state through any appropriation…who abandons the same, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of the right to divert or withdraw for any period of five successive years after July 1, 1967, shall relinquish the right."

Relinquishment is a form of self-forfeiture of a water right due to full or partial non-use. A water right may be designated as relinquished under an order issued by Ecology or through a general adjudication of water rights. Relinquished waters either inure to the next senior appropriator or if there is none, revert back to the state as unappropriated water.

Relinquishment may trigger claims for compensation as defined by the Initiative. There does not appear to be any applicable exemption from the pay or waive requirement. Sec. 2(2)(b)(i) could be construed to limit regulation of water rights or relinquishment of water rights that existed prior to January 1, 1996. If relinquishment enforcement was waived, this could affect other water users' rights, including instream flow rights, and in turn, could result in significant legal activity.

However, relinquishment occurs by operation of law if the right is not used for 5 years without eligibility for an exception. That is, Ecology does not do anything to make relinquishment happen – relinquishment happens, and Ecology formalizes it in a relinquishment order. Under this argument, a relinquishment order by Ecology would not require Ecology to pay compensation.

How would proposed I-933 affect Ecology's ability to reduce wasteful water practices?

Under RCW 90.03.005, Ecology is directed to reduce practices that waste water to the "maximum extent practicable." Under RCW 90.44.120:

> "The unauthorized use of ground water to which another person is entitled, or the willful or negligent waste of ground water, or the failure, when required by the department, to cap flowing wells or equip the same with valves, fittings, or casings to prevent waste of ground waters, or to cap or plug wells producing waters which contaminate other waters, shall be a misdemeanor."

A water right holder might argue that his or her water right certificate or claim states the amount of water to which he or she is entitled, and any decrease in that amount would require compensation. However, under Washington state law, a person's water right is limited to the amount of water the person is able to put to beneficial use without waste. Thus, the amount of water "wasted" is beyond the scope of the holder's water right, and requiring a person to minimize waste is not depriving him or her of any property to which he or she has a right.

The Initiative, however may open claims for compensation claims based on the impact to their property, with Ecology perhaps having to compensate the landowner for damages (for the cost of improving efficiency) or waive the regulation. This is so because Sec. 2(2)(b)(iii) states that "damaging the use or value" means:

> "Prohibiting or restricting operations and maintenance of structures necessary for the operation of irrigation facilities, including, but not limited to, diversions, operation structures, canals, drainage ditches, flumes, or delivery systems."

Regulating water waste is based on the statute itself, but since it necessarily involves interpretation of the statute it may be considered, in effect, secondary legislation, which is commonly referred to as a regulation. If that rationale is accepted by the courts, it seems likely that Ecology efforts to reduce wasteful water practices would entail paying for the infrastructure that brings about the desired increase in water efficiency.

How would proposed I-933 affect Ecology's permitting decisions with respect to spreading and/or changes in diversion place and/or manner?

> Under RCW 90.03.380: "A change in the place of use, point of diversion, and/or purpose of use of a water right to enable irrigation of additional acreage or the addition of new uses (spreading) may be permitted if such change results in no increase in the annual consumptive quantity (ACQ) of water used under the water right. For purposes of this section, ACQ means the estimated or actual annual amount of water diverted pursuant to the water right, reduced by the estimated annual amount of return flows, averaged over the two years of greatest use within the most recent five-year period of continuous beneficial use of the water right."

The definition of ACQ was adopted in 2003. Depending on how I-933 is interpreted, Ecology may have to change the decision making requirements that currently go into regulating spreading and water rights transfers or pay compensation for damages that result from not allowing spreading and transfers.

How would proposed I-933 affect Ecology's ability to regulate dam safety?
RCW 90.03.350 and RCW 43.21A.064(2) govern the regulation of the safety of dams and hydraulic structures. A strong argument can be made that Ecology's dam safety regulations apply equally to all dams subject to the agency's jurisdiction, and therefore are not included in the definition of "damaging the use or value." However, a dam owner could argue the contrary. If that argument prevailed, ordering correction of deficiencies or abatement of structures for safety purposes might not be possible unless there were an "immediate" threat to public safety per Sec. 2(2)(c)(i). If this argument prevailed, Ecology might not be able to prevent a non-immediate threat (e.g. a dam could fail the following winter during the rainy season) until the threat became imminent.

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SHORELANDS AND ENVIRONMENTAL ASSISTANCE PROGRAM
The Shorelands and Environmental Assistance Program's has a broad range of responsibilities including:

- Wetlands protection activities including development permit review and technical assistance to local governments.

- Shoreline Management Act technical and financial assistance to local governments for Shoreline Master Program updates; assistance with local permitting; and formal approval of SMP updates and certain Shoreline permits.
- Section 401 Clean Water Act Water Quality Certifications to protect water quality, habitat, and aquatic life.
- Department of Transportation construction project permitting and mitigation; lead role in coordinated DOT permit review processes.
- State Environmental Policy Act technical assistance regarding SEPA processes, maintain the statewide SEPA register.
- Office of Regulatory Assistance staff working within SEA provide information to applicants and other parties on state permit processes and requirements.
- Flood hazard reduction technical and financial assistance to local governments. The program coordinates the state's role in the National Flood Insurance Program.

Summary of Impacts

The provisions of I-933 would appear to significantly affect adoption and implementation of Shoreline Master Programs across the state – a major new program just now underway after a more than a decade of effort. The definition of "damage" would appear to significantly constrain ability of local governments and Ecology to adopt updated Shoreline Master Programs as required by statute and rule. Ecology would also have to waive or compensate for Shoreline permit actions that impose restrictions on how land is used.

Ecology would likely be unable to certify that water quality standards under 401 permits unless funding was available to compensate applicants. 401 permits contain conditions affecting the "use, size, scope or intensity" of the proposal in order to meet water quality standards. I-933 would subject these permits to "damage" claims and Ecology would be precluded from issuing this permit without compensation to the property owner.

I-933 appears to preclude local governments from meeting the requirements of the National Flood Insurance Program (NFIP). Prerequisites for the NFIP include keeping development out of designated Floodways. If the local government does not qualify for the NFIP, property owners would lose their flood insurance. Without flood insurance, no federally-backed bank loan can be obtained for homes or businesses in flood plain areas– potentially affecting roughly 175,000 households located in floodplains. Federal disaster aid for flooding would also appear to be unavailable to governments, homeowners and businesses.

Analysis

How does I-933 affect adoption of updated Shoreline Master Programs under the Shoreline Management Act (RCW 90.58)?

Ecology has a direct role in approval of Shoreline Master Programs (SMP) and certain types of Shoreline permits. Local governments are the primary implementing entity for Shoreline regulations. However, Ecology must provide formal review and approval for each SMP update prepared by local government. Unlike GMA, Ecology approval must be

obtained before the local regulation takes effect. While the final action is a letter from the Director, this action is under the authority of statute and rule. Thus, the SMP approval action of Ecology would appear likely to be included under I-933. We would therefore be subject to the waive or compensate provisions of the Initiative.

I-933 appears to significantly undercut the effectiveness of upcoming comprehensive Shoreline Master Program (SMP) updates. In many cities and counties, the SMPs adopted in the 1970's have remained virtually unchanged over the decades. In response, the 2003 Legislature adopted a mandatory SMP update schedule and authorized funding to initiate comprehensive updates of all SMPs statewide. Ecology adopted detailed Guidelines in rule for preparation and adoption of comprehensive updates to SMPs.

Local governments would be unable to enforce SMA regulations that fall within the "damage" section of 2(2) (b) (ii) without providing compensation and would therefore be reluctant to update standards. I-933 would significantly limit the effective update of SMPs to meet statutory and rule requirements. The restrictions on these updates may lead local governments to simply forgo updating as required by statute. If this occurs, local governments would be non-compliant with statute, forcing Ecology to adopt an updated SMP for the local government.

Elements of I-933 that would appear to significantly limit the effectiveness of SMP updates include:

<u>Land use standards rollback to 1/1/96:</u>
Under I-933, "damage" is defined to include "[p]rohibiting or restricting any use, or size, scope, or intensity of any use legally existing or permitted as of January 1, 1996" . For SMPs, this is a particularly limiting provision – because Shoreline land use policies in effect in 1996 had been adopted years or decades earlier in many jurisdictions. The I-933 "damage" provisions appear to include virtually all aspects of land use standards that a community might address in their SMP update – without compensation, there could be no additional standards applied to "use, size, scope or intensity" of land use.

<u>Buffers</u>:
Use of buffers between land uses or to protect shoreline ecological functions would appear to be significantly limited under I-933. "Damage" includes "[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." Local governments will be required to compensate property owners if buffers were required, with the narrow exception of standards "necessary to prevent immediate harm to human health and safety." For example, buffers are a common development standard between intensive uses such as gravel mines and other uses, to minimize conflicts and impacts to adjacent uses. Local governments could not require such buffers unless they compensated the gravel mine owner. Given the restricted revenue for local government, it appears unlikely that buffer standards would be applied.

I-933 specifically precludes (without compensation) restrictions on "removal of trees or vegetation". Standards that protect vegetation along shorelines are a very common feature in SMPs and Shoreline permits, as a means of allowing land development while still protecting shoreline habitat. Standards for protecting shoreline vegetation could not be implemented under I-933, unless compensated.

<u>Specific limits on regulating shoreline infrastructure:</u>
The "damage" definition specifically includes matters within the purview of SMA regulations. "Damage" includes: "[p]rohibiting the continued operation, maintenance, replacement, or repair of existing tidegates, bulkheads, revetments, or other infrastructure reasonably necessary for the protection of the use or value of private property."

This appears to apply regardless of how long ago the regulations were enacted or when the shoreline improvements were made. Thus, even long-established SMP oversight of shoreline structures could be removed by I-933 unless compensation is provided.

<u>Procedural requirements:</u>
A significant new set of analysis for adopting land use regulations would be established by the Initiative in Section 2 and local governments would likely seek additional state financial resources to meet this requirement.

Would Ecology be liable for "damage" resulting from implementation of Shoreline Master Programs?
Unlike most local land use regulations, each SMP or SMP amendment is formally approved by the Department of Ecology under RCW 90.58. Thus, each SMP is both a local and a state agency regulation. The statute makes local government the primary administrative entity for SMPs, including issuance of Shoreline Substantial Development Permits. Ecology has authority to appeal such actions. In addition, Ecology has express final approval authority for Shoreline Conditional Use and Variance permits. Thus, the limits on permit conditions that "damage" property would appear to directly apply to Ecology for these permits. Ecology would be unable to comply with the standards in adopted SMPs such as buffers and land use without compensation. It appears that the Initiative would prevent state and local governments from meeting the objectives of the Shoreline Management Act relating to environmental protection, public access and reserving shoreline areas for water dependent uses.

What impact would I-933 have on Ecology Section 401 Certifications?
Under Section 401 of the Clean Water Act, each state must certify that projects requiring a federal permit or license comply with state water quality standards and water related state requirements. These water quality certifications usually contain conditions that limit how the proposed project will be constructed or operated.

Often, the dialogue leading up to a final permit application and the conditions of permit approval constitute changes in "use, size, scope or intensity" of the proposal. This would appear to be a "damage" under I-933. Ecology would be precluded from issuing this permit without compensation to the property owner. We would assume that funding for

wholesale compensation will not be available. Thus, Ecology could not approve the 401 permit – we could not certify that water quality standards would be met.

It appears that the "damage" standard in I-933 could result in a 401 waiver from Ecology. Federal agencies could issue 404 permits, including mitigation requirements pursuant to their permitting standards.

Are there implications of I-933 for flood hazard management and existing development within flood plains?

Roughly 175,000 households in the State are located within floodplains. The National Flood Insurance Program (NFIP) provides flood insurance within the 241 cites and 39 counties that are compliant with NFIP flood plain management requirements. However, I-933 appears to preclude local governments from meeting the requirements of the NFIP. There would be significant implications for residential and commercial property owners if their communities could not meet NFIP requirements. Ecology is the state agency responsible for coordinating the flood plain management elements of the National Flood Insurance Program (NFIP) per RCW 86.16.

Flood plain-oriented "structural standards in building or fire codes" appear to be exempt from "damage" under I-933. This narrow exemption does not appear to accommodate all the eligibility requirements of the National Flood Insurance Program and Chapter 86.16 RCW. These include:

Floodway Development Restriction.

Communities must adopt a designated "floodway" and prohibit most development in that zone. This is a very important requirement. If I-933 only allows exemptions based on "structural standards in building codes," it would appear that the residential prohibition in floodways could not be enforced.

Subdivision and Utility Requirements.

All communities must require certain standards for subdivisions that are proposed in floodplains, including designing them to minimize flood damage, providing adequate drainage, assuring that utility systems minimize flood damages, and developing Base Flood Elevations where they have not been provided. Some of these requirements would appear to exceed the "damage" exception in I-933.

If a city or county cannot meet NFIP standards, FEMA would have to suspend them from the NFIP - thereby making flood insurance unavailable to anyone in the community. If flood insurance cannot be obtained, no federally-backed bank loan could be obtained for a house or business in a flood plain area.

For example, a homeowner could not sell a house if a bank loan is involved. In addition, federal mortgage insurance would not be available. Small businesses located in flood plains could not obtain loans or grants for buildings from any federal agency (ex. Small Business Administration).

Federal disaster aid for flooding would also appear to be unavailable to governments, homeowners and businesses. This could have a significant affect in counties and cities with significant existing flood plain development.

Could I-933 affect development review processes under SEPA?
I-933 could significantly change the mechanisms and basic process of the State Environmental Protection Act. There may be other impacts due to inability to mitigate identified impacts of a proposed project. Mitigation is a cornerstone of the SEPA process and often involves the protection of sensitive features by land use restrictions. I-933 could reduce the effectiveness of the SEPA process in significant ways including:

Loss of the "mitigated DNS": A very common route for development projects is a "mitigated DNS." This is a time-effective means of identifying and mitigating impacts of a project without a costly and time-consuming EIS. Common mitigation mechanisms include fees and protection of sensitive features by setting these areas aside. These mitigation actions would appear to be "damage" as defined by I-933 and thus precluded (without compensation.) If the "mitigated DNS" route is not available, a full EIS would often be triggered to comply with SEPA. This can be a costly process and entail significant time to prepare and review the documents.

Documented unmitigated impacts: Even if a full EIS is prepared, opportunities for mitigation may be unavailable due to the "damage" definition in I-933. Significant project impacts could end up being documented and categorized as "impacts that cannot be mitigated." There may be significant legal implications where development permits are issued with documented unmitigated impacts. There may be legal exposure both for the issuing government and for the project proponents.

Infrastructure needs not met: SEPA is used by many jurisdictions to ensure that infrastructure capacity is increased as development occurs. This fundamental role of SEPA may be removed or reduced by I-933.

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