

WASHINGTON DEPARTMENT OF ECOLOGY ISSUES REPORT ON INSTREAM FLOWS AND WATERSHED PLANNING

In December 2006, the Washington Department of Ecology issued its third annual report to the Legislature on the progress of watershed planning and setting instream flows in Washington State. The report, available on the Department of Ecology website at <http://www.ecy.wa.gov/biblio/0611046.html>, describes the status of watershed planning and implementation efforts statewide, changes in state water law or regulations recommended by local watershed planning groups, and Ecology's progress to date in adopting administrative rules to manage water resources and protect instream flows.

Watershed Planning in Washington

The Watershed Planning Act (ESHB 2514) was passed by the Legislature in 1998. *See* RCW chapter 90.82. The law provides a framework for local governments, Tribes, state agencies, and local citizens to work together to develop watershed plans addressing the water needs of local communities. The law requires planning groups to address water quantity issues, and gives them the option of addressing instream flows, water quality, and habitat. The Legislature intended that locally-developed plans would describe strategies for providing sufficient and reliable supplies of water into the future to satisfy residential, agricultural, and industrial needs, as well as instream flow needs for fish, habitat, and recreation.

Since 1998, 37 different "planning units" have formed to address 45 of the state's 62 Water Resource Inventory Areas (WRIAs). According to Ecology's latest report, 31 of those planning units are still active in various phases of watershed planning. The Washington Legislature has appropriated over \$44 million from the State's operating budget for local development and implementation of watershed plans. In addition, over \$53 million in capital budget funding has been allocated for a variety of water resource management projects between 2003 and 2007.

A total of 22 local watershed plans have been adopted by local governments since the inception of watershed planning. In 6 WRIAs, the watershed planning process has been terminated with no plan adopted. Notably, several WRIAs located in the populous Puget Sound area (including the Puyallup/White River basin, Duwamish/Green River basin, Cedar/Sammamish River basin, Snohomish River basin, and Stillaguamish River basin) have seen no local watershed planning efforts under ESHB 2514.

Instream Flow Setting in Washington

The Watershed Planning Act gives local planning groups the option of addressing instream flows as part of their watershed management plans. Once a planning unit reaches consensus and submits instream flow recommendations, Ecology is required to initiate the state rule-making process under the Administrative Procedures Act to adopt required minimum instream flows by rule. The law also gives Ecology authority to adopt

instream flows by rule in basins where watershed planning is not occurring, or where the local planning groups do not reach consensus on flow recommendations.

To date, local planning units have attempted to tackle the issue of instream flows in 30 watersheds. Thus far, only 11 planning units have reached consensus and submitted flow recommendations to Ecology. Ecology has adopted one water management/instream flow rule based on the local planning unit recommendation, for the Entiat watershed (*see* WAC Chapter 173-546); for the remaining 10 watersheds, Ecology has initiated the rule-making process.

On its own, Ecology adopted two water management/instream flow rules for basins where watershed planning was not occurring: the Stillaguamish River Basin (WAC chapter 173-505) and Skagit River Basin (WAC chapter 173-503). (*See Western Water Law & Policy Reporter, Volume 10, Number 1, for a discussion of the Stillaguamish instream flow rule.*)

Ecology's 2006 Report to the Legislature

In RCW 90.82.043(5), the Legislature required Ecology to report each year beginning in 2003 to the appropriate legislative standing committees “regarding statutory changes necessary to enable state agency approval or permit decision making needed to implement a plan” approved under the watershed planning law. In RCW 90.82.080(6), the Legislature required Ecology to make similar reports “on the progress of instream flows being set under this chapter, as well as progress toward setting instream flows in those watersheds not being planned” under the watershed planning law.

The Watershed Planning Act structure divides planning activities – and funding – into Phase 1 (organization and start-up), Phase 2 (technical assessment, use of existing data, short-term collection of new data, and long-term data collection and monitoring), Phase 3 (plan development), and Phase 4 (implementation). Ecology reports that “much of the Phase 1 – 3 planning work is done, and we are seeing the shift into ‘Phase 4 Implementation’ activities.” Ecology suggests that “it is possible that all of the existing 31 planning processes may be in Phase 4” by the end of the 2007-09 biennium, and warns that the “funding needed to support implementation will continue to increase as more plans are completed.” Ecology solicited a preliminary list of implementation projects proposed by local watershed planning groups, and concluded that “significant funding is needed to support implementation of watershed plans.” Because existing funding sources are not likely to be adequate, Ecology suggests the exploration of alternative funding sources to meet this need.

Some interesting recommendations for statutory or rule changes emerged from the watershed planning process during the preceding year. For example, the Skokomish-Dosewallips (WRIA 16) planning unit has recommended that Ecology work with the Legislature to identify a specific quantity of rainwater that can be captured and beneficially used without a water right permit, and that the Legislature authorize a permit exemption for rainwater capture in the water code. (As of this writing, several bills have

been introduced in the Legislature to amend RCW chapter 90.03 with respect to “rainwater collection facilities” storing extremely small amounts of water.)

Another recommendation, from the Grays-Elochoman/Cowlitz (WRIAs 25 and 26) and Lewis/Salmon-Washougal (WRIAs 27 and 28) planning units, is that mitigation be required for water right applications in certain circumstances. Ecology’s report describes this recommendation as: “where an applicant applies for a water right under a reservation, [the applicant should] be required to mitigate the predicted stream flow depletion to the maximum extent practicable through flow-related actions. Practicable is meant to include both economic and logistic considerations.” Ecology’s report notes the prohibition in RCW 90.03.255 against requiring an applicant to include a “resource management technique” – which may or may not be the same thing as “mitigation” – as a condition for approving a water right application, and suggests that the Legislature consider amending the Water Code to expressly allow Ecology to require mitigation in certain circumstances.

The WRIA 16 planning unit also recommended that the Departments of Ecology and Health revise their regulations to allow greater use of “alternative sewage and greywater treatment systems” as appropriate. From the Columbia River basin, the Klickitat (WRIA 30) planning unit recommended that Ecology revise its rules on consultation with local, state, and federal agencies and Indian Tribes on water right applications “to include limits on the amount of time allowed for consultation to ensure timely processing of water rights.”

Ecology’s report notes “significant progress” toward new or modified instream flow rules, including the collection of extensive field data on several hundred streams and rivers across the state. Conceding that “often, our progress has been slower than we originally projected” for instream flow rule adoption, Ecology points out that the new “water management rules” are far more complex and comprehensive than earlier versions of instream flow regulations adopted in the 1970’s and 1980’s. The report explains: “In addition to the establishment of stream management units and instream flow levels, the current rules may address how to manage permit-exempt ground water withdrawals, establish water reserves and their conditions of use, determine seasonal and year-round closures, and utilize other innovative and complex management tools.”

In a list of “top priority watersheds” included in the report, Ecology predicts water management rule adoption for 2 basins in spring and fall 2007, 2 basins in winter 2007, 4 basins in 2008, and 3 basins in 2009. In addition, adoption of a new rule for a third basin not planning under the Watershed Planning Act – the Samish River basin – is targeted for winter 2007.

Conclusion and Implications

Ecology’s report emphasizes the need for outreach and education as an integral part of the watershed planning process, in order to build public awareness and acceptance. It also summarizes the agency’s goal in rule-making to “lay down guidelines that will

protect existing water rights and instream resources, while providing water for future urban and rural needs.” The report explains: “Ecology seeks to both improve the public’s overall understanding of the complex issues and concerns involved in managing water, and engage the public in the rule making process, so there is a sense of ownership and local buy-off in the guidelines established by regulation.”

The agency’s ultimate success in this endeavor will depend upon whether the Washington Legislature has a sufficient “sense of ownership” to provide adequate funding for watershed plan implementation, and to enact appropriate statutory amendments encouraging innovative, flexible, and effective management of water resources to meet the needs of the State’s growing population centers, instream resources, agricultural industry, and rural communities.