WASHINGTON STATE DEPARTMENT OF ECOLOGY

Water Resource Policy: Moving Toward Better Decisions

Water rights issues in Washington state have become very controversial over the past several years. The distressed condition of many fish stocks, the need to restore and protect habitat, and. demand for water from a rapidly growing population means increasingly complex issues of water allocation. The discussion on the process to determine how water should be split between new offstream uses and instream uses and who should make these decisions has been especially contentious.

Background

These disagreements led to a lengthy impasse in the water policy arena. Administrative and legislative attempts at resolution were eventually superseded in 1990 by an effort which involved all interested parties in developing, through consensus, a framework for water allocation and policy decisions. The result of this work is embodied in the Chelan Agreement; the inclusion of all parties in a consensus approach to solving water allocation problems is at the heart of the Agreement.

Under the Chelan Agreement, recommendations for instream flows and criteria for water management within identified planning areas are made to Ecology by *regional planning groups* following a negotiated and consensus-based process. Regional planning is preferred by all the caucuses for developing water management plans and determining the levels of instream flow protection for a particular stream or basin.

In addition, the *Water Resources Forum* (established under the Chelan Agreement) addresses issues of statewide significance, making recommendations to Ecology regarding policies. Since 1993 the Forum has been working on many issues of statewide importance. Following long discussions of each caucus's needs and concerns, the Forum has made recommendations to the Department of Ecology on the following two topics:

1) the process for setting levels of instream flows; and,
2) the approach to be taken for addressing *hydraulic continuity* between ground and surface waters in water management decisions.

Instream Flows

Why are instream flows an issue?

Two statutes require the Department of Ecology to protect flows for a variety of instream uses, including: fish, wildlife, navigation, recreation, aesthetics and other environmental values. Ecology has done this through adoption of regulations on water management and instream flow protection.

These instream flow regulations have a priority date like a water right and affect water rights issued subsequently. These regulations do not affect water rights existing prior to rule adoption. Instream flow regulations do not put any water back into a stream. Water rights which are senior to the instream flows become attractive for transfer to new uses, since they cannot be affected by the instream flow regulation and will not be subject to interruption to protect stream flows set by the rule.

Hydraulic Continuity

Why is hydraulic continuity an issue ?

In many parts of the state, ground water is a major source of water flowing in streams. In the late summer and fall, when no rain falls, flows from groundwater to streams are especially important. The pumping of ground water can affect stream flows in two important ways, either by depleting flows from the river or by intercepting ground water which would have recharged the stream.

The Policies

For areas participating in regional planning, the instream flow policy would provide a framework for negotiation. For areas outside regional planning, the recommendation describes a process for Ecology to follow to develop regulations on management of surface water and protection of instream flows.

The hydraulic continuity policy explains the process the Department is to use to evaluate applications for new uses of ground water potentially interconnected with surface water.

The policy would also be an important source of information to local governments and citizens on water management.

Summary of the Water Resources Forum's Recommendations on Instream Flow Policy

In Essence

Regional planning approach preferred

- Process is flexible, dependent on local situation
- Instream flows retained/restored in all streams; goal is "full productive capacity"
- Negotiable levels of instream flow in regional planning areas

Outside regional planning areas

- "Optimum" flow levels to protect resources and options
- Rule-making preferred, but not mandatory
- Combine use of technical experts and local advisory caucuses

Highlights of Situations and Processes

Situation A - Streams not in a probable regional planning area

Ecology develops list of priority streams needing instream flows, considering: productivity for fisheries and wildlife, vulnerability to impacts from withdrawals, over-appropriation,data.

Objective: Protect biological integrity of fish and wildlife by adoption of optimum instream flows.

Process: Withhold decisions on applications for ground or surface water which potentially diminish instream uses;

Assemble experts on fish and wildlife to recommend flows;

Assemble a locally-based group consisting of Water Resources Forum caucus representatives to review;

If no substantive opposition, go to rule-making with "substantial weight" to technical group recommendations; if no substantive comment in opposition, adopt rule;

If substantive comments are provided, Ecology may consult with tribes and local government and proceed with either a *critical situation*[1] process for modification of rule proposal or regional planning; absent agreement on either choice, Ecology adopts rule.

Situation B - Streams in a probable regional planning area

Objective: Preserve management options by combination of setting high levels of flow protection and issuing interim rights on a case-by-case basis.

Process: Withhold decisions on water rights that could impact instream values once process to set interim instream flows is underway;

Instream flow experts recommend flows, all instream uses considered; Ecology uses recommendations to condition water right permits;

If regional planning not initiated within four years, move to Situation A and set instream flows by rule.

Situation C - Streams in an existing regional planning area

Objective: Adopt flows by rule as part of a comprehensive water allocation plan developed through negotiated planning.

Process: Ecology withholds action on water right applications that could affect instream uses;

Regional Planning Group sponsors studies; technical group recommends preliminary instream flows;

Regional Planning Group evaluates water available for instream and offstream needs and negotiates instream and offstream needs, taking into account reduction in demand through conservation measures;

If three government caucuses and majority of non-government caucuses agree, convey allocation strategy to Ecology for rule-making. Absent consensus, Ecology undertakes rule-making.

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1 A critical water resource situation, as discussed in the Chelan Agreement and WAC 173-500-080, is one in which a problem related to water quantity is considered by a state, tribal or local government to warrant specific attention and consultation by the three governments. This intergovernmental group will design a consultation strategy and may officially designate the area a "critical water resource situation."

Summary of the Water Resources Forum's Recommendations On Hydraulic Continuity Policy

In Essence

The Water Resources Forum proposes the following principles:

Water right permits should be issued and managed recognizing the inter-relatedness of ground and surface water;

In decisions on new water rights, the standard of protection is "no impairment" of existing rights or instream uses;

Protection of existing water rights and claims, including federal treaty-related rights, is required in permitting and administering water rights;

New rights are to be conditioned with instream flows;

Evaluate new water rights' risk of hydraulic continuity and potential impacts (high, medium or low);

Analyze water use on a basin-wide basis for cumulative effects;

Regional plans carry substantial weight in water rights decisions and are expressions of the "public interest";

Water right decisions are to be coordinated with local growth management, water quality, fish and wildlife plans;

Conservation is a priority source for meeting new demands;

Wells potentially impairing senior rights may be regulated, even when exempt from permitting requirements;

Where water is not available for new uses, the basin should be closed by regulation;

Mitigation of potential impacts is an option;

An applicant may be responsible for additional information on a water right application. Higher risk locations mean commensurately more responsibility for the applicant.

Process: The policy is intended to be used in decisions made by Ecology on permit issuance, in regulation of existing water rights, and in regional planning groups' evaluation of water availability. In a regional planning area, extensive data gathering will occur as part of obtaining baseline information regarding water use, claims, potential for water conservation and instream flow needs. Outside of regional planning areas, Ecology's assessment of water availability and water use will be based on this policy.

- Identification of basin concerns related to water availability, public interest;
- Assessment of basin hydrogeology;
- Review of permit applications to evaluate use of water and to estimate effects of ground water pumping, if issued; and,
- Evaluation and categorization of impairment risk (to existing rights, instream flows, public interest).

Categories, Risk Factors and Actions

For areas outside regional planning or for the limited number of water rights within a regional planning area which can be considered for issuance, the Water Resources Forum proposes the following categorization of potential water uses and actions by Ecology. Under each category, Ecology is directed to pursue conservation and water use efficiency measures and may encourage an applicant to investigate transfer or reuse of existing rights.

Low Risk

Characterization:

If the results of the area-wide (or basin) assessment indicate that some or all descriptions apply, the risk of impairing existing rights through issuance of new water rights is "low":

- Surface water is available above existing rights, including instream flows;
- The aquifer is "confined";
- There is no history of stream closures, concerns over water availability, or protection of existing rights.

Action:

Ecology may either:

Issue permits with instream flow (or other) conditions; or
Require metering;
In conjunction with conservation and efficiency measures.

Medium Risk

Characterization:

"Medium risk" locations as defined below would require gathering of more data or development of mitigation plans:

- Surface water availability is seasonally limited;
- Ground water sources are contaminated;
- Fisheries resources have been impacted;
- Instream flows established by rule are inadequate or nonexistent;

Action:

Ecology has the flexibility:

- To hold applications pending additional study; or
- To issue a permit subject to any of the following conditions:

  conservation and efficiency measures,
  instream flow provisos,
  requirements to meter use,
  proof of effectiveness of mitigation,
  monitoring of stream levels, or
  development of a conjunctive use scheme;

- To take administrative action to regulate well drilling.

High Risk

Characterization

Areas of high risk are characterized by the following:

- Surface water has been fully appropriated;
- The potential exists for over-appropriation and effects on existing rights, either ground or surface water;
- Ground water contamination is known to exist;
- Strong relationship exists between water levels in wells and streams;
- Condition of fisheries resources is impaired;

Action

In "high risk" locations, the Water Resources Forum directs the department to choose among the following actions:

- Hold applications pending more study or completion of regional planning;
- Adopt rules to close area to further appropriation, manage well drilling or establish instream flows;
- Pursue conservation and water use efficiency; or,
- Issue permit if mitigation is proven to be successful.

For More Information

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