

## WASHINGTON DEPARTMENT OF ECOLOGY PROPOSES NEW MANAGEMENT RULE FOR DUNGENESS WATERSHED

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The Washington Department of Ecology (Ecology) is proposing a new set of water management regulations, including stream closures and minimum instream flows, for the Dungeness River watershed on Washington's Olympic Peninsula. The Elwha-Dungeness area is currently one of the only designated "water critical" basins in western Washington without an instream flow rule. Ecology's proposed rule is based upon a watershed plan originally approved by the Clallam County Board of Commissioners in 2005. The new regulations will be subject to public review and comment until July 9, 2012.

### The Proposed Dungeness Rule

The new rule will apply to the use and appropriation of surface and groundwater in the Dungeness River watershed, located on the Olympia Peninsula east of the City of Port Angeles. Key elements include:

- Closing surface waters in eight streams year-round, and closing the Dungeness River mainstem to new consumptive water appropriations from July 15 until November 15 each year;
- Setting maximum allocations of water from the Dungeness River mainstem during the period when it is open for water appropriation;
- Setting instream flow levels on the Dungeness River and the eight closed streams to protect aquatic resources;
- Determining that all surface water and groundwater sources within the Dungeness watershed are hydraulically connected;
- Requiring mitigation for all new consumptive uses of water, including permit-exempt groundwater withdrawals;
- Establishing "reserves" of water for future indoor domestic use;

- Requiring measuring of all new surface and groundwater appropriations, except rainwater collection;
- Authorizing “expedited” processing of certain water right applications; and
- Allowing storage projects for environmental enhancement and other beneficial uses consistent with the Elwha-Dungeness Watershed Plan.

The new rule, to be published in Washington Administrative Code (WAC) chapter 173-518, will apply to the appropriation and use of surface water and groundwater in the Dungeness River watershed begun after the effective date of the regulation. The new rule does not affect federal or tribal reserved water rights, senior water rights (i.e., those existing on the effective date of the regulation), existing water right permits, exempt groundwater wells where regular beneficial use began before the effective date of the regulation, or exempt groundwater wells used for certain group domestic uses.

### **Instream Flows and Stream Closures**

State law requires Ecology to promulgate rules setting minimum stream flows designed to protect the resources that depend on flowing water – including fish, wildlife, recreation, navigation, water quality, livestock watering and aesthetic needs. Once an instream flow is established by regulation, it is treated as a water right under state law, and new out-of-stream water allocations, if approved, have a junior priority to the instream flow as well as to other senior water rights. In practice, where minimum stream flows are identified by rule but not attained at all times of the year, new water rights are “interruptible” when actual stream flows are lower than the regulatory instream flows.

Ecology consulted with the Jamestown S’Klallam Tribe and the departments of fish and wildlife, agriculture, and commerce to set instream flows “necessary to meet the water resource management objectives” of the 2005 Elwha-Dungeness Watershed Plan. Instream flows for specific “stream management units” would be established in WAC 173-518-040. The proposed regulation provides that the minimum instream flows “will be protected from impairment by any new water rights commenced after the effective date of this chapter and by future water right changes and transfers.”

In proposed WAC 173-518-120, Ecology includes an express reopener providing that if average daily flow at a particular point on the Dungeness River is 105 cfs during a “thirty-day critical period” for eight out of ten consecutive years, Ecology “will assess whether new instream flow or other technical studies are warranted for the Dungeness River.”

Under proposed WAC 173-518-050, the same streams that would be subject to instream flows would also be closed to further consumptive diversions. Bagley Creek, Bell Creek, Cassalery Creek, Gierin Creek, Matriotti Creek, McDonald Creek, Meadowbrook Creek, and

Siebert Creek would be closed year-round. The mainstem of the Dungeness River would be closed between July 15 and November 15 each year.

### **Groundwater Reserves**

Exceptions to the stream closures and instream flows include mitigated groundwater withdrawals and groundwater appropriations from a “reserve” for future domestic supply, subject to “maximum depletion amounts” that may not be exceeded.

State law requires that the “quality of the natural environment shall be protected and, where possible, enhanced” by, among other things, retaining perennial rivers and streams with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, as well as navigational values. The statute provides: “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.” RCW 90.54.020(3)(a).

In proposed WAC 173-518-080, Ecology states that it “weighed the public interest supported by providing a limited amount of water for domestic water supply against the potential for negative impact to instream resources,” and finds that the public interest “clearly overrides the potential for negative impacts on instream resources.” The proposed rule reserves approximately 548,000 gallons per day, allocated between various streams, for future indoor domestic use. However, consumptive groundwater use that would impact closed surface waters must still be offset through mitigation – either the purchase of credits through a water bank or an individual mitigation plan approved by Ecology. When mitigation water is not available, the established “reserve” for each stream will be debited until it is fully allocated.

A similar reservation of water in the Skagit River basin rule has been controversial, and is the subject of a pending appeal by the Swinomish Indian Tribal Community (Court of Appeals Division II, No. 41636-1-II). By all appearances, however, the Dungeness watershed plan has significantly more community support than the Skagit rule.

### **Conclusion and Implications**

One inherent limitation in Washington’s approach to watershed management is that using the rule-making process to close a stream to further appropriation or establish a minimum instream flow does not necessarily guarantee that water will actually be in the stream when it is needed. The Elwha-Dungeness watershed plan is the outgrowth of years of local planning and consensus in favor of creativity and flexibility in developing alternative sources of water and managing the resource to meet the needs of people and fish. The formal public review and comment process for this proposed rule will reveal whether

Ecology struck the right balance in crafting a regulation based on the local community's recommendations.

Ecology expects to adopt the new Dungeness basin regulation in August 2012. For more information, see <http://www.ecy.wa.gov/laws-rules/activity/wac173518.html>.