

## Instream Flows

**What is an Instream Flow?** An instream flow is the amount of water in a stream or mainstem of a river that must remain in the stream at a specified time to protect instream values. Natural stream flows of a river fluctuate wildly throughout the course of the year, with the highest flows usually occurring during the rainy months of winter and again increasing during the melting of snow in spring. Generally, it is during the summer months that stream levels are at their lowest and the demand for water by agricultural interests and municipalities is the greatest. Once an instream flow is set by the Department of Ecology, the flow is a water right with its priority date being the date it was set into rule.

**Statutory Authority** – The Department of Ecology (DOE) is authorized to establish minimum instream flows in rule under laws enacted in the late 1960s or base flows under the Water Resources Act of 1971. These statutes are RCW 90.03, 90.22 and 90.54. In establishing “minimum flows and levels,” Ecology is required to consult with the Departments of Fish and Wildlife, Community, Trade and Economic Development and Agriculture, and affected Indian tribes.

Under RCW 90.22.010, DOE *may* establish minimum instream water flows, but if the Department of Fish and Wildlife requests the protection of fish, game, or other wildlife resources or if the DOE determines it necessary to preserve water quality, then Ecology *shall* establish flows to protect the resources or preserve water quality. (DOE policy statement on instream flow management).

RCW 90.82 also allows the Department of Ecology to set instream flows under the watershed planning process.

**Why Establish Instream Flows?** – The stated legislative intent of establishing minimum flows and levels in “streams, lakes or other public water” is “for the purposes of protecting fish, game, birds, or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.” (RCW 90.22) In 1993, DOE was authorized to establish a statewide list of priorities for evaluation of instream flows, with the achievement of wild salmonid production as its primary goal (RCW 90.22.060). Besides environmental values, navigational values are also to be preserved when considering base flows (RCW 90.54.020(3)). It is under the management of a statewide water resources regime that DOE is authorized to include minimum or base flow levels for our state’s lakes, rivers, and streams.

Regardless of whether instream flows have been set into rule and new water withdrawals would impair the instream flow water right, water withdrawals can still be allowed in these waters. RCW 90.54.020(3)(a) states, “*Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.*” However, the Department of Ecology has made it very clear there is no policy guidance in this matter and that it can never impair existing water rights of which the instream flow is one. To date, this statute exemption has never been acted upon by Ecology.

**Watershed Planning** – The watershed planning process, or as it is sometimes called the “2514 Process” (HB 2514 in 1998 implemented watershed planning) allows each of the state’s 62 watersheds or Watershed Resource Inventory Areas (WRIAs) to have their water usage assessed by a local planning

unit. Members of the planning unit perform an assessment of the present and future needs of the watershed. In the 2514 Process, DOE is present and provides technical advice to the members of the planning unit with the hope that a consensus can be reached in determining the water management needs or objectives to be achieved in the stream and for out-of-stream uses. Planning members include local governments, associations and tribes who have an interest within the watershed. Always present before the group is whether there will be enough water remaining in the watershed for future appropriations while at the same time ensuring the needs for fish and water quality are being met.

Instream flow recommendations are “triggered” in this process if Phase II funding is accepted by the planning unit from the state. If a watershed unit accepts phase II funds from DOE, then the unit must make an instream flow recommendation to DOE within four years of accepting the money.

There are several scenarios in which the planning unit considers recommendation of an instream flow:

1. The first is if the watershed has no instream flow and the planning unit decides to include an instream flow component. In this scenario, approval by the planning unit on an instream flow recommendation is due within four years from the date the unit first received Phase II funds. Ecology will then promptly begin rule making to set the recommendation into rule. However, if the unit does not reach consensus on the flow setting after four years, the Department may initiate rule making. Note: Even though the statute says DOE *may* adopt instream flows, Ecology will automatically begin the rule making.
2. The second scenario is when an already existing instream flow level has been set in a watershed and the planning unit has requested to modify the flows. Under this scenario all members of the planning unit, including the Department of Ecology, must agree with the recommendation. If all agree, then the Department will undertake rule making to adopt the new flows.
3. The third scenario is similar to the second except where there is not unanimous approval among the members of the planning unit. In this case, the existing flows will not be modified.

It is important to remember that the Department of Ecology can set instream flow levels outside of the watershed planning process. The Department can do this under RCW 90.54, which falls under the standard APA rule making process.

## **Status of Setting of Instream Flows**

Again, the setting of instream flows into rule can only be done by the DOE. However, there are two avenues which DOE can consider in setting the instream flow. Currently, the most active method for adopting a rule is through the watershed planning process (2514 Process). The other method is for Ecology to set a flow level at the request of the Department of Fish and Wildlife. The Department of Ecology may also set a flow level if the watershed planning process fails to recommend a flow level. Additionally, the Department may declare a watershed to be closed to any future appropriation of water. This does not set an instream flow, but it has the effect as if a flow were set.

To date, 45 of the 62 WRIs have opted to plan under the 2514 Process. As of December 2006, 30 watersheds have chosen to examine instream flows and make recommendations to Ecology to adopt new or modify existing water management or instream flow rules.

## **Achieving and Protecting Flows through Policy and Funding**

A number of watersheds have water conditions which that too poor to sustain most life stages of fish. Reasons for this are water withdrawals, impoundments and land use changes. In 1999, the Washington Statewide Strategy to Recover Salmon classified 16 of the 62 basins as critical basins because they have a shortage of water to meet the needs of fish. In order to place more “wet” water back into the stream or river, the Legislature has provided the Department with several key powers and funding mechanisms. The following are some of the tools and actions for obtaining water for instream uses:

1. Water right acquisitions through purchases, leases, donations and other means.
2. Flow augmentation from water conservation and reuse projects.
3. Water releases from existing and new water storage projects, including both surface and underground structures.
4. Water releases below hydropower projects to protect stream flows.
5. Enforcement activities against illegal uses and excessive water waste. Stream habitat restoration projects implemented by various watershed groups such as lead entities established under the Salmon Recovery Planning Act.

Achieving instream flows is very much a component of the final phase of watershed planning, and watershed planning groups receive considerable funding from the Legislature for implementing their watershed management plans. Funding these watershed planning groups has significantly increased as a result of many water management projects within these watersheds. Even the 2004 Water Resources Funding Task Force concluded that “Watershed Plans, many of which are projected for completion within the next three years, are expected to result in widespread and substantial requests for operating and capital funds....There is potential for proposed projects to reach billions of dollars.”

### **Some Concerns with the Setting of Instream Flows**

Once an instream flow level has been set into rule by the Department of Ecology, the instream flow is a water right with a priority date being the date it was set into rule. All water rights after this date which are approved by Ecology are “junior” to the instream flow right. Even those water right applications which have been pending for years will be “junior”, if approved by the Department, to the instream flow for that stream or river.

DOE is not processing any new water right applications in basins where the watershed planning is underway. They want to know what future water is available for out-of-stream uses as determined by the planning unit before processing these applications. There are currently over 5,400 new water right applications pending before the DOE.

#### **Skagit County: An Example**

The instream flow that has been set into rule on the Lower Skagit River is a specific example where an instream flow rule is affecting the ability of the county to manage water resources within its jurisdiction. In 2001, the Department of Ecology set into rule the instream flow for the Skagit River (which has one of the largest flows of water for a river west of the Mississippi), an amount that varies between 10,000 cubic feet per second (cfs), during the month of August to 13,000 cfs for the month of November. The instream flow was based on an agreement between the local tribes, the city of Anacortes, the Skagit PUD, and Skagit County. It was *assumed* by the county that there would be an additional 200 cfs for future out-of-

stream uses, and that exempt wells for residences would still be permitted. Because the median flow of the Skagit River is 14,500 cfs, no new water is available for appropriation during most of the year without impairing the “senior” right of the instream flow. After the unnaturally high flow rule was set by DOE, the local tribe filed suit contending the basin was effectively closed to future “exempt well” groundwater withdrawal. Complicating the matter further, there are more than 9,000 parcels which could be put off bounds for any development as they would have no or difficult access to water.

Skagit County was able to have the instream flow rule amended, but only after initiating litigation against the Department of Ecology. On May 15, 2006, a compromise was reached by the county, DOE and local residents which establishes several water reservations for future uses of water for domestic, industrial and agricultural needs. The previous instream flow rule was set so high that flows could not be met under natural conditions, and it did not allow for any future uses. This newly amended rule does *not* change the flow levels. Instead it only allows for a water reservation for future appropriations with no expectation that additional water will be made available for future growth. For information on the newly adopted rule, please refer to the following link at DOE’s website:

<http://www.ecy.wa.gov/programs/wr/instream-flows/skagitbasin.html>

### **An Aside**

John Postema vs. Pollution Control Hearings Board (PCHB) – This 2000 State Supreme Court ruling is the bane of Skagit County. The court made a determination that no ground water withdrawal, no matter how insignificant or *de minimis*, can impair a surface water if hydraulic continuity is determined to exist between the ground water and the instream flow level which has been set into rule. If the instream flow level has been set, as with the Skagit River, and that stream has no water for future appropriation, then all ground water applications (even for exempt residential wells) must be denied.