

## **Primary Statutes and Legal Basis Relating to Instream Flows**

In 1917, the State Water Code was passed (RCW 90.03) which established appropriation as the means for establishing rights to surface water. The State Ground Water Code was passed in 1945 which extended the appropriation system to ground water.

Below are the primary Washington state statutes relating to instream flows. Other statutes also have applicability to instream flows. The full text of these statutes (below), the Surface and Ground Water Codes, as well as related statutes can be found at the Department of Ecology's website at <http://www.ecy.wa.gov/programs/wr/rules/rul-home.html>. Both the Revised Code of Washington (RCW) and Washington Administrative Code (WAC) can be accessed through this website.

### **Chapter 90.22 RCW MINIMUM WATER FLOWS AND LEVELS**

Summary: The 1967 Minimum Water Flows and Levels Act (Ch. 90.22 RCW) set forth a process for protecting instream flows. Among other provisions, it says Ecology must develop a state water plan, consult with the Department of Fish and Wildlife, and conduct public hearings. Selected portions of the RCW pertinent to instream flows are below.

#### **RCW 90.22.010 Establishment of minimum water flows or levels--Authorized--Purposes.**

The department of ecology may establish minimum water flows or levels for streams, lakes or other public waters 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. In addition, the department of ecology shall, when requested by the department of fish and wildlife to protect fish, game or other wildlife resources under the jurisdiction of the requesting state agency, or if the department of ecology finds it necessary to preserve water quality, establish such minimum flows or levels as are required to protect the resource or preserve the water quality described in the request or determination. Any request submitted by the department of fish and wildlife shall include a statement setting forth the need for establishing a minimum flow or level. When the department acts to preserve water quality, it shall include a similar statement with the proposed rule filed with the code reviser. This section shall not apply to waters artificially stored in reservoirs, provided that in the granting of storage permits by the department of ecology in the future, full recognition shall be given to downstream minimum flows, if any there may be, which have theretofore been established hereunder.

### **Chapter 90.54 RCW WATER RESOURCES ACT OF 1971**

Some of the more prominent parts of this Act include base flows are to be retained in streams except where there is "overriding considerations of the public interest". Further, waters of the state are to be protected and utilized for the greatest benefit to the people and that "balancing" the uses of water will be generally based on the securing of "maximum net benefits" to the people of the state. This Act established the Water Resource Inventory Areas (WRIAs) and requires Ecology to reserve waters for future beneficial uses.

**RCW 90.54.020 General declaration of fundamentals for utilization and management of waters of the state.**

Utilization and management of the waters of the state shall be guided by the following general declaration of fundamentals:

(1) Uses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.

(2) Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

(3) The quality of the natural environment shall be protected and, where possible, enhanced as follows:

(a) Perennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values. Lakes and ponds shall be retained substantially in their natural condition. 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.

**Chapter 75.20 RCW CONSTRUCTION PROJECTS IN STATE WATERS**

This statute established the Hydraulic Permit Application program (HPA) and requires consultation between the Department of Fish and Wildlife and Ecology prior to Ecology setting flows.

**RCW 75.20.050 Review of permit applications to divert or store water--Water flow policy.**

It is the policy of this state that a flow of water sufficient to support game fish and food fish populations be maintained at all times in the streams of this state. The director of ecology shall give the director notice of each application for a permit to divert or store water. The director has thirty days after receiving the notice to state his or her objections to the application. The permit shall not be issued until the thirty-day period has elapsed. The director of ecology may refuse to issue a permit if, in the opinion of the director, issuing the permit might result in lowering the flow of water in a stream below the flow necessary to adequately support food fish and game fish populations in the stream. The provisions of this section shall in no way affect existing water rights.

## **Chapter 90.82 RCW WATERSHED PLANNING**

This Act outlines a process whereby local watershed planning groups can make recommendations to Ecology for setting instream flows or modifying those flows already established.

### **RCW 90.82.080 Instream flow component--Rules.**

(1)(a) If the initiating governments choose, by majority vote, to include an instream flow component, it shall be accomplished in the following manner:

(i) If minimum instream flows have already been adopted by rule for a stream within the management area, unless the members of the local governments and tribes on the planning unit by a recorded unanimous vote request the department to modify those flows, the minimum instream flows shall not be modified under this chapter. If the members of local governments and tribes request the planning unit to modify instream flows and unanimous approval of the decision to modify such flow is not achieved, then the instream flows shall not be modified under this section;

(ii) If minimum stream flows have not been adopted by rule for a stream within the management area, setting the minimum instream flows shall be a collaborative effort between the department and members of the planning unit. The department must attempt to achieve consensus and approval among the members of the planning unit regarding the minimum flows to be adopted by the department. Approval is achieved if all government members and tribes that have been invited and accepted on the planning unit present for a recorded vote unanimously vote to support the proposed minimum instream flows, and all nongovernmental members of the planning unit present for the recorded vote, by a majority, vote to support the proposed minimum instream flows.

(b) The department shall undertake rule making to adopt flows under (a) of this subsection. The department may adopt the rules either by the regular rules adoption process provided in [chapter 34.05 RCW](#), the expedited rules adoption process as set forth in [RCW 34.05.230](#), or through a rules adoption process that uses public hearings and notice provided by the county legislative authority to the greatest extent possible. Such rules do not constitute significant legislative rules as defined in [RCW 34.05.328](#), and do not require the preparation of small business economic impact statements.

(c) If approval is not achieved within four years of the date the planning unit first receives funds from the department for conducting watershed assessments under [RCW 90.82.040](#), the department may promptly initiate rule making under [chapter 34.05 RCW](#) to establish flows for those streams and shall have two additional years to establish the instream flows for those streams for which approval is not achieved. (2)(a)

Notwithstanding [RCW 90.03.345](#), minimum instream flows set under this section for rivers or streams that do not have existing minimum instream flow levels set by rule of the department shall have a priority date of two years after funding is first received from the department under [RCW 90.82.040](#), unless determined otherwise by a unanimous vote of the members of the planning unit but in no instance may it be later than the effective date of the rule adopting such flow.

(b) Any increase to an existing minimum instream flow set by rule of the department shall have a priority date of two years after funding is first received for planning in the WRIA or multi-WRIA area from the department under [RCW 90.82.040](#) and the priority

date of the portion of the minimum instream flow previously established by rule shall retain its priority date as established under [RCW 90.03.345](#).

(c) Any existing minimum instream flow set by rule of the department that is reduced shall retain its original date of priority as established by [RCW 90.03.345](#) for the revised amount of the minimum instream flow level.

(3) Before setting minimum instream flows under this section, the department shall engage in government-to-government consultation with affected tribes in the management area regarding the setting of such flows.

(4) Nothing in this chapter either: (a) Affects the department's authority to establish flow requirements or other conditions under [RCW 90.48.260](#) or the federal clean water act (33 U.S.C. Sec. 1251 et seq.) for the licensing or relicensing of a hydroelectric power project under the federal power act (16 U.S.C. Sec. 791 et seq.); or (b) affects or impairs existing instream flow requirements and other conditions in a current license for a hydroelectric power project licensed under the federal power act.

(5) If the planning unit is unable to obtain unanimity under subsection (1) of this section, the department may adopt rules setting such flows.